Description of document:	Four Department of Justice (DOJ) Office of Legal Counsel (OLC) records, 1999-2000
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Source of document:	Elizabeth Farris, Supervisory Paralegal Office of Legal Counsel Room 5515, 950 Pennsylvania Avenue, NW Department of Justice Washington, DC 20530-0001

RECORDS INCLUDED:

1. Statement of Randolph D. Moss, Acting Assistant Attorney General, Office of Legal counsel, before the Committee on the Judiciary, United States Senate, concerning a proposed flag desecration constitutional amendment presented on April 20, 1999

2. Memorandum for Steven Garfinkel Director, Information Security Oversight Office, Re: ISCAP Jurisdiction Over Classification Decisions by the Director of Central Intelligence Regarding Intelligence Sources and Methods, October 5, 1999

3. Memorandum for Stephen R. Colgate, Assistant Attorney General for Administration and Gerald E. McDowell, Chief Asset Forfeiture and Money Laundering Section, Re: Payment of Awards in Excess of $250,000 from the Department of Justice Assets Forfeiture Fund, October 18, 2000

4. Memorandum for William P. Marshall, Deputy Counsel to the President, re: Application of the Coreligionists Exemption in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-l(a), to Religious Organizations That Would Directly Receive Substance Abuse and Mental Health Services Administration Funds Pursuant to Section 704 of H.R. 4923, the "Community Renewal and New Markets Act of 2000, October 12, 2000"

U.S. Department of Justice

Office of Legal Counsel

Washington, D.C. 20530

July 31, 2012

Re: FOIA Tracking No. FY12-099

This responds to your Freedom of Information Act ("FOIA") request to the Office of Legal Counsel dated June 12, 2012. We assigned your request tracking number **FY12-099**. The four records you requested are enclosed. At the request of the Central Intelligence Agency, we have redacted footnote 8 of the memorandum for the Director of the Information Security Oversight Office dated October 5, 1999, pursuant to Exemption Three of FOIA, 5 U.S.C. § 552(b)(3). The information contained in footnote 8 concerns intelligence sources and methods and is therefore protected from disclosure under section 102A(i)(1) of the National Security Act of 1947, as amended (codified at 50 U.S.C. § 403-1(i)(1)).

Insofar as one of the records you requested has been partially redacted, you have the right to file an administrative appeal. You must submit any administrative appeal within 60 days of the date of this letter by mail to the Office of Information Policy, United States Department of Justice, 1425 New York Avenue, Suite 11050, Washington, D.C. 20530, or by e-mail to DOJ.OIP.AdministrativeAppeal@usdoj.gov. Both the letter and the envelope, or the e-mail, should be clearly marked "Freedom of Information Act Appeal."

Sincerely,

Paul P. Colborn
Special Counsel

Enclosures

Department of Justice

STATEMENT

OF

RANDOLPH D. MOSS
ACTING ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

CONCERNING

A PROPOSED FLAG DESECRATION CONSTITUTIONAL AMENDMENT

PRESENTED ON

APRIL 20, 1999

Testimony Before the

United States Senate Committee on the Judiciary

on

A Proposed Flag Desecration Constitutional Amendment

Randolph D. Moss
Acting Assistant Attorney General

Office of Legal Counsel
United States Department of Justice

April 20, 1999

Mr. Chairman, and Members of the Committee:*

As you know, in 1989 the Supreme Court held in Texas v. Johnson[1] that a State could not, consistent with the First Amendment, enforce a statute criminalizing flag desecration against a demonstrator who burned an American flag. In 1990, in United States v. Eichman,[2] the Court held that the First Amendment prohibited the conviction of demonstrators for flag burning under a federal statute that criminalized mutilating, defacing, or physically defiling an American flag.

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* In 1995, Walter Dellinger, Assistant Attorney General, Office of Legal Counsel, provided substantially similar testimony to the Subcommittee on the Constitution, Federalism, and Property Rights of the United States Senate Judiciary Committee regarding S.J. Res. 31, A Bill Proposing an Amendment to the Constitution of the United States to Grant Congress and the States the Power to Prohibit the Physical Desecration of the Flag of the United States.

[1] 491 U.S. 397 (1989).

[2] 496 U.S. 310 (1990).

For nine years, then, the flag has been left without any statutory protection against desecration. For nine years, one thing, and only one thing, has stood between the flag and its routine desecration: the fact that the flag, as a potent symbol of all that is best about our Country, is justly cherished and revered by nearly all Americans. Chairman Hatch has eloquently described the flag's status among the American people:

> The American flag represents in a way nothing else can, the common bond shared by a very diverse people. Yet whatever our differences of party, politics, philosophy, race, religion, ethnic background, economic status, social status, or geographic region, we are united as Americans. That unity is symbolized by a unique emblem, the American flag.[3]

It is precisely because of the meaning the flag has for virtually all Americans that the last nine years have witnessed no outbreak of flag burning, but only a few isolated instances. If proof were needed, we have it now: with or without the threat of criminal penalties, the flag is amply protected by its unique stature as an embodiment of national unity and ideals.

It is against this background that one must assess the need for a constitutional amendment (S.J. Res. 14) that would provide Congress with the "power to prohibit," and presumably impose criminal punishment for, the "physical desecration" of the American flag. Such an amendment would run counter to our traditional resistance, dating back to the time of the Founders, to resorting to the amendment process. Moreover, the amendment, if passed, would for the first time in our history limit the individual liberties protected by the Bill of Rights, adopted over two centuries ago. Whether other truly exigent circumstances justify altering the Bill of Rights is a question we can put to one side here. For you are asked to

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[3] 141 Cong. Rec. S4275 (daily ed. Mar. 21, 1995).

assume the risk inherent in crafting a first-time exception to the Bill of Rights in the absence of any meaningful evidence that the flag is in danger of losing its symbolic value. Moreover, the proposed amendment before you would create legislative power of uncertain dimension to override the First Amendment and other constitutional guarantees. For these reasons, the proposed amendment -- and any other proposal to amend the Constitution in order to punish isolated acts of flag burning -- should be rejected by this Congress.

I.

At the outset, and out of an abundance of caution, I would like to emphasize that the Administration's view on the wisdom of the proposed amendment does not in any way reflect a lack of appreciation for the proper place of the flag in our national community. The President always has and always will condemn in the strongest of terms those who would denigrate the symbol of our Country's highest ideals. The President's record and statements reflect his long-standing commitment to protection of the American flag, and his profound abhorrence of flag burning and other forms of flag desecration.

To conclude that flag desecration is abhorrent and that it should be resoundingly and unequivocally condemned, however, is not to conclude that we should for the first time in our Nation's history cut back on the individual liberties protected in the Bill of Rights. As James Madison observed at the founding, amending the Constitution should be reserved for "great and extraordinary occasions."[4] This caution takes on unique force, moreover, when we think

[4] The Federalist No. 49, at 314 (James Madison) (Clinton Rossiter ed., 1961).

of restricting the Bill of Rights, for its guarantees are premised on an unclouded sense of permanence, a sense that they are inalienable, a sense that we as a society are committed to the proposition that the fundamental protections of the Bill of Rights should be left alone. It is against this background that the Administration has concluded that the isolated incidents of flag desecration that have occurred since 1989 do not justify amending the Constitution in this significant respect.

II.

The text of the proposed amendment is short enough to quote in full: "The Congress shall have power to prohibit the physical desecration of the flag of the United States."[5] The scope of the amendment, however, is anything but clear, and it fails to state explicitly the degree to which it overrides other constitutional guarantees. Accordingly, even if it were appropriate to create an exception to the Bill of Rights in some limited manner, it is entirely unclear how much of the Bill of Rights the proposed amendment would trump.

By its terms, the proposed amendment does no more than confer affirmative power upon Congress to legislate with respect to the flag. Its wording is similar to the power-conferring clauses found in Article I, Section 8 of the Constitution: "Congress shall have power to lay and collect taxes," for instance, or "Congress shall have power . . . to regulate commerce . . . among the several states." Like those powers, and all powers granted

[5] S.J. Res. 14. See also H.J. Res. 33 (same).

government by the Constitution, the authority given by the proposed amendment would seem to be limited by the Bill of Rights and the Fourteenth Amendment.

The text of the proposed amendment does not purport to exempt the exercise of the power conferred from the constraints of the First Amendment or any other constitutional guarantee of individual rights. Read literally, the amendment would not alter the result of the decisions in Johnson or Eichman, holding that the exercise of state and congressional power to protect the symbol of the flag is subject to First and Fourteenth Amendment limits. Instead, by its literal text, it would simply and unnecessarily make explicit the governmental power to legislate in this area that always has been assumed to exist.

To give the proposed amendment meaning, then, we must read into it, consistent with its sponsors' intent, at least some restriction on the First Amendment freedoms identified in the Supreme Court's flag decisions. It is profoundly difficult, however, to identify just how much of the First Amendment and the rest of the Bill of Rights is superseded by the amendment. Once we have departed, by necessity, from the proposed amendment's text, we are in uncharted territory, and faced with genuine uncertainty as to the extent to which the amendment will displace the protections enshrined in the Bill of Rights.

We do not know, for instance, whether the proposed amendment is intended, or would be interpreted, to authorize enactments that otherwise would violate the due process "void for vagueness" doctrine. In Smith v. Goguen,[6] the Court reversed the conviction of a defendant who had sewn a small flag on the seat of his jeans, holding that a state statute making it a

[6] 415 U.S. 566 (1974).

crime to "treat contemptuously" the flag was unconstitutionally vague. We cannot be certain that the vagueness doctrine applied in Smith would limit as well prosecutions brought under laws enacted pursuant to the proposed amendment.

Nor is this a matter of purely hypothetical interest, unlikely to have much practical import. The proposed amendment, after all, authorizes laws that prohibit "physical desecration" of the flag, and "desecration" is not a term that readily admits of objective definition. On the contrary, "desecrate" is defined to include such inherently subjective meanings as "profane" and even "treat contemptuously" itself. Thus, a statute tracking the language of the amendment and making it a crime to "physically desecrate" an American flag would suffer from the same defect as the statute at issue in Smith: it would "fail[] to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not."[7]

The term "flag of the United States" is similarly "unbounded,"[8] and by itself provides no guidance as to whether it reaches unofficial as well as official flags, or pictures or representations of flags created by artists as well as flags sold or distributed for traditional display. Indeed, testifying in favor of a similar amendment in 1989, then-Assistant Attorney General William Barr acknowledged that the word "flag" is so elastic that it can be stretched to cover everything from cloth banners with the characteristics of the official flag, as defined by statute,[9] to "any picture or representation" of a flag, including "posters, murals, pictures, [and]

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[7] 415 U.S. at 574.

[8] Id. at 575.

[9] See 4 U.S.C. § 1.

buttons."[10] And while a statute enacted pursuant to the amendment could attempt a limiting definition, it need not do so; the amendment would authorize as well a statute that simply prohibited desecration of "any flag of the United States." Again, such a statute would implicate the vagueness doctrine applied in Smith, and raise in any enforcement action the question whether the empowering amendment overrides due process guarantees.

Even if we are prepared to assume, or the language of the amendment is modified to make clear, that the proposed amendment would operate on the First Amendment alone, important questions about the amendment's scope remain. Specifically, we still face the question whether the powers to be exercised under the amendment would be freed from all, or only some, First Amendment constraints, and, if the latter, how we will know which constraints remain applicable.

An example may help to illuminate the significance of this issue. In R.A.V. v. City of St. Paul,[11] decided in 1992, the Supreme Court held that even when the First Amendment permits regulation of an entire category of speech or expressive conduct, it does not necessarily permit the government to regulate a subcategory of the otherwise proscribable speech on the basis of its particular message. A government acting pursuant to the proposed amendment would be able to prohibit all flag desecration,[12] but, if R.A.V. retains its force in

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[10] Measures to Protect the Physical Integrity of the American Flag: Hearings on S. 1338, H.R. 2978, and S.J. Res. 180 Before the Senate Comm. on the Judiciary, 101st Cong., 1st Sess. 82-85 (1989) ["1989 Hearings"].

[11] 505 U.S. 377 (1992).

[12] Even a statute that prohibited all flag desecration would be in tension with the principle of R.A.V. Although a few acts done with a flag could be considered a "desecration" in all contexts, that would not be the case with burning, for example. Only some burnings could be prohibited by statutes adopted under the proposed amendment. Respectful burning of the flag will remain legal after the amendment's adoption as before. See 36 U.S.C. § 176(k) ("The flag, when it is in such condition that it is no longer a fitting emblem for display, should

this context, a government could not prohibit only those instances of flag desecration that communicated a particularly disfavored view. Statutes making it a crime – or an enhanced penalty offense – to "physically desecrate a flag of the United States in opposition to United States military actions," for instance, would presumably remain impermissible.

This result obtains, of course, if and only if the proposed amendment is understood to confer powers that are limited by the R.A.V. principle. If, on the other hand, the proposed amendment overrides the whole of the First Amendment, or overrides some select though unidentified class of principles within which R.A.V. falls, then there remains no constitutional objection to the hypothetical statute posited above. This is a distinction that makes a difference, as I hope this example shows, and it should be immensely troubling to anyone considering the amendment that its text leaves us with no way of knowing whether the rule of R.A.V. – or any other First Amendment principle – would limit governmental action if the amendment became part of the Constitution.[13]

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be destroyed in a dignified way, preferably by burning."). What may be prohibited is only that destruction of a flag that communicates a particular message, one of disrespect or contempt. The conclusion that a particular act of burning is a "desecration" may require in most instances consideration of the particular message being conveyed.

[13] Another proposed amendment, contained in H.J. Res. 5, provides: "The Congress and the States shall have power to prohibit the act of desecration of the flag of the United States and to set criminal penalties for that act." Not only does the phrase "act of desecration" appear to be broader, and more vague, than the term "physical desecration" in S.J. Res. 14 and H.J. Res. 33, but H.J. Res. 5 also grants the power of prohibition to the fifty States and an uncertain number of local governments. That raises, of course, the interpretive question whether state legislatures acting under the amendment would remain bound by state constitutional free speech guarantees, or whether the proposed amendment would supersede state as well as federal constitutional provisions.

III.

I have real doubts about whether these interpretive concerns could be resolved fully by even the most artful of drafting. Any effort to constitutionalize an exception to the Bill of Rights necessarily will produce significant interpretive difficulties and uncertainty, as the courts attempt to reconcile a specific exception with the general principles that remain. But even assuming, for the moment, that all of the interpretive difficulties of this amendment could be cured, it would remain an ill-advised departure from a constitutional history marked by a deep reluctance to amend our most fundamental law. The Bill of Rights was ratified in 1791. Since that time, over two hundred years ago, we have not once amended the Bill of Rights. And this is no historical accident, nor a product only of the difficulty of the amendment process itself. Rather, our historic unwillingness to tamper with the Bill of Rights reflects a reverence for the Constitution that is both entirely appropriate and fundamentally at odds with turning that document into a forum for divisive political battles. Indeed, part of the unique force, security, and stature of our Bill of Rights derives from the widely-shared belief that it is permanent and enduring.

The Framers themselves understood that resort to the amendment process was to be sparing and reserved for "great and extraordinary occasions."[14] In The Federalist Papers, James Madison warned against using the amendment process as a device for correcting every perceived constitutional defect, particularly when public passions are inflamed. He stressed

[14] The Federalist No. 49, at 314 (James Madison).

that "frequent appeals would, in great measure, deprive the government of that veneration which time bestows on everything, and without which perhaps the wisest and freest governments would not possess the requisite stability."[15]

The proposed amendment cannot be reconciled with this fundamental and historic understanding of the integrity of the Constitution. I think perhaps Charles Fried, who served with distinction as Solicitor General under President Reagan, made the point best when he testified against a similar proposed amendment in 1990:

> The flag, as all in this debate agree, symbolizes our nation, its history, its values. We love the flag because it symbolizes the United States; but we must love the Constitution even more, because the Constitution is not a symbol. It is the thing itself.[16]

IV.

Americans are free today to display the flag respectfully, to ignore it entirely, or to use it as an expression of protest or reproach. By overwhelming numbers, Americans have chosen the first option, and display the flag proudly. And what gives this gesture its unique symbolic meaning is the fact that the choice is freely made, uncoerced by the government. Were it otherwise -- were, for instance, respectful treatment of the flag the only choice constitutionally available -- then the respect paid the flag by millions of Americans would mean something different and perhaps something less.

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[15] See id. at 314-17. See also 1989 Hearings at 720-23 (statement of Professor Henry Paul Monaghan, Columbia University School of Law).

[16] Proposing an Amendment to the Constitution Authorizing the Congress and the States to Prohibit the Physical Desecration of the American Flag: Hearing Before the Senate Comm. on the Judiciary, 101st Cong., 2d Sess. 110 (1990).

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

October 5, 1999

MEMORANDUM FOR STEVEN GARFINKEL
DIRECTOR, INFORMATION SECURITY OVERSIGHT OFFICE

From: Randolph D. Moss
Acting Assistant Attorney General
Office of Legal Counsel

Re: ISCAP Jurisdiction Over Classification Decisions by the Director of Central Intelligence Regarding Intelligence Sources and Methods

This memorandum responds to a request that we resolve a dispute between members of the Interagency Security Classification Appeals Panel ("ISCAP") over whether determinations made by the Director of Central Intelligence ("DCI") about the classification of information pertaining to intelligence sources and methods are subject to substantive review by ISCAP. The Director of the Intelligence Security Oversight Office ("ISOO") and the General Counsel of the National Archives and Records Administration ("NARA") take the view that such determinations by the DCI are subject to substantive ISCAP review; the DCI takes the contrary view.[1] We conclude that the DCI's determinations are subject to substantive ISCAP review.

I.

The Supreme Court has recognized that the President possesses constitutional authority to classify and control access to information bearing on national security:

> The President . . . is the "Commander in Chief of the Army and Navy of the United States." U.S. Const., Art. II, § 2. His authority to classify and control access to information bearing on national security . . . flows primarily from this constitutional investment of power in the President and exists quite apart from any

[1] The initial request for this opinion was made by the Director, ISOO. See Letter for Janet Reno, Attorney General, from Steven Garfinkel, Director, ISOO (Mar. 23, 1999). The request was joined subsequently by the General Counsel of NARA. See Letter for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Gary M. Stern, General Counsel, NARA (June 8, 1999). The DCI submitted a statement of his legal position on May 14, 1999. See Letter to Randolph D. Moss from Robert M. McNamara, Jr., General Counsel, Central Intelligence Agency (May 14, 1999) ("DCI Initial Submission"). Responses to the DCI statement were submitted by ISOO and NARA. See Memorandum for Paul P. Colborn, Special Counsel, Office of Legal Counsel, from Steven Garfinkel (June 8, 1999); Memorandum of Law to Department of Justice, Office of Legal Counsel, from Gary M. Stern (June 8, 1999). The DCI then replied to those responses. See Memorandum of Reply from Robert M. McNamara, Jr. (June 28, 1999) ("DCI Reply").

> explicit congressional grant. . . . This Court has recognized the Government's "compelling interest" in withholding national security information from unauthorized persons in the course of executive business. . . . The authority to protect such information falls on the President as head of the Executive Branch and as Commander in Chief.

Department of the Navy v. Egan, 484 U.S. 518, 527 (1988) (citations omitted).

Pursuant to this constitutional authority, Presidents starting with Harry Truman have issued executive orders in order to formalize the classification process for preserving the secrecy of national security information. On April 17, 1995, President Clinton issued the currently applicable order, Executive Order No. 12,958, entitled "Classified National Security Information," 60 Fed. Reg. 19825 (1995) ("the Order"), to"prescribe[] a uniform system for classifying, safeguarding, and declassifying national security information." Id., Preamble. The present dispute concerns provisions of the Order that govern the declassification of information and authorize ISCAP to review certain declassification decisions.

