United States General Accounting Office

GAO

Office of the General Counsel

January 2004

Principles of Federal Appropriations Law

Third Edition

Volume I

This volume supersedes the Volume I, Second Edition of the Principles of Federal Appropriations Law, 1991.

On August 6, 2010, the web versions of the Third Edition of the Principles of Federal Appropriation Law, Volumes I, II and III, were reposted to include updated active electronic links to GAO decisions. Additionally, the Third Edition's web based Index/Table of Authorities (Index/TOA) was replaced by an Index/TOA that incorporated information from Volume I, II and III. These four documents can be used independently or interactively. To use the documents interactively, click on http://www.gao.gov/special.pubs/redbook1.html and you will be directed to brief instructions regarding interactive use.

The Security of this file is set to prevent a situation where linked references are appended to the PDF. If this change prevents an Acrobat function you need (e.g., to extract pages), use the the password “redbook” to revise the document security and enable the additional functions.

G A O

Accountability ⋆ Integrity ⋆ Reliability

GAO-04-261SP

Abbreviations

APA	Administrative Procedure Act
BLM	Bureau of Land Management
CDA	Contract Disputes Act of 1978
CCC	Commodity Credit Corporation
C.F.R.	Code of Federal Regulations
EAJA	Equal Access to Justice Act
EEOC	Equal Employment Opportunity Commission
FAR	Federal Acquisition Regulation
FY	Fiscal Year
GAO	Government Accountability Office
GSA	General Services Administration
HUD	Department of Housing and Urban Development
IRS	Internal Revenue Service
NRC	Nuclear Regulatory Commission
OMB	Office of Management and Budget
SBA	Small Business Administration
TFM	Treasury Financial Manual
U.S.C.	United States Code
URA	Uniform Relocation Assistance and Real Property Acquisition Policies Act

This is a work of the U.S. government and is not subject to copyright protection in the United States. It may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.

Abbreviations

APA	Administrative Procedure Act
BLM	Bureau of Land Management
CDA	Contract Disputes Act of 1978
CCC	Commodity Credit Corporation
C.F.R.	Code of Federal Regulations
EAJA	Equal Access to Justice Act
EEOC	Equal Employment Opportunity Commission
FAR	Federal Acquisition Regulation
FY	Fiscal Year
GAO	Government Accountability Office
GSA	General Services Administration
HUD	Department of Housing and Urban Development
IRS	Internal Revenue Service
NRC	Nuclear Regulatory Commission
OMB	Office of Management and Budget
SBA	Small Business Administration
TFM	Treasury Financial Manual
U.S.C.	United States Code
URA	Uniform Relocation Assistance and Real Property Acquisition Policies Act

This is a work of the U.S. government and is not subject to copyright protection in the United States. It may be reproduced and distributed in its entirety without further permission from GAO. However, because this work may contain copyrighted images or other material, permission from the copyright holder may be necessary if you wish to reproduce this material separately.

Foreword

We are pleased to present the third edition of Volume I of *Principles of Federal Appropriations Law*, commonly known as the "Red Book." Our objective in this publication is to present a basic reference work covering those areas of law in which the Comptroller General renders decisions. This volume and all other volumes of *Principles* are available on GAO's Web site (www.gao.gov) under "GAO Legal Products."

Our approach in *Principles* is to lay a foundation with text discussion, using specific legal authorities to illustrate the principles discussed, their application, and exceptions. These authorities include GAO decisions and opinions, judicial decisions, statutory provisions, and other relevant sources. We would encourage users to start with at least a brief review of Chapter 1, which provides a general framework and context for all that follows. Chapter 1 includes a note regarding citations to GAO case law and other relevant GAO material and an explanation of those other materials.

We have tried to be simultaneously basic and detailed—basic so that the publication will be useful as a "teaching manual" and guide for the novice or occasional user (lawyer and nonlawyer alike) and detailed so that it will assist those who require a more in-depth understanding. The purpose of *Principles* is to describe existing authorities; it should not be regarded as an independent source of legal authority. The material in this publication is, of course, subject to changes in statute or federal and Comptroller General case law. Also, it is manifestly impossible to cover in this publication every aspect and nuance of federal appropriations law. We have not attempted to include all relevant decisions, and we admit (albeit grudgingly) that errors and omissions probably are inevitable. *Principles* should therefore be used as a general guide and starting point, not as a substitute for original legal research.

It is also important to emphasize that we have focused our attention on issues and principles of governmentwide application. In various instances, agency-specific legislation may provide authority or restrictions somewhat different from the general rule. While we have noted many of these instances for purposes of illustration, a comprehensive cataloguing of such legislation is beyond the scope of this publication. Thus, failure to note agency-specific exceptions in a given context does not mean that they do not exist.

As with the second edition of *Principles*, we are publishing the third edition in a loose-leaf format. However, it will also be available electronically at www.gao.gov. We plan four volumes with annual updates.

Annual updates will only be published electronically. Users should retain copies of their five volumes of the second edition until each volume is revised. We will not update Volume III of the second edition, which was last revised in November 1994. It deals with functions that were transferred to the executive branch by the General Accounting Office Act of 1996 (Public Law 104-316), including claims against the United States, debt collection, and payment of judgments against the United States. Future editions and updates of *Principles* will not include these subjects.

Volume V, published in April 2002, is a comprehensive index and table of authorities covering the entire second edition of *Principles*. It will continue to apply to the second edition volumes until they are revised. As each volume of the third edition is issued, it will contain its own index. Once the third edition is complete, we will publish a new comprehensive index and table of authorities.

The response to *Principles* has been both gratifying and encouraging since the first edition was published in 1982. We express our appreciation to the many persons in all branches of the federal government, as well as nonfederal readers, who have offered comments and suggestions. Our goal now, as it was in 1982, is to present a document that will serve as a helpful reference for a wide range of users. To that end, we again invite comments and suggestions for improvement. We thank our readers for their support and hope that this publication continues to serve their needs.

Anthony Gamboa
General Counsel

January 2004

Detailed Table of Contents
Volume I
Chapters 1–5

Chapter 1
Introduction

A. Nature of Appropriations Law 1-2
B. The Congressional "Power of the Purse" 1-3
C. Historical Perspective 1-14
1. Evolution of the Budget and Appropriations Process 1-14
2. GAO's Role in the Process 1-21
D. "Life Cycle" of an Appropriation 1-24
1. Executive Budget Formulation and Transmittal 1-25
2. Congressional Action 1-26
a. Summary of Congressional Process 1-26
b. Points of Order 1-29
3. Budget Execution and Control 1-31
a. In General 1-31
b. Impoundment 1-32
4. Audit and Review 1-35
a. Basic Responsibilities 1-35
b. GAO Recommendations and Matters for Consideration 1-36
5. Account Closing 1-37
E. The Role of the Accounting Officers: Legal Decisions . . 1-37
1. A Capsule History 1-37
a. Accounting Officers Prior to 1894 1-37
b. 1894–1921: Comptroller of the Treasury 1-38
c. 1921 to the Present Time 1-39
2. Decisions of the Comptroller General 1-39
a. General Information 1-39
b. Matters Not Considered 1-42
c. Research Aids 1-45
d. Note on Citations 1-45
3. Other Relevant Authorities 1-46
a. GAO Materials 1-46
b. Non-GAO Materials 1-48
c. Note on Title 31 Recodification 1-49

Chapter 2
The Legal Framework

A. Appropriations and Related Terminology 2-3
1. Introduction 2-3
2. Concept and Types of Budget Authority 2-3
a. Appropriations 2-4
b. Contract Authority 2-6
c. Borrowing Authority 2-7
d. Monetary Credits 2-8
e. Offsetting Receipts 2-9

f. Loan and Loan Guarantee Authority 2-10
3. Some Related Concepts 2-12
a. Spending Authority 2-12
b. Entitlement Authority 2-13
4. Types of Appropriations 2-13
a. Classification Based on Duration 2-13
b. Classification Based on Presence or Absence of Monetary Limit 2-14
c. Classification Based on Permanency 2-14
d. Classification Based on Availability for New Obligations . . . 2-15
e. Reappropriation 2-15
B. Some Basic Concepts 2-15
1. What Constitutes an Appropriation 2-15
2. Specific *versus* General Appropriations 2-21
a. General Rule 2-21
b. Two Appropriations Available for Same Purpose 2-23
3. Transfer and Reprogramming 2-24
a. Transfer 2-24
b. Reprogramming 2-29
4. General Provisions: When Construed as Permanent Legislation 2-33
C. Relationship of Appropriations to Other Types of Legislation 2-40
1. Distinction between Authorization and Appropriation 2-40
2. Specific Problem Areas and the Resolution of Conflicts 2-42
a. Introduction 2-42
b. Variations in Amount 2-46
(1) Appropriation exceeds authorization 2-46
(2) Appropriation less than authorization 2-47
(3) Earmarks in authorization act 2-50
c. Variations in Purpose 2-51
d. Period of Availability 2-52
e. Authorization Enacted After Appropriation 2-56
f. Two Statutes Enacted on Same Day 2-59
g. Ratification by Appropriation 2-61
h. Repeal by Implication 2-66
i. Lack of Authorization 2-69
D. Statutory Interpretation: Determining Congressional Intent 2-71
1. The Goal of Statutory Construction 2-72
2. The “Plain Meaning” Rule 2-74
a. In General 2-74
b. The Plain Meaning Rule *versus* Legislative History 2-76

3. The Limits of Literalism: Errors in Statutes and "Absurd Consequences" . . . 2-78
a. Errors in Statutes . . . 2-78
(1) Drafting errors . . . 2-78
(2) Error in amount appropriated . . . 2-80
b. Avoiding "Absurd Consequences" . . . 2-80
4. Statutory Aids to Construction . . . 2-83
a. Definitions, Effective Dates, and Severability Clauses . . . 2-83
b. The Dictionary Act . . . 2-83
c. Effect of Codification . . . 2-84
5. Canons of Statutory Construction . . . 2-85
a. Construe the Statute as a Whole . . . 2-85
b. Give Effect to All the Language: No "Surplusage" . . . 2-87
c. Apply the Common Meaning of Words . . . 2-89
d. Give a Common Construction to the Same or Similar Words 2-89
e. Punctuation, Grammar, Titles, and Preambles Are Relevant but Not Controlling . . . 2-92
f. Avoid Constructions That Pose Constitutional Problems . . . 2-94
6. Legislative History . . . 2-96
a. Uses and Limitations . . . 2-96
b. Components and Their Relative Weight . . . 2-98
(1) Committee reports . . . 2-98
(2) Floor debates . . . 2-100
(3) Hearings . . . 2-102
c. Post-enactment Statements . . . 2-103
d. Development of the Statutory Language . . . 2-105
7. Presumptions and "Clear Statement" Rules . . . 2-106
a. Presumption in Favor of Judicial Review . . . 2-106
b. Presumption against Retroactivity . . . 2-108
c. Federalism Presumptions . . . 2-111
d. Presumption against Waiver of Sovereign Immunity . . . 2-113

Chapter 3 Agency Regulations and Administrative Discretion

A. Agency Regulations . . . 3-2
1. The Administrative Procedure Act . . . 3-3
a. The Informal Rulemaking Process . . . 3-4
b. Informal Rulemaking: When Required . . . 3-9
c. Additional Requirements for Rulemaking . . . 3-13
2. Regulations May Not Exceed Statutory Authority . . . 3-16
3. "Force and Effect of Law" . . . 3-18
4. Waiver of Regulations . . . 3-20
5. Amendment of Regulations . . . 3-24

6. Retroactivity 3-26
B. Agency Administrative Interpretations 3-28
1. Interpretation of Statutes 3-28
2. Interpretation of Agency's Own Regulations 3-37
C. Administrative Discretion 3-40
1. Introduction 3-40
2. Discretion Is Not Unlimited 3-42
3. Failure or Refusal to Exercise Discretion 3-45
4. Regulations May Limit Discretion 3-47
5. Insufficient Funds 3-49

Chapter 4 Availability of Appropriations: Purpose

A. General Principles 4-6
1. Introduction: 31 U.S.C. § 1301(a) 4-6
2. Determining Authorized Purposes 4-9
a. Statement of Purpose 4-9
b. Specific Purpose Stated in Appropriation Act 4-11
3. New or Additional Duties 4-14
4. Termination of Program 4-17
a. Termination Desired 4-17
b. Reauthorization Pending 4-18
B. The "Necessary Expense" Doctrine 4-19
1. The Theory 4-19
a. Relationship to the Appropriation 4-22
b. Expenditure Otherwise Prohibited 4-27
c. Expenditure Otherwise Provided For 4-29
2. General Operating Expenses 4-30
a. Training 4-30
b. Travel 4-31
c. Postage Expenses 4-32
d. Books and Periodicals 4-33
e. Miscellaneous Items Incident to the Federal Workplace 4-33
C. Specific Purpose Authorities and Limitations 4-35
1. Introduction 4-35
2. Attendance at Meetings and Conventions 4-36
a. Government Employees 4-37
(1) Statutory framework 4-37
(2) Inability to attend 4-40
(3) Federally sponsored meetings 4-41
(4) Rental of space in District of Columbia 4-42
(5) Military personnel 4-43
b. Nongovernment Personnel 4-44

(1) 31 U.S.C. § 1345 4-44
(2) Invitational travel 4-47
(3) Use of grant funds 4-50
3. Attorney's Fees 4-51
a. Introduction 4-51
b. Hiring of Attorneys by Government Agencies 4-52
c. Suits Against Government Officers and Employees 4-55
d. Suits Unrelated to Federal Employees 4-67
e. Claims by Federal Employees 4-68
(1) Discrimination proceedings 4-68
(2) Other employee claims 4-70
f. Criminal Justice Act 4-74
(1) Types of actions covered 4-75
(2) Miscellaneous cases 4-76
g. Equal Access to Justice Act 4-77
h. Contract Matters 4-82
(1) Bid protests 4-82
(2) Contract disputes 4-84
i. Public Participation in Administrative Proceedings: Funding of Intervenors 4-85
4. Compensation Restrictions 4-92
a. Dual Compensation 4-93
b. Employment of Aliens 4-93
c. Forfeiture of Annuities and Retired Pay 4-96
(1) General principles 4-96
(2) The Alger Hiss case 4-97
(3) Types of offenses covered 4-98
(4) Related statutory provisions 4-99
5. Entertainment—Recreation—Morale and Welfare 4-100
a. Introduction 4-100
(1) Application of the rule 4-101
(2) What is entertainment? 4-102
b. Food for Government Employees 4-103
(1) Working at official duty station under unusual conditions 4-104
(2) Government Employees Training Act 4-107
(3) Award ceremonies 4-116
(4) Cafeterias and lunch facilities 4-119
c. Entertainment for Government Employees Other Than Food 4-120
(1) Miscellaneous cases 4-120
(2) Cultural awareness programs 4-120

d. Entertainment of Nongovernment Personnel 4-123
e. Recreational and Welfare Facilities for Government Personnel 4-126
(1) The rules: older cases and modern trends 4-126
(2) Child care 4-130
f. Reception and Representation Funds 4-135
6. Fines and Penalties 4-140
7. Firefighting and Other Municipal Services 4-146
a. Firefighting Services: Availability of Appropriations 4-146
b. Federal Fire Prevention and Control Act of 1974 4-150
c. Other Municipal Services 4-151
8. Gifts and Awards 4-155
a. Gifts 4-155
b. Contests 4-161
(1) Entry fees 4-161
(2) Government-sponsored contests 4-162
c. Awards 4-164
9. Guard Services: Anti-Pinkerton Act 4-171
a. Evolution of the Law Prior to 57 Comp. Gen. 524 4-171
b. 57 Comp. Gen. 524 and the Present State of the Law 4-174
10. Insurance 4-175
a. The Self-Insurance Rule 4-175
b. Exceptions to the Rule 4-179
(1) Departments and agencies generally 4-179
(2) Government corporations 4-183
c. Specific Areas of Concern 4-183
(1) Property owned by government contractors 4-183
(2) Use of motor vehicles 4-184
(3) Losses in shipment 4-186
(4) Bonding of government personnel 4-187
11. Lobbying and Related Matters 4-188
a. Introduction 4-188
b. Penal Statutes 4-189
c. Appropriation Act Restrictions 4-196
(1) Origin and general considerations 4-196
(2) Self-aggrandizement 4-199
(3) Covert propaganda 4-202
(4) Pending legislation: overview 4-203
(5) Cases involving “grassroots” lobbying violations 4-207
(6) Pending legislation: cases in which no violation was found 4-210

