THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE ATTORNEY GENERAL
ONE ASHBURTON PLACE
BOSTON, MASSACHUSETTS 02108

ANDREA JOY CAMPBELL
ATTORNEY GENERAL

(617) 727-2200
www.mass.gov/ago

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BY HAND AND VIA E-MAIL

The Honorable Diana DiZoglio, State Auditor
Office of the State Auditor
Massachusetts State House, Room 230
Boston, MA 02133

Dear State Auditor DiZoglio:

I write in response to your letter of July 26, 2023, in which you ask the Attorney General's Office to "recognize" that the State Auditor's Office has the statutory authority to audit the Legislature over its objection. The contemplated authority to audit, as the State Auditor's Office ("SAO") has described it, spans all "accounts, programs, activities and functions" of the Legislature, including "active and pending legislation, the process for appointing committees, the adoption and suspension of House and Senate rules and the policies and procedures of the House and Senate."[1]

We appreciate the important role of the SAO in Massachusetts government, where it provides the public and government decisionmakers with "independent evaluation[s] of the various agencies, activities and programs operated by the Commonwealth."[2] We recognize and value that the SAO is not "simply a critic[,] but is an agent, an advocate, and a catalyst for improved management and delivery of government services."[3] We also recognize and respect that the Auditor is a constitutional officer, elected directly by the people. *See* Mass. Const. Amend. art. 82.

The Attorney General's constitutional, statutory, and common law role in state government includes the responsibility to develop considered, uniform, and consistent legal positions for the Commonwealth.[4] We have evaluated your arguments in that role,

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[1] *See* Letter from Diana DiZoglio, State Auditor, to Andrea Joy Campbell, Attorney General at 3 (July 26, 2023) ("SAO letter").

[2] State Auditor A. Joseph DeNucci, *Office of the State Auditor's Semi-Annual Report for January to June 1996* at 2 (Nov. 19, 1996).

[3] *Id.* at 3.

[4] *See e.g.*, *Feeney v. Commonwealth*, 373 Mass. 359, 364 (1977); *Secretary of Admin. & Finance v. Attorney Gen.*, 367 Mass. 154, 163-165 (1975).

objectively analyzing the relevant law. We comprehensively reviewed the statute governing the SAO, the history of that statute, records reflecting the SAO's historical position on this issue, and the constitutional provisions implicated by your request.

Scope Impairments

After careful analysis of these materials, and as explained at length below, we conclude that the SAO does not currently have the legal authority to audit the Legislature without the Legislature's consent. Our conclusion builds on the advice of the Attorney General's Office to State Auditor DeNucci in 1994, when the office expressed considerable doubt that the SAO had authority to audit the Legislature over its objection.[5] Prior State Auditors have made the same determination, acknowledging they lacked authority to audit the Legislature and proposing legislation to grant them that authority.[6] These acknowledgments appear in various contexts, including, notably, documents cited in your recent letter. *See*, *e.g.*, State Auditor A. Joseph DeNucci, *State Auditor's Report on the Activities of the Sergeant-at-Arms July 1, 1984 to June 30, 1986* at 1 (June 9, 1987) (noting that pursuant to *Westinghouse Broadcasting Co. v. Sergeant-at-Arms of the General Court*, 375 Mass. 179 (1978), "the records generated by the Legislature could be made available to outsiders [*i.e.*, the Auditor] only at the discretion of the House and Senate leadership"). Although we recognize (and discuss in detail below) that the SAO has in the past examined certain entities under the Legislature's control, we have not identified any prior example of an audit of the type currently proposed, *i.e.*, of how the Legislature handles "active and pending legislation, the process for appointing commissions, [or] the adoption and suspension of the House and Senate rules."[7]

The results of our research are sufficiently clear that litigation on this question is not necessary or appropriate. It is the role of the Attorney General's Office "to set a unified and consistent legal position for the Commonwealth." *Feeney v. Commonwealth*, 373 Mass. 359, 364 (1977) (quoting *Secretary of Admin. & Finance v. Attorney Gen.*, 367 Mass. 154, 163 (1975)). This role preserves credibility in the eyes of the public, who reasonably expect that their state government can agree on the meaning of state law, given that we, as state government, collectively ask the public to follow the law. A single state legal position also preserves the Commonwealth's credibility in the courts, which need not referee intra-governmental disputes absent exceptional circumstances that are not present here. *See Secretary of Admin. & Finance*, 367 Mass. at 163-164. In addition, as a steward of taxpayer resources, the Attorney General's Office believes that the cost of such legal sparring among entities within the same state government would be better spent on the sound and efficient delivery of government services.

We are mindful, of course, that the question of whether the SAO currently *can* audit the Legislature over its objection is different from the question of whether the SAO *should*

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[5] *See* Letter from Peter Sacks, Assistant Attorney General and Opinion Coordinator, to A. Joseph DeNucci, State Auditor (April 9, 1994) ("AAG Sacks Letter").

[6] *See, e.g.*, House No. 6 (1999); House No. 7 (1995); House No. 10 (1994); House No. 19 (1985); House No. 19 (1983).

[7] SAO letter, *supra* n.1, at 1.

be able to do so. The latter is, at least in part, a question of policy rather than a question of law. We do not reach that policy question here, and nothing in this letter should be understood as a policy statement.

As you know, the Attorney General has certified an initiative petition as eligible for the November 2024 ballot to which you, in your individual capacity, are a signatory.[8] The initiative proposes an amendment to G.L. c. 11, § 12 ("Section 12") that would explicitly authorize the SAO to audit the Legislature. Should the initiative become law, we may need to consider whether, and the extent to which, constitutional limitations affect how the law would apply. For now, we have confined our analysis to the issue raised by the SAO concerning the scope of your authority under current law.

Legal Analysis

We begin our analysis with the text of Section 12, well-established rules used to interpret the meaning of statutes, and judicial decisions interpreting the term "departments" in similar contexts. Then, we will address the history of the adoption and amendment of Section 12 over the years. As we will explain in detail, each of these methods of ascertaining statutory meaning indicates that the word "departments" in Section 12 is limited to Executive Branch entities.

