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The Honorable Henry J. Hyde
Chairman
Committee on International Relations
House of Representatives

The Honorable Tom Lantos
Ranking Minority Member
Committee on International Relations
House of Representatives

Subject: *State Department—Assistance for Lebanon*

This responds to your June 3, 2004, request for our legal opinion regarding the interpretation of section 1224 of the Foreign Relations Authorization Act, 2003[1] (section 1224) and section 534(a) of the Foreign Operations, Expert Financing and Related Appropriations Act, 2003, as contained in the Consolidated Appropriations Resolution[2] (section 534(a)). You asked whether section 1224 of the authorization act conflicts with section 534(a) of the appropriations act with regard to funds appropriated for assistance to Lebanon, and, if so, whether section 1224, because it was enacted "notwithstanding any other provision of law," supersedes section 534(a).

On September 30, 2002, Congress enacted section 1224,[3] which provides that $10 million of funds "made available for fiscal year 2003 or any subsequent fiscal year" to

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[1] Pub. L. No. 107-228, § 1224, 116 Stat. 1350, 1432 (Sept. 30, 2002).

[2] Pub. L. No. 108-7, div. E, title V, § 534(a), 117 Stat. 11, 193 (Feb. 20, 2003).

[3] The full text of section 1224 states the following:

> "(a) PROHIBITION.—*Notwithstanding any other provision of law,* $10,000,000 of the amounts made available for fiscal year 2003 or any subsequent fiscal year that are allocated for assistance to Lebanon under chapter 4 of part II of the Foreign Assistance Act of 1961 (22 U.S.C. 2346 *et seq.*; relating to the economic support fund) may not be obligated unless and until the President certifies to the appropriate congressional

the Economic Support Fund (ESF)[4] for assistance to Lebanon shall not be obligated until the President certifies to the appropriate congressional committees that Lebanon has deployed armed forces to the border between Lebanon and Israel and that Lebanon has asserted authority over the same area. Section 1224 mandates that these requirements be maintained "[n]othwithstanding any other provision of law. . . ."

Subsequently, Congress enacted section 534(a)[5] on February 20, 2003. It provided that funds appropriated in Titles I and II of the appropriations act for the assistance of Lebanon, among other countries, were to be "made available notwithstanding any other provision of law." In Title II of the act, Congress appropriated $2.27 billion to the ESF and earmarked "not less than $35 million" of that amount for assistance to

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> committees that—
> (1) the armed forces of Lebanon have been deployed to the internationally recognized border between Lebanon and Israel; and
> (2) the Government of Lebanon is effectively asserting its authority in the area in which such armed forces have been deployed.
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> "(b) REQUIREMENT RELATING TO FUNDS WITHHELD.—Notwithstanding any other provision of law, any funds withheld pursuant to subsection (a) may not be programmed in order to be used for a purpose other than for assistance to Lebanon until the last month of the fiscal year in which the authority to obligate such funds lapses."

Pub. L. No. 107-228, § 1224 (emphasis added).

[4] The Economic Support Fund, codified in 22 U.S.C. § 2346, provides economic support to countries in which economic, political, or security conditions require such support in the interests of national security for the United States. *See* 22 U.S.C. § 2346(a).

[5] The full text of section 534(a) is as follows:

> "AFGHANISTAN, LEBANON, MONTENEGRO, VICTIMS OF WAR, DISPLACED CHILDREN, AND DISPLACED BURMESE.—Funds appropriated by this Act that are made available for assistance for Afghanistan may be made available notwithstanding section 512 of this Act and any similar provision of law, and funds appropriated in titles I and II of this Act that are made available for Lebanon, Montenegro, and for victims of war, displaced children, and displaced Burmese, and to assist victims of trafficking in persons and, subject to the regular notification procedures of the Committees on Appropriations, to combat such trafficking, may be made available *notwithstanding any other provision of law*."

Pub. L. No. 108-7, div. E, title V, § 534(a), 117 Stat. at 193 (emphasis added).