The Order provides that information may be declassified[2] through one of three different mechanisms – "Automatic Declassification," "Systematic Declassification Review" or "Mandatory Declassification Review." The Order's automatic declassification provisions require the declassification of "all classified information contained in records that (1) are more than 25 years old, and (2) have been determined to have permanent historical value under title 44, United States Code," "whether or not the records have been reviewed." Id. § 3.4(a).[3] An agency head may exempt certain information from automatic declassification, including information which, if released,

> should be expected to . . . reveal the identity of a confidential human source, or reveal information about the application of an intelligence source or method, or reveal the identity of a human intelligence source when the unauthorized disclosure of that source would clearly and demonstrably damage the national security interests of the United States.

Id. § 3.4(b)(1). An agency head who exercises this exemption authority must notify the Director of ISOO, in his or her capacity as the Executive Secretary of ISCAP, of the information the agency proposes to exempt and, "except for the identity of a confidential human source or a human intelligence source, [must provide] a specific date or event for declassification of the

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[2] The Order defines "declassification" as "the authorized change in the status of information from classified information to unclassified information." Id. § 3.1(a).

[3] The Order provides that such automatic declassification is to occur "within 5 years from the date of this order." Id. § 3.4(a). Thereafter, information is automatically declassified "no longer than 25 years from the date of its original classification." Id.

information." Id., § 3.4(d)(3). ISCAP "may direct the agency not to exempt the information or to declassify it at an earlier date," and the agency may appeal any such direction to the President. Id. Information exempted from automatic disclosure, however, "shall remain subject to the mandatory and systematic declassification review provisions" of the Order. Id. § 3.4(f).

The Order's systematic declassification review provisions require each agency to "establish and conduct a program for systematic declassification review" that prioritizes record review based on either the recommendations of an Information Security Policy Advisory Council established by the Order, or the degree of researcher interest in the information and the likelihood of declassification upon review. Id. § 3.5(a). This program applies "to historically valuable records exempted from automatic declassification under section 3.4." Id. The DCI is authorized to establish special procedures for the systematic review of "information pertaining to . . . intelligence sources or methods." Id. § 3.5(c).

Under the Order's mandatory declassification review provisions, each agency head must develop procedures "to process requests for the mandatory review of classified information." Id. § 3.6(d). Section 3.6(a) provides that

> [e]xcept as provided in paragraph (b) below, all information classified under this order or predecessor orders shall be subject to a review for declassification by the originating agency if: (1) the request for a review describes the document or material containing the information with sufficient specificity to enable the agency to locate it with a reasonable amount of effort; (2) the information is not exempted from search and review under the Central Intelligence Agency Information Act; and (3) the information has not been reviewed for declassification within the past 2 years.

Id. § 3.6(a) (emphasis added). Section 3.6(b) exempts from mandatory declassification review information originated by the incumbent President, the incumbent President's White House Staff, entities within the Executive Office of the President that solely advise or assist the incumbent President, and any committees, commissions or boards appointed by the incumbent President. Id. § 3.6(b). The procedures each agency develops for processing mandatory declassification requests must provide a means for administrative appeal, as well as notice to the requester "of the right to appeal a final agency decision to [ISCAP]." Id. § 3.6(d). The Order permits the DCI, the Secretary of Defense and the Archivist to develop "special procedures for the review" of particular types of information; of relevance here, the DCI may establish such procedures "for the review of information pertaining to . . . intelligence sources or methods." Id. § 3.6(e).

Finally, the Order establishes ISCAP "for the sole purpose of advising and assisting the President in the discharge of his constitutional and discretionary authority to protect the national security of the United States." Id. § 5.4(e). The Secretaries of Defense and State, the Attorney General, the DCI, the Archivist and the Assistant to the President for National Securities Affairs must each appoint a senior level representative to serve as a member of ISCAP, and the President

selects one such representative to serve as ISCAP's Chair. Id. § 5.4(a)(1). ISCAP is authorized to decide appeals by persons who challenge classification decisions; to "approve, deny, or amend agency exemptions from automatic declassification as provided in section 3.4 of this order"; and to "decide on appeals by persons or entities who have filed requests for mandatory declassification review under section 3.6 of this order." Id. § 5.4(b). ISCAP's decisions may be appealed to the President. Id. § 5.4(d).

In a March 9, 1999, memorandum addressed to the Attorney General, the Secretaries of State and Defense, and the Assistant to the President for National Securities Affairs, the DCI challenged ISCAP's authority to review the merits of a DCI decision declining to declassify certain documents that were requested under the mandatory disclosure review procedures. DCI Initial Submission at 6. The DCI concedes that his classification decisions are generally subject to both substantive and procedural review by ISCAP, but he argues that his classification decisions relating to the protection of intelligence sources and methods are substantively "conclusive in the context of classification determination appeals arising before [ISCAP]." Id. at 1. According to the DCI, "ISCAP may not substitute its judgment for that of the DCI in making the decision whether it is necessary to protect specific intelligence sources and methods from unauthorized disclosure, or whether and in what circumstances a prospective disclosure would be authorized." Id. at 25. Under this view, ISCAP is limited in appeals involving intelligence sources and methods to the procedural review of "determin[ing] whether the DCI indeed has made the protection determination at issue." Id. at 27. The ISOO and NARA strongly disagree with these views.

II.

The DCI argues that, in the Order, the President has "delegate[d] his constitutional authority relating to the classification of intelligence sources and methods . . . to the DCI and has not delegated that authority to ISCAP." DCI Reply at 1. The DCI bases this contention on three propositions. First, he notes that, under the National Security Act of 1947, as amended, 50 U.S.C. § 401 (the "NSA"), he has "uniquely broad authority to protect intelligence sources and methods from unauthorized disclosure." DCI Initial Submission at 1. Second, the DCI argues that, because every President since Truman has recognized and relied upon the DCI's broad authority, and because no President has placed limits on that authority, there must be a clear indication in the Order that President Clinton intended to curtail that authority. Id. at 11. Third, the DCI claims that the Order contains no such clear indication, and instead expressly confirms his exclusive authority to protect intelligence sources and methods by stating that the Order does not "supersede any requirement made by or under . . . the [NSA]," Order, § 6.1(a), and that it does not "limit[] the protection afforded any information by . . . the [NSA]," id. § 6.1(c). Indeed, the DCI suggests that if the Order did not recognize and defer to his broad authority to protect intelligence information and sources, it "would contravene the provisions of" the NSA. DCI Initial Submission at 25.

A.

We believe that the language of the Order squarely forecloses any claim that the President

has delegated to the DCI unreviewable discretion concerning the declassification of information pertaining to intelligence sources and methods, and that the President has thereby exempted such decisions from substantive review by ISCAP. To the contrary, the Order makes clear that all DCI declassification decisions, including those involving information about intelligence sources and methods, are subject to substantive ISCAP review.

Consistent with its purpose of prescribing "a uniform system for classifying, safeguarding, and declassifying national security information," Order, Preamble (emphasis added), the Order requires the automatic declassification of "all classified information contained in records that (1) are more than 25 years old, and (2) have been determined to have permanent historical value under title 44, United States Code," "whether or not the records have been reviewed." Id. § 3.4(a) (emphasis added). By its plain terms, this requirement extends to information about intelligence sources and methods. This straightforward reading, moreover, is confirmed by section 3.4(b)(1), which permits an agency head to exempt from the automatic declassification requirement information which, if released, would reveal the "identity of a confidential human source," "the application of an intelligence source or method," or "the identity of a human intelligence source." Id. § 3.4(b)(1). It is likewise confirmed by the notice requirements of the automatic declassification provision, which require an exempting agency to provide a specific date or event for the declassification of exempted information, "except for the identity of a confidential human source or a human intelligence source." Id. § 3.4(d)(3).

The Order further provides that any information exempted from automatic declassification "shall remain subject to the mandatory and systematic declassification review provisions of this order." Id. § 3.4(f). The former provisions specifically allow the DCI to establish special procedures for "information pertaining to . . . intelligence sources or methods," id. § 3.6(e), but do not exempt such information from mandatory declassification review. To the contrary, the Order requires such review for "all information classified under this order or predecessor orders" subject to two specific exceptions: (1) information originated by the incumbent President, that President's White House Staff, entities within the Executive Office of the President that solely advise or assist the incumbent President, or any committees, commissions or boards appointed by that President, and (2) information exempted from search and review under the Central Intelligence Agency Information Act ("CIAIA"). Id. § 3.6(a)-(b) (emphasis added). The specification of these two exceptions – one of which exempts from review certain information originated by the Central Intelligence Agency ("CIA") itself[4] – precludes recognition of an

[4] Subsections (a) and (b) of the CIAIA added Title VII to the NSA. See Pub. L. No. 98-477, § 2, 98 Stat. 2209, 2209 (1984). Title VII of the NSA permits the DCI to exempt from search, review, publication or disclosure the CIA's "operational files," which are defined to include, among other things, the "files of the Directorate of Operations which document . . . intelligence or security liaison arrangements or information exchanges with foreign governments"; the "files of the Directorate for Science and Technology which document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems"; and the "files of the Office of Personnel Security which document the investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources." 50 U.S.C. § 431(b) (1994 & Supp. I 1995). The CIAIA exemption, however, does not apply to files that are the sole repository of disseminated information; to files that contain information derived or disseminated from operational files; or to

additional implied exception for all information pertaining to intelligence sources and methods originated by that same agency.

The Order likewise makes clear that ISCAP has jurisdiction to review decisions concerning the proper classification of CIA-originated information about intelligence sources and methods (not otherwise exempt under the CIAIA) when such information is sought under the Order's mandatory declassification review provisions. Section 5.4(b)(3) of the Order authorizes ISCAP to "decide on appeals by persons or entities who have filed requests for mandatory declassification review under section 3.6 of this order." Id., § 5.4(b)(3). By its plain terms, this provision applies to all appeals brought under section 3.6, and makes no exception for appeals that challenge DCI decisions declining to declassify information about intelligence sources and methods. Indeed, recognition of an implied exception is flatly inconsistent with the structure of the Order, which subjects such information to mandatory declassification review (subject to certain limited exceptions), requires each agency to notify requesters of their right to appeal adverse mandatory declassification review decisions to ISCAP, and then authorizes ISCAP to decide appeals of such decisions.

Section 5.4(b)(2) of the Order, moreover, confirms ISCAP's jurisdiction to review DCI declassification decisions involving intelligence sources and methods. That provision, which empowers ISCAP to "approve, deny, or amend agency exemptions from automatic declassification as provided in section 3.4," id., § 5.4(b)(2), indisputably confers jurisdiction on ISCAP to conduct a substantive review of DCI decisions exempting information concerning "the application of an intelligence source or method" or "the identify of a human intelligence source" from automatic declassification. See id., § 3.4(b)(1); see also id., § 3.4(d)(3) (ISCAP may direct an agency "not to exempt the information or to declassify it at an earlier date than [the agency] recommended"). ISCAP's clear jurisdiction to review DCI exemption decisions for intelligence sources and methods subject to automatic declassification buttresses the conclusion that ISCAP has jurisdiction to review DCI decisions concerning the very same information when it is requested under the mandatory declassification provisions.

B.

Notwithstanding the foregoing provisions, the DCI takes the view that the Order's two savings provisions necessarily carve out of ISCAP's jurisdiction all "sources and methods" information the DCI is required to protect under the NSA. The savings provisions state, respectively, that "[n]othing in this order shall supersede any requirement made by or under . . . the [NSA]," id., § 6.1(a), and that "[n]othing in this order limits the protection afforded any information by . . . the [NSA]." Id., § 6.1(c). We do not believe this language can bear the interpretive weight the DCI places upon it. Numerous provisions of the Order clearly establish

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records from operational files that are disseminated or referred to in non-exempt files. Id. § 431(b), (d)(1) & (d)(3) (1994 & Supp. I 1995). We assume that the three documents at issue in this dispute are not exempt from review as "operational files" within the meaning of section 701 of the NSA.

that, with the narrow exception of information exempted under the CIAIA, information concerning intelligence sources and methods is subject to mandatory declassification review, and that ISCAP has jurisdiction to review the substance of such declassification decisions. The Order's savings provisions, by contrast, do not mention "intelligence sources and methods" or ISCAP's appellate jurisdiction. Neither provision purports to create any exceptions from the requirements of the Order, let alone to create an exception that carves out ISCAP's jurisdiction to review the substance of a classification decision but not the procedural underpinnings of that decision. In light of the clarity with which the Order speaks to ISCAP's authority, we would infer such an elaborate exception only if the otherwise clear requirements of the Order squarely conflicted with the requirements of the NSA. There is, however, no such conflict here, because disclosure of intelligence sources and methods after ISCAP review cannot be an "unauthorized" disclosure within the meaning of the NSA and does not limit the protections the NSA affords such information.

The NSA provides that the Director "shall . . . protect intelligence sources and methods from unauthorized disclosure." 50 U.S.C. § 403-3(c)(6) (Supp. II 1996) (emphasis added). This statutory authority is undoubtedly broad, as the DCI emphasizes. The fact remains, however, that the decision to classify information bearing on national security is an exercise of the President's independent constitutional power to control access to such information. Egan, 484 U.S. at 527. If the President concludes that information concerning intelligence sources and methods should not be classified, the disclosure of such information simply is not "unauthorized" within the meaning of the NSA.[5]

The President created ISCAP for the express purpose of "advising and assisting [him] in the discharge of his constitutional and discretionary authority to protect the national security of the United States." Order, § 5.4(e). An ISCAP ruling constitutes advice to the President that an agency's declassification decision is inconsistent with his classification standards and may result in the withholding of information that should, under those same standards, be disclosed. The DCI, of course, is free to appeal an ISCAP ruling to the President. Id., § 5.4(d). Accordingly, under the Order, the final decision over whether to declassify and to disclose or withhold information rests with the President, or, where no appeal is taken, with ISCAP as his delegee.

In short, because the President may override the views of the DCI and authorize the disclosure of information pertaining to intelligence sources and methods, any disclosure of such

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[5] This conclusion is reinforced by the fact that the language of the NSA upon which the DCI relies "stemmed from President Truman's Directive of January 22, 1946, 11 Fed. Reg. 1337, in which he established . . . [the CIA's] predecessors." CIA v. Sims, 471 U.S. 159, 172 (1985). It thus appears that Congress intended to confer on the DCI a statutory duty that, like its administrative antecedent, is in aid of the President's authority. Indeed, to assume otherwise would raise grave concerns about the constitutionality of the NSA. A construction of the Act that permitted the DCI to block the release of national security information that the President believes should be disclosed would appear to conflict with the Framers' considered judgment, embodied in Article II, that, within the executive branch, all authority over matters of national defense and foreign affairs is vested in the President as Chief Executive and Commander in Chief. In addition, the President must retain authority over the disposition of national security information to the extent necessary to discharge his constitutionally assigned duties.

information that results from the President's decision to uphold an ISCAP ruling is not "unauthorized" within the meaning of the NSA, 50 U.S.C. § 403-3(c)(6), and thus cannot "supersede" any requirement of that statute. Similarly, any declassification or disclosure of such information that results from presidential affirmation of an ISCAP ruling does not "limit[] the protection" otherwise afforded such information: under the NSA, such information enjoys only the level of protection that the President, in the discharge of his constitutional duties, believes such information deserves. Moreover, because the President has authorized ISCAP to act as his delegee regarding classification decisions, an ISCAP declassification decision that the DCI does not appeal has the same significance, for purposes of the NSA, as a decision made by the President himself, and likewise does not "limit[]" or "supersede" the protections and requirements of the NSA, or result in an "unauthorized" disclosure within the meaning of that statute. The Order's two savings provisions thus provide no basis for departing from the plain language of the Order, which authorizes ISCAP to review the substance of DCI decisions concerning the classification of information pertaining to intelligence sources and methods, and recognition of ISCAP's authority in no way contravenes the requirements of the NSA.[6]

The DCI's makes two further arguments in support of a jurisdictional exception. Citing the Supreme Court's decisions in CIA v. Sims, 471 U.S. 159 (1985), and Department of the Navy v. Egan, the DCI contends the Order should be construed to require ISCAP deference to his judgments concerning the protection of intelligence sources and methods because he is the most knowledgeable expert within the executive branch on such matters. DCI Reply at 5-6; see also id. at 6 n.5 (noting that most ISCAP agencies do not have programmatic, working experience with intelligence activities and that several representatives are not intelligence professionals at all). In discharging his constitutional duties to protect the national security, however, the President may seek the advice and assistance of other executive departments as he deems appropriate. The language of the Order makes clear that, in establishing ISCAP, the President has done precisely that; the DCI's belief that his views should be given primacy over the views of other departments provides no basis for ignoring the contrary judgment the President has expressed in the Order.[7]

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[6] This reading of the savings provisions, moreover, does not render them "meaningless," as the DCI suggests. DCI Reply at 5. Because the Order and the NSA address a number of subjects in addition to the classification and declassification of information, the drafters had reason to be concerned that unanticipated ambiguities in the Order might result in inadvertent conflicts between the Order and the NSA. The savings provisions establish that, in such an event, a construction of the Order that avoids a conflict must be chosen over a construction that creates such a conflict. This rule of construction, however, has no application here, where the provisions of the Order are clear and do not conflict with the requirements of the NSA.

[7] The DCI's reliance on Sims and Egan is thus misplaced. In both cases, the Court construed statutes based on the assumption that Congress could not have intended to authorize judicial or administrative adjudicators to second-guess security decisions rendered by the executive agencies or departments charged with protecting classified information. Sims, 471 U.S. at 168-73 (construing Freedom of Information Act); Egan, 484 U.S. at 529-30 (construing the Civil Service Reform Act of 1978). Congress's intent, however, is irrelevant here, where we are construing an Order in which the President is exercising his independent constitutional authority to protect classified information.

Finally, the DCI argues that the Order cannot be read to confer jurisdiction on ISCAP over the classification of information involving intelligence sources and methods because such a reading will require the President to hear and decide appeals in every case in which ISCAP overrules the DCI. Id. at 8. As a factual matter, there appears to be little basis for the DCI's claim that such review will entail a heavy burden. The present dispute did not arise until nearly four years after the Order took effect and involves only three documents. DCI Initial Submission at 4. The DCI himself, moreover, notes that "[d]ecisions regarding the classification of intelligence sources and methods represent only a relatively small percentage of the total universe of issues that come before the ISCAP." Id. at 28. Whatever the nature of the burden, however, it is one the President has chosen, through the language of the Order, to shoulder. He is of course free to change his policy should he conclude that review of DCI appeals constitutes an undue burden on his time and energy. Unless and until the President does so, however, this burden provides no basis for ignoring the plain language of the Order and creating an exception to ISCAP's otherwise plenary jurisdiction to decide appeals of all mandatory review declassification decisions.[8]

We express no view, of course, on the question whether the information at issue in the appeal giving rise to this dispute should remain classified. We address only the authority of ISCAP to decide that question.

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U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

October 18, 2000

MEMORANDUM FOR

STEPHEN R. COLGATE
ASSISTANT ATTORNEY GENERAL FOR ADMINISTRATION

GERALD E. MCDOWELL
CHIEF
ASSET FORFEITURE AND MONEY LAUNDERING SECTION

From: Randolph D. Moss
Assistant Attorney General

Re: Payment of Awards in Excess of $250,000 from the Department of Justice Assets Forfeiture Fund

This memorandum resolves a dispute between the Justice Management Division ("JMD") and the Asset Forfeiture and Money Laundering Section ("AFMLS") of the Criminal Division regarding whether award payments in excess of $250,000 may be paid from the Department of Justice Assets Forfeiture Fund for information and assistance leading to a civil or criminal forfeiture. Specifically, we have been asked whether 28 U.S.C. § 524(c) prohibits an award payment in excess of $250,000. This is a close and difficult question for the reasons explained below. Ultimately, we conclude that although awards for *information* leading to a civil or criminal forfeiture may not exceed $250,000, the best reading of this statute is one that gives the Attorney General the discretion to pay awards from the Fund in excess of $250,000 for *assistance* leading to a forfeiture. Under the statute, the two terms must have distinct meanings, but their specific definitions are left, in the first instance, to the reasonable exercise of the Attorney General's discretion. We also conclude that only the Attorney General or one of the four delegees identified in § 524(c)(2) may authorize awards greater than $250,000 for assistance. We express no view on the policy question whether–contrary to the *Attorney General's Guidelines on Seized and Forfeited Property*–an award greater than $250,000 should be paid from the Fund. Furthermore, we take no position on whether the actions of an informant in any particular case are best characterized as information or assistance, or whether the case in which this dispute has arisen is an appropriate instance for the Attorney General or her delegees to exercise their discretion to make an award in excess of $250,000. Because no interpretation of the statute is entirely satisfactory and the question here is exceedingly close, any consideration of awards of more than $250,000 for assistance calls for caution and special care in determining that the

magnitude of the "assistance" provided is commensurate with the additional amount awarded and that the award promotes important law enforcement objectives.