(7) Pending legislation: Providing assistance to private lobbying groups 4-213
(8) Promotion of legislative proposals: Prohibited activity short of grass roots lobbying 4-215
(9) Dissemination of political or misleading information . 4-218
d. Lobbying with Grant Funds 4-219
e. Informational Activities 4-227
f. Advertising and the Employment of Publicity Experts 4-229
(1) Commercial advertising 4-229
(2) Advertising of government programs, products, or services 4-230
(3) Publicity experts 4-232
12. Membership Fees 4-234
a. 5 U.S.C. § 5946 4-234
b. Attorneys 4-240
13. Personal Expenses and Furnishings 4-242
a. Introduction 4-242
b. Business or Calling Cards 4-243
c. Health, Medical Care and Treatment 4-245
(1) Medical care 4-245
(2) Purchase of health-related items 4-250
(3) The Rehabilitation Act 4-253
d. Office Furnishings (Decorative Items) 4-256
e. Personal Qualification Expenses 4-258
f. Photographs 4-261
g. Seasonal Greeting Cards and Decorations 4-262
(1) Greeting cards 4-262
(2) Seasonal decorations 4-263
h. Traditional Ceremonies 4-263
i. Wearing Apparel 4-265
j. Miscellaneous Personal Expenses 4-271
(1) Commuting and parking 4-271
(2) Flexiplace 4-273
(3) Miscellaneous employee expenses 4-274
14. Rewards 4-276
a. Rewards to Informers 4-276
(1) Reward as “necessary expense” 4-276
(2) Payments to informers: Internal Revenue Service 4-278
(3) Payments to informers: Customs Service 4-280
b. Missing Government Employees 4-281
c. Lost or Missing Government Property 4-282
d. Contractual Basis 4-283

e. Rewards to Government Employees 4-285
15. State and Local Taxes 4-286
a. Introduction 4-286
b. Tax on Business Transactions Where the Federal Government Is a Party 4-289
(1) General principles 4-289
(2) Public utilities 4-295
c. Property-Related Taxes 4-296
d. Taxes Paid by Federal Employees 4-301
(1) Parking taxes 4-302
(2) Hotel and meal taxes 4-303
(3) Tolls 4-305
(4) State and local income withholding taxes 4-306
(5) Possessory interest taxes 4-306
(6) Occupational license fees 4-306
e. Refund and Recovery of Tax Improperly Paid 4-307
16. Telephone Services 4-308
a. Telephone Service to Private Residences 4-308
(1) The statutory prohibition and its major exception 4-308
(2) Funds to which the statute applies 4-310
(3) What is a private residence? 4-311
(4) Application of the general rule 4-312
(5) Exceptions 4-314
b. Long-distance Calls 4-319
c. Mobile or Cellular Phones 4-319

Chapter 5 Availability of Appropriations: Time

A. General Principles—Duration of Appropriations 5-3
1. Introduction 5-3
2. Types of Appropriations 5-4
a. Annual Appropriations 5-4
b. Multiple Year Appropriations 5-7
c. No-Year Appropriations 5-7
3. Obligation or Expenditure Prior to Start of Fiscal Year 5-9
B. The *Bona Fide* Needs Rule 5-11
1. Background 5-11
a. Introduction 5-11
b. The Concept 5-12
2. Future Years' Needs 5-15
3. Prior Years' Needs 5-18
4. Delivery of Materials beyond the Fiscal Year 5-22
5. Services Rendered beyond the Fiscal Year 5-23

6. Replacement Contracts 5-28
7. Contract Modifications and Amendments Affecting Price 5-33
8. Multiyear Contracts 5-37
a. Introduction 5-37
b. Multiple Year and No-Year Appropriations 5-39
c. Fiscal Year Appropriations 5-41
d. Contracts with No Financial Obligation 5-43
9. Specific Statutes Providing for Multiyear and Other Contracting Authorities 5-44
a. Severable Services Contracts 5-44
b. 5-year Contract Authority 5-45
(1) 10 U.S.C. §§ 2306b, 2306c 5-45
(2) 41 U.S.C. § 254c 5-46
c. Examples of Agency-Specific Multiyear Contracting Authorities 5-47
10. Grants and Cooperative Agreements 5-48
C. Advance Payments 5-50
1. The Statutory Prohibition 5-50
2. Government Procurement Contracts 5-54
a. Background 5-54
b. Contract Financing 5-55
c. Payment 5-60
3. Lease and Rental Agreements 5-62
4. Publications 5-63
5. Other Governmental Entities 5-65
D. Disposition of Appropriation Balances 5-67
1. Terminology 5-67
2. Evolution of the Law 5-68
3. Expired Appropriation Accounts 5-71
4. Closed Appropriation Accounts 5-73
5. Exemptions from the Account Closing Procedures 5-75
6. No-Year Appropriations 5-77
7. Repayments and Deobligations 5-78
a. Repayments 5-78
b. Deobligations 5-80
E. Effect of Litigation on Period of Availability 5-81

Chapter 1

Introduction

A. Nature of Appropriations Law 1-2
B. The Congressional "Power of the Purse" 1-3
C. Historical Perspective 1-14
1. Evolution of the Budget and Appropriations Process 1-14
2. GAO's Role in the Process 1-21
D. "Life Cycle" of an Appropriation 1-24
1. Executive Budget Formulation and Transmittal 1-25
2. Congressional Action 1-26
a. Summary of Congressional Process 1-26
b. Points of Order 1-29
3. Budget Execution and Control 1-31
a. In General 1-31
b. Impoundment 1-32
4. Audit and Review 1-35
a. Basic Responsibilities 1-35
b. GAO Recommendations and Matters for Consideration 1-36
5. Account Closing 1-37
E. The Role of the Accounting Officers: Legal Decisions . . 1-37
1. A Capsule History 1-37
a. Accounting Officers Prior to 1894 1-37
b. 1894–1921: Comptroller of the Treasury 1-38
c. 1921 to the Present Time 1-39
2. Decisions of the Comptroller General 1-39
a. General Information 1-39
b. Matters Not Considered 1-42
c. Research Aids 1-45
d. Note on Citations 1-45
3. Other Relevant Authorities 1-46
a. GAO Materials 1-46
b. Non-GAO Materials 1-48
c. Note on Title 31 Recodification 1-49

Introduction

> "[T]he protection of the public fisc is a matter that is of interest to every citizen…"

Brock v. Pierce County, 476 U.S. 253, 262 (1986).

A. Nature of Appropriations Law

A federal agency is a creature of law and can function only to the extent authorized by law.[1] The Supreme Court has expressed what is perhaps the quintessential axiom of "appropriations law" as follows:

> "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."

United States v. MacCollom, 426 U.S. 317, 321 (1976). *See also* B-288266, Jan. 27, 2003. Thus, the concept of "legal authority" is central to the spending of federal money. When we use the term "federal appropriations law" or "federal fiscal law," we mean that body of law that governs the availability and use of federal funds.

Federal funds are made available for obligation and expenditure by means of appropriation acts (or occasionally by other legislation) and the subsequent administrative actions that release appropriations to the spending agencies. The use or "availability" of appropriations once enacted and released (that is, the rules governing the purpose, amounts, manner, and timing of obligations and expenditures) is controlled by various authorities: the terms of the appropriation act itself; legislation, if any, authorizing the appropriation; the "organic" or "enabling" legislation, which prescribes a function or creates a program that the appropriation funds; general statutory provisions that allow or prohibit certain uses of appropriated funds; and general rules that have been developed largely through decisions of the Comptroller General and the courts. These sources, together with certain provisions of the Constitution of the United States, form the basis of "appropriations law"—an area where questions may arise in as many contexts as there are federal actions that involve spending money.

[1] *See, e.g.*, *Atlantic City Electric Co. v. Federal Energy Regulatory Commission*, 295 F.3d 1, 8 (D.C. Cir. 2002); B-288266, Jan. 27, 2003.

Although this publication incorporates some other relevant authorities, its primary focus is on the decisions and opinions of the "accounting officers of the government"—the Comptroller General of the United States and his predecessors.[2]

B. The Congressional "Power of the Purse"

The congressional "power of the purse" refers to the power of Congress to appropriate funds and to prescribe the conditions governing the use of those funds.[3] The power derives from specific provisions of the Constitution of the United States. First, article I, section 8 empowers Congress to "pay the Debts and provide for the common Defence and general Welfare of the United States," and to—

> "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [listed in art. I, § 8], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."

Next, the so-called Appropriations Clause, the first part of article I, section 9, clause 7, provides that—

> "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law… ."

[2] Early decisions often referred to the "accounting officers of the government." While this phrase has fallen into disuse, its purpose was to distinguish those matters within the jurisdiction of the Comptroller General and the General Accounting Office and their predecessors from those matters within the jurisdiction of the "law officers of the government"—the Attorney General and the Department of Justice.

[3] The phrase itself is well known, and there are an increasing number of articles describing and analyzing the substantive aspects of the power. *See*, *e.g.*, Sen. Robert C. Byrd, *The Control of the Purse and the Line Item Veto Act*, 35 Harv. J. on Legis. 297 (1998); Col. Richard D. Rosen, *Funding "Non-Traditional" Military Operations: The Alluring Myth of a Presidential Power of the Purse*, 155 Mil. L. Rev. 1 (1998); Charles Tiefer, *Controlling Federal Agencies by Claims on Their Appropriations? The Takings Bill and the Power of the Purse*, 13 Yale J. on Reg. 501 (1996); Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343 (1988).

The Appropriations Clause has been described as "the most important single curb in the Constitution on Presidential power."[4] It means that "no money can be paid out of the Treasury unless it has been appropriated by an act of Congress." *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937). *See also* B-300192, Nov. 13, 2002. Regardless of the nature of the payment—salaries, payments promised under a contract, payments ordered by a court, whatever—a federal agency may not make a payment from the United States Treasury unless Congress has made the funds available. As the Supreme Court stated well over a century more than 150 years ago:

> "However much money may be in the Treasury at any one time, not a dollar of it can be used in the payment of any thing not… previously sanctioned [by a congressional appropriation]."

Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850). This prescription remains as valid today as it was when it was written.[5] In 1990, citing both *Cincinnati Soap* and *Reeside*, the Supreme Court reiterated that any exercise of power by a government agency "is limited by a valid reservation of congressional control over funds in the Treasury." *Office of Personnel Management v. Richmond*, 496 U.S. 414, 425, 110 S. Ct. 2465, 2472 (1990).[6]

[4] Edward S. Corwin, *The Constitution and What It Means Today*, 134 (14th ed. 1978).

[5] *Cf.*, *e.g.*, *Flick v. Liberty Mutual Fire Insurance Co.*, 205 F.3d 386, 395 (9th Cir. 2000), quoting *Reeside*, *supra*.

[6] Numerous similar statements exist. *See*, *e.g.*, *Knote v. United States*, 95 U.S. 149, 154 (1877); *Gowland v. Aetna*, 143 F.3d 951, 955 (5th Cir. 1998); *Hart's Case*, 16 Ct. Cl. 459, 484 (1880), *aff'd*, *Hart v. United States*, 118 U.S. 62 (1886); *Jamal v. Travelers Lloyds of Texas Insurance Co.*, 131 F. Supp. 2d 910, 919 (S.D. Tex. 2001); *Doe v. Mathews*, 420 F. Supp. 865, 870–71 (D. N.J. 1976).

As these statements by the Supreme Court make clear, the congressional power of the purse reflects the fundamental proposition that a federal agency is dependent on Congress for its funding.[7] At its most basic level, this means that it is up to Congress to decide whether or not to provide funds for a particular program or activity and to fix the level of that funding.

In exercising its appropriations power, however, Congress is not limited to these elementary functions. It is also well established that Congress can, within constitutional limits, determine the terms and conditions under which an appropriation may be used. *See*, *e.g.*, *New York v. United States*, 505 U.S. 144, 167 (1992); *Cincinnati Soap Co.*, 301 U.S. at 321; *Oklahoma v. Schweiker*, 655 F.2d 401, 406 (D.C. Cir. 1981) (citing numerous cases); *Spaulding v. Douglas Aircraft Co.*, 60 F. Supp. 985, 988 (S.D. Cal. 1945), *aff'd*, 154 F.2d 419 (9th Cir. 1946). Thus, Congress can decree, either in the appropriation itself or by separate statutory provisions, what will be required to make the appropriation "legally available" for any expenditure. It can, for example, describe the purposes for which the funds may be used, the length of time the funds may remain available for these uses, and the maximum amount an agency may spend on particular elements of a program. In this manner, Congress may, and often does, use its appropriation power to accomplish policy objectives and to establish priorities among federal programs.

[7] In *Schism v. United States*, 316 F.3d 1259, 1288 (Fed. Cir. 2002), *cert. denied*, ___ U.S. ___, 123 S. Ct. 2246 (2003), retired military personnel sued the government for breach of an implied-in-fact contract, claiming that recruiters had promised free lifetime medical care for them and their dependents, in exchange for 20 years of service. The court rejected those claims, observing:

> "As Commander-in-Chief, the President does not have the constitutional authority to make promises about entitlements for life to military personnel that bind the government because such powers would encroach on Congress' constitutional prerogative to appropriate funding. Under Article I, § 8, only Congress has the power of the purse. To say that the Executive Branch could promise future funds for activities that Congress itself had not authorized… would allow the Executive Branch to commandeer the power of the Legislative Branch."

Congress can also use its appropriation power for other measures. It can, for example, include a provision in an appropriation act prohibiting the use of funds for a particular program. By doing this without amending the program legislation, Congress can effectively suspend operation of the program for budgetary or policy reasons, or perhaps simply defer further consideration of the merits of the program. The courts recognized the validity of this application of the appropriation power. *See, e.g.*, *United States v. Will*, 449 U.S. 200, 222 (1980); *United States v. Dickerson*, 310 U.S. 554 (1940). For a recent example of this, see *Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 225, 229 (1st Cir. 2003), which considered an appropriation act provision banning the use of federal funds to grant permits to those fishermen who would use "spotter planes" to locate Atlantic bluefin tuna. At issue was whether the ban was temporary or permanent in nature. The court found the ban to be a temporary (*i.e.*, annual) provision, based on the language used in it.[8] The court commented:

> "[We do not] consider it unreasonable for Congress to enact such a ban for one year only. The record lays out the competing public policy interests that the ban affects. The choice to balance such interests by temporizing—putting a ban in place for one year and requiring it to be reenacted the following year to remain in effect—is a valid exercise of legislative prerogative. Politics is, after all, the art of compromise."

321 F.3d at 225.

Congress also may use appropriation act provisions to impose preconditions on a program's use of the funds being appropriated. The preconditions on use often effectuate congressional oversight of the program. In *American Telephone & Telegraph v. United States*, 307 F.3d 1374, 1376–79 (Fed. Cir. 2003), the court addressed just such a provision found in the Department of Defense Appropriation Act for Fiscal Year 1988. The provision specified that

> "[n]one of the funds provided… in this Act may be obligated or expended for fixed price-type contracts in excess of $10,000,000 for the development of a major system or

[8] We address the duration of provisions like this in Chapter 2.

> subsystem unless the Under Secretary of Defense for Acquisition determines, in writing, that program risk has been reduced to the extent that realistic pricing can occur…: Provided further, That the Under Secretary report to the Committees on Appropriations of the Senate and House of Representatives in writing, on a quarterly basis, the contracts which have obligated funds under such a fixed price-type developmental contract."

Pub. L. No. 100–202, § 8118, 101 Stat. 1329, 1329-84 (1987). The Navy had entered into a $34.5 million fixed-price contract with American Telephone & Telegraph (AT&T) for technology to be included in an advanced submarine detecting sonar system. AT&T performed, but at a cost of $91 million. When Navy refused to pay the amount in excess of the contract's fixed price, AT&T sued. AT&T pointed out, and Navy conceded, that the Under Secretary for Acquisitions had not satisfied the appropriation act's preconditions on use of the appropriated funds; AT&T argued that the contract was, therefore, invalid and void *ab initio*. The court disagreed. The court said that the language of the Act "provides for legislative oversight and enforcement. The section does not create a cause of action inviting private parties to enforce the provision in courts." *AT&T*, 307 F.3d at 1379. The court emphasized the supervisory role of the legislative branch in ensuring compliance with policies imposed *via* appropriations act provisions, noting that such provisions permit "the appropriate legislative committees to monitor compliance and, presumably, guarantee enforcement in the form of future reductions in, or limitations on, appropriated funds." *Id.* at 1377.

While congressional power of the purse is a very broad power, courts have invalidated funding restrictions when the courts found that the restrictions violated some independent constitutional bar. For example, in *United States v. Lovett*, 328 U.S. 303 (1946), the Supreme Court held an appropriation act restriction unconstitutional as a bill of attainder. The rider in question was a prohibition on the payment of salary to certain named individuals rather than a condition on the receipt of funds. In another case, a provision in the 1989 District of Columbia appropriation act prohibited the use of any funds appropriated by the act unless the District adopted legislation spelled out in the rider. The provision was invalidated on first amendment grounds. *Clarke v. United States*, 705 F. Supp. 605 (D.D.C. 1988), *aff'd*, 886 F.2d 404 (D.C. Cir. 1989), *vacated en banc as moot*, 915 F.2d 699 (D.C. Cir. 1990).

The Supreme Court recognized the breadth of the power of the purse, and its limitations, in *South Dakota v. Dole*, 483 U.S. 203 (1987), a decision addressing Congress's use of its spending power to impose conditions on the use of federal grants. The court noted that—

> "the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution. Thus, objectives not thought to be within Article I's enumerated legislative fields,… may nevertheless be attained through the use of the spending power and the conditional grant of federal funds."

Id. at 207. *See also National Endowment for the Arts v. Finley*, 524 U.S. 569, 588 (1998) ("So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities.").

On the other hand, as the Supreme Court also noted in *Dole*, "[t]he spending power is of course not unlimited." *Id.* The courts have identified a number of limitations on it. In *Dole*, the Supreme Court listed what it referred to as four "general restrictions" established in previous cases: First, the exercise of the spending power must be in pursuit of the general welfare. Second, conditions imposed on the use of federal funds must be reasonably related to the articulated goals. Third, the intent of Congress to impose conditions must be authoritative and unambiguous. Fourth, the action in question must not be prohibited by an independent constitutional bar. *Id.* at 207–208. *See also*, *e.g.*, *Nevada v. Skinner*, 884 F.2d 445, 447–48 (9th Cir. 1989). After the *Dole* Court explained the application of the fourth restriction, it added, "Our decisions have [also] recognized that in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion.'" *Id.* at 211, *quoting Steward Machine Co. v. Davis*, 301 U.S. 548, 590 (1937). Some courts have understood this passage to constitute a "fifth" limitation on congressional spending power. *E.g.*, *A.W. v. Jersey City Public Schools*, 341 F.3d 234, 241 (3rd Cir. 2003); *Kansas v. United States*, 214 F.3d 1196, 1201 (10th Cir. 2000); *Litman v. George Mason University*, 186 F.3d 544, 552–53 (4th Cir. 1999). Others have simply seen it as an "additional" consideration. *E.g.*, *West Virginia v. Department of Health & Human Services*, 289 F.3d 281, 287 (4th Cir. 2002). *See also James Island Public Service District v. City of Charleston*, 249 F.3d 323, 327 (4th Cir. 2001).