Next, we will examine prior reports and audits, and other materials, relating to the SAO's past examinations of legislative activity. We conclude that, like the statute itself, these materials do not support the assertion that the SAO presently has authority to undertake a comprehensive audit of the Legislature over the Legislature's objection. In fact, these materials provide support for the conclusion that the SAO does not have that authority, as the SAO has acknowledged over the years in its own reports.

Finally, we note that separation of powers principles in the Constitution of the Commonwealth may limit an Executive Branch entity's ability to audit certain operations of another branch of government over the latter's objection, that the Legislature would have been aware of these limitations when drafting Section 12, and that it is unlikely that the Legislature would have ignored those limitations by granting the Auditor broad authority to audit its operations.

1. Standard Methods of Interpreting Statutory Language, and Judicial Decisions Interpreting Similar Provisions, Show That the Term "Department" in the SAO's Enabling Statute Does Not Include the Legislature.

Chapter 11 of the General Laws addresses the authorities and responsibilities of the State Auditor, along with the processes that the SAO must follow. Most pertinent to this analysis is Section 12 of Chapter 11, which delineates the SAO's authority and responsibility to conduct audits.

[8] *See* Initiative Petition 23-34 (proposing to authorize the Auditor to audit the Legislature).

Section 12 directs the State Auditor to audit the "accounts, programs, activities and functions directly related to the aforementioned accounts of all *departments, offices, commissions, institutions and activities* of the commonwealth, including those of districts and authorities created by the general court and including those of the income tax division of the department of revenue." G.L. c. 11, § 12 (emphasis added). Each state entity that the Auditor can audit must be audited "at least once every 3 years." *Id.*[9]

The key question is whether the Legislature is a "department" as that term is used in Section 12.[10] Applying well-established rules for interpreting statutes, we conclude that it is not. We find further support for this conclusion from several decisions of the Supreme Judicial Court that considered the word "department" in similar contexts.

First, it is "a basic tenet of statutory construction that a statute must be construed 'so that effect is given to all its provisions, so that no part will be inoperative or superfluous.'" *Bankers Life and Cas. Co. v. Commissioner of Ins.*, 427 Mass. 136, 140 (1998) (*quoting* 2A B. Singer, Sutherland Statutory Construction § 46.06 (5th ed. 1992)). Here, interpreting "department" to include the legislative, executive, and judicial branches of government would render the remaining words in the provision surplusage. Specifically, there would be no reason for the statute also to list "offices, commissions, institutions and activities of the commonwealth, including those of districts and authorities created by the general court and including those of the income tax division of the department of revenue," since many of those entities would already be encompassed by the term "department."

The Supreme Judicial Court addressed a virtually identical issue arising out of the phrase "departments, boards, commissions or institutions" as appearing in Article 48 of the Articles of Amendment to the Massachusetts Constitution. *See Yont v. Secretary of the Commonwealth*, 275 Mass. 365, 367-368 (1931). In *Yont*, the Court considered and rejected a suggestion that the term "department" encompassed "the three grand departments of government" described in Article 30. *Id.* It was "manifest[]," the court explained, that "department" was used "in a much more restricted sense" in Article 48,

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[9] To effectuate these audits, the State Auditor's Office "shall have access to such accounts at reasonable times and . . . may require the production of books, documents, vouchers and other records relating to any matter within the scope of an audit conducted under this section . . . except tax returns." G.L. c. 11, § 12. Should enforcement of requests for materials required for an audit prove necessary, Section 12 confers authority upon the Superior Court to order production. *Id.* Where an audit results in "adverse or critical" results, the SAO "may require a response, in writing, to such audit results." *Id.* The response "shall be filed with the appropriate secretariat, the secretary of administration and finance, the cognizant executive board in the case of an authority, and the house and senate committees on ways and means." *Id.*

[10] The SAO letter focuses mostly on the term "departments," and our analysis therefore does the same. The SAO also briefly argues that the Legislature's legislative and budgetary activities are "activities" and the Legislature's functions are "functions" as those terms appear in Section 12. SAO letter, *supra* n.1, at 3 & n.3. But as a previous AGO opinion noted, "common sense suggests that the Legislature itself is not an 'activity' of the Commonwealth. If it were, then so would be every part of the executive and judicial branches, and the more specific mention in G.L. c. 11, § 12 of 'departments, offices, commissions, [and] institutions' would . . . be rendered impermissibly superfluous." AAG Sacks Letter at 2-3. This same reasoning applies to the term "functions."

and "[t]o attribute the same meaning to the word in both articles would also render superfluous and of no signification the remaining descriptive words in the relevant clause of article 48 of the Amendments, namely: 'boards, commissions or institutions.'" *Id*. at 368. Similarly, the Court in *Westinghouse Broadcasting Co. v. Sergeant-at-Arms of the General Court*, 375 Mass. 179, 184 (1978), considered whether the word "department" as appearing in the statutory phrase "agency, executive office, department, board, commission, bureau, division or authority" included the Legislature in the public records law, G.L. c. 4, § 7, Twenty-sixth. The Court readily concluded that "the term 'department' appearing in this statutory clause has a much more restricted meaning." *Id*. (citing *Yont*, 275 Mass. at 367-68).[11]

Second, it is a fundamental rule of statutory construction that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Dermody v. Executive Office of Health & Human Servs.*, 491 Mass. 223, 230 (2023) (citation omitted). The canon of *noscitur a sociis*—"ordinarily the coupling of words denotes an intention that they should be understood in the same general sense," *Commonwealth v. Hamilton*, 459 Mass. 422, 432 (2011) (quoting 2A N.J. Singer, Sutherland Statutory Construction § 47:16 at 352-353 (7th ed. 2007))—is one means by which the Supreme Judicial Court takes statutory context into account.[12] That canon applies with particular force here. In the first sentence of Section 12, the word "departments" is coupled with the words "offices, commissions, [and] institutions." Similarly, later in the section, "departments" is coupled with "agencies, bureaus, boards, commissions, institutions, [and] authorities." Thus, all of the words with which "departments" is coupled in Section 12 refer to subsidiary governmental entities. It follows that "departments" "should be understood in the same general sense,"[13] to refer to a subsidiary governmental entity (such as the "department of revenue" specifically referenced later in the first sentence), rather than as one of the "three grand departments of government." *See Yont*, 275 Mass. at 367.