Lebanon.[6] The funds appropriated to the ESF for Lebanon and other countries were available through the end of fiscal year 2004 (September 30, 2004). 117 Stat. at 166-67.

As explained below, we conclude that, for fiscal years 2003 and 2004, section 534(a), enacted 4 months after section 1224, supersedes section 1224. As a result, the amounts appropriated in the Consolidated Appropriations Resolution were available for assistance to Lebanon in accordance with section 534(a) through fiscal year 2004.

BACKGROUND

Your request arises because of your concern that the State Department has made $10 million available for assistance to Lebanon without regard to section 1224. According to the documentation submitted with your request, the State Department notified you that it intended to use the $10 million of the ESF to fund wastewater projects and environmental management projects in the Litani River Basin in southern Lebanon. Letter from Richard L. Armitage, Deputy Secretary of State, to the Honorable Tom Lantos, Mar. 9, 2004. You protested this use of the ESF because the State Department did not adhere to the presidential certification requirement of section 1224 before releasing the funds. Letter from Chairman Henry J. Hyde and Ranking Minority Member Tom Lantos to Secretary of State Colin Powell, Mar. 24, 2004. The State Department responded stating that it had determined that section 534(a) of the appropriations act authorizes the release of moneys from the Economic Support Fund without the limitation set forth in section 1224. Letter from Secretary Colin Powell to Ranking Minority Leader Tom Lantos, Apr. 13, 2004.

To address your request, we wrote to the State Department to obtain an explanation for its conclusion that section 534(a) superseded section 1224's certification requirement. The State Department replied in a letter dated October 14, 2004. Letter from James H. Thessin, Principal Deputy Legal Advisor, State Department, to Susan A. Poling, Managing Associate General Counsel, GAO, Oct. 14, 2004. The State Department asserted that section 534(a) prevailed over the restrictions of section 1224 because section 534(a) was enacted later in time and the $35 million earmark in the appropriations act reflected Congress's specific intention to appropriate funds for assisting Lebanon. *Id.*

ANALYSIS

Both sections 1224 and 534(a) address the $35 million appropriations for economic assistance through ESF to Lebanon. Section 1224, a provision of the authorization act, requires a presidential certification of certain milestones before $10 million of those funds can be released. Section 1224 also provides that this restriction governs "[n]otwithstanding any other provision of law . . . ." Section 534(a), a provision of the appropriations act, directs that appropriated funds for Lebanon and other countries "be made available notwithstanding any other provision of law." With

[6] Pub. L. No. 108-7, div. E, title II, 117 Stat. at 166, 167.

regard to the restricted $10 million, the two sections directly conflict—the State Department cannot honor the restriction of section 1224 while at the same time satisfying the direction of section 534(a). To determine the effect of both of these sections on the use of funds appropriated to ESF, we turn to the rules of statutory construction as explained in federal case law and our previous appropriations decisions.

Rules of statutory construction provide that, where two acts address the same subject in a manner that may present a conflict, effect should be given to both acts if at all possible. *Posadas v. National City Bank of New York,* 296 U.S. 497, 503 (1936). Reconciling two similar provisions on the same subject is in keeping with the "cardinal rule" that repeals by implication are disfavored. *See id.* Such repeals have been found only where "the intention of the legislature [is] clear and manifest." *Id.* However, repeals by implication may be warranted where two statutes irreconcilably conflict. *See id.*; *see also Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978); B-240610, Feb. 2, 1989. To resolve such conflicts, we and the federal courts have applied the "last-in-time rule," namely, that the statute enacted last supersedes the previously enacted statute. *See* B-247119, Mar. 2, 1992; *see also American Federation of Government Employees, Local 1945 v. Cheney,* CV-20PT02453-E (N.D. Ala. Dec. 21, 1992) (citing B-247119 for the last-in-time rule). The rule presumes that the interpretation and application of statutes should reflect the most recent expression of Congress's intent.[7] The later-enacted statute, however, will supersede the earlier-enacted statute only to the extent of the irreconcilable conflict. *Posadas,* 296 U.S. at 503; B-203900, Feb. 2, 1989.