While the existence of this list might suggest otherwise, there have actually been few decisions striking down federal statutory spending conditions.[9] *Kansas v. United States*, 214 F.3d 1196, 1201–1202, n.6 (10th Cir. 2000). A recent example can be seen in <, wherein a conditional provision (contained in the annual appropriations for the Legal Service Corporation (LSC) since 1996) was struck down as inconsistent with the First Amendment. This provision prohibited LSC grantees from representing clients in efforts to amend or otherwise challenge existing welfare law. The Supreme Court found this provision interfered with the free speech rights of clients represented by LSC-funded attorneys.[10]

In addition to imposing restrictions in appropriation acts, Congress also exercises its spending power by imposing conditions in the legislation creating or modifying a program.[11] An example of a statutorily imposed spending condition can be seen in the provisions of the Children's Internet Protection Act (CIPA), Pub. L. No. 106-554, 114 Stat. 2763, 2763A-335 (Dec. 21, 2000). CIPA barred public libraries from receiving federal assistance to provide computer access to the Internet unless they installed software to block obscenity and child pornography and prevent minors from obtaining access to material harmful to them. CIPA, § 1711. In *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 123 S. Ct. 2297 (2003), the Supreme Court upheld CIPA's condition as a legitimate exercise of congressional spending power. Among the challenges brought against the

[9] In *United States v. Butler*, 297 U.S. 1 (1936), the Supreme Court struck down a funding condition based on a narrow view of Congress's powers under the Commerce Clause—an approach to which the Court no longer subscribes. *See, e.g.*, *Dole*, 483 U.S. at 216–17 (O'Connor, J., dissenting). *See also* Laurence H. Tribe, *American Constitutional Law* § 5-b, at 836 (3rd ed. 2000) ("the Supreme Court has effectively ignored *Butler* in judging the limits of congressional spending power"). Compare, in this regard, *Commonwealth of Virginia v. Riley*, 106 F.3d 559 (4th Cir. 1997) (*en banc*); *West Virginia v. Department of Health & Human Services*, *supra*; and *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997), on how often and under what circumstances the courts might be willing to invalidate spending conditions as coercive.

[10] Similar challenges have been raised against restrictive federal regulations interpreting statutory spending conditions. *E.g.*, *Rust v. Sullivan*, 500 U.S. 173 (1991) (statute barred funding programs that employ abortion as a method of family planning; court upheld implementing regulations prohibiting doctors employed by federally funded family planning clinics from discussing abortion options with clinic patients).

[11] *Cf.*, *e.g.*, *New York v. United States*, 505 U.S. 144, 166 (1992) ("Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests.").

CIPA condition was the claim that it constituted an impermissible coercion. The Court rejected that claim, explaining that CIPA did not penalize libraries that chose not to install the software. Rather, it simply precluded the use of taxpayer funds to subsidize those libraries that chose not to install such software. *Id.* at 2307–08. The Court also rejected claims that the condition infringed upon protected First Amendment rights, noting that CIPA expressly permitted libraries to customize or even disable the operation of the software for research and other lawful purposes—at the request of an adult user or, under certain circumstances, even at the request of a minor user. *Id.* at 2306–07. Citing *Dole*, *supra*, the Court noted again that, so long as Congress does not "induce" funding recipients to engage in activities that would themselves be unconstitutional, "Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives." *Id.* at 2303.

For some additional recent cases upholding statutory funding conditions, see for example, *Kansas v. United States*, 214 F.3d 1196 (10th Cir. 2000) (upholding the statutory requirement conditioning receipt of federal block grants used to provide cash assistance and other supportive services to low-income families on a state's participation in and compliance with a federal child support enforcement program); *Litman v. George Mason University, supra* (state university's receipt of federal funds was validly conditioned upon waiver of the state's Eleventh Amendment immunity from federal antidiscrimination lawsuits); and *California v. United States*, 104 F.3d 1086, 1092 (9th Cir. 1997) (acknowledging that although it originally agreed to the condition for receipt of federal Medicaid funds on state provision of emergency medical services to illegal aliens, California now viewed that condition as coerced because substantial increases in illegal immigration left California with no choice but to remain in the program to prevent collapse of its medical system; the complaint was dismissed for failure to state a claim upon which relief could be granted).

It would appear safe to say that Congress can, as long as it does not violate the Constitution, appropriate money for any purpose it chooses, from paying the valid obligations of the United States to what the Supreme Court has termed "pure charity,"[12] and can implement policy objectives by imposing conditions on the receipt or use of the money.[13]

The Constitution does not provide detailed instructions on how Congress is to implement its appropriation power, but leaves it to Congress to do so by statute. Congress has in fact done this, and continues to do it, in two ways: through the annual budget and appropriations process and through a series of permanent "funding statutes." As one court has put it:

> " [The Appropriations Clause] is not self-defining and Congress has plenary power to give meaning to the provision. The Congressionally chosen method of implementing the requirements of Article I, section 9, clause 7 is to be found in various statutory provisions."

Harrington v. Bush, 553 F.2d 190, 194–95 (D.C. Cir. 1977) (footnote omitted). *See also*, *e.g.*, *Walker v. Department of Housing & Urban Development*, 912 F.2d 819, 829 (5th Cir. 1990). There were few statutory funding controls in the early years of the nation and abuses were commonplace. As early as 1809, one senator, citing a string of abuses, introduced a resolution to look into ways to prevent the improper expenditure of public funds.[14] In 1816 and 1817, John C. Calhoun lamented the "great evil" of diverting public funds to uses other than those for which they were appropriated.[15] Even as late as the post-Civil War years, the situation saw little improvement. "Funds were commingled. Obligations were made without appropriations. Unexpended balances from prior years were used to augment current appropriations."[16]

[12] *United States v. Realty Co.*, 163 U.S. 427, 441 (1896).

[13] *E.g.*, *Dole*, 483 U.S. at 207; *National Endowment for the Arts v. Finley*, 524 U.S. at 588 ("So long as legislation does not infringe on other constitutionally protected rights, Congress has wide latitude to set spending priorities.").

[14] 19 Annals of Cong. 347 (1809) (remarks of Senator Hillhouse).

[15] Gary L. Hopkins & Robert M. Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51, 57 n.7 (1978).

[16] *Id.* at 57.

The permanent funding statutes, found mostly in Title 31 of the United States Code, are designed to combat these and other abuses. They did not spring up overnight, but have evolved over the span of nearly more than two centuries. Nevertheless, when viewed as a whole, they form a logical pattern. We may regard them as pieces of a puzzle that fit together to form the larger picture of how Congress exercises its control "power of the purse." Some of the key statutory directives in this scheme, each of which is discussed elsewhere in this publication, are:

- A statute will not be construed as making an appropriation unless it expressly so states. 31 U.S.C. § 1301(d).
- Agencies may not spend, or commit themselves to spend, in advance of or in excess of appropriations. 31 U.S.C. § 1341 (Antideficiency Act).
- Appropriations may be used only for their intended purposes. 31 U.S.C. § 1301(a) ("purpose statute").
- Appropriations made for a definite period of time may be used only for expenses properly incurred during that time. 31 U.S.C. § 1502(a) ("*bona fide* needs" statute).
- Unless authorized by law, an agency may not keep money it receives from sources other than congressional appropriations, but must deposit the money in the Treasury. 31 U.S.C. § 3302(b) ("miscellaneous receipts" statute).

The second part of article I, section 9, clause 7 of the Constitution requires that—

> "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."

Implementation of this provision, as a logical corollary of the appropriation power, is also wholly within the congressional province, and the courts have so held.[17] *Washington Post Co. v. United States Department of State*, 685 F.2d 698, 700 (D.C. Cir. 1982) ("the plenary authority of Congress in this area will be respected"), *vacated as moot*, 464 U.S. 979 (1983); *United States v. Richardson*, 418 U.S. 166, 178 n.11 (1974) ("it is clear that Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest"); *Harrington v. Bush*, 553 F.2d at 195; *Hart's Case*, 16 Ct. Cl. 459, 484 (1880), *aff'd*, *Hart v. United States*, 118 U.S. 62 (1886) ("[a]uditing and accounting are but parts of a scheme for payment"). *See also* B-300192, n.10, Nov. 13, 2002.

The Constitution mentions appropriations in only one other place. Article I, section 8, clause 12 provides that Congress shall have power to "raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years."[18] The 2-year limit in clause 12 has been strictly construed as applying essentially to appropriations for personnel and for operations and maintenance and not to other military appropriations such as weapon system procurement or military construction. *See* B-114578, Nov. 9, 1973; 40 Op. Att'y Gen. 555 (1948); 25 Op. Att'y Gen. 105 (1904). In any event, Congress has traditionally made appropriations for military personnel and operations and maintenance on a fiscal year basis.

Whenever one reflects upon the constitutional prerogatives of the legislature, it must be against the backdrop of a central theme underlying much of federal fiscal law and policy—the natural antithesis of executive flexibility and congressional control. Each objective is valid and necessary, but it is impossible to simultaneously maximize both. Either can be enhanced only at the expense of the other. Finding and maintaining a

[17] Thus, Congress has delegated authority to the Comptroller General to prescribe, after consultation with the President and the Secretary of the Treasury, accounting principles and standards for the federal government. 31 U.S.C. § 3511. Since 1991, GAO has implemented this responsibility largely through the Federal Accounting Standards Advisory Board (FASAB)—a federal advisory committee jointly created by the Comptroller General, the Secretary of the Treasury, and the Director of the Office of Management and Budget. For more information about FASAB, check out FASAB Facts, http://www.fasab.gov/pdf/fasabf~2.pdf.

[18] *See United States v. Weiss*, 36 M.J. 224, 237–38 (C.M.A. 1992) (discussing the rationale behind the 2-year limitation).

reasonable and proper balance is both the goal and the challenge of the legal process.

C. Historical Perspective

1. Evolution of the Budget and Appropriations Process [19]

The first general appropriation act, passed by Congress on September 29, 1789, appropriated a total of $639,000 and illustrates what was once a relatively uncomplicated process. We quote it in full (1 Stat. 95):

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there be appropriated for the service of the present year, to be paid out of the monies which arise, either from the requisitions heretofore made upon the several states, or from the duties on impost and tonnage, the following sums, *viz*. A sum not exceeding two hundred and sixteen thousand dollars for defraying the expenses of the civil list, under the late and present government; a sum not exceeding one hundred and thirty-seven thousand dollars for defraying the expenses of the department of war; a sum not exceeding one hundred and ninety thousand dollars for discharging the warrants issued by the late board of treasury, and remaining unsatisfied; and a sum not exceeding ninety-six thousand dollars for paying the pensions to invalids."

As the size and scope of the federal government have grown, so has the complexity of the appropriations process.

In 1789, the House established the Ways and Means Committee to report on revenues and spending, only to disband it that same year following the creation of the Treasury Department. The House Ways and Means

[19] For a detailed discussion of the history of the budget and appropriations process, see Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 Cath. U. L. Rev. 51, 53–59 (1979). For a more current overview of the process, see Allen Schick and Felix LoStracco, *The Federal Budget: Politics, Policy, Process* (The Brookings Institution Press, 2000).

Committee was re-established to function permanently in 1795 and was recognized as a standing committee in 1802.

On the Senate side, the Finance Committee was established as a standing committee in 1816. Up until that time, the Senate had referred appropriation measures to temporary select committees. By 1834, jurisdiction over all Senate appropriation bills was consolidated in the Senate Finance Committee.

In the mid-nineteenth century, a move was begun to restrict appropriation acts to only those expenditures that had been previously authorized by law. The purpose was to avoid the delays caused when legislative items or "riders" were attached to appropriation bills. Rules were eventually passed by both houses of Congress to require, in general, prior legislative authorizations for the enactment of appropriations.

It was during this same period that the concept of a fiscal year separate and distinct from the calendar year came into existence.[20]

Under the financial strains caused by the Civil War, appropriations committees first appeared in both the House and the Senate, diminishing the jurisdiction of the Ways and Means and Finance Committees, respectively. Years later, the need for major reforms was again accentuated by the burdens of another war. Following World War I, Congress passed the Budget and Accounting Act of 1921, Pub. L. No. 67-13, 42 Stat. 20 (June 10, 1921).

[20] Prior to 1842, the government did not distinguish between fiscal year and calendar year. From 1842 to 1976, the government's fiscal year ran from July 1 to the following June 30. In 1974, Congress changed the fiscal year to run, starting with fiscal year 1977, from October 1 to September 30. 31 U.S.C. § 1102. The concept of a fiscal year has been termed an "absolute necessity." *Sweet v. United States*, 34 Ct. Cl. 377, 386 (1899). *See also Bachelor v. United States*, 8 Ct. Cl. 235, 238 (1872) (reasons for fixing a fiscal year are "so obvious… that no one can fail to see their importance").

Before 1921, departments and agencies generally made individual requests for appropriations. These submissions were compiled for congressional review in an uncoordinated "Book of Estimates." The Budget and Accounting Act enhanced budgetary efficiency and aided in the performance of constitutional checks and balances through the budget process. It required the President to submit a national budget each year and restricted the authority of the agencies to present their own proposals. *See* 31 U.S.C. §§ 1104, 1105. With this centralization of authority for the formulation of the executive branch budget in the President and the newly established Bureau of the Budget (now Office of Management and Budget), Congress also took steps to strengthen its oversight capability over fiscal matters by establishing the General Accounting Office.[21]

The decades immediately following World War II saw growth in both the size and the complexity of the federal budget. It became apparent that the congressional role in the "budget and appropriations" process centered heavily on the appropriations phase and placed too little emphasis on the budgetary phase. In other words, Congress responded to the President's spending and revenue proposals only through the cumulative result of individual pieces of legislation reached through an agglomeration of separate actions. Congress did not look at the budget as a whole, nor did it examine or vote on overall spending or revenues. There was no process by which Congress could establish its own spending priorities. Thus, the impetus for a congressional budget process began in the early 1970s. It was not created in a single step; rather, it was created in stages—and for the most part new pieces did not replace but were added to existing processes. As William G. Dauster, former Chief Counsel on the Committee on the Budget, put it: "[t]he law governing the budget process resembles nothing so much as sediment. It has accumulated in several statutes, each layered upon the prior one… [t]his incremental growth has created something of a legal nettle." *Budget Process Law Annotated*, S. Print No. 102-22, at xxvii (1991).

[21] A summary of the changes brought about by the Budget and Accounting Act, including a listing of amendments that have been made to the Act, may be found in *National Federation of Federal Employees v. Cheney*, 883 F.2d 1038, 1043–46 (D.C. Cir. 1989).

The first major round of reforms came about with the Congressional Budget and Impoundment Control Act of 1974.[22] Titles I though IX of the act are referred to as the Congressional Budget Act of 1974, while Title X is referred to as the Impoundment Control Act of 1974. One of the fundamental objectives of the Congressional Budget Act of 1974 was to establish a process through which Congress could systematically consider the total federal budget and determine priorities for allocating budget resources. The design of programs and the allocation of spending within each mission area would be left to the authorizing and appropriations committees. The focus was on overall fiscal policy and an allocation across priorities.[23] The statute made several major changes in the budget and appropriations process. For example:

- It established a detailed calendar governing the various stages of the congressional budget and appropriations process. 2 U.S.C. § 631.

- It provided for congressional review of the President's budget, the establishment of target ceilings for federal expenditures through one or more concurrent resolutions, and the evaluation of spending bills against these targets. 2 U.S.C. §§ 632–642. Prior to this time, Congress had considered the President's budget only in the context of individual appropriation bills. To implement the new process, the law created Budget Committees in both the Senate and the House, and a Congressional Budget Office (CBO). 2 U.S.C. § 601. The law requires the CBO to prepare estimates of new budget authority, outlays, or revenue provided by bills or resolutions reported from committees of either house, or estimates of the costs that the government would incur in carrying out the provisions of the proposed legislation. 2 U.S.C. § 602.

[22] Pub. L. No. 93-344, 88 Stat. 297 (July 12, 1974).

[23] The second and more immediate motive for passage of the Congressional Budget Act was the dispute in the early 1970s related to the impoundment by President Nixon of billions of dollars of funds appropriated by Congress. *See* Committee on the Budget, United States Senate, *The Congressional Budget Process*, *An Explanation*, S. Print No. 105-67 (1998); H.R. Rep. No. 93-1101, at 4 (1974); H.R. Rep. No. 93-658, at 19 (1974).

- Prompted by the growth of "backdoor spending,"[24] it enhanced the role of the Appropriations Committees in reviewing proposals for contract authority, borrowing authority, and mandatory entitlements. 2 U.S.C. § 651.

The 1974 legislation also imposed limitations on the impounding of appropriated funds by the executive branch. 2 U.S.C. §§ 681–688.