I. Background

The statute creating the Department of Justice Assets Forfeiture Fund ("the Fund"), codified at 28 U.S.C. § 524 (1994 & Supp. IV 1998), authorizes "the payment of awards for information or assistance leading to a civil or criminal forfeiture involving any Federal agency participating in the Fund," at the discretion of the Attorney General. *Id.* § 524(c)(1)(C). Subsection 524(c)(2) limits delegation of the authority to approve payment of awards under § 524(c)(1)(C): "Any award paid from the Fund for information . . . shall be paid at the discretion of the Attorney General or his delegate . . . except that the authority to pay an award of $250,000 or more shall not be delegated to any person other than the Deputy Attorney General, the Associate Attorney General, the Director of the Federal Bureau of Investigation, or the Administrator of the Drug Enforcement Administration." The subsection also places a monetary limitation on awards pursuant to § 524(c)(1)(C): "Any award for information pursuant to paragraph (1)(C) shall not exceed the lesser of $250,000 or one-fourth of the amount realized by the United States from the property forfeited." *Id.* § 524(c)(2).

The Drug Enforcement Administration ("DEA") has sought approval from the Attorney General (through AFMLS) to award $1.5 million from the Fund to a DEA informant who played an integral role in a drug trafficking investigation resulting in the seizure and forfeiture of $89,016,022 by the United States.[1] This request was subsequently referred to JMD for its concurrence, and JMD questioned the legality of the award.

In its first memorandum on this question, JMD took the view that the text of 28 U.S.C. § 524 forbids the payment of any award greater than $250,000 from the Fund. *See* Memorandum for Michael A. Perez, Director, Asset Forfeiture Management Staff, from Stuart Frisch, General Counsel, Justice Management Division, *Re: Proposed $1.5 Million Award to Drug Enforcement Administration Confidential Source* (May 12, 2000) ("JMD Memo 1"). In response, AFMLS argued that the statute draws a distinction between assistance and information for purposes of the monetary limitation. In AFMLS's view, the $250,000 limitation on payments from the Fund is restricted to awards paid for information. Accordingly, the Fund may be used to pay awards in excess of $250,000 for actions that qualify as assistance. AFMLS further argued that this interpretation gives meaning to the words "$250,000 or more" in the first sentence of the subsection concerning limitations on delegation of authority to pay awards. Memorandum for Randolph D. Moss, Acting Assistant Attorney General, Office of Legal Counsel, from Gerald E. McDowell, Chief, Asset Forfeiture and Money Laundering Section, *Re: Monetary Limits on Award Payments from the Assets Forfeiture Fund* (June 21, 2000) ("AFMLS Memo"). In a second memorandum, JMD argued that the question whether there is a distinction between

[1] This $89 million equals half of the total amount seized in the investigation. The other half was retained by a foreign government taking part in the investigation.

information and assistance under § 524(c)(2) does not need to be reached because the facts of the case at issue do not implicate any potential distinction between the two terms. *See* Memorandum for Michael A. Perez, Director, Asset Forfeiture Management Staff, from Stuart Frisch, General Counsel, Justice Management Division, *Re: Proposed Legal Distinction Between Provision of "Information" and Provision of "Assistance" with Respect to Proposed $1.5 Million Award to Drug Enforcement Administration (DEA) Confidential Source* (June 6, 2000) ("JMD Memo 2"). Our Office has been asked to resolve this dispute.

II. Discussion

Subsection 524(c)(1) establishes the Fund and makes it "available to the Attorney General without fiscal year limitation for [specified] law enforcement purposes." Among the specified purposes of the Fund is "the payment of awards for information or assistance leading to a civil or criminal forfeiture involving any Federal agency participating in the Fund." 28 U.S.C. § 524(c)(1)(C). Subsection 524(c)(2) places a limitation on the use of the Fund for purposes described in paragraphs (c)(1)(B)[2] and (c)(1)(C):

> Any award paid from the Fund for information, as provided in paragraph (1)(B) or (C), shall be paid at the discretion of the Attorney General or his delegate under existing departmental delegation policies for the payment of awards except that the authority to pay an award of $250,000 or more shall not be delegated to any person other than the Deputy Attorney General, the Associate Attorney General, the Director of the Federal Bureau of Investigation, or the Administrator of the Drug Enforcement Administration. Any award for information pursuant to paragraph (1)(B) shall not exceed $250,000. Any award for information pursuant to paragraph (1)(C) shall not exceed the lesser of $250,000 or one-fourth of the amount realized by the United States from the property forfeited.

Thus, the statutory language permits payments from the Fund for "information or assistance" leading to a forfeiture, but appears to place certain limitations on the delegation of the authority to pay awards and on the amount of awards paid for "information."

We have considered several interpretations of this statute. An ideal reading of the provision would give effect to all of its words based on their ordinary meanings and would produce sensible results. *Moskal v. United States*, 498 U.S. 103, 108 (1990) ("In determining the scope of a statute, we look first to its language . . . giving the words used their ordinary meaning.") (internal citations and quotation marks omitted); *United States v. Menasche*, 348 U.S.

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[2] Paragraph (c)(1)(B) authorizes the payment of awards for "information or assistance directly relating to violations of the criminal drug laws of the United States or of sections 1956 and 1957 of title 18, sections 5313 and 5324 of title 31, and section 6050I of the Internal Revenue Code of 1986." This paragraph is not implicated by this dispute because the award at issue is proposed to be paid pursuant to paragraph (1)(C).

528, 538-39 (1955) ("The cardinal principle of statutory construction is to save and not to destroy. . . . It is our duty to give effect, if possible, to every clause and word of a statute.") (quoting *Labor Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937), and *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883)) (internal citations and quotation marks omitted); *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) ("[T]o construe statutes so as to avoid results glaringly absurd, has long been a judicial function."). No such ideal reading is possible here, however, because of the interpretive ambiguities created by the interaction between § 524(c)(1)(C), which authorizes the Attorney General to pay awards for "*information or assistance* leading to a civil or criminal forfeiture" and § 524(c)(2), which limits awards paid pursuant to paragraph (1)(C), but refers to awards paid from the Fund "*for information.*" (Emphasis added.)

The first possible reading is that the statute distinguishes between *information* and *assistance*, that the limitations in subsection 524(c)(2) apply exclusively to awards for *information*, and that the statute places no restrictions whatsoever on awards from the Fund for *assistance*. Subsection 524(c)(1)(C) seems to authorize payments from the Fund for two distinct types of services by informants: the provision of information *or* the provision of assistance. Terms connected by the word "or" are commonly understood to be distinct alternatives that should ordinarily be treated separately. *See Garcia v. United States*, 469 U.S. 70, 73 (1984) ("Canons of construction indicate that terms connected in the disjunctive . . . be given separate meanings."); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("[T]erms connected by a disjunctive must be given separate meanings unless the context dictates otherwise."). *See generally* 1A Norman J. Singer, *Sutherland on Statutory Construction* § 21.14 (5th ed. 1992 & Supp. 2000) (observing that "or" usually separates terms that are used in the alternative and that the terms generally must be read to have different meanings in order to avoid redundancy). The limitations in subsection 524(c)(2) refer exclusively to awards for *information* as provided in paragraphs (1)(B) and (C). Thus, under this interpretation, the statute would place a $250,000 limit on awards for *information*, but no monetary limit on award payments for *assistance* leading to a civil or criminal forfeiture. Furthermore, the limitation on delegation, stating that the authority to pay awards for information may be approved by the Attorney General or a delegate, except that the authority to pay an award of $250,000 or more "shall not be delegated to any person other than [listed officials]," would apply only to awards for information. As a consequence, awards of any amount could be paid for *assistance*, and the power to approve such awards presumably could be delegated under the Attorney General's statutory authority, 28 U.S.C. § 510 (1994), to any officer or employee of the Department.

This interpretation, however, would be seriously flawed. It would give no meaning to the words "or more" in the limitation on delegation. Under § 524(c)(1)(C), *no* awards for information could exceed $250,000. Thus, a provision concerning delegations of authority to pay awards for information of $250,000 *or more* would have no effect. This would be contrary to the fundamental canon of statutory interpretation that an interpretation must give effect, if possible, to every clause and word of a statute. *Menasche*, 348 U.S. at 538-39; *see also* 2A *Sutherland* § 46.06 ("A statute should be construed so that effect is given to all its provisions, so that no part

will be inoperative or superfluous . . . ."). Moreover, while the statute would purport to limit the officials to whom the Attorney General could delegate the authority to pay awards for *information*, it would not restrict at all the delegation of authority for awards for *assistance* that might be greater than $250,000.

The second possible understanding of the statute, alluded to by JMD in its submissions,[3] is to read "information" in subsection 524(c)(2) to mean both information *and* assistance. Under this theory, the entirety of subsection 524(c)(2)–the limitation on the Attorney General's delegation of the authority to pay awards of $250,000 or more *and* the limitation that awards not exceed $250,000–would apply to awards for assistance as well as information. Thus, any awards over $250,000 would be prohibited under § 524(c)(2).

This alternative approach presents one of the same problems as the previous reading: the phrase "or more" would be inoperative.[4] If no award can be paid over $250,000 for information *or* assistance, there is no purpose in delegating the authority to pay awards over $250,000 for information or assistance. The words "or more" are meaningless. In addition, reading "information" in subsection 524(c)(2) to mean "information and assistance" renders the word "assistance" in subsection 524(c)(1)(C) meaningless. If the word "information" captured the concepts of information *and* assistance, there would have been no need to include the word "assistance" at all; it would be mere surplusage. Because of the strong presumption in favor of giving meaning, if possible, to every word of a statute, we are reluctant to endorse this interpretation.

The legislative history of the statutes creating and governing the Fund provides no particular support for either of these two approaches, nor does it suggest that Congress intended the surplusage that those interpretations would require us to accept. There is no evidence that Congress considered the relationship between information and assistance in section 524(c), and to the extent the legislative history discusses the monetary limitation on awards or the delegation of authority to pay awards over $250,000 at all, it is ambiguous. The Fund was first created by the

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[3] JMD ultimately declines to take a position on whether the monetary limitation in § 524(c)(2) applies solely to awards for information under this statute, and argues instead that any potential distinction between information and assistance under the statute is not implicated by the facts of this case. However, JMD's submissions suggest arguments in favor of applying the $250,000 limitation to awards for both assistance and information. *See* JMD Memo 1, at 5; JMD Memo 2, at 1 n.2, 2 n.3. We address these arguments here.

[4] It is also worth noting that, under both of the first two interpretations, the provision concerning the delegation of authority to pay awards would have extremely limited application, since it would apply only to awards of exactly $250,000. It seems to us unlikely that Congress would have made the effort to limit the delegees who may pay awards of exactly $250,000, if awards lower than that can be made by anyone the Attorney General designates and awards higher than that are prohibited.

Comprehensive Forfeiture Act of 1984, Pub. L. No. 98-473, tit. 2, § 310, 98 Stat. 2040, 2052, which authorized payment of awards "for information or assistance leading to a civil or criminal forfeiture . . . at the discretion of the Attorney General." The 1984 statute included a provision very similar to the existing restrictions, except that the limitation on the delegation of authority to make award payments for information was set at $10,000, and the absolute limit on awards for information was set at $150,000.[5] The 1984 version, like the current statute, did not specifically refer to any limitation on delegations or the amount of payment for awards for assistance. In discussing this section, the Senate Judiciary Committee report stated:

> Under new subsection (j), the amounts realized in profitable forfeitures would be deposited in a Drug Assets Forfeiture Fund which would be available, through the appropriations process, for payments, at the discretion of the Attorney General for four specified purposes. These purposes [include] . . . payments for information or assistance relating to a drug investigation or leading to a forfeiture of drug assets . . . . Reward payments from the fund in excess of $10,000 must be authorized by either the Attorney General, Deputy or Associate Attorney General, Director of the Federal Bureau of Investigation, or the Administrator of the Drug Enforcement Administration. These awards also may not exceed a maximum of $150,000 or, in the case of a reward in a forfeiture case, the lesser of $150,000 or one quarter the amount realized by the United States in the forfeiture action.

S. Rep. No. 98-225, at 217 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3400. While it could be argued that "[t]hese awards" in the last sentence refers to awards for both information *and* assistance, we do not find this to be a clear expression of congressional intent. It is ambiguous at best, and we believe it to be an insufficient basis for an interpretation rendering the words "or more" and "assistance" meaningless.[6]

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[5] The 1984 provision read:

> Any award paid from the fund for information concerning a forfeiture . . . shall be paid at the discretion of the Attorney General or his delegate, except that the authority to pay an award of $10,000 or more shall not be delegated to any person other than the Deputy Attorney General, the Associate Attorney General, the Director of the Federal Bureau of Investigation, or the Administrator of the Drug Enforcement Administration. Any award for such information shall not exceed the lesser of $150,000 or one-fourth of the amount realized by the United States from the property forfeited.

Id.

[6] The Assets Forfeiture Amendments Act of 1988, which amended the limitation provision in subsection 524(c)(2) to read as it does today, provides no insight as to whether Congress intended for the limitations to reach awards for assistance, or only awards for information.

We therefore turn to, and endorse, a third interpretation that gives meaning to all of the words of the statute and squares with a sensible understanding of Congress's purposes. We read § 524(c) to mean that the Attorney General has discretion to make payments greater than $250,000 for *assistance* leading to a civil or criminal forfeiture, but that she may only delegate the authority to approve awards of $250,000 or more to the persons set forth in the statute. This reading gives effect to the words *information* and *assistance* in § 524(c)(1)(C). Furthermore, by contemplating that awards for *assistance* may exceed $250,000, it opens the possibility that the words "or more" in § 524(c)(2) may have some meaning. That possibility can be realized if the limit in the delegation provision ("the authority to pay an award of $250,000 or more shall not be delegated to any person other than [the enumerated officials]") means that the authority to pay *any award* of $250,000 or more shall not be delegated to anyone other than those persons enumerated in the statute. Since awards for information are held to a $250,000 cap, the awards of $250,000 or more referred to in the delegation provision are those awards without such a cap, *i.e.*, awards for assistance.

We recognize that this interpretation requires us to employ a somewhat unusual understanding of the word "except" in the first sentence of § 524(c)(2).[7] Commonly, the phrase that follows the word "except" is as an exception to the phrase that precedes it. In other words, the exception here ("except that the authority to pay an award of $250,000 or more shall not be delegated to any person other than [the enumerated officials]") is most naturally understood as an exception to the category of awards described immediately prior to the word "except" ("[a]ny award paid from the fund for information . . . shall be paid at the discretion of the Attorney General or his delegate, under existing departmental delegation policies for the payment of awards"). As we have discussed above, however, this reading of the statute would limit the delegation provision to awards for information and render the phrase "or more" meaningless. The best way to give effect to the words in the statute is to understand the language that follows the word "except" to be an additional limitation on all awards paid from the Fund, rather than an exception to the category of awards paid from the Fund for information.[8]

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[7] "Any award paid from the Fund for information, as provided in paragraph (1)(B) or (C), shall be paid at the discretion of the Attorney General or his delegate, under existing departmental delegation policies for the payment of awards, *except* that the authority to pay an award of $250,000 or more shall not be delegated to any person other than the Deputy Attorney General, the Associate Attorney General, the Director of the Federal Bureau of Investigation, or the Administrator of the Drug Enforcement Administration." (Emphasis added.)

[8] We also recognize that this interpretation leaves a gap in the delegation provision of the statute. Under our preferred interpretation, the first part of the first sentence ("Any award paid from the Fund for information . . . shall be paid at the discretion of the Attorney General or his delegate") provides for a delegation to pay awards less than $250,000 for information and the second part of the sentence ("except that the authority to pay an award of $250,000 or more shall not be delegated to any person other than [the enumerated officials]") provides for a delegation to pay awards of $250,000 or more for information or assistance. There is no provision in the

Congress could sensibly have intended this result. It could have understood *assistance* to involve, under some circumstances, greater effort or risk than the provision of *information* and to justify, under those circumstances, awards exceeding $250,000. But to promote accountability and to ensure that these large awards were truly merited, Congress could have restricted the approval authority, in those cases, to the highest officials of the Department.

As JMD points out in its submission, this approach is at odds with both *The Attorney General's Guidelines on Seized and Forfeited Property* ("*Guidelines*") and a section-by-section analysis of the 1988 amendments that was sent to federal prosecutors by Attorney General Richard Thornburgh on November 16, 1988, expressly stating that awards for both information and assistance should not exceed $250,000. JMD Memo 1, at 5; JMD Memo 2, at 2 n.3. It is true that an award for assistance over $250,000 would constitute a departure from the Attorney General's *Guidelines*, which state that "[a]ny award pursuant to 28 U.S.C. § 524(c)(1)(C) shall not exceed the lesser of $250,000 or one-fourth the amount realized by the United States from the property forfeited." *The Attorney General's Guidelines on Seized and Forfeited Property* § VII(F)(5) (1990). These *Guidelines*, however, were not intended to have the force of law, but rather to assist the Attorney General and her delegees in exercising their discretion under the statute. *Guidelines*, § I ("These Guidelines are not intended to create or confer any rights, privileges or benefits on prospective or actual claimants, defendants or petitioners. Likewise, they are not intended to have the force of law."). In an exercise of discretion, the Attorney General issued guidelines setting the limit for monetary awards for *assistance* to match the statutorily mandated limit for awards for *information*. The *Guidelines* are subject to alteration as appropriate: "The Deputy Attorney General or his designee may issue supplementary and interpretive guidance to address issues that arise under these Guidelines." *Id.* § III(C). These guidelines govern internal agency procedures with respect to the administration of the Department of Justice Assets Forfeiture Fund. As such, they merely establish guidelines for the exercise of the Department's discretion; they are not a binding limitation on the Attorney General's authority. *See Aulenback, Inc. v. Federal Highway Administration*, 103 F.3d 156, 169 (D.C. Cir. 1997) ("[A]gencies do not develop written guidelines to aid their exercise of discretion only at the peril of having a court transmogrify those guidelines into binding norms.") (citation and internal quotation marks omitted); *Western Radio Services Co. v. Espy*, 79 F.3d 896, 901 (9th Cir.) (Forest Service Manual providing guidelines for exercise of Forest Service's prosecutorial

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statute concerning the delegation of the authority to pay awards less than $250,000 for assistance. We believe the Attorney General may delegate the payment of such awards for assistance pursuant to her general delegation authority. 28 U.S.C. § 501 ("The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice any function of the Attorney General."). We acknowledge, however, that it seems unusual that Congress would include a specific provision addressing delegations of the power to pay awards less than $250,000 for information, without accounting for delegations to pay awards of the same amount for assistance. Notwithstanding this weakness in our interpretation, we believe it to be the best of the three possible options.

discretion is not binding on the Service's authority.), *cert. denied*, 519 U.S. 822 (1996). The statute itself places no legal limitation on the amount of an award for assistance. Accordingly, the Attorney General is free to revise the *Guidelines* or make exceptions as appropriate.[9]

Similarly, we are not persuaded by the section-by-section analysis issued by the Attorney General on November 16, 1988, which described the 1988 amendment as "rais[ing] the maximum award for information or assistance leading to drug-related or racketeering-related forfeitures from $150,000 to the lesser of $250,000 or one-fourth of the amount realized from the forfeiture." Memorandum to Federal Prosecutors, from Dick Thornburgh, Attorney General, *Re: Anti-Drug Abuse Act of 1988* (Nov. 16, 1988), Section-by-Section Attachment, at 29. JMD correctly observed that the "[l]ong-continued contemporaneous and practical interpretation" of a statute by the executive officers charged with administering the statute is given great weight by courts in determining the meaning of an ambiguous statute. *See* 2B *Sutherland* § 49.03. We do not believe, however, that this section-by-section analysis is the type of long-continued contemporaneous interpretation to which the courts would give such weight. The section-by section portion of the memorandum was described by Attorney General Thornburgh himself as a "quick reference" summary, issued after the bill was passed by Congress and two days before the President signed it into law, and it did not attempt to grapple with textual difficulties of this confusing provision. Memorandum to Federal Prosecutors at 1. Accordingly, we do not find the memorandum to be sufficient to control our interpretation of this statute.