With regard to the provisions in question here, we do not see how we can give effect to the language of both notwithstanding clauses. Taken individually, each notwithstanding clause expresses Congress's manifest intent that the respective statute should supersede all other statutes on the subject. *Cf. Shomberg v. United States,* 348 U.S. 540, 547 (1955) (notwithstanding clause in Immigration and Nationality Act manifested Congress's clear intent that certain policies should override other policies); *see also Cisneros v. Alpine Ridge Group,* 508 U.S. 10, 17 (1993) (noting the general agreement among several federal courts of appeal that a notwithstanding clause is a legislature's clear intent that the provision supersede all other provisions of law). We recognize that a notwithstanding clause may not supersede all other laws, such as those laws that are not directly related to the object to which a statute seeks to address. *See* B-290125.2, B-290125.3, Dec. 18, 2002. For example, a notwithstanding clause in a statute directing the Architect of the Capital to take all necessary steps to ensure that certain employees be provided retirement benefits did not supersede the Antideficiency Act. *See* B-303961, Dec. 6, 2004. Here, however, where both sections 1224 and 534(a) seek to legislate the availability of the appropriations for Lebanon, there can be little argument that both sections are not directly related to the same objective. Yet, we cannot give effect to both sections;

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[7] The rationale for the "last-in-time" rule is, in this sense, a consistent application of the longstanding rule that a Congress may not bind future Congresses. We discuss this rule below on page 7.

you cannot restrict the use of appropriations, as section 1224 mandates, and simultaneously allow unfettered use, as section 534(a) mandates. To the extent that section 534(a) and section 1224 are irreconcilable, the last-in-time rule provides that the section enacted last, section 534(a), shall supersede the earlier enacted section. *See Posadas,* 296 U.S. at 503.

Apart from the amounts addressed in both sections, the extent of the conflict between sections 534(a) and 1224 is defined by the length of time each section is in effect. Section 534(a), as a provision in an appropriations act, is presumed to be nonpermanent legislation that will expire at the end of the fiscal year unless otherwise specified. 65 Comp. Gen. 588, 589 (1986). A provision in an appropriations act may overcome this presumption if the provision contains "words of futurity," indicating that Congress intended the provision to be permanent. *See* B-271412, June 13, 1996; *see, e.g.*, 36 Comp. Gen. 434, 436 (1956). Here, section 534(a) has no words that would indicate that Congress intended permanence. Nevertheless, while section 534(a) clearly is not permanent legislation, section 534(a) does apply to "funds appropriated in titles I and II of this Act that are made available for Lebanon," and would apply during the time period of availability of those appropriations. Congress appropriated funds for Lebanon through September 30, 2004. 117 Stat. at 166-67 (stating that funds appropriated for the ESF, including the $35 million for assistance to Lebanon, remain available until September 30, 2004).[8] Section 534(a), then, with regard to the $10 million for Lebanon, applied through fiscal year 2004, until September 30, 2004.

On the other hand, Congress clearly intended section 1224 of the authorization act to be permanent legislation. Despite the title of the authorization act indicating that the statute authorized appropriations to be available for fiscal year 2003, section 1224 states that its certification requirements for obligating $10 million apply to "amounts made available for fiscal year 2003 or *any subsequent fiscal year*." 116 Stat. at 1432 (emphasis added).