The next piece of major legislation in the fiscal area was the Balanced Budget and Emergency Deficit Control Act of 1985, known as the Gramm-

Rudman-Hollings Act (Gramm-Rudman).[25] It was enacted to deal with a growing budget deficit (excess of total outlays over total receipts for a given fiscal year). 2 U.S.C. § 622(6). Gramm-Rudman established "maximum deficit amounts." Pub. L. No. 99-177,§ 201(a)(1). If the deficit exceeded these statutory limits, the President was required to issue a sequester order (a cancellation of budgetary resources) that would reduce all nonexempt spending by a uniform percentage. *Id.* § 252. In the spring of 1990, it became clear that the deficit was going to exceed Gramm-Rudman maximum deficit limits by a considerable amount. To respond to these large deficits, President George H.W. Bush and congressional leadership convened negotiations on the budget in May 1990. In November, the Omnibus Budget Reconciliation Act of 1990 was enacted, which represented the budget agreement negotiated between the Bush Administration and Congress. Pub. L. No. 101-508, 104 Stat. 1388 (Nov. 5, 1990). *See* S. Print No. 105–67, *supra*.

The Omnibus Budget Reconciliation Act of 1990 included the Budget Enforcement Act (1990 BEA),[26] which provided a major overhaul of the Gramm-Rudman procedures. The law established maximum adjustable deficit amounts for each fiscal year through fiscal year 1995, but in effect, it

[24] The term backdoor spending is a collective designation for authority provided in legislation other than appropriation acts to obligate the government to make payments. The most common forms of backdoor spending are borrowing authority, contract authority, and entitlement authority. *See* U.S. General Accounting Office, A *Glossary of Terms Used in the Federal Budget Process (Exposure Draft)*, GAO/AFMD-2.1.1 (Washington, D.C.: Jan. 1993). From the perspective of the appropriations committees, funding provided by these forms of authority causes their funding control to "sneak out" legislative "back doors."

[25] Pub. L. No. 99-177, title II, 99 Stat. 1037, 1038 (Dec. 12, 1985).

[26] Pub. L. No. 101-508, title XIII, 104 Stat. at 1388-573.

replaced the Gramm-Rudman-Hollings system of deficit limits with two different enforcement mechanisms. The 1990 BEA established annual caps on spending controllable through the appropriations process (discretionary spending) and a pay-as-you-go requirement for spending controllable through substantive legislation outside of the appropriations process (so-called direct or mandatory spending) and revenue legislation. The two types of spending were subject to different rules. If discretionary appropriations were enacted that exceeded the annual caps, the law provided mechanisms for making appropriate spending reductions, sequestrations of budget authority, similar to those provided for in Gramm-Rudman. 2 U.S.C. § 903. For the second spending category, mandatory spending and receipts, the 1990 BEA required that all legislation within a session of Congress that increased mandatory spending or decreased receipts was to be fully offset or paid for by corresponding increases in receipts or decreases in spending so that it was deficit neutral. Failure to obtain budget neutrality for mandatory spending would trigger an offsetting sequestration among nonexempt mandatory accounts. 2 U.S.C. § 902. This pay-as-you-go requirement was referred to as PAYGO, and legislation dealing with mandatory spending or receipts was often referred to as PAYGO legislation.

To determine compliance with the 1990 BEA requirements, the Act required the Office of Management and Budget (OMB) and CBO to estimate new budget authority and outlays provided by any new legislation through a process that came to be called "scorekeeping." 2 U.S.C. §§ 901, 902. CBO would transmit its estimates to OMB, which would report any discrepancies to both houses of Congress. The 1990 BEA, however, required that OMB's estimates be used to determine whether a sequestration was necessary. 2 U.S.C. §§ 902, 904. The statement of managers accompanying the conference report on the 1990 BEA instructed the House and Senate Budget Committees to work in consultation with OMB and CBO to develop scorekeeping guidelines. H.R. Rept. No. 101-964, at 1172 (1990). The guidelines are printed in OMB Circular A-11, *Preparation*, *Submission and Execution of the Budget*, app. B (July 25, 2003).

In 1993, the discretionary spending limits and the PAYGO rules were extended through fiscal year 1998. Pub. L. No. 103-66, 107 Stat. 683 (Aug. 10, 1993). The 1997 Budget Enforcement Act (1997 BEA) again extended the discretionary spending caps and the PAYGO rules through 2002. Pub. L. No. 105-33, title X, 111 Stat. 251, 701 (Aug. 5, 1997). Although the overall discretionary spending caps expired in 2002, additional caps on

Highway and Mass Transit spending established under the Transportation Equity Act for the 21st Century (TEA-21)[27] continued through 2003, and another set of caps on conservation spending,[28] established as part of the fiscal year 2001 Interior Appropriations Act,[29] were set through 2006. In addition, the sequestration procedures were to apply through 2006 to the conservation category. However, Pub. L. No. 107-312, 116 Stat. 2456 (Dec. 2, 2002) eliminated the PAYGO sequestration requirement.

While most of the budget enforcement mechanisms in the 1990 BEA have expired, OMB uses the same scorekeeping rules developed for use with BEA for purposes of budget execution. OMB determines how much budget authority must be obligated for individual transactions. OMB interprets the scorekeeping guidelines to determine the cost that should be recognized and recorded as an obligation at the time the agency signs a contract or enters into a lease. "When an agency signs a contract, budgetary resources to measure the government's contribution to each of the terms of the contract are set aside (obligated). The 'total score' refers to the total amount of resources the government must obligate (set aside) for a given project." Letter from Franklin D. Raines, Director, Office of Management and Budget, to the Honorable William S. Cohen, Secretary of Defense, *Re: Scoring DOD's Military Housing Privatization Initiatives*, June 25, 1997.

In addition to the statutory spending caps, Congress, in fiscal year 1994, began including overall limits on discretionary spending in the concurrent budget resolution that have become known as congressional caps. H.R. Con. Res. 64, 103rd Cong. § 12(b) (1993). Congress established these caps to manage its internal budget process, while the BEA statutory caps continued to govern for sequestration purposes. The congressional caps were enforceable in the Senate by a point of order that prohibited the consideration of a budget resolution that exceeded the limits for that fiscal year (the point of order could be waived or suspended by a three-fifths

[27] Pub. L. No. 105-178, 112 Stat. 107 (June 9, 1998).

[28] The conservation spending category includes the acquisition, conservation, and maintenance of federal and nonfederal lands and resources, and payments in lieu of taxes. 2 U.S.C. § 901.

[29] Pub. L. No. 106-291, 114 Stat. 922 (Oct. 11, 2000).

vote).[30] Although the statutory 1997 BEA limits expired at the end of fiscal year 2002, Congress continues to use the concurrent resolution on the budget to establish and enforce congressional budgetary limits. H.R. Con. Res. 95, 108th Cong. § 504 (2003).

2. GAO's Role in the Process

As the budget and appropriations process has evolved over the course of the twentieth century, GAO's role with respect to it has also evolved. Title III of the Budget and Accounting Act of 1921,[31] GAO's basic enabling statute, created two very different roles for the Comptroller General and the new agency.

First, he was to assume all the duties of the Comptroller of the Treasury and his six subordinate auditors, and to serve as the chief accounting officer of the government. To this end, the Comptroller General was given the authority to settle all claims by and against the government.[32] In 1995, Congress transferred GAO's claim settlement authority to the executive branch.[33]

Second, under the enabling statute the Comptroller General was given the authority to settle the accounts of the U.S. government, which includes the authority to issue legal decisions.[34] The issuance of legal decisions is discussed in section E of this chapter.

[30] This point of order, established in the Congressional Budget and Impoundment Control Act of 1974, as amended, applies only to the Senate.

[31] Pub. L. No. 67-13, 42 Stat. 20 (June 10, 1921).

[32] Budget and Accounting Act § 305, 31 U.S.C. § 3702(a).

[33] Pub. L. No. 104-53, 109 Stat. 514 (Nov. 19, 1995) and Pub. L. No. 104-316, 110 Stat. 3826 (Oct. 19, 1996), transferred the Comptroller General's authority over claims and related functions to the Director of the Office of Management and Budget, who in turn delegated specific functions to the Departments of Defense and Treasury, the General Services Administration, and the Office of Personnel Management. For additional details, see B-275605, Mar. 17, 1997.

[34] 31 U.S.C. § 3526(a), also derived from § 305 of the Budget and Accounting Act; 31 U.S.C. § 3529. As a result of this authority, the Comptroller General and GAO were sometimes referred to as the "accounting officers of the government" in early legal decisions. *See* footnote 2 of this chapter.

The Comptroller General was also directed to investigate the receipt, disbursement, and application of public funds, reporting the results to Congress;[35] and to make investigations and reports upon the request of either house of Congress or of any congressional committee with jurisdiction over revenue, appropriations, or expenditures.[36] He was also directed to supply such information to the President when requested by the President.[37] The mandates in the 1921 legislation, together with a subsequent directive in the Legislative Reorganization Act of 1946 to make expenditure analyses of executive branch agencies with reports to the cognizant congressional committees,[38] have played a large part in preparing Congress to consider the merits of the President's annual budget submission.

The Accounting and Auditing Act of 1950 authorized the Comptroller General to audit the financial transactions of most[39] executive, legislative, and judicial agencies;[40] and to prescribe, in consultation with the President

[35] Budget and Accounting Act §§ 312(a) and (c), 31 U.S.C. §§ 712(1), 719(c).

[36] Budget and Accounting Act § 312(b), 31 U.S.C. §§ 712(4) and (5). At about this same time, both the House and the Senate consolidated jurisdiction over all appropriation bills in a single committee in each body.

[37] 31 U.S.C. § 719(f), derived from Budget and Accounting Act § 312(e).

[38] Pub. L. No. 79-601, § 206, 60 Stat. 812, 837 (Aug. 2, 1946), 31 U.S.C. §§ 712(3), 719(e).

[39] With certain exceptions, the audit authority and responsibility of the General Accounting Office extends to all activities, financial transactions, and accounts of the federal government. However, certain agencies and activities are not subject to audit by reason of specific statutory prohibitions and the type of funds involved. For example, prior to 1980, the Comptroller General did not have the authority to audit expenditures approved without vouchers. Enactment of Pub. L. No. 96-226, § 101, 94 Stat. 311 (Apr. 3, 1980) provided the authority to the Comptroller General to audit these unvouchered transactions; however, the Comptroller General may only release the results of the audit to the President or head of the agency, or, if there is an unresolved discrepancy, to the Senate Committee on Governmental Affairs, the House Committee on Government Reform, and the committees of Congress having legislative or appropriation oversight of the expenditure. This law, however, does not provide GAO with the authority to audit transactions of the Central Intelligence Agency or certain other financial transactions involving specified sensitive matters exempted by the President. 31 U.S.C. § 3524.

[40] Pub. L. No. 81-784, § 117(a), 31 U.S.C. § 3523(a).

and the Secretary of the Treasury, accounting principles, standards, and requirements for the executive agencies suitable to their needs.[41]

The Legislative Reorganization Act of 1970 expanded the focus of GAO's audit activities to include program evaluations as well as financial audits.[42]

The Congressional Budget and Impoundment Control Act of 1974 gave GAO a number of additional duties in the budgetary arena. It directs GAO, in cooperation with Treasury, the Office of Management and Budget, and the Congressional Budget Office, to "establish, maintain, and publish standard terms and classifications for fiscal, budget, and program information of the Government, including information on fiscal policy, receipts, expenditures, programs, projects, activities, and functions." Agencies are to use these terms and classifications in providing information to Congress.[43] GAO published this information i*n A Glossary of Terms Used in the Federal Budget Process (Exposure Draft)*, GAO/AFMD-2.1.1 (Washington, D.C.: Jan. 1993). The law gives GAO a variety of functions relating to obtaining, studying, and reporting to Congress fiscal, budget, and program information.[44] Finally, it gives the Comptroller General the responsibility to monitor and report to Congress on all proposed impoundments of budget authority by the executive branch.[45]

[41] *Id.* § 112(a), 31 U.S.C. § 3511(a). For more information on accounting standards, see footnote 17 of this chapter.

[42] Pub. L. No. 91-510, § 204, 84 Stat. 1140, 1168 (Oct. 26, 1970), 31 U.S.C. § 717.

[43] 31 U.S.C. §§ 1112(c) and (d), derived from the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, § 801(a), 88 Stat. 297, 327 (July 12, 1974).

[44] 31 U.S.C. §§ 1113(b)–(e), also derived from Pub. L. No. 93-344, § 801(a). GAO is continually studying the budget process as part of its overall mission. For an overview of GAO reform proposals, with references to related GAO reports, see U.S. General Accounting Office, *Budget Issues: Budget Enforcement Compliance Report*, GAO-02-794 (Washington, D.C.: June 14, 2002); *Budget Process: Extending Budget Controls*, GAO-02-682T (Washington, D.C.: Apr. 25, 2002); *Studies of the Budget Deficit Include Long-Term Fiscal Challenges*, GAO-02-467T (Washington, D.C.: Feb. 27, 2002); and *Long-Term Budget Issues: Moving From Balancing the Budget to Balancing Fiscal Risk*, GAO-01-385T (Washington, D.C.: Feb. 26, 2001).

[45] Pub. L. No. 93-344, §§ 1014(b), 1015, 2 U.S.C. §§ 685(b), 686.

The Federal Managers' Financial Integrity Act of 1982[46] is a very brief law but one that has had substantial impact. It was intended to increase governmentwide emphasis on internal accounting and administrative controls. Agencies are to establish internal accounting and administrative control systems in accordance with standards prescribed by the Comptroller General (*see* U.S. General Accounting Office, *Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: Nov. 9, 1999)), conduct annual reviews of their systems in accordance with Office of Management and Budget guidelines, and report the results of these reviews to the President and to Congress. OMB Circular No. A-123, *Management Accountability and Control* (June 21, 1995). The act has been beneficial in focusing management and employee attention on the importance of internal controls. More recently, however, Congress enacted a number of statutes to provide a framework for performance-based management and accountability.[47] GAO monitors, and issues governmentwide reports on, the implementation of these statutes. *See*, *e.g.*, U.S. General Accounting Office, *Financial Management: FFMIA (Federal Financial Management Improvement Act) Implementation Necessary to Achieve Accountability*, GAO-03-31 (Washington, D.C.: Oct. 1, 2002); *Managing for Results: Status of the Government Performance and Results Act*, GAO/T-GGD-95-193 (Washington, D.C.: June 27, 1995).

D. "Life Cycle" of an Appropriation

An appropriate subtitle for this section might be "phases of the budget and appropriations process." An appropriation has phases roughly similar to the various stages in the existence of "man"—conception, birth, death, even an afterlife. The various phases in an appropriation's "life cycle" may be identified as follows:

- executive budget formulation and transmittal,
- congressional action,

[46] Pub. L. No. 97-255, 96 Stat. 814 (Sept. 8, 1982), *codified at* 31 U.S.C. §§ 3512(c) and (d).

[47] *See*, *e.g.*, The Chief Financial Officers Act of 1990, Pub. L. No. 101-576, 104 Stat. 2838 (Nov. 15, 1990); the Government Management Reform Act of 1994, Pub. L. No. 103-356, 108 Stat. 3410 (Oct. 13, 1994); the Government Performance and Results Act of 1993, Pub. L. No. 103-62, 107 Stat. 285 (Aug. 3, 1993); and the Federal Financial Management Improvement Act of 1996, Pub. L. No. 104-208, title VIII, 110 Stat. 3009, 3009-389 (Sept. 30, 1996).

- budget execution and control,
- audit and review, and
- account closing.

1. Executive Budget Formulation and Transmittal

The first step in the life cycle of an appropriation is the long and exhaustive administrative process of budget preparation and review, a process that may well take place several years before the budget for a particular fiscal year is ready to be submitted to Congress. The primary participants in the process at this stage are the agencies and individual organizational units, which review current operations, program objectives, and future plans, and the Office of Management and Budget (OMB),[48] which is charged with broad oversight, supervision, and responsibility for coordinating and formulating a consolidated budget submission.

Throughout this preparation period, there is a continuous exchange of information among the various federal agencies, OMB, and the President, including revenue estimates and economic outlook projections from the Treasury Department, the Council of Economic Advisers, the Congressional Budget Office, and the Departments of Commerce and Labor.

The President's budget request must be submitted to Congress on or before the first Monday in February of each year, for use during the following fiscal year. 2 U.S.C. § 631.[49] Numerous statutory provisions, the most important of which are 31 U.S.C. §§ 1104–1109, prescribe the content and nature of the materials and justifications that must be submitted with the

[48] Part 1 of Reorganization Plan No. 2 of 1970 (84 Stat. 2085), designated the former Bureau of the Budget as OMB and transferred all the authority vested in the Bureau and its director to the President. By Executive Order No. 11541, July 1, 1970, the President in turn delegated that authority to the Director of OMB. OMB's primary functions include assistance to the President in the preparation of the budget and the formulation of the fiscal program of the government, supervision and control of the administration of the budget, centralized direction in executive branch financial management, and review of the organization and management of the executive branch.

[49] Section 1105(a) of title 31 of the United States Code states the requirement for a presidential budget submission slightly different than 2 U.S.C. § 631: "On or after the first Monday in January but not later than the first Monday in February of each year, the President shall submit a budget of the United States Government for the following fiscal year."

President's budget request. Specific instructions and policy guidance are contained in OMB Circular No. A-11, *Preparation, Submission and Execution of the Budget* (July 25, 2003).

2. Congressional Action

a. Summary of Congressional Process

In exercising the broad discretion granted by the Constitution, Congress can approve funding levels contained in the President's budget request, increase or decrease those levels, eliminate proposals, or add programs not requested by the administration.