Third, contrary to the maxim that "a statute should be read as a whole to produce an internal consistency," *Telesetsky v. Wright*, 395 Mass. 868, 873 (1985) (citing 2A C. Sands, Sutherland Statutory Construction § 46.05 (4th ed. 1984)), the SAO's proposed interpretation of "department" conflicts with how Chapter 11 otherwise refers to the Legislature. Specifically, throughout Chapter 11, the Legislature is called "the general court." For example, G.L. c. 11, § 6 provides that the salaries of the officers and employees in the Auditor's Office may not "exceed the sum annually appropriated therefor by the general court." G.L. c. 11, §§ 6B and 17 require that reports be made to

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[11] We do not agree that the reasoning of the *Westinghouse* decision "was narrowly limited to the state's public records law and is not directly applicable to [Section 12], the language of which differs and is broader." *See* SAO letter, *supra* n.1, at 4 n.5. Rather, we concur with prior State Auditors, who have expressly recognized the importance of *Westinghouse* and have noted that the decision precludes under existing law any ability of the SAO to obtain records from the Legislature over its objection. *See infra* at 12.

[12] *See Richardson v. UPS Store, Inc.*, 486 Mass. 126, 130-131 (2020) ("The canon of noscitur a sociis counsels that terms must be read within the context of the statute in which they appear.").

[13] *Hamilton*, 459 Mass. at 432.

"the general court." Indeed, Section 12 itself refers to "districts and authorities created by the general court." The Legislature would not use the term "department" to subject itself to the Auditor's mandatory audit requirement where it used a different, more specific term ("general court") to refer to itself in the very same sentence and elsewhere in the chapter. "Where the Legislature used different language in different paragraphs of the same statute, it intended different meanings." *Commonwealth v. Williamson*, 462 Mass. 676, 682 (2012) (quoting *Ginther v. Commission of Ins.*, 427 Mass. 319, 324 (1998)); *accord Commonwealth v. Wynton W.*, 459 Mass. 745, 751-752 (2011) (Court presumes that Legislature intended different meanings when it used distinct terms in two statutes enacted at the same time).

It is, of course, true that certain provisions of the Massachusetts Constitution and some statutes refer to the "legislative department" or the "department of legislation." For example, Article 30 of the Declaration of Rights, which establishes the principle of separation of powers, states in part that "the legislative department shall never exercise the executive or judicial powers."[14] The Supreme Judicial Court has also occasionally referred to the "legislative department."[15] However, as explained above, multiple Supreme Judicial Court decisions have found that use of the term "department" in a statute, when read in context, refers to Executive Branch departments, not to entire branches of government. *See, e.g.*, *Westinghouse*, 375 Mass. at 184; *Yont*, 275 Mass. at 367-368; *Massachusetts Probation Ass'n v. Commissioner of Admin.*, 370 Mass. 651, 661 (1976) (noting "the similar phraseology" between statutes limited by their terms to executive branch departments and labor statute defining public employee as "any employee of the commonwealth assigned to work in any department, board, commission or other agency thereof," and concluding that labor statute was limited to executive branch employees).

As one of my predecessors, Attorney General Francis X. Bellotti, observed, these decisions have all "considered the meaning of the word 'department' as it appears in statutory or constitutional provisions listing several types of governmental entities (e.g.,

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[14] *See also* Mass. Const. pt. 2, c. 1, § 1, art. 1 (specifying that "[t]he department of legislation shall be formed by two branches, a Senate and House of Representatives"); Mass. Const. Amend. art. 87 (referring to "the executive department of the government of the commonwealth"); G.L. c. 231A, § 2 (providing that declaratory judgment procedures "shall not apply to the governor and council or the legislative and judicial departments"); G.L. c. 29, § 7L (providing that "expenses of the commonwealth shall include expenses of the executive, legislative and judicial departments"); G.L. c. 234A, § 37 (stating that "the legislative, executive, and judicial departments of the commonwealth and of the United States shall not be impeded by the provisions of this chapter from freely exercising their independent powers and duties"). It is also worth noting that the Massachusetts Constitution has no consistent reference term for the Legislature. As one legal commentator has observed, "[a]lthough no language in the Massachusetts Constitution should be considered *superfluous*, the use of one word over another is not necessarily *significant*. The state constitution runs rampant with synonyms and uses them for no discernable reason." Kenneth Bresler, *Synonyms in the Massachusetts Constitution*, 98 Mass. L. Rev. 7, 7 (Oct. 2016) (emphasis in original).

[15] *See, e.g.*, *Answer of the Justices to the Governor*, 444 Mass. 1201, 1204-1205 (2005) (Article 30 "acts as an inhibition upon the Justices giving opinions as to the duties of either the executive or legislative department except under the Constitution.").

'board,' 'commission,' 'office,' 'authority'), in a manner and order very similar to" the statute he was considering, which in turn is very similar to Section 12. 1977-78 *Op. Att'y Gen'l* No. 28, P.D. No. 12 at 141 (June 2, 1978) (interpreting small business purchasing provisions of St. 1976, c. 434) (citations omitted). Attorney General Bellotti further observed that "[i]n each case the court concluded that 'department' referred only to departments within the executive branch of government, and did not include either the legislative or judicial branches." *Id.* Noting the "similarity between the language" in the statute he was considering "and the statutes under review in the cited cases," Attorney General Bellotti concluded that the proper course was to "follow the court's decisions and conclude that 'department' in [the statute at issue] does not encompass the legislative or judicial branch." *Id.* Likewise, a 1921 opinion of Attorney General J. Weston Allen determined that "it is plain that the words 'every state officer, department, or head thereof' are confined to the executive branch of government." 1921-1922 Op. Att'y Gen'l, P.D. No. 12 at 348-349 (Dec. 20, 1921). I adopt the views of my predecessors that the word "department" in statutes such as these should in general encompass only executive branch departments.[16]

In summary, settled principles of statutory construction and judicial decisions cited above, together with prior opinions of this Office, all dictate our conclusion that "department," as it appears in Section 12, does not include the Legislature.