In B-271412, June 13, 1996, we examined a similar situation involving an appropriation for assistance to Azerbaijan. In that case, subsection (w) of the 1996 Foreign Operations, Expert Financing, and Related Programs Appropriations Act appropriated a lump sum for assistance provided to the Government of Azerbaijan for humanitarian purposes for fiscal years 1996 and 1997. *Id.* Section 907 of the FREEDOM Support Act, however, proscribed monetary assistance "until the President determines, and so reports to the Congress, that the Government of Azerbaijan is taking demonstrable steps to cease all blockades and other offensive uses of force against Armenia and Nagorno-Karabakh." *Id.* We held that subsection (w) did not permanently supersede section 907 of the FREEDOM Support Act, but

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[8] The appropriations specifically states that amounts appropriated "[f]or necessary expenses to carry out the provisions of chapter 4 of part II [of the Foreign Assistance Act of 1961 as codified in 22 U.S.C. § 2346]" are "to remain available until September 30, 2004." 117 Stat. at 166. As noted above, this statutory reference is to the ESF.

temporarily suspended its effectiveness for fiscal years 1996 and 1997. *Id.* Similarly, here, where section 534(a)'s authority extends only through fiscal year 2004 and section 1224's authority is permanent, section 534(a) would only supersede the requirements of section 1224 through September 30, 2004. Accordingly, the State Department was not required to meet the certification requirements of section 1224 before obligating the funds in March 2004. The enactment of section 534(a) eliminated the requirement for fiscal year 2004.[9]

In the materials provided to us with your request, you noted federal cases in which the courts found that a notwithstanding clause in a federal statute did not preempt state law or did not apply to other federal statutory schemes. *See Oregon Natural Resources Council v. Thomas,* 92 F.3d 792, 797-98 (9th Cir. 1996); *E.P. Paup Co. v. United States Dept. of Labor,* 999 F.2d 1341, 1349-50 (9th Cir. 1993); *In re Glacier Bay,* 944 F.2d 577, 581-83 (9th Cir. 1991); *Golden Nugget, Inc. v. American Stock Exchange,* 828 F.2d 586, 589-90 (9th Cir. 1987). We note, in the first instance, that none of these cases construed two statutes each of which had a notwithstanding clause. Instead, the courts were asked to address whether a notwithstanding clause superseded another statute. The holdings of these cases are consistent with our determination here. In each of these cases, the respective courts found that an important factor in determining whether a statute with a notwithstanding clause superseded another statute was whether the two statutes at issue were in conflict. For example, in *In re Glacier Bay*, the Court of Appeals for the Ninth Circuit did, indeed, determine that the phrase "notwithstanding the provision of any other law" in a provision of the Trans-Alaska Pipeline Authorization Act (TAPAA) was not dispositive of whether TAPAA implicitly repealed the liability provisions of the Limitation of Vessel Owner's Liability Act (Limitation Act). *Id.* at 582-83. TAPAA, enacted subsequent to the Limitation Act, imposed a strict liability scheme on vessel owners for damages arising out of transportation of trans-Alaska oil, and the Limitation Act allowed vessel owners to

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[9] While section 534(a) was enacted in the State Department's fiscal year 2003 appropriations act, the requirement that the appropriations for assistance to Lebanon be available "notwithstanding any other provision of law" was extended by State's fiscal year 2004 appropriations act, the Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, 118 Stat. 3 (Jan. 23, 2004). In this act, Congress appropriated an additional $35 million to the ESF to be available through September 30, 2005. *See* 118 Stat. at 151. Recently, Congress again extended the requirement that appropriations for assistance to Lebanon be available "notwithstanding any other provision of law." Consolidated Appropriations Act, 2005, Pub. L. No. 108-447 (Dec. 8, 2004). In the 2005 Act, Congress appropriated another $35 million to the ESF for assistance to Lebanon to be available through September 30, 2006. *See* Pub. L. No. 108-447, div. D, title II. Both the 2004 Act and the 2005 Act contain provisions with the same language as section 534(a). *See* 118 Stat. at 181; *see also* Pub. L. No. 108-447, div. D, title V, § 534(a). The statutory conflict that we address in this opinion will arise in the future only to the extent that the Congress continues to enact legislation with similar language as found in section 534(a). *Cf.* 39 Comp. Gen. 665 (1960) (noting that Congress may continue with limitations enacted in temporary appropriations legislation by taking legislative action to extend the limitations).