In simpler times, appropriations were often made in the form of a single, consolidated appropriation act. The most recent *regular* consolidated appropriation act[50] was the General Appropriation Act of 1951, Pub. L. No. 759, 64 Stat. 595 (Sept. 6, 1950). Since that time, appropriations have generally been made in a series of regular appropriation acts plus one or more supplemental appropriation acts. Most regular appropriation acts are organized based on one or more major departments and a number of smaller agencies (corresponding to the jurisdiction of appropriations subcommittees), although a few are based solely on function. An agency may receive funds under more than one appropriation act. The individual structures are of course subject to change over time. At the present time, there are 13 regular appropriation acts, as follows:

- Departments of Commerce, Justice, State, the Judiciary, and related agencies;
- Department of Defense;
- Department of the Interior and related agencies;
- Departments of Labor, Health and Human Services, Education, and related agencies;
- Department of Homeland Security;

[50] For a few years in the mid-1980s, very few regular appropriation acts were passed, resulting in consolidated continuing resolutions for those years.

- Departments of Transportation, Treasury, and independent agencies;
- Departments of Veterans Affairs, Housing and Urban Development, and independent agencies;
- District of Columbia;
- Energy and Water Development;
- Foreign Operations, Export Financing, and related programs;
- Legislative Branch;
- Military Construction; and
- Department of Agriculture, Rural Development, Food and Drug Administration, and related agencies.

Before considering individual appropriation measures, however, Congress must, under the Congressional Budget Act, first agree on governmentwide budget totals. A timetable for congressional action is set forth in 2 U.S.C. § 631, with further detail in sections 632–656. Key steps in that timetable are summarized below.[51]

First Monday in February. On or before this date, the President submits to Congress the Administration's budget request for the fiscal year to start the following October 1. The deadline under the 1974 Budget Act had been the first Monday after January 3.[52]

February 15. The Congressional Budget Office submits to the House and Senate Budget Committees its annual report required by 2 U.S.C. § 602(e).

[51] Some useful references discussing the congressional budget process are: U.S. General Accounting Office, *Budget Process: Evolution and Challenges*, GAO/T-AIMD-96-129 (July 11, 1996); Committee on the Budget, United States Senate, *The Congressional Budget Process, An Explanation*, S. Print No. 105-67 (revised Dec. 1998); and Library of Congress, Congressional Research Service, No. RS20358, *Overview of the Congressional Budget Process* (July 23, 2003).

[52] The Omnibus Budget Reconciliation Act of 1990 amended section 1105(a) of Title 31 of the United States Code to require the President to submit a budget "[o]n or after the first Monday in January but not later than the first Monday in February of each year."

The report contains the Congressional Budget Office's analysis of fiscal policy and budget priorities.

Within 6 weeks after President submits a budget request, or at such time as may be requested by the Committee on the Budget. Each congressional committee with legislative jurisdiction submits to the appropriate Budget Committee its views and estimates on spending and revenue levels for the following fiscal year on matters within its jurisdiction. 2 U.S.C. § 632(d), as amended. The House and Senate Budget Committees then hold hearings and prepare their respective versions of a concurrent resolution, which is intended to be the overall budget plan against which individual appropriation bills are to be evaluated.

April 15. Congress completes action on the concurrent resolution, which includes a breakdown of estimated new budget authority and outlays for each major budget function. 2 U.S.C. § 632(a). The conference report on the concurrent resolution allocates the totals among individual committees. 2 U.S.C. § 633(a). The resolution may also include "reconciliation directives"—directives to individual committees to recommend legislative changes in revenues or spending to meet the goals of the budget plan. 2 U.S.C. § 641(a).

June 10. House Appropriations Committee completes the process of reporting out the individual appropriation bills.

June 15. Congress completes action on any reconciliation legislation stemming from the concurrent resolution.

June 30. House of Representatives completes action on annual appropriation bills.

Of course, House of Representative consideration of the individual appropriation bills will have begun several months earlier. The first step is for each subcommittee of the House Appropriations Committee to study appropriation requests and evaluate the performance of the agencies within its jurisdiction. Typically, each subcommittee will conduct hearings at which federal officials give testimony concerning both the costs and achievements of the various programs administered by their agencies and provide detailed justifications for their funding requests. Eventually, each subcommittee reports a single appropriation bill for consideration by the entire committee and then the full House membership.

As individual appropriation bills are passed by the House, they are sent to the Senate. As in the House, each appropriation measure is first considered in subcommittee and then reported by the full Appropriations Committee to be voted upon by the full Senate. In the event of variations in the Senate and House versions of a particular appropriation bill, a conference committee, including representatives of both houses of Congress, is formed. It is the function of the conference committee to resolve all differences, but the full House and Senate (in that order) must also vote to approve the conference report.

Following either the Senate's passage of the House version of an appropriation measure, or the approval of a conference report by both bodies, the enrolled bill is then sent to the President for signature or veto. The Congressional Budget Act envisions completion of the process by October 1, the beginning of the new fiscal year.

b. Points of Order

A number of requirements relevant to an understanding of appropriations law and the legislative process are found in rules of the Senate and the House of Representatives. For example, Rule XXI(2), Rules of the House of Representatives, prohibits appropriations for objects not previously authorized by law.[53] A similar but more limited prohibition exists in Rule XVI, Standing Rules of the Senate.[54] Other examples are the

prohibition against including general legislation in appropriation acts[55] (Senate Rule XVI, House Rule XXI), and the prohibition against consideration by a conference committee of matters not committed to it by either House (Senate Rule XXVIII, House Rule XXII). The applicability of Senate and House rules is exclusively within the province of the particular House.[56]

[53] Citations to the Rules of the House are from the Rules of the House of Representatives, 108th Congress, Jan. 7, 2003.

[54] Citations to the Senate rules are from the Standing Rules of the Senate, S. Doc. No. 106-15, Nov. 19, 1999 (revised as of April 27, 2000).

[55] Whether a given item is general legislation or merely a condition on the availability of an appropriation is frequently a difficult question.

[56] The Comptroller General will not render an opinion on these matters. *E.g.*, B-173832, Aug. 1, 1975.

In addition, rather than expressly prohibiting a given item, legislation may provide that it shall not be in order for the Senate or House to consider a bill or resolution containing that item. An important example from the Congressional Budget Act of 1974[57] is 2 U.S.C. § 651(a), which provides that it shall not be in order for either house to consider any bill, resolution, or amendment containing certain types of new spending authority, such as contract authority, unless that bill, resolution, or amendment also provides that the new authority is to be effective for any fiscal year only to the extent provided in appropriation acts.

The effect of these rules and of statutes like 2 U.S.C. § 651(a) is to subject the noncomplying bill to a "point of order." A point of order is a procedural objection raised on the House or Senate floor or in committees by a Member alleging a departure from a rule or statute governing the conduct of business. *See* U.S. General Accounting Office, *A Glossary of Terms Used in the Federal Budget Process (Exposure Draft)*, GAO/AFMD-2.1.1 (Washington, D.C.: Jan. 1993). It differs from an absolute prohibition in that (a) it is always possible that no one will raise it and (b) if raised, it may or may not be sustained. Also, some laws, like the Congressional Budget Act, authorize points of order to be raised, and some measures may be considered under special resolutions waiving points of order.[58] If a point of order is raised and sustained, the offending provision is effectively killed and may be revived only if it is amended to cure the noncompliance.

The potential effect of a rule or statute subjecting a provision to a point of order is limited to the pre-enactment stage. If a point of order is not raised, or is raised and not sustained, the provision, if enacted, is no less valid. To restate, a rule or statute subjecting a given provision to a point of order has no effect or application once the legislation or appropriation has been enacted. 65 Comp. Gen. 524, 527 (1986); 57 Comp. Gen. 34 (1977); 34 Comp. Gen. 278 (1954); B-173832, *supra*; B-123469, Apr. 14, 1955; B-87612, July 26, 1949.

[57] Pub. L. No. 93-344, 88 Stat. 297 (July 12, 1974).

[58] Usually, a point of order may be waived by a simple majority vote. *See* GAO/AFMD-2.1.1. However, in the Senate, waiver of some points of order requires a three-fifths vote. *See* Congressional Research Service, No. 97-865, *supra.* For example, waiver of the prohibition against consideration of nongermane amendments to budget resolutions requires a three-fifths vote of all members of the Senate. Pub. L. No. 93-344, § 305(b)(2).

3. Budget Execution and Control

a. In General

The body of enacted appropriation acts for a fiscal year, as amplified by legislative history and the relevant budget submissions, becomes the government's financial plan for that fiscal year. The "execution and control" phase refers generally to the period of time during which the budget authority made available by the appropriation acts remains available for obligation. An agency's task during this phase is to spend the money Congress has given it to carry out the objectives of its program legislation.

The Office of Management and Budget apportions or distributes budgeted amounts to the executive branch agencies, thereby making funds in appropriation accounts (administered by the Treasury Department) available for obligation. 31 U.S.C. §§ 1511–1516. The apportionment system through which budget authority is distributed by time periods (usually quarterly) or by activities is intended to achieve an effective and orderly use of available budget authority, and to reduce the need for supplemental or deficiency appropriations. Each agency then makes allotments pursuant to the OMB apportionments or other statutory authority. 31 U.S.C. §§ 1513(d), 1514. An allotment is a delegation of authority to agency officials that allows them to incur obligations within the scope and terms of the delegation.[59] These concepts will be discussed further in Chapter 6. Further detail on the budget execution phase may also be found in U.S. General Accounting Office, *A Glossary of Terms Used in the Federal Budget Process (Exposure Draft)*, GAO/AFMD-2.1.1 (Washington, D.C.: Jan. 1993), and OMB Circular No. A-11, *Preparation, Submission and Execution of the Budget*, pt. 4, *Instructions on Budget Execution* (July 25, 2003).

In addition, OMB exercises a leadership role in executive branch financial management. This role was strengthened and given a statutory foundation by the Chief Financial Officers Act of 1990, Pub. L. No. 101-576, 104 Stat. 2838 (Nov. 15, 1990). The Chief Financial Officers Act also enacted a new 31 U.S.C. ch. 9, which establishes a Chief Financial Officer in the cabinet departments and several other executive branch agencies to work with

[59] Note the distinction in terminology: Congress *appropriates*, OMB *apportions*, and the receiving agency *allots* (or allocates) within the apportionment.

OMB and to develop and oversee financial management plans, programs, and activities within the agency.

b. Impoundment

While an agency's basic mission is to carry out its programs with the funds Congress has appropriated, there is also the possibility that, for a variety of reasons, the full amount appropriated by Congress will not be expended or obligated by the administration. Under the Impoundment Control Act of 1974, an impoundment is an action or inaction by an officer or employee of the United States that delays or precludes the obligation or expenditure of budget authority provided by Congress. 2 U.S.C. §§ 682(1), 683.[60] The act applies to "Salaries and Expenses" appropriations as well as program appropriations. 64 Comp. Gen. 370, 375–76 (1985).

There are two types of impoundment actions—deferrals and rescission proposals. A deferral is a postponement of budget authority in the sense that an agency temporarily withholds or delays obligation or expenditure. The President is required to submit a special message to Congress reporting any deferral of budget authority. Deferrals are authorized only to provide for contingencies, to achieve savings made possible by changes in requirements or greater efficiency of operations, or as otherwise specifically provided by law.[61] A deferral may not be proposed for a period beyond the end of the fiscal year in which the special message reporting it is transmitted, although, for multiple year funds, nothing prevents a new deferral message covering the same funds in the following fiscal year. 2 U.S.C. §§ 682(1), 684.[62]

[60] For a detailed discussion of impoundment before the 1974 legislation, see B-135564, July 26, 1973.

[61] These requirements are repeated in 31 U.S.C. § 1512(c), which prescribes conditions for establishing reserves through the apportionment process. The President's deferral authority under the Impoundment Control Act thus mirrors his authority to establish reserves under the Antideficiency Act. In other words, deferrals are authorized only in those situations in which reserves are authorized under the Antideficiency Act. U.S. General Accounting Office, *Impoundment Control: President's Third Special Impoundment Message for FY 1990*, GAO/OGC-90-4 (Washington, D.C.: Mar. 6, 1990). Deferrals for policy reasons are not authorized. 2 U.S.C. § 684(b).

[62] Under the original 1974 legislation, a deferral could be overturned by the passage of an impoundment resolution by either the House or the Senate. This "legislative veto" provision was found unconstitutional in *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987), and the statute was subsequently amended to remove it. *See* Pub. L. No. 100-119, § 206, 101 Stat. 754 (Sept. 29, 1987), *codified at* 2 U.S.C. § 684(b). Congress may, of course, enact legislation disapproving a deferral and requiring that the deferred funds be made available for obligation.

A rescission involves the cancellation of budget authority previously provided by Congress (before that authority would otherwise expire), and can be accomplished only through legislation. The President must advise Congress of any proposed rescissions, again in a special message. The President is authorized to withhold budget authority that is the subject of a rescission proposal for a period of 45 days of continuous session following receipt of the proposal. Unless Congress acts to approve the proposed rescission within that time, the budget authority must be made available for obligation. 2 U.S.C. §§ 682(3), 683, 688.[63]

The Impoundment Control Act requires the Comptroller General to monitor the performance of the executive branch in reporting proposed impoundments to Congress. A copy of each special message reporting a proposed deferral or rescission must be delivered to the Comptroller General, who then must review each such message and present his views to the Senate and House of Representatives. 2 U.S.C. § 685(b). If the Comptroller General finds that the executive branch has established a reserve or deferred budget authority and failed to transmit the required special message to Congress, the Comptroller General so reports to Congress. 2 U.S.C. § 686(a); U.S. General Accounting Office, *Impoundment Control: Deferrals of Budget Authority in GSA*, GAO/OGC-94-17 (Washington, D.C.: Nov. 5, 1993) (unreported impoundment of General Service Administration funds); *Impoundment Control: Comments on Unreported Impoundment of DOD Budget Authority*, GAO/OGC-92-11 (Washington, D.C.: June 3, 1992) (unreported impoundment of V-22 Osprey funds). The Comptroller General also reports to Congress on any special message transmitted by the executive branch that has incorrectly classified a deferral or a rescission. 2 U.S.C. § 686(b). GAO will construe a deferral as a *de facto* rescission if the timing of the proposed deferral is such that "funds could be expected with reasonable certainty to lapse before they

[63] In 1996, the Congress enacted the Line Item Veto Act, Pub. L. No. 104-130, 110 Stat. 1200 (Apr. 9, 1996), which was codified at 2 U.S.C. §§ 691–692. The Line Item Veto Act (Veto Act) gave the President the power to "cancel in whole" three types of provisions already enacted into law: (1) any dollar amount of discretionary budget authority, (2) any item of new direct spending, or (3) any limited tax benefit. The Veto Act imposed procedures for the President to follow whenever he exercised this cancellation authority. The Veto Act also provided for expedited congressional consideration of bills introduced to disapprove the cancellations. In *Clinton v. City of New York*, 524 U.S. 417 (1998), the Supreme Court held that because the Veto Act established cancellation procedures that authorized the President, by canceling already enacted provisions of law, "to create a different law—one whose text was not voted on by either House of Congress or presented to the President for signature," it violated the Presentment Clause (U.S. Const. art. I, § 7) and thus was unconstitutional. *Id.* at 448.

could be obligated, or would have to be obligated imprudently to avoid that consequence." 54 Comp. Gen. 453, 462 (1974).

If, under the Impoundment Control Act, the executive branch is required to make budget authority available for obligation (if, for example, Congress does not pass a rescission bill) and fails to do so, the Comptroller General is authorized to bring a civil action in the U.S. District Court for the District of Columbia to require that the budget authority be made available. 2 U.S.C. § 687.

The expiration of budget authority or delays in obligating it resulting from ineffective or unwise program administration are not regarded as impoundments unless accompanied by or derived from an intention to withhold the budget authority. B-229326, Aug. 29, 1989. Similarly, an improper obligation, although it may violate several other statutes, is generally not an impoundment. 64 Comp. Gen. 359 (1985).

There is also a distinction between deferrals, which must be reported, and "programmatic" delays, which are not impoundments and are not reportable under the Impoundment Control Act. A programmatic delay is one in which operational factors unavoidably impede the obligation of budget authority, notwithstanding the agency's reasonable and good faith efforts to implement the program. B-290659, July 24, 2002; U.S. General Accounting Office, *Impoundment Control: Deferral of DOD Budget Authority Not Reported*, GAO/OGC-91-8 (Washington, D.C.: May 7, 1991); *Impoundment Control: Deferrals of Budget Authority for Military Construction Not Reported*, GAO/OGC-91-3 (Washington, D.C.: Feb. 5, 1991). Since intent is a relevant factor, the determination requires a case-by-case evaluation of the agency's justification in light of all of the surrounding circumstances. A programmatic delay may become a reportable deferral if the programmatic basis ceases to exist.

Delays resulting from the following factors may be programmatic, depending on the facts and circumstances involved:

- conditions on availability for using funds not met (B-290659, *supra*);
- contract delays due to shipbuilding design modification, verification, or changes in scope (GAO/OGC-90-4);
- uncertainty as to the amount of budget authority that will ultimately be available for the program (B-203057, Sept. 15, 1981; B-207374, July 20,

1982, noting that the uncertainty is particularly relevant when it "arises in the context of continuing resolution funding, where Congress has not yet spoken definitively");

- time required to set up the program or to comply with statutory conditions on obligating the funds (B-96983, B-225110, Sept. 3, 1987);
- compliance with congressional committee directives (B-221412, Feb. 12, 1986);
- delay in receiving a contract proposal requested from contemplated sole source awardee (B-115398, Feb. 6, 1978);
- historically low loan application level (B-115398, Sept. 28, 1976);
- late receipt of complete loan applications (B-195437.3, Feb. 5, 1988);
- delay in awarding grants pending issuance of necessary regulations (B-171630, May 10, 1976); and
- administrative determination of allowability and accuracy of claims for grant payments (B-115398, Oct. 16, 1975).