JMD argues that even if, as we have found, there is a distinction between information and assistance in subsection 524(c)(1)(C), that difference is not implicated by the facts of this particular investigation. They contend that the services provided by the informant in this case cannot be characterized as anything other than the provision of information. AFMLS, in contrast, takes the position that the informant in this case provided assistance "in addition to the mere provision of information," and thus, the Attorney General may exercise her discretion to make an award from the Fund in excess of $250,000. AFMLS Memo at 3. Such assistance, according to AFMLS, included general guidance to the DEA throughout the course of the investigation, identification of key personnel in a large drug trafficking organization, explanation of how specific money laundering schemes worked, identification and assistance with tracing illegal drug money, and the provision of testimony deemed essential for prosecutorial purposes. JMD counters that all of these services should be characterized as the provision of *information*, not *assistance*. Otherwise, all provision of information would also qualify as assistance and there would be no basis for placing a monetary limit on the amount of the award for information only.[10]

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[9] Because the *Guidelines* governing the payment of awards from the Fund were issued by the Attorney General in the exercise of her discretion under the statute, the Attorney General should make appropriate revisions or exceptions to the *Guidelines* to pay such awards if an award of more than $250,000 is to be approved by a delegee rather than the Attorney General herself.

[10] JMD acknowledges that there may be a category of assistance that would not also qualify as information, such as wearing a recording device or setting up a rendezvous, but

Section 524 does not include definitions of the terms *information* or *assistance*, nor does the legislative history of the 1984 act or the 1988 amendments elucidate what Congress intended by use of these terms. Accordingly, we believe it lies within the reasonable discretion of the Attorney General and her delegees to define these terms and to distinguish between them in the first instance.[11] Of course, the distinction between information and assistance that Congress has drawn in this statute must be recognized. "Assistance" must be defined as something more than or different from "information." The two terms could not be defined such that "assistance" would include all acts that constitute "information," thereby removing awards for information from the $250,000 limitation set forth in the statute. Congress intended these terms to refer to distinct alternatives, and it subjected only one of those alternatives–awards for information–to the

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suggests that no such assistance was provided here. JMD Memo 2, at 3 n.4.

[11] Our Office has not been asked, nor do we offer a view, on whether an informant could receive an award of more than $250,000 exclusively in exchange for his testimony. In defining the terms *assistance* and *information* under the statute, it is important to be aware that courts are divided on whether paying an informant for testimony would run afoul of the antigratuity statute, 18 U.S.C. § 201 (1994). *Compare United States v. Anty*, 203 F.3d 305, 309 (4th Cir. 2000) (18 U.S.C. § 201(c) does not preclude the government's payment of money to informants "to assist in investigating and prosecuting crimes, by giving truthful testimony"), *cert. denied*, No. 99-9966, 2000 WL 796310 (Oct. 2, 2000); *United States v. Barnett*, 197 F.3d 138, 145 (5th Cir. 1999) ("18 U.S.C. § 201(c)(2) is not violated when prosecutors compensate informants for their cooperation."), *cert. denied*, 120 S. Ct. 1966 (2000); *United States v. Albanese*, 195 F.3d 389 (8th Cir. 1999) (government does not violate 18 U.S.C. § 201(c) when it compensates testifying witnesses for participation in criminal investigation); *United States v. Murphy*, 193 F.3d 1, 9 (1st Cir. 1999) (18 U.S.C. § 201(c) does not apply to government; overruling holding by district court that payment of witnesses for testimony violated antigratuity statute) *with United States v. Jackson*, 213 F.3d 1269, 1287-88 (10th Cir. 2000) (reserving question whether antigratuity statute would permit prosecutors to pay cash for favorable testimony), *petition for cert. filed*, (U.S. Aug. 31, 2000) (No. 00-5999); *United States v. Harris*, 210 F.3d 165, 168 (3d Cir. 2000) (holding that government may pay informants to gather information and testify about evidence, but reserving judgment on whether "the antigratuity statute allows the government to pay a witness solely or essentially for favorable testimony"); *United States v. Condon*, 170 F.3d 687, 689 (7th Cir.) (reserving question whether antigratuity statute would permit prosecutors to pay cash for favorable testimony), *cert. denied*, 526 U.S. 1126 (1999). While 18 U.S.C. § 3059B authorizes the Attorney General "[n]otwithstanding any other provision of law" to "pay awards . . . to any individual who assists the Department of Justice in performing its functions," it is unclear the extent to which the provision includes the authority to pay individuals for their testimony. *Compare Anty*, 203 F.3d at 309 ("In authorizing the payment of rewards for information, assistance, and services in the enforcement of criminal statutes, Congress surely must have contemplated payments to informants for assisting both in investigations and by testifying.") *with Harris*, 210 F.3d at 167-68 (citing 18 U.S.C. § 3059B, but reserving question whether government can compensate witness "solely or essentially for favorable testimony").

monetary limitation. Within these constraints, the Attorney General nevertheless has some range of discretion to define the two terms. We do not believe, however, that our Office is best suited to make this initial determination on behalf of the Department. Similarly, we express no view on whether it is appropriate for the Department to exercise its discretion to issue an award in excess of $250,000 in this case.

III. Conclusion

We believe the preferred construction of the statute is the one that best permits us to give meaning to all the words of the provision. Thus, we conclude that awards may be paid from the Fund at the discretion of the Attorney General for information or assistance leading to a civil or criminal forfeiture involving any Federal agency participating in the Fund. The only monetary limitation on the payment of awards from the Fund is that awards for *information* shall not exceed $250,000 or one-fourth of the amount realized by the United States from the property forfeited. There is no statutory limitation on the amount of awards for *assistance* under § 524(c)(2); the amount of such awards lies within the reasonable discretion of the Attorney General. If the Attorney General chooses to exercise that discretion to pay an award over $250,000 for assistance, she may exercise that authority herself, or she may delegate the authority to pay such an award only to one of the four persons listed (assuming the *Guidelines* are amended as discussed in n. 9). We express no view on the policy question whether the *Guidelines* should be amended to include awards over $250,000. Furthermore, the determination of which activities constitute assistance and which constitute the provision of information is left to the reasonable discretion of the Attorney General and her delegees within the constraints discussed above. Our Office offers no view on whether the actions taken by the informant in this case are best characterized as information or assistance. In light of the close question of statutory interpretation presented here and the fact that payment of awards over $250,000 would constitute a departure from current guidelines, we believe that any decision to pay such an award should be carefully considered to determine that the assistance provided is commensurate with the amount awarded and that the award promotes important law enforcement objectives.

U.S. Department of Justice

Office of Legal Counsel

Office of the Assistant Attorney General

Washington, D.C. 20530

October 12, 2000

MEMORANDUM FOR WILLIAM P. MARSHALL
DEPUTY COUNSEL TO THE PRESIDENT

FROM: Randolph D. Moss RDM
Assistant Attorney General

RE: Application of the Coreligionists Exemption in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a), to Religious Organizations That Would Directly Receive Substance Abuse and Mental Health Services Administration Funds Pursuant to Section 704 of H.R. 4923, the "Community Renewal and New Markets Act of 2000"

This memorandum responds to your request for guidance on certain questions concerning the interplay between title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (1994), and section 704 of H.R. 4923, the "Community Renewal and New Markets Act of 2000," which would confirm and codify the eligibility of religious organizations to receive Substance Abuse and Mental Health Services Administration ("SAMHSA") funds directly from SAMHSA or from a state government for the purpose of carrying out programs to prevent or treat substance abuse.

You have asked us to address several, related constitutional questions. First, would the Establishment Clause of the First Amendment invariably prohibit a government from providing SAMHSA funds directly to a religious organization to enable the organization to provide substance-abuse treatment or prevention services, where that organization is eligible to invoke section 702(a) of title VII, 42 U.S.C. § 2000e-1(a), which exempts certain religious organizations from title VII liability for preferring employees "of a particular religion"? Second, would the Establishment Clause categorically prohibit such direct aid to a religious organization that does, in fact, give preferences to employees "of a particular religion"? Third, assuming the answer to the first two questions is "no" — i.e., that there is no such categorical funding prohibition with respect to organizations that are eligible for or that act in accord with the section 702(a) exemption — would such aid be unconstitutional when the employment discrimination occurs within the funded substance-abuse program itself and where, therefore, the private religious organization in effect uses the government aid to hire employees pursuant to a religious test? Finally, is section 702(a), which exempts certain religious organizations from title VII coverage

for employment discrimination in favor of coreligionists, itself an unconstitutional religious preference as applied to the employees who work within a particular substance-abuse program that receives direct SAMHSA aid?

We conclude that, although some organizations that are eligible for title VII's section 702(a) exemption relating to a preference for employees of "a particular religion" may be constitutionally ineligible for the receipt of direct funding for substance-abuse programs, the Establishment Clause does not categorically prohibit direct funding to all such organizations. That is to say, there may be certain organizations that are statutorily eligible for the section 702(a) exemption and yet remain constitutionally eligible for the receipt of direct SAMHSA funds. We further conclude, however, that the constitutional question is far more difficult, and unresolved, with respect to organizations that discriminate in favor of coreligionists in a substance-abuse program that directly receives SAMHSA funds. Funding provided to such programs may under certain circumstances be unconstitutional, where a reasonable observer would conclude that the government entity providing the funds endorses the private organization's religious discrimination. Moreover, although the Supreme Court already has held that the section 702(a) exemption from title VII is generally constitutional as applied to qualifying nonprofit religious organizations, the application of that exemption to employees in SAMHSA-funded programs, who may not engage in specifically religious activities, raises very difficult and unresolved constitutional questions, the resolution of which may well depend on circumstances relating to particular organizations and specific funding mechanisms and arrangements.

You also have asked us to address the statutory question whether section 702(a) exempts qualifying religious organizations from title VII's prohibitions on employment discrimination on grounds other than religion, where such discrimination is religiously motivated. We conclude that section 702(a) does not exempt qualifying religious organizations from title VII liability for any form of discrimination other than a preference for employees "of a particular religion" and, in particular, does not permit an employer to escape title VII's proscriptions against race and sex discrimination, even where the employer may be religiously motivated to engage in such forms of employment discrimination.

STATUTORY BACKGROUND

In order to answer the questions you have posed, we must provide some background on the "charitable choice" provision of H.R. 4923, and on the provision in section 702(a) of title VII that exempts certain employers from title VII liability for employment discrimination in favor of coreligionists, i.e., "individuals of a particular religion."

Section 704 of H.R. 4923

On July 25, 2000, the House of Representatives passed H.R. 4923, the "Community Renewal and New Markets Act of 2000." See 146 Cong. Rec. H6840-41 (daily ed. July 25, 2000). Section 704 of that bill would amend title V of the Public Health Service Act ("PHSA"), 42 U.S.C. §§ 290aa–290gg (1994), to add a new "Part G," to be entitled "Services Provided Through Religious Organizations." Part G would expressly prohibit governments from discriminating against religious organizations in all "discretionary and formula grant programs" administered by the Substance Abuse and Mental Health Services Administration that "make awards of financial assistance to public or private entities for the purpose of carrying out activities to prevent or treat substance abuse." Proposed PHSA section 581(a).

The prohibition on governmental discrimination against religious organizations would apply in two distinct types of SAMHSA grant programs. The first category includes those programs in which SAMHSA itself provides discretionary grants or awards to, inter alia, private, nonprofit organizations. SAMHSA officials have informed us that SAMHSA makes numerous such grants under its general authority contained in 42 U.S.C. § 290aa (1994), and that it has the authority to issue specific grants relating to substance-abuse prevention and treatment under several other statutory provisions, such as 42 U.S.C. §§ 290aa-5, 290bb-1–290bb-5, and 290bb-21–290bb-24 (1994). The second category of covered programs consists of grants that SAMHSA makes to the States, including "formula" grants awarded to the States pursuant to 42 U.S.C. §§ 300x-21–300x35 (1994 & Supp. 1998), to enable the States to achieve certain substance-abuse treatment and prevention goals. See also id. § 300y (1994) (discretionary grants to States). The statutory provisions establishing the formula-grant regime in several places indicate that a State may use SAMHSA funds to make its own grants or awards to, or contracts with, private nonprofit organizations, so that such private organizations may provide the substance-abuse services for which the State received the SAMHSA grant.[1] SAMHSA officials inform us that there is an array of mechanisms (prescribed by state law) by which the various States provide SAMHSA formula-grant funds to private organizations, and that most, if not all, such mechanisms involve discretionary decisions by State and local officials regarding the allocation of limited SAMHSA funds to competing private organizations.

Section 704 of H.R. 4923 would amend the Public Health Service Act to provide expressly that "[n]otwithstanding any other provision of law, a [nonprofit] religious organization, on the same basis as any other nonprofit private provider . . . (1) may receive financial assistance under a designated program; and (2) may be a provider of services under a designated program." PHSA section 582(c), in turn, would prescribe with more particularity the contours of this nondiscrimination rule:

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[1] See, e.g., 42 U.S.C. § 300x-31(a)(1)(E) (1994) (imposing requirement that States agree not to expend the SAMHSA grant "to provide financial assistance to any entity other than a public or nonprofit private entity"); see also, e.g., id. §§ 300x-22(c)(3), 300x-24(a)(1)(A), 300x-25(a)(1), 300x-62(b).

(c) NONDISCRIMINATION AGAINST RELIGIOUS ORGANIZATIONS-

(1) ELIGIBILITY AS PROGRAM PARTICIPANTS- Religious organizations are eligible to be program participants on the same basis as any other nonprofit private organization as long as the programs are implemented consistent with the Establishment Clause and Free Exercise Clause of the First Amendment to the United States Constitution.[2] Nothing in this Act shall be construed to restrict the ability of the Federal Government, or a State or local government receiving funds under such programs, to apply to religious organizations the same eligibility conditions in designated programs as are applied to any other nonprofit private organization.

(2) NONDISCRIMINATION- Neither the Federal Government nor a State or local government receiving funds under designated programs shall discriminate against an organization that is or applies to be a program participant on the basis that the organization has a religious character.

These provisions, which are similar to "charitable choice" provisions in two other recently enacted laws,[3] would, if enacted, manifest "Congress' considered judgment that religious organizations can help solve the problems," Bowen v. Kendrick, 487 U.S. 589, 606-07 (1988), to which the SAMHSA grant programs are addressed. These provisions would not give religious organizations any special entitlement to receive SAMHSA funds; they simply would require governments to treat such organizations on an equal footing with other nonprofit organizations.

H.R. 4923 would impose certain restrictions on participating private organizations (including religious organizations). Most importantly, proposed PHSA section 583 would provide that "[n]o funds provided under a designated program shall be expended for sectarian worship, instruction, or proselytization."[4] In addition, proposed PHSA section 582(f)(4) would prohibit a participating religious organization from engaging in religious discrimination against the ultimate beneficiaries of a program (i.e., the individuals receiving the substance-abuse

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[2] PHSA section 581(c)(4) would define "program participant" to mean "a public or private entity that has received financial assistance under a designated program." Section 581(c)(6) would define "religious organization" to mean a "nonprofit religious organization."

[3] See section 104(c) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 ("PRWORA"), 42 U.S.C. § 604a(c) (Supp. II 1996); section 679(a) of the Community Services Block Grant Act ("CSBGA"), 42 U.S.C. § 9920(a) (Supp. IV 1998).

[4] This is similar to restrictions imposed in other charitable choice statutes. See PRWORA section 104(j), 42 U.S.C. § 604a(j) (Supp. II 1996); CSBGA section 679(c), 42 U.S.C. § 9920(c) (Supp. IV. 1998); see also, e.g., 42 U.S.C. § 9858k(a) (1994) ("No financial assistance [for child-care services and related activities] provided under this subchapter . . . shall be expended for any sectarian purpose or activity, including sectarian worship or instruction.").

services): "A religious organization that is a program participant shall not in providing program services or engaging in outreach activities under designated programs discriminate against a program beneficiary or prospective program beneficiary on the basis of religion or religious belief."[5] Furthermore, the statute would require governments that administer the designated programs to ensure that if an individual who is a program beneficiary (or prospective beneficiary) objects to the religious character of a provider organization, such individual will be referred to an accessible alternative service provider. Proposed PHSA section 582(f)(1)-(3).

Notably, however, nothing in H.R. 4923 would independently prohibit a participating private organization from engaging in religious discrimination against its employees. Instead, PHSA section 582(e) would provide as follows:

> Nothing in this section shall be construed to modify or affect the provisions of any other Federal or State law or regulation that relates to discrimination in employment. A religious organization's exemption provided under section 702 of the Civil Rights Act of 1964 regarding employment practices shall not be affected by its participation in, or receipt of funds from, a designated program.[6]

Thus, the proposed amendment to the PHSA would, by its terms, leave the law of employment discrimination in SAMHSA-funded programs in exactly the same place that it currently stands. In particular, the bill would emphasize that if an organization is otherwise entitled to the exemption provided in section 702(a) of title VII, 42 U.S.C. § 2000e-1(a), that organization's receipt of funds pursuant to a SAMHSA substance-abuse program will not affect the organization's eligibility for the section 702(a) exemption.[7] We turn now to a brief description of the section 702(a) exemption to title VII.

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[5] This restriction, too, would be similar to a provision found in the PRWORA. See 42 U.S.C. § 604a(g) (Supp. II 1996).

[6] See also PRWORA § 104(f), 42 U.S.C. § 604a(f) (Supp. II 1996); CSBGA § 679(b)(3), 42 U.S.C. § 9920(b)(3) (Supp. IV 1998).

[7] With respect to certain SAMHSA programs, title VII is not the only existing statute that restricts employment discrimination. In particular, as explained infra at 8-9, a separate statutory provision, 42 U.S.C. § 300x-57(a)(2) (1994), prohibits religious discrimination under "any program or activity funded in whole or in part with funds made available" under the SAMHSA program providing "formula grants" to the States. Nothing in H.R. 4923 would affect that preexisting antidiscrimination provision. Indeed, proposed PHSA section 582(e) would expressly reaffirm that the new provisions in PHSA section 582 involving religious organizations would not modify or affect the provisions of any other law relating to discrimination in employment.

Title VII

Section 703(a) of title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994), generally prohibits employers from engaging in employment discrimination on the basis of race, color, religion, sex, or national origin. That section provides:

> It shall be an unlawful employment practice for an employer -
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
>
> or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[8]

One of several exemptions to title VII's prohibitions is found in section 702(a), 42 U.S.C. § 2000e-1(a) (1994), which provides as follows:

> This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

As first enacted in 1964, the section 702 exemption for religious discrimination extended only to persons employed to perform work "connected with the carrying on by such [religious] corporation, association, or society of its religious activities." Pub. L. No. 88-352, § 702, 78 Stat. 255 (1964). In 1972, Congress amended section 702 in pertinent part to delete the word "religious" modifying "activities," so that the exemption applies to persons employed to perform work "connected with the carrying on by such [religious] corporation, association, or society of its activities." Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972).[9] Accordingly, title VII presently does not prohibit qualifying employers from

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[8] In addition, section 704 of title VII, 42 U.S.C. § 2000e-3, prohibits certain forms of retaliation against employees who raise claims or questions concerning alleged title VII violations. See infra note 64.