2. The Historical Context of Section 12's Adoption Indicates that the Term "Departments" References the Executive Branch.

The historical context of the addition of the term "departments" to Section 12 provides further support for our conclusion that the Legislature is not within the ambit of that term as it is used in Section 12.

The Legislature created the State Auditor's Office, originally known as the "Office of Auditor of Accounts," by statute in 1849. *See* St. 1849, c. 56. In 1907, the Legislature amended the Auditor's enabling statute to direct the Auditor to "at least once in each year, and oftener in his discretion, audit the accounts of all state officials, boards and institutions receiving moneys to be turned into the treasury of the Commonwealth." St. 1907, c. 139, § 1. This is the origin of the provision currently at issue: Section 12. Notably absent from this provision was the term "department."

[16] The SAO letter argues that the absence of an explicit exclusion of the Legislature from Section 12 is an indication that the Legislature intended to include itself. SAO letter, *supra* n.1, at 4-5. In support of this proposition, the SAO letter cites to a 1931 opinion written by Attorney General Warner that states, "[t]he plain meaning of section 12 . . . is that the [SAO] shall make a careful audit of all departments, offices, commissions, institutions, and activities of the Commonwealth, except such as are expressly exempted in the statute." *Id.* (citing 1930-31 *Op. Att'y Gen'l*, P.D. No. 12 at 58 (March 4, 1931)). However, because we conclude the term "department" in Section 12 does not include the Legislature, the question of whether the Legislature expressly exempted itself from a list in which it was not included does not arise. Therefore, there is no conflict between Attorney General Warner's opinion and the opinions by Attorneys General Allen and Bellotti discussed in the text.

The term "department" did not appear in this section until 1920, when the General Laws were enacted. *See* G.L. c. 11, § 12 (1921). The margin notes in the General Laws beside the 1920 version of this section cite to a 1919 act that reorganized the executive branch into "departments." *See id.* (citing St. 1919, c. 350, § 54).[17] This 1919 act implemented Article 66, an amendment to the Massachusetts Constitution adopted in 1918 that required the executive and administrative work of the Commonwealth to be organized into not more than twenty "departments."[18] Proponents of this amendment argued that this change was necessary given the large and disorganized state of the Executive Branch, with one noting that there were "over 100 boards, commissioners, and officers, all independent" with "no grouping, no correlation, no co[o]rdination, no integration."[19]

The Article 66 restructuring prompted "sweeping changes" to the Commonwealth's laws to reflect the new department system.[20] This included the addition of the word "department" to clauses that had previously only referred to boards or commissions. *See, e.g.*, G.L. c. 5, § 11 (1921),[21] G.L. c. 111, § 160 (1921),[22] G.L. c. 121, § 19 (1921).[23] One such clause was contained in the Auditor's enabling statute, which had previously stated that the Auditor shall "audit the accounts of all state officials, boards and institutions."

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[17] Pursuant to that act, "[a]ll executive and administrative offices, boards, commissions and other governmental organizations and agencies, except those now or by virtue of this act serving directly under the governor or the governor and council" were placed into "departments." *See* St. 1919, c. 350, § 1. All rights, powers, duties, and obligations of the existing offices, boards, and commissions were transferred to the new departments. *See generally* St. 1919, c. 350.

[18] "Article 66 was superseded in 1966 by art. 87, which provides for a scheme of greater flexibility." *Ward v. Coletti*, 383 Mass. 99, 107 n. 11 (1981).

[19] Debates in the Massachusetts Constitutional Convention 1917-1918 Vol. III, c. LIII at 1024.

[20] *See* Senate Doc. No. 27 at 4-5 (1920) ("The amendment requiring no more than twenty state departments has resulted in the passage of chapter 350 of the General Acts of 1919 . . .. [This law] has made necessary sweeping changes in 50 other chapters . . . and lesser changes in 35 chapters, making in all 102 chapters which have had to be drafted, redrafted, or changed since July 23, 1919, the date of passage of said chapter 350."); *see also* Introduction to the General Laws Vol. I at iii (1921) (noting that much of the collection "was changed by . . . [Article 66], providing for consolidation of all State boards and offices, except those under the Governor and Council, into not more than twenty departments").

[21] This provision directed clerks to "annually prepare a manual of the general court" and the state secretary to distribute copies of the manual to each of the "officers of the several state departments, boards and commissions." G.L. c. 5, § 11 (1921). The preceding version of this section directed secretary distribute the manuals to "each of the officers of the several state boards and commissions." R.L. c. 9, § 10 (1902).

[22] This provision authorized the Department of Public Health to "delegate the granting and withholding of any permit required by such rules or regulations to state departments, boards and commissions." G.L. c. 111, § 160 (1921). The preceding version authorized the Department of Public Health (then "the State Board of Health") to "delegate the granting and withholding of any permit required by such rules or regulations to state boards and commissions." R.L. c. 75, § 113 (as amended by St. 1907, c. 467, § 1).

[23] This provision required the Department of Public Welfare to "give notice . . . to the institutions, departments, boards, officers, or persons . . .." G.L. c. 121, § 19 (1921). The preceding version required the Department of Public Welfare (then "The State Board of Charity") to "give notice . . . to the institutions, boards, officers, or persons . . .." R.L. c. 86, § 53 (1902).

R.L. c. 6, § 21 (as amended by St. 1907, c. 139, § 1). After the changes necessitated by Article 66, that statute now read: "[the Auditor] shall . . . audit the accounts of all state *departments*, officers, commissions and institutions receiving money to be paid to the commonwealth." G.L. c. 11, § 12 (1921) (emphasis added). The insertion of the term "department" is thus best understood in context of a larger restructuring of the Executive Branch into "departments." This history thus indicates that the Legislature added the term "department" to Section 12 not to expand its scope to include the Legislature, but rather to update its terms to match the recently-enacted restructuring of the executive branch of the Commonwealth's government—exactly as it did with numerous other statutes.