Where the Department of Defense withheld military construction funds to improve program efficiency, not because of an unavoidable delay, and the Department did not take the necessary steps to implement the program while funds were temporarily unobligated, the withholding was an impoundment, not a programmatic delay. B-241514.2, Feb. 5, 1991.

4. Audit and Review

a. Basic Responsibilities

Every federal department or agency has the initial and fundamental responsibility to ensure that its application of public funds adheres to the terms of the pertinent authorization and appropriation acts, as well as any other relevant statutory provisions. This responsibility—enhanced by the enactment of the Federal Managers' Financial Integrity Act and the creation of an Inspector General in many agencies—includes establishing and maintaining appropriate accounting and internal controls, one of which is an internal audit program. Ensuring the legality of proposed payments is also, under 31 U.S.C. § 3528, one of the basic responsibilities of

agency certifying officers. The Chief Financial Officers Act of 1990 (Pub. L. No. 101-576, §§ 303, 304, 104 Stat. 2838, 2849–53 (Nov. 15, 1990), *codified at* 31 U.S.C. § 3515 and §§ 3521(e)–(h)) provides for the preparation and audit of financial statements for those agencies required to establish Chief Financial Officers. In addition, the Secretary of the Treasury, in coordination with the Director of the Office of Management and Budget, is required to annually prepare and submit to the President and Congress a financial statement for the executive branch of the government that has been audited by GAO. 31 U.S.C. § 331(e). GAO also regularly audits federal programs under the various authorities that we summarize in section C.2 of this chapter.

b. GAO Recommendations and Matters for Consideration

In carrying out its various responsibilities to examine the financial, management, and program activities of federal agencies, and to evaluate the efficiency, effectiveness, and economy of agency operations, GAO reports to Congress both objective findings and recommendations for improvement. Recommendations are addressed to agency heads for action that the agency is authorized to take under existing law. Matters for consideration are addressed to Congress.

Under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720(b), whenever GAO issues a report that contains recommendations to the head of a federal agency, the agency must submit a written statement of the actions taken with respect to the recommendations to (1) the Senate Committee on Governmental Affairs and the House Committee on Government Reform, not later than 60 days after the date of the report and (2) the Senate and House Appropriations Committees in connection with the agency's first request for appropriations submitted more than 60 days after the date of the report. As GAO pointed out in a letter to a private inquirer (B-207783, Apr. 1, 1983, nondecision letter), the law does not require the agency to comply with the recommendation, merely to report on the "actions taken," which can range from full compliance to zero. The theory is that, if the agency disagrees with the GAO recommendation, Congress will have both positions so that it can then take whatever action it might deem appropriate.

The term "agency" for purposes of 31 U.S.C. § 720 is broadly defined to include any department, agency, or instrumentality of the U.S. government, including wholly owned but not mixed-ownership government corporations, or the District of Columbia government. 31 U.S.C. § 720(a). *See also* B-114831-O.M., July 28, 1975.

5. Account Closing

Continuing our "life cycle" analogy, an appropriation "dies" in a sense at the end of its period of obligational availability. There is, however, an afterlife to the extent of any unexpended balances. Unexpended balances, both obligated and unobligated, retain a limited availability for five fiscal years following expiration of the period for which the source appropriation was made. At midnight on the last day of an appropriation's period of availability, the appropriation account expires and is no longer available for incurring new obligations. The expired appropriation remains available for 5 years for the purpose of paying obligations incurred prior to the account's expiration and adjusting obligations that were previously unrecorded or under recorded. 31 U.S.C. § 1553(a). After 5 years, the expired account is closed and the balances remaining are canceled. 31 U.S.C. § 1552(a). These concepts are discussed in Chapter 5.

E. The Role of the Accounting Officers: Legal Decisions

1. A Capsule History

Since the early days of the Republic, Congress, in exercising its oversight of the public purse, has utilized administrative officials for the settlement of public accounts and the review of federal expenditures.

a. Accounting Officers Prior to 1894

Throughout most of the nineteenth century, the accounting officers[64] consisted of a series of comptrollers and auditors. Starting in 1817 with two comptrollers and four auditors, the number increased until, for the second half of the century, there were three co-equal comptrollers (First Comptroller, Second Comptroller, Commissioner of Customs) and six auditors (First Auditor, Second Auditor, *etc.*), all officials of the Treasury Department. The jurisdiction of the comptrollers and auditors was divided generally along departmental lines, with the auditors examining accounts and submitting their settlements to the appropriate comptroller.

[64] *See* section A of this chapter, footnote 2.

The practice of rendering written decisions goes back at least to 1817. However, very little of this material exists in published form. (Until sometime after the Civil War, the decisions were handwritten.)

There are no published decisions of the First Comptroller prior to the term of William Lawrence (1880–85). Lawrence published his decisions in a series of six annual volumes. After Lawrence's decisions, a gap of 9 years followed until First Comptroller Robert Bowler published a single unnumbered volume of his 1893–94 decisions.[65]

The decisions of the Second Comptroller and the Commissioner of Customs were never published. However, volumes of digests of decisions of the Second Comptroller were published starting in 1852. The first volume, unnumbered, saw three cumulative editions, the latest issued in 1869 and including digests for the period 1817–69. Three additional volumes (designated volumes 2, 3, and 4) were published in 1884, 1893, and 1899 (the latter being published several years after the office had ceased to exist), covering respectively, the periods 1869–84, 1884–93, and 1893–94.[66]

Thus, material available in permanent form from this period consists of Lawrence's six volumes, Bowler's single volume, and four volumes of Second Comptroller digests.

b. 1894–1921: Comptroller of the Treasury

In 1894, Congress enacted the so-called Dockery Act, actually a part of the general appropriation act for 1895 (ch. 174, 28 Stat. 162, 205 (July 31, 1894)), which consolidated the functions of the First and Second Comptrollers and the Commissioner of Customs into the newly created Comptroller of the Treasury. (The title was a reversion to one that had been used before 1817.) The six auditors remained, with different titles, but their settlements no longer had to be automatically submitted to the Comptroller.

[65] Citations to these are rarely encountered, and we have observed no consistent citation format, except that the First Comptroller's name is always included to prevent confusion with the later Comptroller of the Treasury series. Example: 5 Lawrence, First Comp. Dec. 408 (1884).

[66] Digests are numbered consecutively within each volume. Citations should specify the digest number rather than the page number since several digests appear on each page. Example: 4 Dig. Second Comp. Dec. ¶ 35 (1893). Without the text of the decisions themselves, the digests are primarily of historical interest.

The Dockery Act included a provision requiring the Comptroller of the Treasury to render decisions upon the request of an agency head or a disbursing officer. (Certifying officers did not exist back then.) Although this was to a large extent a codification of existing practice, it gave increased significance to the availability of the decisions. Accordingly, the first Comptroller of the Treasury (Robert Bowler, who had been First Comptroller when the Dockery Act passed) initiated the practice of publishing an annual volume of decisions "of such general character as will furnish precedents for the settlements of future accounts." 1 Comp. Dec. iv (1896) (Preface).

The *Decisions of the Comptroller of the Treasury* series consists of 27 volumes covering the period 1894–1921.[67] Comptroller of the Treasury decisions not included in the annual volumes exist in bound "manuscript volumes," which are now in the custody of the National Archives, and are thus, unavailable as a practical matter.

c. 1921 to the Present Time

When the Budget and Accounting Act of 1921 created the General Accounting Office, the offices of the Comptroller of the Treasury and the six Auditors were abolished and their functions transferred to the Comptroller General. Among these functions was the issuance of legal decisions to agency officials concerning the availability and use of appropriated funds. Thus, the decisions GAO issues today reflect the continuing evolution of a body of administrative law on federal fiscal matters dating back to the Nation's infancy. We turn now to a brief description of this function under the stewardship of the Comptroller General.

2. Decisions of the Comptroller General

a. General Information

Certain federal officials are entitled by statute to receive GAO decisions. The Comptroller General renders decisions in advance of payment when requested by disbursing officers, certifying officers, or the head of any

[67] These are cited by volume and page number, respectively, and the year of the decision, using the abbreviation "Comp. Dec." Example: 19 Comp. Dec. 582 (1913). There is also a hefty (2,497 pages) volume, published in 1920, of digests of decisions appearing in volumes 1–26.

department or establishment of the federal government, who may be uncertain whether he or she has authority to make, or authorize the making of, particular payments. 31 U.S.C. § 3529. The Comptroller General also renders, for example, decisions to heads of agency components, including general counsels and inspectors general. *See*, *e.g.*, B-291947, Aug. 15, 2003; B-285794, Dec. 5, 2000. The Comptroller General's decisions are logically known as "advance decisions."

Decisions are also provided to disbursing and certifying officers who request review of a settlement of their accounts. 31 U.S.C. §§ 3527, 3528(b). In addition, the Comptroller General may, in his discretion, render decisions or legal opinions to other individuals or organizations, both inside and outside the government.

A decision regarding an account of the government is binding on the executive branch[68] and on the Comptroller General himself,[69] but is not binding on a private party who, if dissatisfied, retains whatever recourse to the courts he would otherwise have had. The Comptroller General has no power to enforce decisions. Ultimately, agency officials who act contrary to Comptroller General decisions may have to respond to congressional appropriations and program oversight committees.

There is no specific procedure for requesting a decision from the Comptroller General. A simple letter is usually sufficient. The request should, however, include all pertinent information or supporting material and should present any arguments the requestor wishes to have considered. GAO will also receive requests for decisions by e-mail. To submit a request

[68] 31 U.S.C. § 3526(d) ("[o]n settling an account of the Government, the balance certified by the Comptroller General is conclusive on the executive branch of the Government"); *see United States ex rel. Skinner & Eddy Corp. v. McCarl*, 275 U.S. 1, 4 n.2 (1927); *St. Louis, Brownsville & Mexico Railway Co. v. United States*, 268 U.S. 169, 174 (1925); *United States v. Standard Oil Co. of California*, 545 F.2d 624, 637–38 (9th Cir. 1976); *Burkley v. United States*, 185 F.2d 267, 272 (7th Cir. 1950); *United States ex rel. Steacy-Schmidt Manufacturing Co. v. Globe Indemnity Co.*, 66 F.2d 302, 303 (3rd Cir. 1933); *United States ex rel. Brookfield Construction Co. v. Stewart*, 234 F. Supp. 94, 99–100 (D.D.C. 1964), *aff'd* 339 F.2d 753 (D.C. Cir. 1964); *Pettit v. United States*, 488 F.2d 1026, 1031 (Ct. Cl. 1973); 54 Comp. Gen. 921 (1975); 45 Comp. Gen. 335, 337 (1965). Comptroller General decisions on bid protests under the Competition in Contracting Act, 31 U.S.C. §§ 3551–3556, are advisory only. *See Ameron, Inc. v. Corps of Engineers*, 809 F.2d 979 (3rd Cir. 1986).

[69] 31 U.S.C. § 3526(b) ("A decision of the Comptroller General under section 3529 of this title is conclusive on the Comptroller General when settling the account containing the payment.").

by e-mail, refer to the "Legal Products" page of GAO's Web site, www.gao.gov, and follow the instructions provided therein.

A request for an advance decision submitted by a certifying officer will usually arise from "a voucher presented… for certification." 31 U.S.C. § 3529(a)(2). At one time, GAO insisted that the original voucher accompany the request and occasionally declined to render the decision if this was not done. *See*, *e.g.*, 21 Comp. Gen. 1128 (1942). The requirement was eliminated in B-223608, Dec. 19, 1988:

> "Consistent with our current practice, submission of the original voucher need not accompany the request for an advance decision. Accordingly, in the future, the original voucher should be retained in the appropriate finance office. A photocopy accompanying the request for decision will be sufficient. Language to the contrary in prior decisions may be disregarded."

Even if no voucher is submitted, GAO will most likely render the decision notwithstanding the absence of a voucher if the question is of general interest and appears likely to recur. *See*, *e.g.*, 55 Comp. Gen. 652 (1976); 53 Comp. Gen. 429 (1973); 53 Comp. Gen. 71 (1973); 52 Comp. Gen. 83 (1972).

Often, requests for decisions will require factual development, and GAO will contact the agency as necessary to establish and document relevant facts. It is the usual practice of GAO to obtain the legal positions and views of the agency or agencies involved in the request for a decision or opinion.

An involved party or agency may request reconsideration of a decision. The standard applied is whether the request demonstrates error of fact or law (*e.g.*, B-184062, July 6, 1976) or presents new information not considered in the earlier decision. B-271838.2, May 23, 1997. While the Comptroller General gives precedential weight to prior decisions,[70] a decision may be modified or overruled by a subsequent decision. In overruling its decisions,

[70] It is a general principle of administrative law that an agency or administrative board rendering administrative decisions should follow its own decisions or give a reasoned explanation for departure. *See*, *e.g.*, *Hinson v. National Transportation Safety Board*, 57 F.3d 1144 (D.C. Cir. 1995); *Doubleday Broadcasting Co. v. FCC*, 655 F.2d 417, 422–23 (D.C. Cir. 1981).

GAO tries to follow the approach summarized by the Comptroller of the Treasury in a 1902 decision:

> "I regret exceedingly the necessity of overruling decisions of this office heretofore made for the guidance of heads of departments and the protection of paying officers, and fully appreciate that certainty in decisions is greatly to be desired in order that uniformity of practice may obtain in the expenditure of the public money, but when a decision is made not only wrong in principle but harmful in its workings, my pride of decision is not so strong that when my attention is directed to such decision I will not promptly overrule it. It is a very easy thing to be consistent, that is, to insist that the horse is 16 feet high, but not so easy to get right and keep right."

8 Comp. Dec. 695, 697 (1902).

GAO also entertains informal inquiries, via telephone and e-mail, regarding matters of appropriations law. To submit such an inquiry by e-mail, refer to the "Legal Products" page of GAO's Web site, www.gao.gov, and follow the instructions provided therein. Informal opinions expressed by GAO officers or employees may not represent the views of the Comptroller General or GAO and are in no way controlling on any subsequent formal or official determinations by the Comptroller General. 56 Comp. Gen. 768, 773–74 (1977); 31 Comp. Gen. 613 (1952); 29 Comp. Gen. 335 (1950); 12 Comp. Gen. 207 (1932); 4 Comp. Gen. 1024 (1925).

b. Matters Not Considered

There are a number of areas in which, as a matter of law or policy, the Comptroller General will generally decline to render a decision.

For example, as we discussed earlier in this chapter, effective June 30, 1996, Congress transferred claims settlement authority under 31 U.S.C. § 3302 to the Director of the Office of Management and Budget (OMB). Congress gave the director of OMB the authority to delegate this function to such agency or agencies as he deemed appropriate. *See*, *e.g.*, B-278805, July 21, 1999.

Other areas where the Comptroller General will decline to render decisions include questions concerning which the determination of another agency is by law "final and conclusive." Examples are determinations on the merits of a claim against another agency under the Federal Tort Claims Act

(28 U.S.C. § 2672) or the Military Personnel and Civilian Employees' Claims Act of 1964 (31 U.S.C. § 3721). Another example is a decision by the Secretary of Veterans Affairs on a claim for veterans' benefits (38 U.S.C. § 511). *See* 56 Comp. Gen. 587, 591 (1977); B-266193, Feb. 23, 1996; B-226599.2, Nov. 3, 1988 (nondecision letter).

In addition, GAO has traditionally declined to render decisions in a number of areas that are specifically within the jurisdiction of some other agency and concerning which GAO would not be in the position to make authoritative determinations, even though the other agency's determination is not statutorily "final and conclusive." Thus, GAO will not "decide" whether a given action violates a provision of the Criminal Code (Title 18 of the United States Code) since this is within the jurisdiction of the Justice Department and the courts.[71] If the use of public funds is an element of the alleged violation, the extent of GAO's involvement will be to determine if appropriated funds were in fact used and to refer the matter to the Justice Department if deemed appropriate or if requested to do so.[72]

Other examples of areas where GAO has declined to render decisions are antitrust law,[73] political activities of federal employees under the Hatch Act,[74] and determinations as to what is or is not taxable under the Internal Revenue Code.[75]

[71] 48 Comp. Gen. 24, 27 (1968); 37 Comp. Gen. 776 (1958); 20 Comp. Gen. 488 (1941); B-215651, Mar. 15, 1985.

[72] An example here is 18 U.S.C. § 1913, the anti-lobbying statute; *see* B-284226.2, Aug. 17, 2000.

[73] 59 Comp. Gen. 761 (1980); 50 Comp. Gen. 648 (1971); 21 Comp. Gen. 56, 57 (1941); B-284110, n. 8, Feb. 18, 2000; B-218279, B-218290, Mar. 13, 1985; B-190983, Dec. 21, 1979; B-194584, Aug. 9, 1979.

[74] B-218996, June 4, 1985; B-165548, Jan. 3, 1969.

[75] B-147153, Nov. 21, 1961; B-173783.127, Feb. 7, 1975 (nondecision letter). *See also* 26 U.S.C. § 6406.

GAO avoids opining on an issue that is the subject of current litigation, unless the court expresses an interest in receiving GAO's opinion.[76] GAO's policy with respect to issues that are the subject of agency administrative proceedings is generally similar to its litigation policy. *See* 69 Comp. Gen. 134 (1989) (declining to render an opinion on the propriety of an attorney's fee award being considered by the Equal Employment Opportunity Commission). *See also* B-259632, June 12, 1995.