[9] That amendment also added "religious . . . educational institutions" to the list of exempt religious organizations in section 702, while deleting a broader, separate "educational institution" exemption that originally

discriminating in favor of employees "of a particular religion" — a form of discrimination "because of [an] individual's . . . religion" that section 703(a) otherwise would prohibit.[10]

It is important for present purposes to emphasize that the section 702(a) exemption does not apply to all employers that would, for religious reasons, prefer to hire and retain coreligionist employees. See EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 619 (9th Cir. 1988), cert. denied, 489 U.S. 1077 (1989). Nor can the exemption be construed to cover every organization or employer with some tie to an organized religious denomination or church. See id. at 617-18; EEOC v. Kamehameha Schs./Bishop Estate, 990 F.2d 458, 460 (9th Cir.), cert. denied, 510 U.S. 963 (1993).[11] The only employers entitled to the exemption are "religious corporation[s], association[s], educational institution[s], [and] societ[ies]." Title VII does not further define these terms, and there has been limited litigation contesting their meaning. The courts of appeals that have addressed the issue have concluded that whether a particular religious or religiously affiliated organization is entitled to the exemption will depend upon "[a]ll significant religious and secular characteristics" of the organization, that "each case must turn on its own facts," and that the ultimate inquiry is whether the organization's purpose and character are "primarily religious." Townley Eng'g & Mfg., 859 F.2d at 618; accord Kamehameha, 990 F.2d at 460; Hall v. Baptist Mem'l Health Care Corp., 215 F.3d 618, 624 (6th Cir. 2000). The Department of Justice, on behalf of the Equal Employment Opportunity Commission, has defended that understanding of the scope of the exemption.[12] We have no occasion here to question this prevailing interpretation of § 702(a), and for purposes of the analysis that follows we therefore

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had appeared in section 702 as enacted in 1964.

[10] The Equal Employment Opportunity Commission construes the section 702(a) exemption to apply only to decisions concerning hiring, discharge and promotion, and not to exempt religious organizations from liability under title VII for discriminating on the basis of religion in compensation, terms, conditions, or privileges of employment. See 2 EEOC Compliance Manual (CCH) ¶ 2183, App. 605-I (1998) (Policy Statement on "Religious Organization Exception"). We are not aware of any reported decisions directly addressing that distinction; and we do not address it here. In section II of our Analysis, infra at 29-32, we discuss further the substantive meaning of the phrase "of a particular religion," and the effect of the section 702(a) exemption on other forms of discrimination (such as race and sex discrimination) that title VII prohibits.

[11] Such a broad reading would threaten to render redundant another title VII exemption, found in section 703(e)(2), 42 U.S.C. § 2000e-2(e)(2) (1994), which provides that title VII does not prohibit an educational institution from hiring employees of a particular religion if that institution is wholly or partly supported "by a particular religion or by a particular religious corporation, association, or society." When Congress enacted title VII, it included this additional exemption because it understood that not all such educational institutions would be able to take advantage of the "religious corporation, association or society" exemption then found in section 702 (or of the additional "educational institution" exemption that initially was included in section 702). See Townley Eng'g & Mfg., 859 F.2d at 617 (discussing legislative history).

[12] See Brief for the Equal Employment Opportunity Comm'n in Opposition [to Petition for Certiorari] at 10, Kamehameha Schs./Bishop Estate v. EEOC, 510 U.S. 963 (1993) (No. 93-171) ("The court of appeals' approach of weighing the organization's religious and secular characteristics in order to determine its primary 'purpose and character' is eminently sensible. Petitioner itself suggests no more appropriate methodology, and none occurs to us.").

will assume that the correct test for coverage under section 702(a) is whether an organization's purpose and character are "primarily religious."

Thus, not all religious organizations receiving funds under a SAMHSA grant program would be entitled to title VII's section 702(a) exemption. The proposed new PHSA section 582(e) in H.R. 4923 would provide simply that an organization's section 702 exemption "shall not be affected by its participation in, or receipt of funds from, a designated program." Neither section 582(e) nor any other provision of H.R. 4923 would purport to extend the section 702(a) exemption to any organization not otherwise eligible for it. Accordingly, an organization receiving SAMHSA funding will be eligible for the section 702(a) exemption only if its purpose and character are "primarily religious."[13]

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Before turning to the constitutional questions involving application of title VII to SAMHSA funding recipients, we should note that, just as H.R. 4923's proposed amendment to the PHSA would not affect the operation of title VII, so, too, that amendment to the PHSA would not modify any other antidiscrimination obligation by which a participating organization must abide. See proposed PHSA section 582(e) ("Nothing in this section shall be construed to modify or affect the provisions of any other Federal or State law or regulation that relates to discrimination in employment."). In particular, H.R. 4923 would not alter the operation of a separate antidiscrimination provision, 42 U.S.C. § 300x-57(a)(2) (1994), which reads as follows:

> No person shall on the ground of sex (including, in the case of a woman, on the ground that the woman is pregnant), or on the ground of religion, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity funded in whole or in part with funds made available under section 300x or 300x-21 of this title.

Section 300x-57(a)(2) prohibits religious discrimination under "any program or activity funded in whole or in part with funds made available under" SAMHSA's formula-grant provisions.[14]

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[13] There are very few reported decisions concerning whether particular organizations involved in providing social or charitable services are entitled to the section 702(a) exemption. Compare, e.g., McClure v. Salvation Army, 323 F. Supp. 1100, 1104 (N.D. Ga. 1971) (Salvation Army is a "religious corporation" for purposes of section 702 exemption), aff'd on other grounds, 460 F.2d 553 (5th Cir.), cert. denied, 409 U.S. 896 (1972), with Fike v. United Methodist Children's Home, 547 F. Supp. 286, 290 (E.D. Va. 1982) (United Methodist Children's Home not a "religious corporation" entitled to section 702 exemption), aff'd on other grounds, 709 F.2d 284 (4th Cir. 1983). As explained in the text, the particular characteristics of each organization would have to be examined to determine whether it is entitled to the exemption.

[14] Section 300x-21, to which this provision refers, is the SAMHSA program providing "formula grants" to the States. See supra at 3.

Such a prohibition has been in place since the inception of the SAMHSA formula-grant statute.[15] It appears that this prohibition, like analogous antidiscrimination provisions relating to federal funding recipients, imposes restrictions on, inter alia, employment discrimination in the covered programs and activities.[16] Thus, it always has been the case that a private organization receiving formula-grant SAMHSA funds from a State could not engage in religious discrimination in employment in the SAMHSA "program or activity,"[17] even if the organization otherwise were entitled to the section 702(a) exemption for purposes of title VII liability. H.R. 4923 would not affect this longstanding PHSA antidiscrimination requirement, even as to organizations that are entitled to the exemption in section 702(a) of title VII.[18] Section 300x-57(a)(2) does not, however, apply to those statutory provisions pursuant to which SAMHSA itself provides grants directly to private organizations. See supra at 3.[19] Therefore, the existence of the prohibition on religious employment discrimination in § 300x-57(a)(2) does not render moot the questions you have asked us to consider with respect to title VII and SAMHSA grant programs.

ANALYSIS

I. Constitutional Questions

You have asked us to consider several constitutional questions concerning employment discrimination by religious organizations that receive SAMHSA aid under certain substance-abuse grant programs. As noted above, the "charitable choice" provisions in proposed PHSA

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[15] See Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, tit. IX, § 901, 95 Stat. 551 (1981); ADAMHA Reorganization Act, Pub. L. No. 102-321, tit. II, § 203(a), 106 Stat. 407 (1992).

[16] Cf., e.g., Consolidated Rail Corp. v. Darrone, 465 U.S. 624, 632-33 & n.13 (1984); North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 520-22, 530 (1982); United States v. City of Chicago, 395 F. Supp. 329, 343-44 (N.D. Ill.), aff'd mem., 525 F.2d 695 (7th Cir. 1975).

[17] The prohibition plainly is intended to extend not only to the States themselves but also to "an entity that has received a payment pursuant to section 300x or 300x-21 of this title." 42 U.S.C. § 300x-57(b)(1). Cf. also, e.g., Frazier v. Board of Trustees, 765 F.2d 1278, 1288-91 (5th Cir.), opinion amended in other respects, 777 F.2d 329 (5th Cir. 1985), cert. denied, 476 U.S. 1142 (1986); Graves v. Methodist Youth Servs., Inc., 624 F. Supp. 429, 433 (N.D. Ill. 1985).

[18] Enforcement of the § 300x-57(a)(2) prohibition would not necessarily be the same as title VII enforcement. If the chief executive officer of a State does not secure compliance with § 300x-57(a)(2) within 60 days after notification by the Secretary of Health and Human Services of a violation, the Secretary may refer the matter to the Attorney General with a recommendation that an appropriate civil action be instituted. 42 U.S.C. § 300x-57(b)(1)(A) (1994). When such a matter is referred to the Attorney General, or "whenever the Attorney General has reason to believe that a State or an entity is engaged in a pattern or practice in violation of . . . subsection (a)(2)," the Attorney General may bring a civil action in any appropriate district court of the United States "for such relief as may be appropriate, including injunctive relief." Id. § 300x-57(b)(2).

[19] Nor would it apply to any private organizations using funds that SAMHSA provides to the States pursuant to the discretionary grant program described in 42 U.S.C. § 300y (1994).

Part G would apply to all "discretionary and formula grant programs administered by the Substance Abuse and Mental Health Services Administration that make awards of financial assistance to public or private entities for the purpose of carrying out activities to prevent or treat substance abuse." H.R. 4923, § 704 (proposed PHSA section 581(a)). We are not familiar with the details of each of the affected SAMHSA programs. Accordingly, our analysis necessarily is general in nature and might be altered by, or inapposite to, the specific characteristics of certain SAMHSA programs. You have asked us to focus our attention on a particular category of programs — namely, programs under which a governmental entity (either SAMHSA itself or a State or local government disbursing SAMHSA funds) uses its discretionary authority to provide financial aid directly to one or more religiously affiliated organizations, as part of a broader program of discretionary allocation of SAMHSA funds to private organizations to enable such organizations, in a nongovernmental capacity, to provide substance-abuse services.[20]

There are four distinct constitutional questions that might arise in this context. The first three questions all concern, in somewhat different forms, whether it would be constitutionally permissible for a government to provide SAMHSA aid directly to an organization that discriminates in favor of coreligionists pursuant to the section 702(a) exemption — and, in particular, whether such funding would be constitutional where the religious employment discrimination occurs in the very program that receives SAMHSA funds. The final question is, in effect, the flip side of those questions, namely, whether the title VII section 702(a) exemption itself is constitutional as applied to employees who work within a substance-abuse program subsidized by direct SAMHSA funds and who must, accordingly, refrain from religious activity within the program that receives direct government funding.[21]

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[20] Thus, as explained below, see infra note 21, this memorandum does not address programs pursuant to which a government provides funds to individuals in need of substance-abuse assistance, who then can choose to use such aid for treatment at organizations of their choosing. Nor does this memorandum address any programs pursuant to which a private organization might contract with a government to act as an agent or representative of the government itself, subject to the government's supervisory control.

[21] Our references in the text to "direct aid" are intended to refer both to aid that SAMHSA itself provides to private organizations to enable such organizations to provide substance-abuse services, and to SAMHSA aid that state and local governments provide to such private entities for similar purposes. By contrast, our use of the term "direct aid" is not intended to refer to statutes and programs pursuant to which a government instead provides aid to the ultimate individual beneficiaries and permits such persons to use the aid for services at substance-abuse-service organizations of their choosing. The constitutional analysis that applies when individuals choose to use such "indirect" aid at religious organizations can vary significantly from the analysis applicable to the sort of "direct" governmental aid to religious organizations that is the subject of this memorandum. Cf. Zobrest v. Catalina Foothills Sch. Dist., 509 U.S. 1, 9-10 (1993); Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481, 486-88 (1986); Mueller v. Allen, 463 U.S. 388, 398-99 (1983). As Justice O'Connor recently explained:

> [W]e decided Witters and Zobrest on the understanding that the aid was provided directly to the individual student who, in turn, made the choice of where to put that aid to use.... Accordingly, our approval of the aid in both cases relied to a significant extent on the fact that "[a]ny aid ... that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients." Witters, [474 U.S.] at 487 .... This characteristic of both

The four questions are as follows:

A. Does the Establishment Clause principle that government aid provided directly to a private religious organization may not be used to advance "specifically religious activit[ies] in an otherwise substantially secular setting," Kendrick, 487 U.S. at 621 (internal quotation omitted), invariably preclude a government from providing SAMHSA funds directly to an organization that is eligible for the section 702(a) exemption, by virtue of the fact that such an organization must, in order to be eligible for the section 702(a) exemption, have a purpose and character that are "primarily religious"? In other words, is it possible for an organization to be both sufficiently religious to be statutorily eligible for the section 702(a) exemption and sufficiently secular to be constitutionally eligible to receive direct SAMHSA aid?

B. Does an organization's decision to invoke the section 702(a) exemption and to discriminate in employment in favor of coreligionists inevitably render the organization so "pervasively sectarian" that there is a constitutionally impermissible risk that government aid provided directly to the organization will be used to advance "specifically religious activit[ies] in an otherwise substantially secular setting"?

C. If an organization engages in religious employment discrimination within the very substance-abuse program that receives SAMHSA funds directly from a government, does the government's decision to provide such direct aid to that organization constitute a preference for, or "endorsement" of, that religious discrimination that would violate the Establishment Clause?

D. As applied to employees of a program that receives direct SAMHSA aid, whose functions within that program must be secular, is the exemption in section 702(a) of title VII for certain religious organizations a violation of the Establishment Clause as an impermissible preference for religion, or is it instead a permissible religious accommodation?

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programs made them less like a direct subsidy, which would be impermissible under the Establishment Clause, and more akin to the government issuing a paycheck to an employee who, in turn, donates a portion of that check to a religious institution.

Mitchell v. Helms, 120 S. Ct. 2530, 2558 (2000) (O'Connor, J., concurring in the judgment) (some citations omitted); see also id. at 2559 (explaining that "the distinction between a per-capita-aid program and a true private-choice program is important when considering aid that consists of direct monetary subsidies," and that the "Court has 'recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions'") (quoting Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 842 (1995)). In this memorandum, our discussion is limited to programs pursuant to which a government, rather than private individuals, chooses the organizations that will receive SAMHSA funds.

Before we address each of these questions, we must first provide some detailed background describing the constitutional limitations the Establishment Clause imposes on a government's provision of funds directly to religious organizations.

Bowen v. Kendrick and other cases establish that an organization's religious affiliations do not constitutionally disqualify it from participating equally in a governmental program that provides grants to religious and nonreligious entities alike on a neutral basis.[22] A government may not, however, choose to fund a particular organization because it is religious in character or because of its religious affiliations. See Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet, 512 U.S. 687, 703 (1994) (it is a "principle at the heart of the Establishment Clause" that government "should not prefer . . . religion to irreligion").[23] Accordingly, a government providing funds to private organizations to perform social services may not limit its aid to religious organizations, and must not otherwise prefer such organizations over others, e.g., by setting aside a particular portion of funds for them. The criteria for funding should be neutral and secular.[24] For instance, a government may make a SAMHSA grant to a particular religiously affiliated organization because of that organization's effectiveness in providing substance abuse treatment and/or prevention services, but not because the government supports or prefers the organization's religious tenets, activities or affiliations.[25] Moreover, a government may not prefer certain religious denominations or organizations over others for funding, except on the

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[22] See Kendrick, 487 U.S. at 608-11 (holding that Adolescent Family Life Act grants to be used to help individuals avoid unwanted pregnancies may be awarded to religious institutions in light of the availability of such grants to a fairly "wide spectrum of public and private organizations"); see also, e.g., Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (upholding grant program for colleges and universities as applied to schools with religious affiliations); Bradfield v. Roberts, 175 U.S. 291, 298 (1899) (permitting appropriation of public funds for financing of hospital buildings to be operated "under the influence or patronage" of the Roman Catholic Church).

[23] See also, e.g., id. at 703-05; Kendrick, 487 U.S. at 607-09 (stressing the "neutrality" of the government aid to private organizations — in particular, that "nothing on the face of the Act suggests that it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution"); cf. Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995) (plurality opinion) ("Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination).").

[24] Moreover, the government must not "convey[] or attempt[] to convey a message that religion or a particular religious belief is favored or preferred." Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring in the judgment).

[25] See Kendrick, 487 U.S. at 605 n.9 ("'Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants made by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents.'") (quoting S. Rep. No. 97-161, at 16 (1981)); Bradfield, 175 U.S. at 298 (religious affiliation of publicly funded hospital "is not of the slightest consequence with reference to the law of its incorporation, nor can the individual beliefs upon religious matters of the various incorporators be inquired into"); Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 696-97 (1970) (Harlan, J.).

basis of secular criteria unrelated to the organizations' religious affiliations or tenets. See Larson v. Valente, 456 U.S. 228, 244-47 (1982); see also Kiryas Joel, 512 U.S. at 706-07.

Although religious organizations may receive federal funds to provide social services or to engage in social-welfare activities, such organizations must not use aid they receive directly from a government to advance "'specifically religious activit[ies] in an otherwise substantially secular setting.'" Kendrick, 487 U.S. at 621 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).[26] This holding reflects what Justice O'Connor has characterized as a "bedrock principle[]" of Establishment Clause doctrine, namely, that "direct state funding of religious activities" is impermissible. Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 847 (1995) (O'Connor, J., concurring). The Court's decisions permitting the government to fund some secular functions performed by sectarian organizations "provide no precedent for the use of public funds to finance religious activities." Id.[27] Thus it would be impermissible for a

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[26] In Kendrick, all nine Justices accepted the principle that the use of government funds for religious activities would be impermissible. 487 U.S. at 611-12 (Establishment Clause would be violated if public monies were used to fund "'indoctrination into the beliefs of a particular religious faith'") (quoting School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 385 (1985)); id. at 621 (in assessing constitutionality of funding a particular program it would be relevant to determine, for example, "whether the Secretary has permitted [Adolescent Family Life Act] grantees to use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith"); id. at 623 (O'Connor, J., concurring) ("[A]ny use of public funds to promote religious doctrines violates the Establishment Clause."); id. at 624 (Kennedy, J., concurring) (reasoning that the Establishment Clause would be violated if funds "are in fact being used to further religion"); id. at 634-48 (Blackmun, J., dissenting) (opining that government aid may not be used to advance religion, even if aid were intended for secular purposes). This conclusion was consistent with position that the Government advanced in the Kendrick litigation. See Brief for the [Federal] Appellant at 34-38, Bowen v. Kendrick, 487 U.S. 589 (1988) (Nos. 87-253, 87-431, 87-462) ("U.S. Kendrick Brief").