The Supreme Judicial Court discussed this historical context in *Yont*, 275 Mass. at 367. There, as noted above, the Court addressed the meaning of the term "department" as it appeared in Article 48 of the amendments to the Massachusetts Constitution. *Id*. The Court looked to the history of Article 48 and noted that it was enacted at the same time as Article 66. *Id*. Considering these two amendments together, the Court concluded that "departments" in Articles 48 and 66 had the same meaning: Executive Branch departments. *Id*.

3. The SAO's Past Statements, Reports, and Audits Do Not Indicate that Current Law Authorizes a Legislative Audit Over the Legislature's Objection.

The SAO letter cites to 113 reports referencing the Legislature as precedent for the type of audit now proposed. We have reviewed each of those reports—as well as two additional reports identified by our office and four additional reports identified recently by the SAO—and we do not agree. We conclude, instead, that the reports do not provide support for the authority the SAO now seeks, for two principal reasons.

- First, 74 of these reports predate 1923, at which time the Auditor's enabling statute was amended to transfer the bulk of its financial reporting responsibilities to the newly created Office of the Comptroller. *See* St. 1922, c. 545, § 5. These reports are not "audits" as that term is currently understood, but instead were summaries of the Commonwealth's finances. As such, they have no bearing on whether the Auditor's enabling statute currently gives the Auditor the authority to audit the Legislature.

- Second, while the SAO indeed audited specific entities under the control of the Legislature after 1923, these audits were irregular, limited in scope, and did not examine core legislative functions.

We turn first to the pre-1923 reports. When the SAO was established in 1849, the Auditor's role was similar to what would later become the Comptroller's role: examining the financial records of the Commonwealth to ensure accuracy and reliability. *See* St. 1849, c. 56, § 4. Specifically, the Auditor's enabling statute required the Auditor, every January, to "carefully examine all the books and accounts of the treasurer," and submit an annual report to the Legislature detailing "a complete statement of the public

property of the Commonwealth," including its debts, obligations, revenue, expenses, and balance left in the treasury. *Id*. These reports were not limited to the "departments, offices, commissions, institutions and activities of the commonwealth" (like the Auditor's current authority). Instead, the reports covered all public property and financial accounts "of the Commonwealth," including property held and accounts spent by the Legislature. *See id*. In 1922, however, the Office of the Comptroller was established,[24] and the Auditor's annual financial reporting duties were transferred to the Comptroller.[25] *See* St. 1922, c. 545, § 5 (specifying that the Comptroller has the authority "to perform all the accounting duties hereinbefore transferred from the [SAO]").

As noted above, we have reviewed each of the pre-1923 reports. From that review, it is clear that those reports were made pursuant to the Auditor's annual financial accounting authority that ended in 1922. We therefore see no connection between these reports and the question of whether the Auditor currently has the authority to conduct a performance audit of the Legislature over the Legislature's objection. First, many of the reports themselves explicitly state that they are annual financial reports made pursuant to the Auditor's statutory authority under St. 1849, c. 56, § 4 and its subsequent iterations.[26] The inaugural report, for instance, published less than one year after the creation of the SAO, explains that the report is intended to fulfill the Auditor's yearly financial reporting duty as it is outlined by St. 1849, c. 56, § 4.[27] Many of the subsequent reports also cite to or quote the statute governing the Auditor's financial reporting authority. These reports contain a broad overview of all of the financial accounts, expenditures, and debts of state entities, which included the Legislature. Second, the reports are limited to financial information, and only occasionally included asides to the Legislature about how the Commonwealth could reduce its expenditures. They do not contain the kind of in-depth review of legislative functions that the SAO currently

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[24] St. 1922, c. 545 established the Commission on Administration and Finance, which included the "comptroller's bureau." *See* St. 1922, c. 545, §§ 3 (organizing the commission into three bureaus, including the "comptroller's bureau"), 5 (specifying the Comptroller's responsibilities). For consistency, we will refer to the "comptroller's bureau" as the "Comptroller" or "Office of the Comptroller."

[25] Specifically, the Comptroller was required to prepare and file annual statements of state accounts. *See* St. 1922, c. 545, § 5 (requiring the Comptroller to "prepare and file annually . . . statements of state accounts setting forth . . . estimates of all claims and other expenditures authorized by law, including interest, sinking fund and serial bond requirements, the appropriations for the preceding fiscal year and expenditures for all state purposes for the preceding three fiscal years"). The Auditor's authority to audit enumerated state entities was left in place. *See* St. 1922, c. 545, § 1 ("[a]ll the rights, powers, duties, and obligations . . . of the state Auditor except such as relate to the auditing of the accounts of all departments, offices and commissions of the commonwealth and to the keeping of reports of such audits . . . are hereby transferred to . . . the commission on administration and finance established by this act").

[26] The SAO's enabling statute and its mandate to issue annual financial reports were set forth in different locations over time. *See e.g*., St. 1849, c. 56, §§ 4 (specifying Auditor's financial reporting responsibilities); St. 1867, c. 178, §§ 6-12 (same); Public Statutes, c. 16, §§ 9-13 (1882); Revised Laws, c. 6, §§ 22-25 (1902) (same); General Laws, c. 11, §§12-15 (1921).

[27] *See* State Auditor David Wilder, Jr., *Report of the Auditor of Accounts of the Commonwealth of Massachusetts for the Year Ending December 31, 1849* at 3 (Jan. 10, 1850).

proposes. Third, the reports were made on a regular, annual basis only until the Auditor's financial reporting authority was transferred to the Comptroller in 1922. This change is acknowledged in the Auditor's final pre-1923 report, which states, "[t]his will be the last report of the Auditor to contain the financial transactions of the Commonwealth, as under the provisions of [St. 1922, c. 545] my report will, in the future, relate only to audits."[28] Because the pre-1923 reports were made pursuant to the Auditor's annual financial reporting authority–a responsibility the Auditor has not had for more than 100 years—they do not bear on the question now before us.

The post-1923 audits cited in the SAO letter likewise do not support the SAO's claim of authority to conduct a broad audit of the Legislature. These audits fall roughly into three groups.