Another long-standing GAO policy concerns the constitutionality of acts of Congress. As an agent of Congress, GAO recognizes that it is neither our role nor our province to opine on or adjudicate the constitutionality of duly enacted statutes. Such laws come to GAO with a heavy presumption in favor of their constitutionality and, like the courts, GAO will construe statutes narrowly to avoid constitutional issues.[77] *Immigration & Naturalization Service v. St. Cyr*, 533 U.S. 289, 299, n.12 (2001); B-300192, Nov. 13, 2002 (regarding a provision in the fiscal year 2003 Continuing Resolution, Pub. L. No. 107-229, § 117, 116 Stat. 1465, 1468 (Sept. 30, 2002), prohibiting the use of appropriations to acquire private sector printing and specifically prohibiting the use of appropriations to pay for printing the President's Budget other than through the Government Printing Office: "Given our authority to settle and audit the accounts of the government…, we will apply laws as we find them absent a controlling opinion that such laws are unconstitutional"). GAO will, however, express

[76] 58 Comp. Gen. 282, 286 (1979); B-240908, Sept. 11, 1990; B-218900, July 9, 1986; B-217954, July 30, 1985; B-203737, July 14, 1981; B-179473, Mar. 7, 1974; A-36314, Apr. 29, 1931. For examples of cases where GAO's opinion was requested by a court, *see* 56 Comp. Gen. 768 (1977) and B-186494, July 22, 1976. Also, under 28 U.S.C. § 2507, the United States Court of Federal Claims may issue a "call" upon GAO (or any other agency) for comments on a particular issue or for other information.

[77] B-215863, July 26, 1984; B-210922.1, June 27, 1983; B-114578, Nov. 9, 1973; B-157984, Nov. 26, 1965; B-124985, Aug. 17, 1955; A-23385, June 28, 1928; *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). Except for matters perceived as involving conflicts between the prerogatives of the executive and legislative branches, the Attorney General has expressed a similar policy. *See, e.g.*, 39 Op. Att'y Gen. 11 (1937); 20 Op. Off. Legal Counsel 214, 226 (1996). In B-300192, Nov. 13, 2002, Walter Dellinger, the United States Assistant Attorney General is quoted as stating:

> "When the President's obligation to execute laws enacted by Congress is in tension with his responsibility to act in accordance with the Constitution, questions arise that really go to the very heart of the system. And the President can decline to comply with the law, in our view, only where there is a judgment where the Supreme Court has resolved the issue."

Id. at 6.

its opinion, upon the request of a Member or committee of Congress, on the constitutionality of a bill prior to enactment. *E.g.*, B-360241, Mar. 18, 2003; B-300192, *supra*; B-228805, Sept. 28, 1987.

c. Research Aids

Between July 1921 and September 1994, decisions that the General Counsel determined had wide applicability were published annually in hardbound volumes entitled *Decisions of the Comptroller General*. All other decisions, after GAO had distributed copies to the requester and other interested parties, were filed at GAO and available publicly upon request. There is no legal distinction between a decision published in *Decisions of the Comptroller General* and an unpublished decision. 28 Comp. Gen. 69 (1948). Since 1994, all decisions have been posted to the GAO Internet Web site, www.gao.gov. The decisions are available at the GAO Web site only for a period of 60 days. After 60 days, the Government Printing Office (GPO) posts GAO's decision to its GPO Access WAIS system, an archival system. Researchers can access the GPO system through GAO's Web site. The GPO system includes GAO decisions issued since January 1996. GAO's Office of General Counsel will assist researchers who have difficulty locating a copy of GAO decisions.

Some of the computerized legal research systems (*e.g.*, Lexis, Westlaw) carry Comptroller General decisions. Researchers might also find decisions available through the Air Force's Federal Legal Information Through Electronics (FLITE) Web site. GAO's procurement decisions are published commercially, and some of the commercial "newsletter" services include summaries of other GAO issuances, including appropriations law decisions.

d. Note on Citations

Decisions of the Comptroller General published in the *Decisions of the Comptroller General* volumes are cited by volume, page number on which the decision begins, and the year. For example: 31 Comp. Gen. 350 (1952). Unpublished decisions before 1994 and all decisions thereafter are cited by file number and date. For example: B-193282, Dec. 21, 1978. The present file numbering system ("B-numbers") has been in use since January 1939. From 1924 through 1938, file numbers had an "A" prefix.[78]

[78] Cases prior to 1924 were classified according to type into one of four categories: advance decision (A.D. 1234), review decision (Review No. 2345), division memorandum (D.M.) 3456, or appeal (Appeal No. 4567). In addition, some of the earliest decisions have no file designation. These must be cited by reference to the "manuscript volume" in which the decision appears. (These volumes are maintained by GAO, containing the written products of the Office of General Counsel for a given month in chronological sequence.) Example: unpublished decision of September 1, 1921, 1 MS Comp. Gen. 712.

3. Other Relevant Authorities

a. GAO Materials

GAO expresses its positions in many forms. Most of the GAO materials cited in this publication are decisions of the Comptroller General. While these constitute the most significant body of GAO positions on legal issues, the editors have also included, as appropriate, citations to the following items:

1. *Legal opinions to Congress*—GAO prepares legal opinions at the request of congressional committees or individual Members of Congress. Congressional opinions are prepared in letter rather than decision format, but have the same weight and effect as decisions. The citation form is identical to that for decisions. As a practical matter, except where specifically identified in the text, the reader will not be able to distinguish between a decision and a congressional opinion based on the form of the citation.

2. *Office memoranda*—Legal questions are frequently presented by other divisions or offices within GAO. The response is in the form of an internal memorandum, formerly signed by the Comptroller General, but now, for the most part, signed by the General Counsel or someone on the General Counsel's staff. The citation is the same as for an unpublished decision, except that the suffix "O.M." (Office Memorandum) has traditionally been added. More recent material tends to omit the suffix, in which case our practice in this publication is to identify the citation as a memorandum to avoid confusion with decisions. Office memoranda are usually not cited in decisions. Technically, an office memorandum is *not* a decision of the Comptroller General as provided in 31 U.S.C. § 3529, does not have the same legal or precedential effect, and should never be cited as a decision. *See*, *e.g.*, A-10786, May 23, 1927. Instead, office memoranda represent the views of the General Counsel or members of the General Counsel's staff. Notwithstanding these limitations, we have included selected citations to GAO office memoranda, particularly where they provide guidance in the absence of formal decisions on a given point or contain useful research or discussion.

3. *Audit reports*—A GAO audit report is cited by its title, date of issuance, and a numerical designation. Up to the mid-1970s, the same file numbering system was used as in decisions ("B-numbers"). From the mid-1970s until October 2000, the designation for an audit report

consisted of the initials of the issuing division, the fiscal year, and the report number, although a "B-number" was also assigned. Now the designation includes only the fiscal year and the report number. Reports are numbered sequentially within each fiscal year.

Several audit reports are cited throughout this publication either as authority for some legal proposition or to provide sources of additional information to supplement the discussion in the text. To prevent confusion stemming from different citation formats used over the years, our practice in this publication is to always identify an audit report as a "GAO report" in the text, in addition to the citation.

As required by 31 U.S.C. § 719(g), GAO issues monthly and annual lists of reports. In addition, GAO occasionally prepares bibliographies of reports and decisions in a given subject area (food, land use, *etc.*). The lists and GAO reports can be found at GAO's Web site, www.gao.gov.

In addition to the reports themselves, GAO publishes a number of pamphlets and other documents relating to its audit function. *See*, *e.g.*, U.S. General Accounting Office, *Government Auditing Standards*, GAO-03-673G (Washington, D.C.: June 2003) (known as the "Yellow Book"). References to any of these will be fully described in the text where they occur.

4. *Nondecision letters*—On occasion, GAO may issue letters, signed by some subordinate official on the General Counsel's staff, usually to an individual or organization who has requested information or who has requested a legal opinion, but is not entitled by law to a formal decision. Their purpose is basically to convey information rather than resolve a legal issue. Several of these are cited in this publication, either because they offer a particularly clear statement of some policy or position, or to supplement the material found in the decisions. Each is identified parenthetically. The citation form is otherwise identical to an unpublished decision. As with the office memoranda, these are not decisions of the Comptroller General and do not have the same legal or precedential effect.

5. *Circular letters*—A circular letter is a letter addressed simply to the "Heads of Federal Departments and Agencies" or to "Federal Certifying and Disbursing Officers." Circular letters, although not common, are used for a variety of purposes and may emanate from a particular division within GAO or directly from the Comptroller General. Circular

letters that announce significant changes in pertinent legal requirements or GAO audit policy or procedures are occasionally cited in this publication. They are identified as such and often, but not always, bear file designations similar to unpublished decisions. *See* B-275605, Mar. 17, 1997 (announcing changes resulting from the transfer of claims settlement and other related functions).

6. *GAO's Policy and Procedures Manual for Guidance of Federal Agencies*—Originally published in 1957 as a large loose-leaf volume, this was, for many years, the official medium through which the Comptroller General issued accounting principles and standards and related material for the development of accounting systems and internal auditing programs, uniform procedures, and regulations governing GAO's relationship with other federal agencies and private parties. Of the eight original titles of the volume, only three remain in effect. The title of particular relevance for federal appropriations law is Title 7, "Fiscal Procedures." It is an important complement to this manual. Researchers can access Title 7 on GAO's Web site, www.gao.gov.

7. *Glossary of Terms Used in the Federal Budget Process (Exposure Draft)*, GAO/AFMD-2.1.1 (Jan. 1993)—This publication contains standard definitions of fiscal and budgetary terms. It is published by GAO as required by 31 U.S.C. § 1112(c), and is updated periodically. Definitions used throughout *Principles of Federal Appropriations Law* are based on the Glossary unless otherwise noted.

b. Non-GAO Materials

As we have emphasized, the primary focus of this publication is the issuance of GAO, particularly legal decisions and opinions. Manifestly, however, various non-GAO authorities require inclusion.

References to legislative materials should be readily recognizable. Citations to the United States Code are to the edition or its supplements current as of the time of publication, unless specified otherwise. We specify the year only when referring to an obsolete edition of the Code. Section numbers and even title numbers may change over the years as a result of amendments or recodifications. For convenience and (we hope) clarity, we have generally used current citations even though the referenced decision may have used an older obsolete citation. Where the difference is significant, it will be noted in the text.

We have also included relevant decisions and opinions of other administrative agencies, although our research in these areas has not been exhaustive. For example, we have included some relevant opinions of the Attorney General. The Attorney General renders legal opinions pursuant to various provisions of law. *E.g.*, 28 U.S.C. §§ 511–513. There are two series of published opinions. Those signed by the Attorney General are called "formal opinions," and are published in volumes entitled *Official Opinions of the Attorneys General of the United States Advising the President and Heads of Departments in Relation to Their Official Duties* (cited "Op. Att'y Gen."). The series started in 1852 and now numbers 43 volumes. They are published at irregular intervals.

The second series consists of selected opinions by the Justice Department's Office of Legal Counsel (OLC), which prepares and issues legal opinions under delegation from the Attorney General. Commencing in 1977, volumes 1–20 of the Opinions of the Office of Legal Counsel have thus far been published. Logically enough, they are cited "Op. Off. Legal Counsel." Given the lengthy intervals in recent decades between volumes of the "formal" Attorney General opinions, these are now included in the OLC volumes as well. We have used a parallel citation format to identify this latter group. Example: 43 Op. Att'y Gen. 224, 4A Op. Off. Legal Counsel 16 (1980).

A Treasury Department publication cited a number of times is the Treasury Financial Manual (TFM), Volume I. This, also issued in loose-leaf form, is the Treasury Department's detailed procedural guidance on fiscal matters (central accounting and reporting, receipts, disbursements, *etc.*). The TFM is indispensable for finance personnel.

c. Note on Title 31 Recodification

Many of the key statutes of general applicability that govern the use of appropriated funds are found in Title 31 of the United States Code (U.S.C.). Title 31 was recodified on September 13, 1982 (Pub. L. No. 97-258, 96 Stat. 877). A recodification is intended as a—

> "compilation, restatement, and revision of the general and permanent laws of the United States which conforms to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections both of substance and of form… ."

2 U.S.C. § 285b(1). Enactment of a recodification transforms the title into "positive law." A recodified title is legal evidence of the law, and resorting to the Statutes at Large for evidentiary purposes is no longer necessary.

The recodification of Title 31 is essentially a restatement in updated form. It is not supposed to make any substantive change in the law. This point is made in the statute itself (Pub. L. No. 97-258, § 4(a), 96 Stat. 1067, 31 U.S.C. note preceding § 101) and in the accompanying report of the House Judiciary Committee (H.R. Rep. No. 97-651, at 3 (1982)). In addition, the courts will not read a substantive change into a recodification in the absence of evidence that Congress intended a substantive change. *E.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 209 (1993); *United States v. Thompson*, 319 F.2d 665, 669 (2nd Cir. 1963).

Chapter 2

The Legal Framework

A. Appropriations and Related Terminology 2-3
1. Introduction 2-3
2. Concept and Types of Budget Authority 2-3
a. Appropriations 2-4
b. Contract Authority 2-6
c. Borrowing Authority 2-7
d. Monetary Credits 2-8
e. Offsetting Receipts 2-9
f. Loan and Loan Guarantee Authority 2-10
3. Some Related Concepts 2-12
a. Spending Authority 2-12
b. Entitlement Authority 2-13
4. Types of Appropriations 2-13
a. Classification Based on Duration 2-13
b. Classification Based on Presence or Absence of Monetary Limit 2-14
c. Classification Based on Permanency 2-14
d. Classification Based on Availability for New Obligations . . . 2-15
e. Reappropriation 2-15
B. Some Basic Concepts 2-15
1. What Constitutes an Appropriation 2-15
2. Specific *versus* General Appropriations 2-21
a. General Rule 2-21
b. Two Appropriations Available for Same Purpose 2-23
3. Transfer and Reprogramming 2-24
a. Transfer 2-24
b. Reprogramming 2-29
4. General Provisions: When Construed as Permanent Legislation 2-33
C. Relationship of Appropriations to Other Types of Legislation 2-40
1. Distinction between Authorization and Appropriation 2-40
2. Specific Problem Areas and the Resolution of Conflicts 2-42
a. Introduction 2-42
b. Variations in Amount 2-46
(1) Appropriation exceeds authorization 2-46
(2) Appropriation less than authorization 2-47
(3) Earmarks in authorization act 2-50
c. Variations in Purpose 2-51
d. Period of Availability 2-52
e. Authorization Enacted After Appropriation 2-56
f. Two Statutes Enacted on Same Day 2-59
g. Ratification by Appropriation 2-61

h. Repeal by Implication 2-66
i. Lack of Authorization 2-69

D. Statutory Interpretation: Determining Congressional Intent 2-71

1. The Goal of Statutory Construction 2-72
2. The "Plain Meaning" Rule 2-74
   a. In General 2-74
   b. The Plain Meaning Rule *versus* Legislative History 2-76
3. The Limits of Literalism: Errors in Statutes and "Absurd Consequences" 2-78
   a. Errors in Statutes 2-78
      (1) Drafting errors 2-78
      (2) Error in amount appropriated 2-80
   b. Avoiding "Absurd Consequences" 2-80
4. Statutory Aids to Construction 2-83
   a. Definitions, Effective Dates, and Severability Clauses 2-83
   b. The Dictionary Act 2-83
   c. Effect of Codification 2-84
5. Canons of Statutory Construction 2-85
   a. Construe the Statute as a Whole 2-85
   b. Give Effect to All the Language: No "Surplusage" 2-87
   c. Apply the Common Meaning of Words 2-89
   d. Give a Common Construction to the Same or Similar Words 2-89
   e. Punctuation, Grammar, Titles, and Preambles Are Relevant but Not Controlling 2-92
   f. Avoid Constructions That Pose Constitutional Problems . . . 2-94
6. Legislative History 2-96
   a. Uses and Limitations 2-96
   b. Components and Their Relative Weight 2-98
      (1) Committee reports 2-98
      (2) Floor debates 2-100
      (3) Hearings 2-102
   c. Post-enactment Statements 2-103
   d. Development of the Statutory Language 2-105
7. Presumptions and "Clear Statement" Rules 2-106
   a. Presumption in Favor of Judicial Review 2-106
   b. Presumption against Retroactivity 2-108
   c. Federalism Presumptions 2-111
   d. Presumption against Waiver of Sovereign Immunity 2-113

The Legal Framework

A. Appropriations and Related Terminology

1. Introduction

The reader will find it useful to have a basic understanding of certain appropriations law terminology that will be routinely encountered throughout this publication. Some of our discussion will draw upon definitions that have been enacted into law for application in various budgetary contexts. Other definitions are drawn from custom and usage in the budget and appropriations process, in conjunction with administrative and judicial decisions.

In addition, 31 U.S.C. § 1112(c), previously noted in Chapter 1, requires the Comptroller General, in cooperation with the Treasury Department, Office of Management and Budget, and Congressional Budget Office, to maintain and publish standard terms and classifications for "fiscal, budget, and program information," giving particular consideration to the needs of the congressional budget, appropriations, and revenue committees. Federal agencies are required by 31 U.S.C. § 1112(d) to use this standard terminology when providing information to Congress.

The terminology developed pursuant to this authority is published in a GAO booklet entitled *A Glossary of Terms Used in the Federal Budget Process (Exposure Draft)*, GAO/AFMD-2.1.1 (Washington, D.C.: Jan. 1993) [hereinafter *Glossary*]. Unless otherwise noted, the terminology used throughout this publication is based on the *Glossary*.[1] The following sections present some of the more important terminology in the budget and appropriations process. Many other terms will be defined in the chapters that deal specifically with them.