[27] The Court has, for example, applied the no-direct-funding-of-religious-activity principle in a line of cases involving assistance for building construction and repair. Thus, in Tilton v. Richardson, 403 U.S. 672 (1971), the Court upheld aid to religious schools insofar as the program in question expressly excluded the construction of "'any facility used or to be used for sectarian instruction or as a place for religious worship,'" id. at 675 (plurality opinion) (citation omitted), but unanimously invalidated the program insofar as it permitted funding for construction of buildings that were ever to be used for religious activities, see id. at 683 (plurality opinion) (concluding that the 20-year limitation on the statutory prohibition on the use of the buildings for religious activities violated the Establishment Clause, because "[i]f, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion"); id. at 692 (Douglas, J., dissenting in part, joined by Black and Marshall, JJ.); Lemon v. Kurtzman, 403 U.S. 602, 659-61 (1971) (separate opinion of Brennan, J., concurring in the judgment in part in Tilton); id. at 665 & n.1 (White, J., concurring in the judgment in Tilton, and "accept[ing] the Court's invalidation of the provision in the federal legislation whereby the restriction on the use of buildings constructed with federal funds terminates after 20 years"). Compare also Hunt v. McNair, 413 U.S. 734, 744-45 (1973) (upholding construction of religiously affiliated college and university facilities financed by state issuance of bonds (repayable upon more favorable interest terms than otherwise would have been available), where such aid was subject to the restriction that the facilities not be used for "religious purposes"), with Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973) (invalidating state maintenance and repair grants for nonpublic elementary and secondary schools (on the same day as the decision in Hunt) because it was not possible to "restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes").

government to provide SAMHSA financial assistance to a private organization to finance a program in which the recipient engages in religious worship, religious instruction, or proselytizing. See, e.g., Kendrick, 487 U.S. at 621 (constitutionality of providing funds to a particular organization would depend in part on whether the grantee "use[s] materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith").[28] And such a prohibition applies even where, as in Kendrick, the government funds are distributed on a neutral, nondiscriminatory basis, to religious and nonreligious groups alike, for a secular purpose. See, e.g., Roemer v. Board of Pub. Works, 426 U.S. 736, 747 (1976) (plurality opinion) ("The Court has taken the view that a secular purpose and a facial neutrality may not be enough, if in fact the State is lending direct support to a religious activity.").[29]

In accord with these authorities, this Office in 1988 issued an opinion to the Department of Housing and Urban Development ("HUD") in which it concluded that, "[a]lthough it is clear beyond peradventure that the government cannot subsidize religious counseling by the Salvation Army, there is nothing precluding HUD from subsidizing the [Salvation] Army's secular program for the homeless (food and shelter) if it can be meaningfully and reasonably separated from the Army's sectarian program (religious counseling)." Department of Housing and Urban Development Restrictions on Grants to Religious Organizations That Provide Secular Social Services, 12 Op. O.L.C. 190, 199 (1988) ("Kmiec Opinion") (emphasis added). That opinion went on to explain in further detail:

> [A]s a constitutional matter the Salvation Army cannot undertake religious counseling with public funds; however, it can accept public funds to provide food and shelter. If the facility used for the shelter program was not constructed, renovated, or maintained with public funds, it is theoretically possible for a portion of the facility to be used exclusively for the publicly-funded secular purpose of food and shelter and another portion to be used for the non-publicly funded sectarian purpose of religious counseling. Beyond this physical separation, HUD need only ensure that the Army's privately-funded religious activities are not offered as part of its shelter program and that the shelter program is not used as a device to involve the homeless in religious activities.

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[28] The prohibition on the use of government funds for "specifically religious activities" is not contravened, however, simply by virtue of the fact that the organization uses government funds to convey a secular message that happens to coincide with the organization's religious views or beliefs. Id. at 612-13, 621.

[29] As noted above at 4, proposed PHSA section 583 in H.R. 4923 also would establish a statutory prohibition that "[n]o funds provided under a designated program shall be expended for sectarian worship, instruction, or proselytization."

Id. (emphasis added; footnote omitted); see also id. at 201 ("Kendrick does not in any way establish that religious organizations may use public funds in connection with promotion of religious views or practices").[30]

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[30] Neither the Court in Kendrick nor this Office in its 1988 opinion addressed in detail the degree to which, and the means by which, organizations must keep separate their religious activities from their government-funded secular activities. As this Office explained in its 1988 opinion, however, "[i]t is clear . . . that at least some of the religious grantees [receiving grants under the Adolescent Family Life Act ("AFLA") at issue in Kendrick] did not maintain the constitutionally required separation between their religious mission and their secular function under AFLA." Kmiec Opinion, 12 Op. O.L.C. at 201. In the Kendrick litigation, the Government conceded that there were "departures from proper constitutional practice" in cases where AFLA recipients proposed to include spiritual counseling in its AFLA program, used curricula that included explicitly religious materials, and included religious discussions at the conclusion of otherwise secular AFLA programs. U.S. Kendrick Brief at 41; see also Kendrick v. Bowen, 657 F. Supp. 1547, 1566 (D.D.C. 1987); Kmiec Opinion, 12 Op. O.L.C. at 201 & n.21. The Court in Kendrick, presumably referring to these incidents, noted that "there is no dispute that the record contains evidence of specific incidents of impermissible behavior by AFLA grantees." 487 U.S. at 620; see also id. at 622 (O'Connor, J., concurring) ("I do not believe that the Court's approach reflects any tolerance for the kind of improper administration that seems to have occurred in the Government program at issue here."). The one specific thing the Court indicated in this regard is that it would be relevant to the as-applied challenge to determine on remand whether the government had permitted AFLA grantees to "use materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith." Id. at 621.

Accordingly, while it is difficult to provide categorical guidance with respect to the manner in which an organization's secular and sectarian activities must be segregated, we agree with the conclusion in the 1988 opinion that an organization's federally funded secular program must be "meaningfully and reasonably separated from" the organization's sectarian program, and that the government must ensure that the organization's privately funded religious activities "are not offered as part of its [federally funded] program and that the . . . program is not used as a device to involve the [beneficiaries] in religious activities." Kmiec Opinion, 12 Op. O.L.C. at 199. Furthermore, the 1988 opinion also was correct in concluding that "Kendrick does not suggest that the Court would be amenable to relaxing the degree [recognized in prior cases] to which [religious] organizations must separate their religious functions from their government-funded secular activities," id. at 201, in a case involving direct monetary aid to religious organizations. Thus, for example, it is constitutionally insufficient for a government agency to calculate what "percentage" of a program is secular and simply to ensure that the federal funds are not used to pay more than that "secular" percentage of the program's operating costs. Funds are fungible, and thus, without further segregation, SAMHSA aid must be presumed to subsidize all of the "parts" of a funded program. See Nyquist, 413 U.S. at 777-79. Moreover, the secular and religious functions must be sufficiently segregated such that any government inspection and evaluation of a organization's financial records to determine which expenditures are religious will not of necessity be so intrusive as to establish "an intimate and continuing relationship between church and state." Lemon, 403 U.S. at 621-22. With respect to this concern, the Court in Kendrick indicated that a program must be conducted in such a way that the governmental monitoring necessary to ensure the program operates in a constitutional manner does not result in excessive entanglement. 487 U.S. at 616-17.

We should note, in this regard, that proposed PHSA section 582(d), as added by H.R. 4923, would provide that "[e]xcept as provided in this section, any religious organization that is a program participant shall retain its independence from Federal, State, and local government, including such organization's control over the definition, development, practice, and expression of its religious beliefs," section 582(d)(1), and that "[n]either the Federal Government nor a State shall require a religious organization to . . . alter its form of internal governance," section 582(d)(2)(A). We would not construe PHSA section 582(d) to restrict the ability of a federal or state governmental agency to ensure that recipient religious organizations abide by statutory and constitutional conditions on the use of SAMHSA funds, such as those we discuss in this footnote. If the language were read to prohibit a government from

Those 1988 conclusions continue to reflect governing Establishment Clause doctrine. In particular, the Supreme Court's recent decision in Mitchell v. Helms, 120 S. Ct. 2520 (2000), permitting a local school district to provide educational and instructional materials directly to religiously affiliated primary and secondary schools, does not call into question those 1988 conclusions. To be sure, the rationale of the plurality opinion in Mitchell, if it were to be adopted by the Court, would undermine some of the legal principles underlying the "no direct aid" rule. See, e.g. id. at 2544-52 (plurality opinion). But Justice O'Connor's controlling opinion in Mitchell[31] (joined by Justice Breyer) emphasized that the Court's "decisions 'provide no precedent for the use of public funds to finance religious activities,'" id. at 2558 (O'Connor, J., concurring in the judgment) (quoting Rosenberger, 515 U.S. at 847 (O'Connor, concurring)), and that, in particular, the Court's decision in Kendrick "demonstrates" that where a government has given aid directly to a religious institution, "diversion of secular government aid to religious indoctrination" is "constitutionally impermissible," id. Thus, as Justice O'Connor explained, even where a government provides aid to a school on a nondiscretionary, per-capita basis, if the recipient "uses the aid to inculcate religion in its students, it is reasonable to say that the government has communicated a message of endorsement." Id. at 2559.[32] Largely for this reason, Justice O'Connor concluded that the principle she articulated in Kendrick — that "'any use of public funds to promote religious doctrines violates the Establishment Clause,'" id. at 2571 (quoting 487 U.S. at 623 (O'Connor, J., concurring)) (emphasis in Kendrick and in Mitchell) — "of course remains good law," id., and that if plaintiffs were to prove "that the aid in question actually is, or has been, used for religious purposes," they would "establish a First Amendment violation," id. at 2567. Moreover, Justice O'Connor emphasized that the constitutional concern that direct aid might be impermissibly diverted to religious activities is especially pronounced when the aid is in the form of direct monetary subsidies. Id. at 2559-60.[33]

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ensuring that federal funds are used in a constitutional manner, then section 582(d) would itself present serious constitutional problems.

[31] See Marks v. United States, 430 U.S. 188, 193 (1977); Romano v. Oklahoma, 512 U.S. 1, 9 (1994).

[32] Of course, the constitutional concerns are even more pronounced where, as under the SAMHSA programs at issue, government decisionmakers selectively allocate aid among competing applicants, on the basis of subjective and discretionary criteria. In such a case it is even more reasonable to presume that the government endorses the manner in which the organization uses the aid. We further discuss this distinction infra at 22-25. See also Mitchell, 120 S. Ct. at 2541 (plurality opinion) (acknowledging that where aid is not awarded on the basis of neutral, nondiscretionary criteria, a government can more "easily[] grant special favors that might lead to a religious establishment").

[33] It is notable, in this regard, that Justice O'Connor's opinion in Mitchell reaffirmed the Court's decision, and her own concurrence, invalidating the "Community Education" program at issue in School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985). Under the "Community Education" program, a public school district hired teachers to teach supplementary classes, at the conclusion of the regular school day, in subjects such as Arts & Crafts, Home Economics, Spanish, Gymnastics, Yearbook Production, Christmas Arts & Crafts, Drama, Newspaper, Humanities, Chess, Model Building and Nature Appreciation. Id. at 376-77. The program was run by public authorities, and the classes were available in public as well as private schools. The constitutional question was raised by the fact that virtually every course taught on the facilities of a private religious school had an

With this constitutional framework in place, we can now address the four constitutional questions described above at 11.[34]

A. The first question is whether, if a government were to provide direct aid to an organization that is entitled to title VII's section 702(a) exemption, such funding would inevitably violate the constitutional no-direct-funding-of-religious-activities principle discussed above by virtue of the fact that such an organization's purpose and character must (in order to qualify for the exemption) be "primarily religious." See supra at 7-8.

The Supreme Court has explained that, because government funds provided directly to religious organizations may not be used to promote religious doctrine or otherwise to advance "specifically religious activit[ies] in an otherwise substantially secular setting," Kendrick, 487 U.S. at 621 (internal quotation omitted), it follows that the government may not provide such aid directly to organizations in which "secular activities cannot be separated from sectarian ones," Roemer, 426 U.S. at 755 (plurality opinion). This is so because, where secular and sectarian activities are "inextricably intertwined," Kendrick, 487 U.S. at 620 n.16, the provision of direct financial aid invariably will support religious activity.[35] As this Office concluded in 1988, this

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instructor employed full time by that private school, id. at 377, teaching "the same parochial school students who attend their regular parochial school classes," id. at 399 (O'Connor, J., concurring in the judgment in pertinent part). Even though "[n]ot one instance of attempted religious inculcation exist[ed] in the record[]," id. at 401 (Rehnquist, J., dissenting), the Court nevertheless invalidated the payment of teacher salaries, id. at 386-87 (majority opinion), reasoning that "there is a substantial risk that, overtly or subtly, the religious message [the religious school teachers] are expected to convey during the regular schoolday will infuse the supposedly secular classes they teach after school," id. at 387 (majority opinion); see also id. at 398 (Burger, C.J., concurring in the judgment in pertinent part); id. at 399-400 (O'Connor, J., concurring in the judgment in pertinent part). In Mitchell, Justice O'Connor explained that, in the context of the after-school classes in Ball, "I was willing to presume that the religious-school teacher who works throughout the day to advance the school's religious mission would also do so, at least to some extent, during the supplemental classes provided at the end of the day," and that "[b]ecause the government financed the entirety of such classes, any religious indoctrination taking place therein would be directly attributable to the government." 120 S. Ct. at 2568 (O'Connor, J., concurring in the judgment).

[34] In its 1988 Opinion, this Office concluded "that the Constitution not only permits the granting of an exemption [under section 702(a)] to religious organizations from otherwise applicable prohibitions on religious discrimination . . . , but also that it permits government financial assistance to the organizations so exempted." Kmiec Opinion, 12 Op. O.L.C. at 195. That Opinion, however, considered only the second of the four constitutional questions that we have identified. While we basically concur with the analysis of the 1988 Opinion on that particular question, see infra at 19, we conclude that the constitutional analysis is more difficult and uncertain with respect to the third and fourth questions, which the 1988 Opinion did not address.

[35] See also id. at 621 (suggesting that plaintiffs could prevail in an as-applied challenge if they could show that aid flowed to grantees that were "pervasively sectarian religious institutions"); Columbia Union College v. Clarke, 159 F.3d 151, 157-62 (4th Cir. 1998), cert. denied, 527 U.S. 1013 (1999); U.S. Kendrick Brief at 27-41; see generally Memorandum for John J. Knapp, General Counsel, Department of Housing and Urban Development, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Re: First Amendment Issues Implicated in Section 202 Loans and the Community Development Block Grant Program (July 1, 1983) ("Olson Opinion").

"[c]onstitutional difficulty only arises when the secular component [of the funded program] is inseparable from the sectarian component to permit government assistance." Kmiec Opinion, 12 Op. O.L.C. at 199; see also, e.g., Statement of the President on Signing the Community Opportunities, Accountability, and Training and Educational Services Act of 1998, II Pub. Papers of William J. Clinton 1882-83 (Oct. 27, 1998). The Supreme Court's recent decision in Mitchell v. Helms — in particular, Justice O'Connor's controlling concurrence — is consistent with that conclusion.[36]

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[36] In a series of cases preceding Mitchell that involved aid to primary and secondary schools, the Supreme Court drew a sharp distinction between religious institutions that are "pervasively sectarian" and those that are not, and held that direct aid to "pervasively sectarian" institutions is unconstitutional where the aid can be used to further the instructional operations of such schools. See Mitchell, 120 S. Ct. at 2582-83 & n.7 (Souter, J., dissenting) (collecting cases). Courts have struggled over the years to identify the various factors that are germane to the question whether an institution is "pervasively sectarian." See, e.g., Minnesota Fed'n of Teachers v. Nelson, 740 F. Supp. 694, 708-15 & n.3 (D. Minn. 1990) (discussing 36 factors that might be relevant to the question). In Mitchell, four Justices advocated that the Court abandon any effort to draw legal distinctions on the basis of the "pervasively sectarian" category. 120 S. Ct. at 2550-52 (plurality opinion). Justices O'Connor and Breyer did not join this call for abandonment of the "pervasively sectarian" legal construct; but the rationale of Justice O'Connor's opinion indicates that, in her view, certain forms of nonmonetary aid can be provided directly to certain schools that might previously have been considered pervasively sectarian, so long as adequate mechanisms are in place to ensure that recipients will abide by prohibitions on the diversion of such aid to religious activities. Id. at 2568 (O'Connor, J., concurring in the judgment) (rejecting the legal presumption that religious school instructors will not abide by legal requirement that any religious teaching be done without the instructional aids provided by the government). (Notably, even the dissenters in Mitchell did not assert that aid to pervasively sectarian schools should be categorically prohibited. They went only so far as to say that in a pervasively sectarian school, "where religious indoctrination pervades school activities of children and adolescents, it takes great care to be able to aid the school without supporting the doctrinal effort." Id. at 2597 (Souter, J., dissenting).) We think that in light of the various opinions in Mitchell it is fair to conclude that when direct nonmonetary aid is at issue, the most pertinent constitutional question is simply whether, under the specific facts and circumstances of a particular case, there is an impermissible risk that an organization's secular and religious activities are so "'inextricably intertwined,'" Kendrick, 487 U.S. at 620 n.16, that the organization will be unable to segregate its religious activities from the secular activities that are supported by the particular direct government aid in question.

However, when the aid in question is in the form of direct funding, the constitutional question remains somewhat more uncertain. Indeed, in her controlling opinion in Mitchell, Justice O'Connor suggests that a more categorical rule might apply with respect to financial grants to certain religious institutions. In that opinion, Justice O'Connor noted that there are "special dangers associated with direct money grants to religious institutions," and that the "concern with direct monetary aid is based on more than just diversion [of the aid to religious activities]." 120 S. Ct. at 2566; see also id. at 2559-60; Agostini v. Felton, 521 U.S. 203, 228 (1997) (emphasizing that "[n]o Title I funds ever reach the coffers of religious schools"); Mitchell, 120 S. Ct. at 2546-47 (plurality opinion) (acknowledging that "[o]f course, we have seen 'special Establishment Clause dangers,' Rosenberger, 515 U.S., at 842, when money [as opposed to nonmonetary aid] is given to religious schools or entities directly") (emphasis in original). "In fact," Justice O'Connor cautioned, "the most important reason for according special treatment to direct money grants is that this form of aid falls precariously close to the original object of the Establishment Clause's prohibition." Id. at 2566 (O'Connor, J., concurring in the judgment). Thus, while Kendrick holds that the government can provide direct monetary aid to certain religious organizations, and while Mitchell holds that direct nonmonetary aid can be provided directly to institutions that might previously have been considered "pervasively sectarian" where there is not a substantial risk that such aid will be diverted to religious activities, it remains unresolved after Mitchell whether there are some sorts of religious institutions, such as churches, to which a

If an organization's secular activities cannot be separated from its sectarian activities (including in its substance-abuse program) — thus rendering the organization's substance-abuse program constitutionally ineligible for direct government funding — then chances are that such organization's purpose and character are primarily religious, and thus that the organization will be eligible for the section 702(a) exemption to title VII. But the converse does not necessarily follow. While some organizations entitled to the section 702(a) exemption might not choose, or be able, to segregate their secular and religious activities, it is possible that a particular organization's overall purpose and character could be "primarily religious" (thus making it eligible for the section 702(a) exemption), but that it could nevertheless assure that its "privately funded religious activities are not offered as part of its [government-funded] program." Kmiec Opinion, 12 Op. O.L.C. at 199 (emphasis added).[37] We cannot say, in the abstract, what percentage of organizations eligible for the section 702(a) exemption would be able and willing to forego any specifically religious activities in the programs receiving SAMHSA grants. But we see no reason to presume that the requisite segregation between secular and religious activities would be categorically impossible within substance-abuse programs run by organizations entitled to invoke title VII's section 702(a) exemption.[38]

B. The next question is a related one — namely, whether an organization's religious discrimination in employment pursuant to the section 702(a) exemption would itself invariably render the organization ineligible to receive direct government funding because of the risk that such aid will be used to subsidize religious activities. Courts occasionally have suggested that whether an organization engages in such employment discrimination is a relevant factor in determining whether the organization is so "pervasively sectarian" that it is constitutionally prohibited from receiving funds directly from the government.[39] For instance, if an organization does engage in such discrimination among employees in a program that is government-funded, that discriminatory practice could be relevant evidence that the organization expects the functions performed by its employees in that program to include religious teaching or inculcation (which would render the program constitutionally ineligible for direct government aid). By contrast, if an organization does not restrict its employees to coreligionists, that fact might help to

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government may not provide direct monetary aid under any circumstances.

[37] For instance, it might be that the SAMHSA-funded program represents but a small part of a religious organization's activities, and that the vast majority of the organization's other activities are sectarian in character.

[38] Of course, in a particular case an organization's provision of secular substance-abuse services could become such a prominent part of the organization's activities as to render its overall character and purpose primarily secular, in which case that organization would no longer be entitled to the section 702(a) exemption. But we have no reason to believe that invariably will be the case.

[39] See, e.g., Roemer, 426 U.S. at 757 (plurality opinion); Tilton, 403 U.S. at 686 (plurality opinion); Columbia Union College, 159 F.3d at 166 (although religious employment discrimination was relevant to question whether it would be constitutional to provide aid to college, it would not be dispositive); Minnesota Fed'n of Teachers, 740 F. Supp. at 720 (whether all faculty must be Christian would be a "principal" factual question in determining whether a particular school was so pervasively sectarian that it was ineligible to receive state aid).

demonstrate that religious activities are not an invariable part of the funded program's functions. But while religious discrimination in employment might be germane to the question whether an organization's secular and religious activities are separable in a government-funded program, that factor is not legally dispositive.[40] This Office reached a substantially similar conclusion in its 1988 opinion, 12 Op. O.L.C. at 193-94; and there has been no intervening development in the case law that would cause us to reconsider that conclusion.[41]

C. When the religious discrimination in employment occurs in the very program that receives SAMHSA aid, however, a much more difficult and novel question is raised. In particular, if a government, pursuant to its discretionary powers to allocate aid, chooses to provide direct funding to such a program, are there circumstances under which the government's choice to provide such aid to the discriminating organization would constitute an impermissible favoring or endorsement of the religious employment discrimination?