First, from the nearly fifty-year period between 1923 and 1971, we know of only seven relevant audits, namely: five audits of the Sergeant-at-Arms, one audit of the Special Commission on the Structure of State Government, and one audit of the Legislative Research Council and Bureau.[29] The audits from this period that were made available for our review were not of the Legislature as a whole, but instead focused narrowly on an entities under the purview of the Legislature and were primarily focused on the finances or contracting practices of those entities.[30]

Second, between 1972 and 1990, the SAO conducted regular audits of three specific entities within the legislative branch: the Sergeant-at-Arms, the Legislative Research Council and Legislative Research Bureau, and the Legislative Post Audit and Oversight Bureau (and one of its successors, the Office of the Legislative Post Audit and Oversight Bureau of the House of Representatives). To our knowledge, the SAO also conducted one audit of the Joint Commission on Federal Base Conversion and one audit of the Revolutionary War Bicentennial Commission.[31] Again, the audits from this period that were made available for our review, many of which were entitled "Report on the Examination of the Accounts of [the subject entity]," were of entities under the

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[28] *See* State Auditor Alonzo B. Cook, *Report of the Auditor for the Fiscal Year Ending November 20, 1922* at 2 (Jan. 10, 1923). Auditor Cook's statement that his reports would "in the future, relate only to audits," suggests that Auditor Cook may not have considered the yearly financial reports "audits" at all.

[29] *See* State Auditor Russell A. Wood, *Report on the Examination of the Accounts of the Sergeant-at-Arms from December 15, 1937 to April 27, 1939* (July 5, 1939); State Auditor Thomas J. Buckley, *Department of the Auditor Annual Report for the Fiscal Year Ending June 30, 1946* at 135 (Mar. 19, 1947); State Auditor Thomas J. Buckley, *Report on the Examination of the Accounts of the Sergeant-at-Arms from April 11, 1951 to March 14, 1952* (May 27, 1952); State Auditor Thomas J. Buckley, *Department of the Auditor Annual Report for the Fiscal Year Ending June 30, 1953* at 4 (Dec. 14, 1953); State Auditor Thomas J. Buckley, *Department of the Auditor Annual Report for the Fiscal Year Ending June 30, 1956* at 80, 85 (Oct. 8, 1956).

[30] These audits included occasional suggestions about how the subject entities could reduce their expenditures. The audits also noted the statutory authority for the entities and how the offices were organized.

[31] State Auditor Thaddeus Buczko, *Commonwealth of Massachusetts Department of the State Auditor Annual Report Fiscal Year Ended June 30, 1977* at 19 (issue date unknown).

Legislature's purview–not the whole of the Legislature itself–and primarily examined financial accounts of the entities (e.g., expenditures, appropriations, miscellaneous income).[32] Furthermore, as we understand from the SAO and the Legislature, it is not clear whether the Legislature consented to these audits.

Of particular relevance to the question now before us, we do know that after the Supreme Judicial Court's *Westinghouse* decision in 1978, the Senate stopped cooperating with some of the audits. In an audit of the Sergeant-at-Arms from 1987, for example, Auditor A. Joseph DeNucci explained that his office was "not permitted to examine time or attendance records for Senate Court Officers, Senate Pages and Legislative Document Room employees."[33] Auditor DeNucci further noted that, pursuant to *Westinghouse*, "the records generated by the Legislature could be made available to outsiders *only at the discretion* of the House and Senate leadership."[34] A virtually identical statement was included in an audit of the Sergeant-at-Arms from 1990.[35] Statements that expressly recognized legislative discretion to comply (or not) with SAO requests also appear in audits of the Sergeant-at-Arms from 1982 and 1985—neither of which are cited in the SAO letter.[36] For example, the 1982 report states that "[w]e were not permitted to examine time or attendance records for the senate court officers, senate pages and employees working in the Legislative Document Room because of the constitutional separation of the legislative and executive branch[e]s of government in the Commonwealth of Massachusetts."[37] Further reflecting the Senate's position, when the Legislative Post Audit and Oversight Bureau was abolished in 1981 and replaced with bureaus in the House and Senate, the Auditor only audited the Office

[32] Like the previous reports, these audits also included occasional suggestions about how the entities could reduce their expenditures. The audits also noted the statutory authority for the entities and how the entities were organized.

[33] State Auditor A. Joseph DeNucci, *State Auditor's Report on the Activities of the Sergeant-at-Arms July 1, 1984 to June 30, 1986* at 1 (June 9, 1987).

[34] *Id.* (emphasis added).

[35] State Auditor A. Joseph DeNucci, *State Auditor's Report on the Activities of the Sergeant-at-Arms July 1, 1988 to June 30, 1989* at 2 (Sep. 17, 1990).

[36] *See* State Auditor John J. Finnegan, *State Auditor's Report on the Activities of the Sergeant-at-Arms July 1, 1980 to June 30, 1981* at 1 (June 8, 1982) ("1982 report"); State Auditor John J. Finnegan, *State Auditor's Report on the Activities of the Sergeant-at-Arms July 1, 1982 to June 30, 1984* at 1 (June 3, 1985) ("The Massachusetts Supreme Court has ruled that the records generated by the legislature could be made available to outsiders only at the discretion of the House and Senate Leadership. The leadership granted us permission to examine time or attendance records for House Court officers and House pages for the audit period. However, we were not permitted to examine time or attendance records for Senate Court officers, Senate pages, and Legislative Document Room employees.").

[37] 1982 report, *supra* n.36, at 1.

of the Legislative Post Audit and Oversight Bureau of the House of Representatives. After 1990, the State Auditor's Office stopped auditing these entities completely.[38]

The third group of legislative audits consists of those that have taken place in the 33 years from 1990 to the present. There are only three such audits: a 1992 report covering overpayments to a court officer,[39] a 2002 report covering information technology (IT)-related controls at the Sergeant-at-Arms,[40] and a 2006 report covering IT-related controls at the Legislative Information Services.[41] These limited audits are not comparable to the broad audit of the Legislature, over its objection, that the SAO now proposes. The 1992 report addressing overpayments to a court officer states that it was made at the request of the Attorney General and with the express cooperation of the House of Representatives.[42] It focused solely on overpayments made to a single court officer. While neither the 2002 nor the 2006 IT report explains how it came to occur, both are narrowly focused on the IT-related controls of specific Legislative entities, and do not address core legislative powers, the exercise of which the SAO now seeks to audit.