virtually eliminate their liability for damages. The court, however, did not end its analysis by looking at TAPAA's notwithstanding clause; it looked at both acts and determined that, because TAPAA's strict liability scheme could not be reconciled with the liability scheme of the Limitation Act, Congress intended that TAPAA supersede the liability scheme of the Limitation Act. *Id.* at 583. As we noted above, and in accord with *In re Glacier Bay*, it is inappropriate to assume that a notwithstanding clause negates the application of any and all other laws. The point of *In re Glacier Bay* is that when confronted with two laws in irreconcilable conflict, we must apply rules of construction to determine which law takes precedence.

You also ask whether sections 1224 and 534(a) can be reconciled by reading section 534(a) to apply to all other funds other than those appropriated to the ESF and whether the notwithstanding clause of section 534(a) would apply not to section 1224 but only to older statutes dealing with concerns regarding narcotics, human rights, and terrorism restrictions. The statutory language does not support either interpretation. Indeed, section 534(a) applies to funds appropriated in titles I and II of division E of Public Law 108-7. Title II of that division appropriates funds to ESF.[10] Consequently, we must conclude that section 534(a) applies to funds appropriated to ESF, not just to all other funds. Furthermore, we cannot conclude that section 534(a) applies not to section 1224 but only to older statutes. Any attempt to reconcile the language of sections 1224 and 534(a) in a manner in which appropriations for the assistance of Lebanon through September 24, 2004, are subject to the section 1224 certification would improperly annul the notwithstanding clause of section 534(a), which requires that appropriated funds in titles I *and* II of the appropriations act be made available to Lebanon without any existing restriction.

Finally, you note that the legislative history of section 1224 indicates that the notwithstanding clause of that section was intended to apply to section 534(a). You suggest that, by inserting a notwithstanding clause into section 1224, Congress, aware of the notwithstanding clause in the then-contemplated, but not yet enacted, section 534(a), intended to counteract the notwithstanding clause of section 534(a). To accept this argument, we would have to find that Congress, in passing section 1224 in September 30, 2002, could constitutionally override the legislative effect of a statute not yet enacted. The 107th Congress enacted section 1224, and the 108th Congress enacted section 534(a). To adopt the suggestion that Congress, with section 1224, intended to limit the application of the later-enacted section 534(a) contradicts the accepted notion that one act of Congress cannot abridge the legislative powers of a succeeding Congress. *See generally Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 133 (1810). Moreover, while the legislative history of section 1224 may be instructive in resolving some statutory ambiguities subsequently, it could not counteract the plain

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[10] Section 534(a) states that the provision applies to funds appropriated in titles I and II of "this Act" that are made available to Lebanon and other listed countries. Section 3 of the Act provides: "Except as expressly provided otherwise, any reference to 'this Act' contained in any division of this joint resolution shall be treated as referring only to the provisions of that division." Accordingly, the reference in section 534(a) to titles I and II of this Act is referring to titles I and II of division E of Pub. L. No. 108-7.

unambiguous statutory language subsequently enacted into law. *See Lincoln v. Vigil*, 508 U.S. 182, 192 (1993).

CONCLUSION

The notwithstanding clauses present an irreconcilable conflict between sections 1224 and 534(a) in the use of funds appropriated to the ESF available for assistance to Lebanon through fiscal year 2004. Because section 534(a) was passed later in time, under applicable rules of statutory construction, section 534(a) will supersede section 1224 to the extent that the two provisions conflict. As a result, the State Department was permitted to use amounts appropriated in the Consolidated Appropriations Resolution available for assistance to Lebanon without the certification requirements of section 1224.

If you have any questions, please contact Susan A. Poling, Managing Associate General Counsel, at (202) 512-2667 or Thomas H. Armstrong, Assistant General Counsel, at (202) 512-8257.

Sincerely yours,

/signed/

Anthony H. Gamboa
General Counsel