There can be no dispute that a government may not select its employees on the basis of religious affiliation or belief, or insist that its employees abide by the religious tenets of a particular denomination. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." Larson, 456 U.S. at 244.[39]

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[40] See Columbia Union College, 159 F.3d at 163 (stressing that no one factor is dispositive).

[41] In 1983 this Office opined that an organization that discriminated on the basis of religion with respect to the beneficiaries of a social-services program "would by definition be a pervasively sectarian organization" to which direct funds cannot constitutionally be provided. Olson Opinion at 19; see also Lemon, 403 U.S. at 651 (Brennan, J., concurring) ("when a sectarian institution accepts state financial aid it becomes obligated under the Equal Protection Clause of the Fourteenth Amendment not to discriminate in admissions policies and faculty selection"); id. at 671 n.2 (White, J., dissenting) (acknowledging that a statute authorizing aid to religious schools would be unconstitutional "to [the] extent" there were evidence "that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith"); Norwood v. Harrison, 413 U.S. 455, 464 n.7 (1973) (citing to Justice White's footnote with apparent favor); Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872, 892-93 (D. Kan. 1974) (opining that a state tuition grant program violated the Establishment Clause as applied to tuition used at a college that reserved the right to give preferences in enrollment to applicants from congregations of a particular church, as applied to colleges that required students to attend chapel services, and as applied to a college that required students to express a belief in Christianity).

In light of the provision in proposed PHSA section 582(f)(4) that would expressly prohibit program participants from engaging in religious discrimination against individuals receiving substance-abuse treatment, the conclusion in the 1983 memorandum is not implicated here. Accord Kmiec Opinion, 12 Op. O.L.C. at 194 n.8 (noting, and declining to reconsider, the 1983 conclusion).

[39] See also Kiryas Joel, 512 U.S. at 706-07 ("whatever the limits of permissible legislative accommodations may be, . . . it is clear that neutrality as among religions must be honored") (citations omitted); Torcaso v. Watkins, 367 U.S. 488, 495 (1961) ("Neither [a State nor the Federal Government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.") (footnotes omitted)).

Similarly, the Equal Protection Clause of the Fourteenth Amendment in many contexts would prohibit States from discriminating on the basis of religion,[40] a prohibition that would apply to the federal government by virtue of the equal protection component of the Due Process Clause of the Fifth Amendment.[41] Furthermore, article VI, clause 3 of the Constitution provides that "no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States." Accordingly, as Justice O'Connor has noted, "the Religion Clauses — the Free Exercise Clause, the Establishment Clause, the Religious Test Clause, Art. VI, cl. 3, and the Equal Protection Clause as applied to religion — all speak with one voice on this point: Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." Kiryas Joel, 512 U.S. at 715 (O'Connor, J., concurring in part and concurring in the judgment).[42]

Therefore, if private organizations receiving SAMHSA funding were state actors, they could not in that capacity hire employees on the basis of religion. In the context of the SAMHSA grant programs that you have asked us to consider, however, if a recipient organization engages in religious discrimination in employment, such discrimination does not become attributable to the government for constitutional purposes merely by virtue of the fact that the private organization has received government aid that it uses to fund that employment position. "It is . . . clear that mere receipt of government financial assistance will not transform the religious organization into a state actor subject to constitutional prohibitions on religious discrimination." Kmiec Opinion, 12 Op. O.L.C. at 195 n.12.[43] Furthermore, an organization receiving SAMHSA grants does not become a state actor merely by virtue of the fact that it "performs a function which serves the public." Rendell-Baker v. Kohn, 457 U.S. 830, 842 (1982). To be sure, on rare occasion the Supreme Court has found state action present in the exercise by a private entity of powers traditionally reserved exclusively to the state.[44] But the substance-abuse functions that

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[40] See, e.g., Niemotko v. Maryland, 340 U.S. 268 (1951); Fowler v. Rhode Island, 345 U.S. 67 (1953); McDaniel v. Paty, 435 U.S. 618, 643-46 (1978) (White, J., concurring in the judgment);

[41] See United States v. Armstrong, 517 U.S. 456, 464 (1996) (citing Oyler v. Boles, 368 U.S. 448, 456 (1962)).

[42] See also id. at 728 (Kennedy, J., concurring in the judgment) ("[T]he Establishment Clause forbids the government to use religion as a line-drawing criterion. In this respect, the Establishment Clause mirrors the Equal Protection Clause. Just as the government may not segregate people on account of their race, so too it may not segregate on the basis of religion.").

[43] See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1011 (1982); Rendell-Baker v. Kohn, 457 U.S. 830, 840-41 (1982).

[44] See, e.g., Marsh v. Alabama, 326 U.S. 501 (1946) (regulation of speech on sidewalks of "company town"); Terry v. Adams, 345 U.S. 461 (1953) (conduct of primary election that, in effect, determined selection of public official); Evans v. Newton, 382 U.S. 296 (1966) (management of park that had a tradition of municipal control); see also Edmonson v. Leesville Concrete Co., 500 U.S. 614, 627 (1991) ("The selection of jurors represents a unique governmental function delegated to private litigants and attributable to the government for purposes of invoking constitutional protections against discrimination by reason of race."). See generally Flagg

are subsidized with SAMHSA funds are not functions that traditionally have been the exclusive prerogative of the state, nor functions "traditionally associated with sovereignty," Jackson v. Metropolitan Edison Co., 419 U.S. 345, 353 (1974).[45] Nor is it likely that a private substance-abuse program receiving federal funding would qualify as an "Office or public Trust under the United States" for purposes of article VI, such that any decision to reserve certain employment positions for persons of a particular religion would constitute a prohibited "religious Test . . .. required as a Qualification" to such Office or public trust.[46]

However, where a private entity discriminates with the use of government funds; a difficult Establishment Clause question may be raised respecting the constitutionality of the government's own decision to provide funds to that organization, a decision that undoubtedly is state action.[47] Moreover, that constitutional question is especially thorny where, as under the

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Bros., Inc. v. Brooks, 436 U.S. 149, 157-64 (1978).

[45] For similar reasons, we believe that a government's funding of religious organizations to engage in the substance-abuse services at issue under the PHSA ordinarily will not raise any question regarding an improper delegation of traditional state functions to ecclesiastical authorities. The Establishment Clause generally prohibits a government from "vesting discretionary governmental powers in religious bodies." Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982); see also id. at 127 ("The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions."). But the authority of private organizations to engage in substance-abuse services (and to hire employees to work within substance-abuse programs) does not, by virtue of SAMHSA funding, become "a power ordinarily vested in agencies of government," id. at 122, let alone the sort of regulatory power and authority that was at issue in Larkin (which involved a statute that in effect permitted neighboring churches and schools to veto a city's issuance of liquor licenses for particular properties).

[46] Employment in a SAMHSA-funded substance-abuse program would not be an "Office . . . under the United States" for purposes of Article VI. The question whether the operation of a SAMHSA-funded program would be a "public Trust under the United States" is less clear. There is virtually no federal case law discussing what constitutes a "public Trust" for purposes of article VI's religious test ban, let alone whether and under what circumstances the notion of "public Trust" might encompass recipients of federal grants to perform social services. See Robert A. Destro, The Structure of the Religious Liberty Guarantee, 11 J.L. & Relig. 355, 369 n.59 (1994-1995). Cf. American Communications Ass'n v. Douds, 339 U.S. 382, 414-15 (1950) (concluding that a statutorily imposed oath for union officers did not impose a "religious Test" that would be inconsistent with Article VI, without discussing the question whether the position within the union was an "Office or public Trust under the United States"). We think the religious test ban might best be read as a limitation on or qualification of the first portion of article VI, clause 3, which provides that "[t]he Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution." If that understanding is correct, then "public Trust" would properly be construed to be limited to certain positions, other than "Office[s]," that are subject to the oath requirement in the first portion of clause 3, such as federal "Senators and Representatives." A more expansive construction of "public Trust" might include any position or function the performance of which is subject to a duty of loyalty to the United States. Under either of these two interpretations, the operation of a SAMHSA-funded program would not be a "public Trust under the United States."

[47] See Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 737 (1996) (plurality opinion); id. at 782 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part).

SAMHSA programs in question, the government metes out scarce aid selectively among competing applicants, pursuant to subjective and discretionary criteria.[48]

In recent cases in which the Supreme Court has upheld governmental provision of certain benefits to religious organizations or institutions, or to students attending religiously affiliated schools, the benefits in question were generally available to all parties that satisfied some objective, neutral criteria, and the Court identified such neutrality as a critical protection against the risk of the government favoring (or disfavoring) religiously affiliated recipients. See, e.g., Mitchell, 120 S. Ct. at 2541-44 (plurality opinion); id. at 2556-58 (O'Connor, J., concurring in the judgment) (explaining that neutrality is an important, but not sufficient, indicia of constitutionality); Agostini v. Felton, 521 U.S. 203, 228, 231-32 (1997). The same emphasis on neutral criteria has been critical to the Court's decisions in a series of cases involving the question whether the Establishment Clause would prohibit the use of government property for religious expression where such property is made broadly available for a range of other forms of private expression.[49] More generally, and in addition to its focus on neutrality, the Court has, "[i]n recent years, . . . paid particularly close attention to whether the challenged governmental practice either has the purpose or effect of 'endorsing' religion." County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989).[50] The endorsement test asks whether a reasonable observer would view a government decision as endorsing religion in general, or any particular religious creed. See, e.g., Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, concurring in part and concurring in the judgment). One obvious way in which such impermissible endorsement might occur is if the state is reasonably perceived as having used its discretionary authority to favor particular religions, religious adherents, or religious activities.[51]

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[48] See also infra note 55 (discussing a related equal protection question).

[49] See, e.g., Pinette, 515 U.S. at 761-66 (plurality opinion); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 394-95 (1993); Board of Educ. of Westside Community Schs., 496 U.S. 226, 247-52 (1990) (plurality opinion); Widmar v. Vincent, 454 U.S. 263, 273-75 (1981).

[50] See also id. at 624-32 (O'Connor, J., concurring in part and concurring in the judgment); Mitchell, 120 S. Ct. at 2559 (O'Connor, J., concurring in the judgment); Santa Fe Indep. Sch. Dist. v. Doe, 120 S. Ct. 2266, 2278 (2000); Agostini, 521 U.S. at 235; Pinette, 515 U.S. at 773-75 (O'Connor, J., joined by Souter and Breyer, JJ., concurring in part and concurring in the judgment).

[51] For example, in County of Allegheny the Court invalidated the state's placement of a creche on the Grand Staircase of the county courthouse, in part because that site was not "the kind of location in which all were free to place their displays for weeks at a time, so that the presence of the creche in that location for over six weeks would then not serve to associate the government with the creche." 492 U.S. at 600 n.50. Because the government was highly selective in choosing private displays that could be placed at that location, "any display located there fairly may be understood to express views that receive the support and endorsement of the government." Id.; see also Pinette, 515 U.S. at 764 (plurality opinion) (distinguishing County of Allegheny from public-forum cases on the ground that the "staircase was not . . . open to all on an equal basis, so the county was favoring sectarian religious expression").

Where the state provides aid to religious groups in the context of a program that makes aid "generally" available to all applicants that satisfy some objective and neutral criteria, such "generally available" aid will rarely reflect or convey any governmental endorsement of or preference for religion, or for the particular religious tenets of the recipient.[52] But it is our understanding that SAMHSA grants to private organizations are rarely, if ever, made "generally" available to all organizations that satisfy specified secular, objective criteria. Instead, grants typically are awarded on a competitive basis, where a governmental entity (such as SAMHSA or a State agency) is free to make highly subjective individualized assessments of the grant applicants and the manner in which such applicants will use the SAMHSA funds. A government's application of such subjective criteria may require, or at least be reasonably perceived as reflecting, governmental judgments about the relative value of the recipient entities, and of the manner in which such organizations plan to use the SAMHSA aid. "[T]he more discriminating and complicated" the criteria underlying the government's decisions, "the greater the potential for state involvement in evaluating the character of the organizations." Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 698-99 (1970) (Harlan, J.). And the greater the potential for such evaluative judgments by the state, the greater the risk of real or perceived religious preference or endorsement.[53]

Of course, this concern that the government will be perceived as endorsing religiously affiliated organizations is inherent in the very practice of choosing such organizations to receive government funds to engage in social services pursuant to a process in which government decisionmaking is governed by discretionary and subjective criteria. Yet the Court's holding in Bowen v. Kendrick indicates that the perceived endorsement problem in such a context does not constitutionally disqualify religious organizations from eligibility for such discretionary aid where "nothing on the Act's face suggests that it is anything but neutral with respect to the grantee's status as a sectarian or purely secular institution," 487 U.S. at 608, where the aid may not be used for religious activities, and where (therefore) there would be little reason for a reasonable observer to assume that the government's choice to fund a religious organization was based on, or reflects endorsement of, that organization's religious activities, tenets or affiliations.

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[52] We do not mean by this to suggest that such neutrality and objective criteria inevitably would eliminate all possibility of unconstitutional endorsement or aid. Even where a government implements formally neutral and objective criteria, the provision of aid to religious organizations or for religious speech sometimes can create an undue risk of perceived government endorsement. See, e.g., Mitchell, 120 S. Ct. at 2559-60 (O'Connor, J., concurring in the judgment); Santa Fe Indep. Sch. Dist., 120 S. Ct. at 2278 n.21 (citing Pinette, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in the judgment)).

[53] Cf. also, e.g., Decker v. O'Donnnell, 661 F.2d 598, 616-17 & n.36 (7th Cir. 1980) (holding that government aid was unconstitutional as applied to religious schools in large part because of the "wide degree of discretion" that the government exercised in choosing among "competitive applications" for the aid); Constitutionality of Section 7(b)(3) of the Emergency Veterans' Job Training Act of 1983, 13 Op. O.L.C. 31, 44 n.17 (1989) (emphasizing the constitutional distinction between a program that provides funds to any applicant meeting objective criteria and a program that vests discretion in the government to choose aid recipients).

Nevertheless, even though (as Kendrick indicates) there is no constitutionally significant risk that the government would reasonably be perceived as endorsing all of a funding recipient's practices, tenets or affiliations, in certain cases there would be a risk that the government's discretionary and subjective decisionmaking would reasonably be perceived as reflecting the government's endorsement of the uses to which the scarce government funds are put. The individualized determination by government decisionmakers that one particular substance-abuse program is sufficiently meritorious or effective to warrant the preference for that program over all others vying for public funding could reasonably suggest that the government approves of the recipient's use of the aid.[54]

Accordingly, where a government selectively exercises its discretion to award funds to one recipient among several competing for such aid, knowing that such funds are to be used to subsidize employment positions that are reserved for persons of a particular religion, the question might arise whether the government would reasonably be viewed as giving its imprimatur to the religious discrimination, which the Establishment Clause forbids. The answer to that question would depend on the facts of a particular governmental funding practice. See Allegheny County, 492 U.S. at 629 (O'Connor, J., concurring in part and concurring in the judgment) ("the endorsement test depends on a sensitivity to the unique circumstances and context of a particular challenged practice"). The constitutional calculus in any given case likely would turn, in large part, on whether a reasonable observer, familiar with the "history and context" of the governmental practice in question, Pinette, 515 U.S. at 780 (O'Connor, J., concurring in the judgment), would conclude that the government's decision to provide aid to the discriminating organization was made in spite of, rather than because of, the organization's discriminatory employment practice. Such an inquiry would "require[] courts to examine the history and administration of a particular practice to determine whether it operates as [an impermissible] endorsement." Id. at 778. The risk that a court would find an impermissible endorsement would be heightened where a government's funding decisions are dependent in part upon discretionary evaluation of the identity or characteristics of the employees who are to operate a substance-abuse program. By contrast, if a government disbursing SAMHSA funds is generally indifferent to the criteria by which a private organization chooses its employees and to the identity and characteristics of those employees, there would be less likelihood that the government could reasonably be perceived to endorse the organization's use of religious criteria in employment decisions.[55]

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[54] See, e.g., Santa Fe Indep. Sch. Dist., 120 S. Ct. at 2278, 2282 (where school district implements policy of "extremely selective access" by giving student-body majority the power to select one speaker from among many candidates to provide statement before football games, "an objective . . . student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval"); see also Board of Regents of Univ. of Wis. Sys. v. Southworth, 120 S. Ct. 1346, 1357 (2000); Rosenberger, 515 U.S. at 892-93 n.11 (Souter, J., dissenting) (noting the "communicative element inherent in the very act of funding itself").

[55] In this context, we should note a related constitutional question. In Norwood v. Harrison, 413 U.S. 455 (1973), the Supreme Court held that the Equal Protection Clause prohibits a State from "giving significant aid to institutions that practice racial or other invidious discrimination," id. at 467, even pursuant to a neutral program in

D. The final constitutional question presented is whether title VII's section 702(a) exemption itself would be an unconstitutional preference for religious organizations as applied to employees within a program that receives direct government funding — i.e., employees who must, as a matter of constitutional and statutory law, refrain from specifically religious activities within the funded program. This, too, is a difficult and unresolved constitutional question.[56]

As noted above, title VII generally forbids employers from discriminating against employees on the basis of their religion. The section 702(a) exemption creates an express preference for certain religious employers, permitting them to avoid title VII liability for conduct (religious discrimination) that all other employers must forego. This preference harms prospective and actual employees against whom the exempted employers are permitted to discriminate, both by limiting their employment opportunities and by "burdening the religious liberty of prospective and current employees. An exemption says that a person may be put to the choice of either conforming to certain religious tenets or losing a job opportunity, a promotion, or . . . employment itself. The potential for coercion caused by such a provision is in serious

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which aid is awarded on the basis of objective criteria having nothing to do with such discrimination, where the aid "has a significant tendency to facilitate, reinforce, and support" the discrimination, id. at 466. Especially in light of more recent doctrinal developments, see, e.g., Washington v. Davis, 426 U.S. 229 (1976), the parameters of the Norwood precedent, even with respect to government aid that supports racial discrimination, are uncertain and ill-defined. Compare, e.g., Bob Jones Univ. v. United States, 461 U.S. 574, 622-23 n.4 (1983) (Rehnquist, J., dissenting); and Brief for the United States, Goldsboro Christian Schs. v. United States and Bob Jones Univ. v. United States, 461 U.S. 574 (1983), Nos. 81-1 and 81-3, at 39-40 & n.36, with, e.g., United States v. Virginia, 518 U.S. 515, 599-600 (1996) (Scalia, J., dissenting); National Black Police Ass'n v. Velde, 712 F.2d 569, 580-83 (D.C. Cir. 1983), cert. denied, 466 U.S. 963 (1984); Young v. Pierce, 628 F. Supp. 1037, 1052-55 (E.D. Tex. 1985); Bishop v. Starkville Academy, 442 F. Supp. 1176, 1180-82 (N.D. Miss. 1977). See also Brown v. Califano, 627 F.2d 1221, 1235-37 (D.C. Cir. 1980); Mayer G. Freed and Daniel D. Polsby, Race, Religion, and Public Policy: Bob Jones University v. United States, 1983 S. Ct. Rev. 1, 12-17. What is more, even assuming the continuing force of Norwood in the context of race discrimination, courts have had little occasion to consider the Norwood question in the context of funding of private, religiously motivated discrimination in favor of coreligionists. But cf. note 41, supra (citing the opinions of Justices Brennan and White in Lemon). Therefore it is very difficult to predict whether and how Norwood would be applied in the context of such religious discrimination by recipients of SAMHSA funds. We think, however, that if a court in a particular case rejected the Establishment Clause argument that the decision to provide SAMHSA aid constitutes an impermissible endorsement of the recipient's religious discrimination, it is extremely unlikely that such court would then conclude that the provision of aid raised a serious equal protection problem under Norwood.