In sum, despite the existence of numerous SAO reports on certain discrete activities or entities within the legislative branch, we have found no historical precedent at all for the type of audit the SAO seeks to conduct now: a sweeping audit of the Legislature over its objection, which would include review of many of its core legislative functions, namely, active and pending legislation, the process for appointing committees, the adoption and suspension of House and Senate rules, and the policies and procedures of the legislative bodies.

To the contrary, historical precedent indicates that the type of audit now proposed has not previously been performed, and prior State Auditors did not believe the SAO to have the power now claimed.[43] Where a power asserted by part of one branch of the

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[38] It is notable that several of these audits were completed during the tenure of Auditor DeNucci, the same Auditor who in 1994, requested an opinion from the Attorney General's Office as to whether the State Auditor's Office could audit the Legislature without its consent.

[39] *See* State Auditor A. Joseph DeNucci, *State Auditor's Report Covering Overpayments to a Court Officer for the Period January 18, 1984 to May 11, 1989* (January 15, 1992) ("1992 report").

[40] *See* State Auditor A. Joseph DeNucci, *Review of Selected Information Technology (IT)-related controls at the Office of the Sergeant-at-Arms* (February 28, 2002).

[41] *See* State Auditor A. Joseph DeNucci, *Office of the State Auditor's Report on Information Technology-Related Controls for Virus Protection at the Legislative Information Services October 9, 2003 to December 8, 2005* (May 11, 2006).

[42] *See* 1992 report, *supra* n.39, at 1, 2 (noting that this review was conducted "[a]t the request of the Office of the Attorney General" and "express[ing] [the Auditor's] appreciation to [the House of Representatives] and the Sergeant-at-Arms for [their] cooperation and assistance").

[43] As a 1994 letter of the Attorney General's Office emphasized, where a part of government is listed in Section 12, the SAO's authority to audit is also a mandate that it must regularly audit that part of government (i.e., every three years), such that the absence of regular audits of the Legislature (rather than a small entity within its control) is particularly instructive. *See* AAG Sacks Letter at 3.

government against another branch has not been exercised or even acknowledged before, that "longstanding 'practice of the government' can inform [our] determination of 'what the law is.'" *NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) (citations and quotations omitted); *accord Simon v. State Examiners of Electricians*, 395 Mass. 238, 246 (1985) ("Authority actually granted by [the Legislature] of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred.") (quoting *Federal Trade Comm'n v. Bunte Bros., Inc.*, 312 U.S. 349, 352 (1941)). On this point, we note that the previous State Auditor disclaimed the authority to audit the Legislature over its objection[44]; and prior State Auditors have filed legislation that would have granted them that authority (thereby at least suggesting that Section 12 did not already do so).[45] In addition, the power the SAO now claims also would allow it to compel the Legislature to produce records by judicial enforcement. *See* G.L. c. 11, § 12. But we are not aware of any such lawsuit ever having been filed.

Consequently, the historical record is consistent with the legal precedent set forth above in showing that Section 12 does not confer upon the SAO the authority to audit the Legislature without its consent.

4. Because of the Constitutional Issues Implicated by Auditing Another Branch of Government, the Legislature Is Unlikely to Have Granted Unconditional Authority to the Auditor to Conduct Legislative Audits Without Explicitly Saying So.

As former Auditors Bump and DeNucci both observed, the possibility of auditing the Legislature over its objection raises significant separation of powers concerns.[46] Those concerns stem in part from the fact that, to accomplish such an audit, the SAO would require the authority to demand that the Legislature, over its objection, produce all

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[44] In 2022, former State Auditor Suzanne Bump issued a statement on behalf of the SAO explaining that the SAO "does not have the authority, express or implied, to audit the Legislature." *See* Bruce Mohl, *Bump Says Auditor Cannot Audit Legislature*, Commonwealth Magazine (April 7, 2022). https://commonwealthmagazine.org/politics/bump-says-auditor-cannot-audit-legislature/. Auditor Bump went on to state that "the Legislature is not an agency or department but rather another branch of government and, thus, subject to protections under the separation of powers doctrine." *Id.*

[45] *See, e.g.*, House No. 6 (1999); House No. 7 (1995); House No. 10 (1994); House No. 19 (1985); House No. 19 (1983). While the Supreme Judicial Court has expressed caution in drawing conclusions from proposed legislation that was not adopted, it has found repeatedly "proposed but unadopted legislation" to be "illustrative of the meaning of" existing language. *Furtado v. Town of Plymouth*, 451 Mass. 529, 537-38 & nn. 14-15 (2008); *Simon v. State Examiners of Electricians*, 395 Mass. 238, 246-47 (1985) (similar).

[46] *See* Mohl, *supra* n.44 (quoting former Auditor Bump's recognition that the Legislature is "subject to protections under the separation of powers doctrine"); 1982 report, *supra* n.36, at 1 (noting the Auditor's inability to access certain legislative documents due to the "constitutional separation of the legislative and executive branch[e]s of government").

"books, documents, vouchers and other records relating to any matter within the scope of an audit," against the backdrop of potential Superior Court litigation to enforce those demands. G.L. c. 11, § 12. The SAO claims this auditing power extends equally to the Judiciary, which also would have to subject all of its "accounts, programs, activities and functions" to regular audit, with requisite and enforceable document demands, because the Judiciary, too, is a "department."[47] The enforceability of a document production order from the Superior Court against the Legislature, or against the Judiciary as a whole, would itself present a serious constitutional question. *See e.g.*, *Abuzahra v. City of Cambridge*, 101 Mass. App. Ct. 267, 270 (2022) ("If the documents at issue here were communications among members of the Legislature about proposed legislation, the order to disclose them would raise a significant question under the separation of powers provisions of art. 30 of the Massachusetts Declaration of Rights.") (citing *K.J. v. Superintendent of Bridgewater State Hosp.*, 488 Mass. 362, 368 (2021)).

For reasons we explain, in light of these constitutional concerns, the authority now asserted by the SAO is not authority the Legislature would have afforded to the SAO lightly or by implication. "As the United States Supreme Court has observed regarding Congress, the Legislature 'does not, one might say, hide elephants in mouseholes.'" *Patel v. 7-Eleven*, 489 Mass. 356, 364 (2022) (quoting *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001)).

We do not seek in this letter to define precisely the extent to which the state constitution may limit the ability of the Auditor to conduct even statutorily-authorized audits into core legislative (or judicial) functions, although that issue may arise if the voters approve the ballot initiative proposed for the November 2024 ballot. Nevertheless, we think it clear that an assertion of authority to audit all "programs, activities and functions" of the Legislature (including the authority to demand and require the production of information), absent the Legislature's consent, raises separation of powers issues.[48] When the separation of powers is at issue, the "essence of what cannot be tolerated" is interference by one branch with the core functions of another. *Chief Admin. Justice of the Trial Court v. Labor Relations Comm'n*, 404 Mass. 53, 56 (1989) (citation omitted). The Constitution recognizes the authority of the House of Representatives and the Senate to determine their own rules of proceeding, *see* Mass. Const. p. 2, c. 1, § 2, arts. 7 (Senate), 10 (House); and Article 21 protects the "freedom of deliberation, speech and debate" in the Legislature, such that it may not be "the foundation of any accusation or prosecution, action or complaint, in any court or place whatsoever."[49] Mass. Const. p. 2, c. 1, § 2, art. 21. Subjecting the Legislature to

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[47] We note that, although the Judiciary has complied with SAO audit requests, it has done so voluntarily, and entities within the Judiciary previously have raised constitutional concerns regarding the SAO's assertions of authority to audit all "accounts, programs, activities and functions" of the Judiciary.

[48] "If the coordinated activity of branches of government is voluntary and the activity of one branch does not intrude into the internal function of another, the strictures of art. 30 are not violated." *Commonwealth v. Tate*, 34 Mass. App. Ct. 446, 448 (1993).

[49] The latter provision is intended "to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal." *Coffin v. Coffin*, 4

compelled discovery into its exercise of core legislative authority very well may impermissibly interfere with or encroach upon powers uniquely granted to the Legislature (and protected from such Executive Branch encroachment or interference by Articles 21 and 30).

As we consider the meaning of Section 12, we must presume that the Legislature took into consideration existing constitutional principles. *See, e.g., School Comm. of Greenfield v. Greenfield Educ. Ass'n*, 385 Mass. 70, 80 (1982). That presumption is particularly forceful where the constitutional principles bear on the Legislature's own operations and authority. Here, it is implausible that the Legislature intended, merely by including the term "departments" within a list of other subsidiary governmental entities, to make itself and all of its programs, activities, and functions subject to the Auditor's mandatory audit authority without any provision limiting the scope of such audits or shielding its core legislative activity from potentially unconstitutional interference. That the Legislature did not include any such provisions or protections further supports the statutory analysis above, *i.e.*, that the term "department" in Section 12 was not intended to encompass the Legislature.[50] At the very least, given all of these considerations, if the Legislature had intended to include itself and the Judiciary within the term "departments," it would have done so explicitly—as it has done in a variety of other statutes. *See, e.g.*, G.L. c. 7, § 3 (referring to "the executive department of the government of the commonwealth"; G.L. c. 29, § 7L (referring to "the executive, legislative and judicial departments"); G.L. c. 29, § 23 (referring to agencies "within the executive or legislative department"); G.L. c. 234A, § 37 (referring to "[t]he legislative, executive, and judicial departments of the commonwealth").

In sum, our analysis does not rely on constitutional separation of powers principles, but cognizance of those principles does provide context that aids our interpretation of Section 12. An unqualified auditing power sufficient to audit the Legislature over its objection would be difficult to reconcile with the powers vested exclusively in the Legislature by various parts of Chapter 1 of Part II of the Massachusetts Constitution, and protected from encroachment by Articles 21 and 30 of the Massachusetts Declaration of Rights.[51] We do not believe that the Legislature would have chosen to

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Mass. 1, 27 (1808). The protections of Article 21 against civil inquiry into the legislative process generally reflect the common law at the time the Massachusetts constitution was adopted. *See Bogan v. Scott-Harris*, 523 U.S. 44, 48-50 (1998).

[50] Similarly, it is most unlikely that the Legislature would have attempted to subject the Judiciary to audits of all of its "programs, activities and functions" without addressing the host of constitutional issues posed in that context, as well. *See, e.g., In re Enforcement of Subpoena*, 463 Mass. 162, 170 (2012) ("The judiciary's independence from the other branches of government and from outside influences and extraneous concerns has been one of the cornerstones of our constitutional democracy, intended to ensure that judges will be free to decide cases on the law and the facts as their best judgment dictates, without fear or favor.").

[51] We understand the consideration of separation of powers principles may be vexing, frustrating, or insufficiently responsive to the politics of the moment. But "[w]ith all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted constraints spelled out in the constitution."

ignore these separation of powers issues entirely. Instead, the Legislature simply did not include itself among the entities subject to the SAO's auditing authority.

Conclusion

The SAO is a creation of the Legislature and is vested with the authority granted to it by the Legislature. For the reasons set forth in this letter, that authority does not include the power to audit the Legislature itself over the Legislature's objection. This conclusion is supported by the statutory text, its legislative history, judicial interpretation of similar statutes, and the historical record. We provide this conclusion in carrying out the role of the Attorney General's Office to establish a uniform and consistent legal position for the Commonwealth. *See Secretary of Admin. & Fin.*, 367 Mass. at 163. Please let us know if you or members of the SAO would like to discuss.

Very truly yours,

Andrea Joy Campbell
Attorney General

cc: Michael Leung-Tat, Deputy Auditor & General Counsel
Pat Moore, First Assistant Attorney General
James C. Kennedy, Chief Legal Counsel to the Massachusetts House of Representatives
James E. DiTulio, Counsel to the Massachusetts Senate

K.J. v. Superintendent of Bridgewater State Hosp., 488 Mass. 362, 367 n.10 (2021) (quoting *Immigration & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983)).