[56] The one district court that has directly addressed the question held, without substantial analysis, that section 702(a) was unconstitutional as applied to the Salvation Army's religious discrimination against an employee of a domestic violence shelter where the position in question was substantially government-funded. Dodge v. Salvation Army, 1989 WL 53857, at *2-*4 (S.D. Miss. 1989); see also Siegel v. Truett-McConnell College, 13 F. Supp. 2d 1335, 1343-44 (N.D. Ga. 1994) (reasoning that even if Dodge was correctly decided in the context of direct subsidies, there could be no constitutional violation where the government did not fund a college that engaged in employment discrimination but instead merely provided aid to students to attend that college), aff'd mem., 73 F.3d 1108 (11th Cir. 1995); Young v. Shawnee Mission Med. Center, 1988 U.S. Dist. LEXIS 12248 at *3-*6 (D. Kan. 1988) (rejecting argument similar to that in Dodge, but relying on questionable ground that defendant's acceptance of Medicare payments "for individual patient's benefit" does not "transform defendant into a federally funded institution").

tension with our commitment to individual freedom of conscience in matters of religious belief." Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 340-41 (1987) (Brennan, J., concurring in the judgment). The imposition of such harms naturally raises the question whether, as applied to the employees in question, the Establishment Clause prohibits the religious preference in section 702(a).

It is a "principle at the heart of the Establishment Clause" that the government "should not prefer . . . religion to irreligion." Kiryas Joel, 512 U.S. at 703. Thus, as a general rule the government may not provide a public benefit exclusively to religious adherents, or exempt them "from a general obligation of citizenship," Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972); instead, in order to pass muster under the Establishment Clause, government benefits generally must be provided on a religion-neutral basis. See, e.g., Texas Monthly, Inc. v. Bullock, 489 U.S. 1 (1989); Kiryas Joel, 512 U.S. at 703-05. A religious exemption from a general obligation of citizenship, such as the exemption found in section 702(a) of title VII, would uniquely benefit certain religious organizations and therefore run afoul of this Establishment Clause requirement unless it could be defended as what the Court has called a permissible "accommodation" of religious exercise. A statutory exception exclusively for religion may be a permissible "accommodation" where it has the purpose and effect of "alleviat[ing] significant governmental interference" with the exercise of religion. Amos, 483 U.S. at 335, 339 (1987) (emphasis added); see also Kiryas Joel, 512 U.S. at 705 ("the Constitution allows the State to accommodate religious needs by alleviating special burdens") (emphasis added); Texas Monthly, 489 U.S. at 15 (plurality opinion) (religion-only accommodation must "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion") (emphasis added).[57]

In Amos, the Court sustained the constitutionality of the religious exemption in section 702(a) as applied to "secular" employment positions of qualifying nonprofit religious corporations, reasoning that the exemption as so applied was "rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions." 483 U.S. at 339. The reasons for the Court's conclusion are important to the question here.

The plaintiffs in Amos argued that, as applied to employees who were involved exclusively in their employers' secular, rather than religious, activities, the title VII exemption did not relieve any burden on the employers' religious exercise, and thus could not be viewed as a permissible religious accommodation. The Court did not take issue with plaintiffs' contention

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[57] Even where an exemption would lift a "significant" or "special" government-imposed burden, the Constitution might prohibit extending such exemption exclusively to religious persons or entities if the exemption "burdens nonbeneficiaries markedly." Texas Monthly, 489 U.S. at 15 (plurality opinion); see also Estate of Thornton v. Caldor, Inc., 472 U.S. 703, 709-10 (1985) (invalidating religious preference that did not lift government-imposed burden and that did impose "significant" and "substantial" burdens on nonbeneficiaries). The Court's decision in Amos indicates that the burden section 702(a) imposes on disfavored employees (and applicants for employment), while serious, is not in and of itself so significant as to automatically render the exemption unconstitutional, at least as applied to nonprofit employers.

that confining such employment positions to coreligionists would not directly assist the organizations in fulfilling their religious missions. The Court explained, however, that Congress's 1972 extension of the exemption to all of a qualifying employer's employees (see supra at 6) did, indeed, alleviate a different "significant burden" on religious exercise — namely, the burden of requiring an organization, "on pain of substantial liability, to predict which of its activities a secular court will consider religious." Id. at 336 (emphasis added). The Court further explained why this burden of "prediction" was "significant": "The line [between the organization's secular and religious activities] is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission." Id. (footnote omitted). Moreover, the broader exemption alleviated serious entanglement concerns by "avoid[ing] the kind of intrusive inquiry into religious belief" by the government that would be necessary if the exemption were limited to an organization's "religious" activities. Id. at 339.

While the decision in Amos provides a helpful framework for evaluating whether application of section 702(a) to employees of a SAMHSA-funded program would be a permissible accommodation, it does not resolve that question, because the rationale for the Court's decision in Amos is inapposite in the context of employers that receive direct SAMHSA funds. As explained above at 12-16, the Establishment Clause requires that the activities in the SAMHSA-funded program be secular: organizations that receive direct government aid under a SAMHSA grant program categorically cannot use such aid for "specifically religious activit[ies] in an otherwise substantially secular setting." Kendrick, 487 U.S. at 621 (internal quotation omitted). Unlike the Appellant church in Amos, which wished to "propagate its religious doctrine through the Gymnasium" that had employed the plaintiff, 483 U.S. at 337, a direct recipient of SAMHSA grants may not "propagate its religious doctrine" in a subsidized substance-abuse program. The "line," in other words, is a "bright one," id. at 336, in this case: It would not be difficult for a recipient of SAMHSA aid to "predict" that activities in its government-funded program would be secular, rather than religious, because the Constitution requires such a clean separation (and H.R. 4923 itself also would prohibit the use of the funds for specifically religious activities). "Since the state funded . . . functions are to be exclusively secular, there can be no chilling effect created by uncertainty as to how these jobs would be characterized by a reviewing court."[58] Accordingly, confining such jobs to persons of a particular religion would not appear to serve any religious objective, and title VII's legal proscription against religious discrimination would not impose the significant burden that the Amos Court identified. An organization receiving SAMHSA funding for a substance-abuse program would not be required, "on pain of substantial liability," id. at 336, to make difficult predictions concerning which of its activities in that program would be considered religious. Nor in this context would application of title VII's antidiscrimination rule require government officials to engage in any additional "intrusive inquiry into religious belief." Id. at 339. The government

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[58] Alan Brownstein, Constitutional Questions About Charitable Choice, in Welfare Reform & Faith-Based Organizations 219, 234 (Derek H. Davis & Barry Hankins eds., 1999).

already would be required to take steps sufficient to ensure that prohibited religious activities are not present in federally funded programs. Such monitoring need not itself result in an impermissible entanglement, Kendrick, 487 U.S. at 616-17, and the antidiscrimination rule would not result in any additional governmental entanglement in religious affairs. For these reasons, the majority's opinion in Amos does not provide a rationale as to why a recipient organization could claim a religious need to discriminate on the basis of religion in hiring persons to work in the secular, SAMHSA-funded program.

Nevertheless, Justice Brennan's concurring opinion in Amos provides a possible alternative rationale that some religious organizations receiving SAMHSA funds might be able to invoke to explain how title VII's prohibition on religious discrimination would impose a significant burden on their exercise of religion, even as applied to employees who must, by law, be engaged in wholly secular activities. Many religious organizations and associations historically have engaged in extensive social welfare and charitable activities, such as operating soup kitchens and day care centers or providing aid to the poor and the homeless. Even where the content of such activities is secular — in the sense that it does not include religious teaching, proselytizing, prayer or ritual — the religious organization's performance of such functions may be "infused with a religious purpose." Amos, 483 U.S. at 342 (Brennan, J., concurring). And churches and other religious entities "often regard the provision of such services as a means of fulfilling religious duty and of providing an example of the way of life a church seeks to foster." Id. at 344 (footnote omitted). In other words, the provision of "secular" social services and charitable works that do not involve "explicitly religious content" and are not "designed to inculcate the views of a particular religious faith," Kendrick, 487 U.S. at 621, nevertheless might be "religiously inspired," id., and can, in addition, play an important part in the "furtherance of an organization's religious mission." Amos, 483 U.S. at 342 (Brennan, J., concurring).

As Justice Brennan further explained, a religious organization may have good reason for preferring that individuals similarly committed to its religiously motivated mission operate such secular programs, for such collective activity can be "a means by which a religious community defines itself." Id. Indeed, such collective activity not only can advance the organization's own religious objectives, but also can further the religious mission of the individuals that constitute the religious community: "For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals." Id.

Accordingly, it is possible that a preference for coreligionist employees in particular social-service programs could advance a religious organization's religious mission, facilitate the religiously motivated calling and conduct of the individuals who are the constituents of that organization, and fortify the organization's religious tradition. Where an organization makes such a showing, it is possible the courts might conclude that the title VII prohibition on religious discrimination might impose "significant governmental interference" with the ability of that organization "to define and carry out [its] religious mission[]," Amos, 483 U.S. at 335, even as

applied to employees who are engaged in work that must, by law, be wholly secular in content. And, where that is the case, the section 702(a) exemption might be a permissible religious accommodation that "alleviat[es] special burdens," Kiryas Joel, 512 U.S. at 705 (emphasis added), rather than an impermissible religious preference. We emphasize, however, that such a theory has not yet been tested by the courts, and thus the constitutionality of the section 702(a) exemption in such a case remains a difficult and unresolved question.

II. Statutory Question

Finally, you have asked whether, as a matter of statutory law, section 702(a) in any respect exempts qualifying religious organizations from title VII's prohibitions on employment discrimination other than religious discrimination, such as discrimination on the basis of race, color, sex (including pregnancy), or national origin.[59]

By its terms, section 702(a) applies only "with respect to the employment of individuals of a particular religion." In other words, that exemption "merely indicates that [qualifying] institutions may choose to employ members of their own religion without fear of being charged with religious discrimination." Boyd v. Harding Academy of Memphis, 88 F.3d 410, 413 (6th Cir. 1996).[60] Furthermore, the legislative history manifests congressional intent that section 702(a) would not exempt qualifying organizations from other forms of discrimination that title

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[59] We note that another provision of title VII, section 703(e)(1), 42 U.S.C. § 2000e-2(e)(1) (1994), provides that it shall not be an unlawful employment practice under title VII for an employer to hire and employ employees on the basis of religion, sex or national origin "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." This "BFOQ" exception is construed narrowly, permitting the otherwise-prohibited forms of discrimination only where use of the classification can be shown, based on objective and verifiable evidence, to be reasonably necessary to ensure employees' ability to perform a job related to the central mission (or "essence") of the employer's business. See UAW v. Johnson Controls, Inc., 499 U.S. 187, 200-04 (1991). We suspect the BFOQ exception would rarely, if ever, justify discrimination on the basis of sex or national origin in federally funded substance-abuse programs.

[60] At least two courts of appeals have held that section 702(a) affords qualifying employers an exemption from title VII liability not only when they prefer employees affiliated with a particular religious denomination, but also when they insist that such coreligionist employees share the organization's beliefs or philosophies, see Killinger v. Samford Univ., 113 F.3d 196 (11th Cir. 1997) (involving divinity school discharge of teacher who allegedly did not share the school's theological views), or when they insist that employees abide by particular requirements of religious observance, see Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991) (involving Catholic school's failure to renew contract of teacher who had failed to pursue the proper canonical process from the Roman Catholic Church to obtain validation of her second marriage). Nothing in those decisions suggests that section 702(a) would exempt an employer from title VII liability if the employer imposed such a belief or observance requirement in a manner that discriminates against certain employees on the basis of, e.g., sex or race. And, as we discuss in the text above, courts have held that where an employer is entitled to insist that its employees conduct their lives in accord with certain moral or religious standards, "Title VII requires that this code of conduct be applied equally to both sexes." Boyd, 88 F.3d at 414 (citation omitted).

VII proscribes, such as discrimination on the basis of race and sex.[61] Indeed, the Senate Managers' section-by-section analysis that accompanied the Conference Committee Report on the 1972 amendments to title VII includes a clear statement of intent that religious organizations that qualify for the section 702(a) exemption generally should be required to abide by title VII's prohibitions, except with respect to the favoring of coreligionists:

> The limited exemption from coverage in this section for religious corporations, associations, educational institutions or societies has been broadened to allow such entities to employ individuals of a particular religion in all their activities instead of the present limitation [under the 1964 law] to religious activities. Such organizations remain subject to the provisions of Title VII with regard to race, color, sex or national origin.

118 Cong. Rec. 7167 (1972) (presented by Sen. Williams) (emphasis added). Accordingly, the courts uniformly have concluded that section 702(a) does not exempt qualifying employers from title VII's prohibitions on any form of discrimination other than preferences for coreligionists,[62] even where such discrimination is religiously motivated.[63]

Thus, for example, one court of appeals has held that section 702(a) does not exempt an employer from liability under section 704(a), 42 U.S.C. § 2000e-3(a), for discharging an employee in retaliation for having instituted EEOC proceedings, even where the employee's conduct violated church doctrines prohibiting lawsuits against the church. EEOC v. Pacific Press

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[61] During consideration of title VII in 1964 and later the Equal Employment Opportunity Act of 1972, Congress considered and rejected proposals that would have categorically excluded certain religious employers from coverage under title VII. Congress instead enacted the more limited exemption for discrimination in favor of employees "of a particular religion," and extended that exemption in 1972 to all of a qualifying organization's employees. See, e.g., EEOC v. Pacific Press Publ'g Ass'n, 676 F.2d 1272, 1276-77 (9th Cir. 1982) (recounting legislative history).

[62] See, e.g., Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 658 (6th Cir. 2000); Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940, 945 (9th Cir. 1999); Boyd, 88 F.3d at 413; DeMarco v. Holy Cross High Sch., 4 F.3d 166, 173 (2d Cir. 1993); EEOC v. Freemont Christian Sch., 781 F.2d 1362, 1366 (9th Cir. 1986); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164, 1166-67 (4th Cir. 1985), cert. denied, 478 U.S. 1020 (1986); Pacific Press, 676 F.2d at 1276-77; EEOC v. Mississippi College, 626 F.2d 477, 484 (5th Cir. 1980), cert denied, 453 U.S. 912 (1981); McClure v. Salvation Army, 460 F.2d 553, 558 (5th Cir.), cert. denied, 409 U.S. 896 (1972); Ganzy v. Allen Christian Sch., 995 F. Supp. 340, 348 (E.D.N.Y. 1998); Vigars v. Valley Christian Ctr. of Dublin, Cal., 805 F. Supp. 802, 806-08 (N.D. Cal. 1992); Dolter v. Wahlert High Sch., 483 F. Supp. 266, 269 (N.D. Iowa 1980).

[63] See, e.g., Fremont Christian Sch., 781 F.2d at 1364-67 (church-owned school violated title VII by providing health insurance to married men but not married women, even where such discrimination reflected scriptural belief that in marriage only a man can be the head of a household).

Publishing Ass'n, 676 F.2d 1272, 1276-77, 1280 (9th Cir. 1982).[64] Similarly, courts have held that, even where an employer is entitled to insist that its employees conduct their lives in accord with certain moral or religious standards, "Title VII requires that this code of conduct be applied equally to both sexes." Boyd, 88 F.3d at 414 (citation omitted).[65] For instance, whereas an employer may be permitted to insist that its employees adhere to an evenhandedly enforced policy requiring males and females alike to refrain from adultery,[66] the employer may not (even for religious reasons) discipline or dismiss female employees on the basis of pregnancy outside of marriage, because title VII defines such pregnancy discrimination as a proscribed form of sex discrimination, see title VII section 701(k), 42 U.S.C. § 2000e(k) (1994).[67]

Finally, we would be remiss if we did not mention that in analyzing whether a particular religious institution may be sued under title VII for forms of employment discrimination that are not subject to the section 702(a) coreligionists exemption, courts often may also need to consider a related constitutional question. Several courts of appeals have held that the Religion Clauses of the First Amendment compel what has been termed a "ministerial" exception to title VII and analogous antidiscrimination statutes, which permits religious institutions to select and retain certain of their representatives free from government interference and the threat of litigation.[68] The ministerial exception is not confined to members of the clergy, but extends as well to employees of religious institutions whose "'primary duties consist of teaching, spreading the faith, church governance, supervision of a religious order, or supervision or participation in

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[64] Section 704 prohibits certain forms of retaliation against employees who raise claims or questions concerning alleged title VII violations. That section provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

[65] Accord Cline, 206 F.3d at 658; Ganzy, 995 F. Supp. at 348.

[66] Cline, 206 F.3d at 658; Boyd, 88 F.3d at 414; Ganzy, 995 F. Supp. at 348-49, 359-60; Dolter, 483 F. Supp. at 270.

[67] Cline, 206 F.3d at 658; Ganzy, 995 F. Supp. at 348; Vigars, 805 F. Supp. at 806-08; Dolter, 483 F. Supp. at 269-70.

[68] See, e.g., EEOC v. Roman Catholic Diocese of Raleigh, N.C., 213 F.3d 795, 800-01 (4th Cir. 2000); Gellington v. Christian Methodist Episcopal Church, Inc., 203 F.3d 1299, 1301-04 (11th Cir. 2000); Bollard v. California Province of the Soc'y of Jesus, 196 F.3d 940, 945-50 (9th Cir. 1999); Combs v. Central Tex. Annual Conf. of the United Methodist Church, 173 F.3d 343, 345-50 (5th Cir. 1999), and cases cited therein, id. at 347; EEOC v. Catholic Univ. of America, 83 F.3d 455, 461-67 (D.C. Cir. 1996); Rayburn, 772 F.2d at 1168-72; McClure, 460 F.2d at 558-61.

religious ritual or worship.'" Rayburn v. General Conf. of Seventh-day Adventists, 772 F.2d 1164, 1169 (4th Cir. 1985) (quoting Bruce N. Bagni, Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations, 79 Colum. L. Rev. 1514, 1545 (1979)), cert. denied, 478 U.S. 1020 (1986).[69]

Having said that, we should add that we suspect the ministerial exception would rarely, if ever, apply in the context of substance-abuse programs that receive direct SAMHSA funds. The ministerial exception, which is limited to what is necessary to comply with the First Amendment,[70] "does not insulate wholesale the religious employer from the operation of federal anti-discrimination statutes,"[71] and, in particular, does not extend to employees whose primary duties do not consist of spiritual functions, even if such employees are, for example, expected to be "exemplars" of a particular faith or denomination.[72] Therefore it is unlikely that the ministerial exception would apply to employees of a religious organization whose primary duties are to conduct the operations of a SAMHSA-funded substance-abuse program, because such employees cannot within that program engage in the sort of specifically religious activities that can trigger the ministerial exception.[73]

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[69] Accord Roman Catholic Diocese of Raleigh, 213 F.3d at 801; Catholic Univ. of America, 83 F.3d at 461. See generally Hartwig v. Albertus Magnus Coll., 93 F. Supp. 2d 200, 207-12 (D. Conn. 2000) (canvassing cases applying ministerial exception to particular employment positions).

[70] See Bollard, 196 F.3d at 947.

[71] Roman Catholic Diocese of Raleigh, 213 F.3d at 801.

[72] See Starkman v. Evans, 198 F.3d 173, 176 (5th Cir. 1999) (quoting Mississippi College, 626 F.2d at 485), cert. denied, 121 S. Ct. 49 (2000); Mississippi College, 626 F.2d at 488-89.

[73] See, e.g., Shirkey v. Eastwind Community Devel. Corp., 941 F. Supp. 567, 576-78 (D. Md. 1996) (ministerial exception could not be applied to "lay position of community developer," where the religious employer's job description did not require the employee to lead religious services, act as a pastoral counselor, or perform services necessitating religious training), reaffirmed in pertinent part by dist. ct., 993 F. Supp. 370, 372-73 & n.1 (D. Md. 1998).