2. Concept and Types of Budget Authority

Congress finances federal programs and activities by providing "budget authority." Budget authority is a general term referring to various forms of authority provided by law to enter into financial obligations that will result

[1] The Office of Management and Budget adopted these definitions in OMB Circular No. A-11, *Preparation, Submission and Execution of the Budget* (July 25, 2003).

in immediate or future outlays of government funds. As defined by the Congressional Budget Act, "budget authority" includes:

> "(i) provisions of law that make funds available for obligation and expenditure (other than borrowing authority), including the authority to obligate and expend the proceeds of offsetting receipts and collections;
>
> "(ii) borrowing authority, which means authority granted to a Federal entity to borrow and obligate and expend the borrowed funds, including through the issuance of promissory notes or other monetary credits;
>
> "(iii) contract authority, which means the making of funds available for obligation but not for expenditure; and
>
> "(iv) offsetting receipts and collections as negative budget authority, and the reduction thereof as positive budget authority.
>
> "The term includes the cost for direct loan and loan guarantee programs, as those terms are defined by [the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13201(a)]." [2]

a. Appropriations

Appropriations are the most common form of budget authority. As we have seen in Chapter 1 in our discussion of the congressional "power of the purse," the Constitution prohibits the withdrawal of money from the Treasury unless authorized in the form of an appropriation enacted by Congress.[3] Thus, funds paid out of the United States Treasury must be

[2] Section 3(2) of the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 622(2) and note, as amended by the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 13201(b) and 13211(a), 104 Stat. 1388, 1388-614 and 1388-620 (Nov. 5, 1990). Prior to the Congressional Budget Act, the term "obligational authority" was frequently used instead of budget authority.

[3] The Constitution does not specify precisely what assets comprise the "Treasury" of the United States. An important statute in this regard is 31 U.S.C. § 3302(b), discussed in detail in Chapter 6, which requires that, unless otherwise provided, a government agency must deposit any funds received from sources other than its appropriations in the general fund of the Treasury, where they are then available to be appropriated as Congress may see fit.

accounted for by charging them to an appropriation provided by or derived from an act of Congress.

The term "appropriation" may be defined as:

> "Authority given to federal agencies to incur obligations and to make payments from Treasury for specified purposes."[4]

While other forms of budget authority may authorize the incurring of obligations, the authority to incur obligations by itself is not sufficient to authorize payments from the Treasury. *See*, *e.g.*, *National Ass'n of Regional Councils v. Costle*, 564 F.2d 583, 586 (D.C. Cir. 1977); *New York Airways*, *Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966). Thus, at some point if obligations are paid, they are paid by and from an appropriation. Section B.1 of this chapter discusses in more detail precisely what types of statutes constitute appropriations.

Appropriations do not represent cash actually set aside in the Treasury. They represent legal authority granted by Congress to incur obligations and to make disbursements for the purposes, during the time periods, and up to the amount limitations specified in the appropriation acts. *See United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284 (4th Cir. 2002).

Appropriations are identified on financial documents by means of "account symbols," which are assigned by the Treasury Department, based on the number and types of appropriations an agency receives and other types of funds it may control. An appropriation account symbol is a group of numbers, or a combination of numbers and letters, which identifies the agency responsible for the account, the period of availability of the appropriation, and the specific fund classification. Detailed information on reading and identifying account symbols is contained in the *Treasury Financial Manual* (I TFM 2-1500). Specific accounts for each agency are listed in a publication entitled *Federal Account Symbols and Titles*, issued quarterly as a supplement to the TFM.

[4] *Glossary* at 21; *Andrus v. Sierra Club*, 442 U.S. 347, 359 n.18 (1979). *See also* 31 U.S.C. §§ 701(2) and 1101(2).

b. Contract Authority

Contract authority is a form of budget authority that permits obligations to be incurred in advance of appropriations. *Glossary* at 22. It is to be distinguished from the inherent authority to enter into contracts possessed by every government agency, but which depends on the availability of funds.

Contract authority itself is not an appropriation; it provides the authority to enter into binding contracts but not the funds to make payments under them. Therefore, contract authority must be funded (or, in other words, the funds needed to liquidate obligations under the contracts must be provided) by a subsequent appropriation (called a "liquidating appropriation") or by the use of receipts or offsetting collections authorized for that purpose. *See PCL Construction Service, Inc. v. United States*, 41 Fed. Cl. 242 (1998); *National Ass'n of Regional Councils v. Costle*, 564 F.2d 583, 586 (D.C. Cir. 1977); B-300167, Nov. 15, 2002; B-228732, Feb. 18, 1988.

Contract authority may be provided in appropriation acts (*e.g.*, B-174839, Mar. 20, 1984) or, more commonly, in other types of legislation (*e.g.*, B-228732, Feb. 18, 1988). Either way, the authority must be specific. 31 U.S.C. § 1301(d). As we noted in Chapter 1, one of the objectives of the Congressional Budget and Impoundment Control Act of 1974 was to provide increased control by the appropriations process over various forms of so-called "backdoor spending" such as contract authority. To this end, legislation providing new contract authority will be subject to a point of order in either the Senate or the House of Representatives unless it also provides that the new authority will be effective for any fiscal year only to such extent or in such amounts as are provided in advance in appropriation acts. 2 U.S.C. § 651(a).

Contract authority has a "period of availability" analogous to that for an appropriation. Unless otherwise specified, if it appears in an appropriation act in connection with a particular appropriation, its period of availability will be the same as that for the appropriation. If it appears in an appropriation act without reference to a particular appropriation, its period of availability, again unless otherwise specified, will be the fiscal year covered by the appropriation act. 32 Comp. Gen. 29, 31 (1952); B-76061, May 14, 1948. *See Cray Research, Inc. v. United States*, 44 Fed. Cl. 327, 331 n.4 (1999); *Costle*, 564 F.2d at 587–88. This period of availability refers to the time period during which the contracts must be entered into.

As noted above, appropriations constitute budget authority. An appropriation to liquidate contract authority, however, is not new budget authority, since contract authority itself constitutes new budget authority. This treatment is necessary to avoid counting the amounts twice. B-171630, Aug. 14, 1975.

Since the contracts entered into pursuant to contract authority constitute obligations binding on the United States, Congress has little practical choice but to make the necessary liquidating appropriations. B-228732, Feb. 18, 1988; B-226887, Sept. 17, 1987. As the Supreme Court has put it:

> "The expectation is that appropriations will be automatically forthcoming to meet these contractual commitments. This mechanism considerably reduces whatever discretion Congress might have exercised in the course of making annual appropriations."

Train v. City of New York, 420 U.S. 35, 39 n.2 (1975). A failure or refusal by Congress to make the necessary appropriation would not defeat the obligation, and the party entitled to payment would most likely be able to recover in a lawsuit. *E.g.*, B-211190, Apr. 5, 1983.

c. Borrowing Authority

"Borrowing authority" is authority that permits agencies to incur obligations and make payments to liquidate the obligations out of borrowed moneys.[5] Borrowing authority may consist of (a) authority to borrow from the Treasury (authority to borrow funds from the Treasury that are realized from the sale of public debt securities), (b) authority to borrow directly from the public (authority to sell agency debt securities), (c) authority to borrow from (sell agency debt securities to) the Federal Financing Bank, or (d) some combination of the above.

Borrowing from the Treasury is the most common form and is also known as "public debt financing." As a general proposition, GAO has traditionally expressed a preference for financing through direct appropriations on the grounds that the appropriations process provides enhanced congressional control. *E.g.*, B-301397, Sept. 4, 2003; B-141869, July 26, 1961. The Congressional Budget Act met this concern to an extent by requiring generally that new borrowing authority, as with new contract authority, be

[5] *Glossary* at 22.

limited to the extent or amounts provided in appropriation acts. 2 U.S.C. § 651(a). GAO has recommended that borrowing authority be provided only to those accounts that can generate enough revenue in the form of collections from nonfederal sources to repay their debt. U.S. General Accounting Office, *Budget Issues: Budgeting for Federal Capital*, GAO/AIMD-97-5 (Washington, D.C.: Nov. 12, 1996); *Budget Issues: Agency Authority to Borrow Should Be Granted More Selectively*, GAO/AFMD-89-4 (Washington, D.C.: Sept. 15, 1989).[6] On occasion, however, GAO has recommended borrowing authority when supplemental appropriations might otherwise be necessary. *See* U.S. General Accounting Office, *Aviation Insurance: Federal Insurance Program Needs Improvements to Ensure Success*, GAO/RCED-94-151 (Washington, D.C.: July 15, 1994).

d. Monetary Credits

A type of borrowing authority specified in the expanded definition of budget authority contained in the Omnibus Budget Reconciliation Act of 1990 is monetary credits. The monetary credit is a relatively uncommon concept in government transactions. At the present time, it exists mostly in a handful of statutes authorizing the government to use monetary credits to acquire property such as land or mineral rights. Examples are the Rattlesnake National Recreation Area and Wilderness Act of 1980, discussed in 62 Comp. Gen. 102 (1982), and the Cranberry Wilderness Act, discussed in B-211306, Apr. 9, 1984.[7]

Under the monetary credit procedure, the government does not issue a check in payment for the acquired property. Instead, it gives the seller "credits" in dollar amounts reflecting the purchase price. The holder may then use these credits to offset or reduce amounts it owes the government in other transactions that may, depending on the terms of the governing legislation, be related or unrelated to the original transaction. The statute may use the term "monetary credit" (as in the Cranberry legislation) or

[6] If an agency cannot repay with external collections, it must either extend its debt with new borrowings, seek appropriations to repay the debt, or seek to have the debt forgiven by statute. Repayment from external collections is the only alternative that reimburses the Treasury in any meaningful sense. *See* GAO/AFMD-89-4 at 17, 20.

[7] These and other examples are noted in the report: U.S. General Accounting Office, *Budget Treatment of Monetary Credits*, GAO/AFMD-85-21 (Washington, D.C.: Apr. 8, 1985). For more recent examples, see Mount St. Helens National Volcanic Monument Completion Act, Pub. L. No. 105-279, 112 Stat. 2690 (Oct. 23, 1998); Kentucky National Forest Land Transfer Act of 2000, Pub. L. No. 106-429, app. A-1, 114 Stat. 1900, 1900A-71 (Nov. 6, 2000); and Pueblo of Acoma Land and Mineral Consolidation, Pub. L. No. 107-138, 116 Stat. 6 (Feb. 6, 2002).

some other designation such as "bidding rights" (as in the Rattlesnake Act). Where this procedure is authorized, the acquiring agency does not need to have appropriations or other funds available to cover the purchase price because no cash disbursement is made. An analogous device authorized for use by the Commodity Credit Corporation is "commodity certificates."[8]

The inclusion of monetary credits as budget authority has the effect of making them subject to the appropriation controls of the Congressional Budget Act, such as the requirements of 2 U.S.C. § 651.

e. Offsetting Receipts

The federal government receives money from numerous sources and in numerous contexts. For budgetary purposes, collections are classified in two major categories, governmental receipts and offsetting collections.[9]

Governmental receipts or budget receipts are collections resulting from the government's exercise of its sovereign or regulatory powers. Examples are tax receipts, customs duties, and court fines. Collections in this category are deposited in receipt accounts and are compared against total outlays for purposes of calculating the budget surplus or deficit.

Offsetting collections are collections resulting from business-type or market-oriented activities, such as the sale of goods or services to the public, and intragovernmental transactions. Their budgetary treatment differs from governmental receipts in that they are offset against (deducted from or "netted against") budget authority in determining total outlays. Offsetting collections are also divided into two major categories.[10]

First is *offsetting collections credited to appropriation or fund accounts*. These are collections which, under specific statutory authority, may be deposited in an appropriation or fund account under the control of the receiving agency and which are then available for obligation by the agency subject to the purpose and time limitations of the receiving account.

[8] *See* U.S. General Accounting Office, *Farm Payments: Cost and Other Information on USDA's Commodity Certificates*, GAO/RCED-87-117BR (Mar. 26, 1987).

[9] *See Glossary* at 22, 27–29.

[10] *See* U.S. General Accounting Office, *Federal User Fees: Budgetary Treatment, Status, and Emerging Management Issues*, GAO/AIMD-98-11 (Dec. 19, 1997).

Second is *offsetting receipts*. Offsetting receipts are offsetting collections that are deposited in a receipt account.[11] For budgetary purposes, these amounts are deducted from budget authority by function or subfunction and by agency.[12]

The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1038 (Dec. 12, 1985), first addressed the budgetary treatment of offsetting receipts by adding the authority "to collect offsetting receipts" to the definition of budget authority. The expanded definition in the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (Nov. 5, 1990), is more explicit. The authority to obligate and expend the proceeds of offsetting receipts and collections is treated as negative budget authority. In addition, the reduction of offsetting receipts or collections (*e.g.*, legislation authorizing an agency to forego certain collections) is treated as positive budget authority.[13]

f. Loan and Loan Guarantee Authority

A loan guarantee is any guarantee, insurance, or other pledge with respect to the payment of all or a part of the principal or interest on any debt obligation of a nonfederal borrower to a nonfederal lender.[14] The government does not know whether or to what extent it may be required to honor the guarantee until there has been a default. Loan guarantees are contingent liabilities that may not be recorded as obligations until the contingency occurs. *See* 64 Comp. Gen. 282, 289 (1985); B-290600, July 10, 2002. See also Chapter 11.

Prior to legislation enacted in November 1990, loan guarantees were expressly excluded from the definition of budget authority. Budget authority was created only when an appropriation to liquidate loan guarantee authority was made.

[11] This usually means a general fund receipt account (miscellaneous receipts), but also includes amounts deposited in special or trust fund accounts. *See American Medical Ass'n v. Reno*, 857 F. Supp. 80 (D.D.C. 1994); B-199216, July 21, 1980.

[12] H.R. Conf. Rep. No. 99-433, at 102 (1985). This is the conference report on the Balanced Budget and Emergency Deficit Control Act of 1985.

[13] This was the intent of the 1985 legislation, as reflected in the conference report, *supra*, although it had not been expressed in the legislation itself.

[14] *Glossary* at 50–51.

Statutory reform of the budgetary treatment of federal credit programs came about in two stages. First, the Balanced Budget and Emergency Deficit Control Act of 1985 added a definition of "credit authority" to the Congressional Budget Act, specifically, "authority to incur direct loan obligations or to incur primary loan guarantee commitments." 2 U.S.C. § 622(10).[15] Any bill, resolution, or conference report providing new credit authority will be subject to a point of order unless the new authority is limited to the extent or amounts provided in advance in appropriation acts. 2 U.S.C. § 651(a).[16]

The second stage was the Federal Credit Reform Act of 1990,[17] effective starting with fiscal year 1992. Under this legislation, the "cost" of loan and loan guarantee programs is budget authority. Cost means the estimated long-term cost to the government of a loan or loan guarantee (defaults, delinquencies, interest subsidies, *etc.*), calculated on a net present value basis, excluding administrative costs. Except for entitlement programs (the statute notes the guaranteed student loan program and the veterans' home loan guaranty program as examples) and certain Commodity Credit Corporation programs, new loan guarantee commitments may be made only to the extent budget authority to cover their costs is provided in advance or other treatment is specified in appropriation acts. Appropriations of budget authority are to be made to "credit program accounts," and the programs administered from revolving nonbudgetary "financing accounts."

The Federal Credit Reform Act reflects the thrust of proposals by GAO, the Office of Management and Budget, the Congressional Budget Office, and the Senate Budget Committee. *See* U.S. General Accounting Office, *Credit Reform: U.S. Needs Better Method for Estimating Cost of Foreign Loans and Guarantees*, GAO/NSIAD/GGD-95-31 (Washington, D.C.: Dec. 19, 1994); *Credit Reform: Case-by-Case Assessment Advisable in Evaluating*

[15] The statute does not further define the term "primary loan guarantee."

[16] This is the same control device we have previously noted for contract authority and borrowing authority. Although loan guarantee authority was not viewed as budget authority in 1985, the apparent rationale was that the control, if it is to be employed, must apply at the authorization stage because the opportunity for control no longer exists by the time liquidating budget authority becomes necessary. An example of a statute including this language is discussed in B-230951, Mar. 10, 1989.

[17] Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13201(a), 104 Stat. 1388, 1388-609 (Nov. 5, 1990).

Coverage and Compliance, GAO/AIMD-94-57 (Washington, D.C.: July 28, 1994). *See also* U.S. General Accounting Office, *Budget Issues: Budgetary Treatment of Federal Credit Programs*, GAO/AFMD-89-42 (Washington, D.C.: Apr. 10, 1989) (discussion of the "net present value" approach to calculating costs).

3. Some Related Concepts

a. Spending Authority

The Congressional Budget Act of 1974 introduced the concept of "spending authority." The term is a collective designation for authority provided in laws other than appropriation acts to obligate the United States to make payments. It includes, to the extent budget authority is not provided in advance in appropriation acts, permanent appropriations (such as authority to spend offsetting collections), the nonappropriation forms of budget authority described above (*e.g.*, contract authority, borrowing authority, and authority to forego collection of offsetting receipts), entitlement authority, and any other authority to make payments. 2 U.S.C. § 651(c)(2). The different forms of spending authority are subject to varying controls in the budget and appropriations process. *See* Chapter 1, sections C and D. For example, as noted previously, proposed legislation providing new contract authority or new borrowing authority will be subject to a point of order unless it limits the new authority to such extent or amounts as provided in appropriation acts.

Further information on spending authority may be found in two 1987 GAO companion reports—one a summary presentation[18] and the other a detailed inventory[19]—as well as in more recent updates.[20]

[18] U.S. General Accounting Office, *Budget Issues: The Use of Spending Authority and Permanent Appropriations Is Widespread*, GAO/AFMD-87-44 (Washington, D.C.: July 17, 1987).

[19] U.S. General Accounting Office, *Budget Issues: Inventory of Accounts With Spending Authority and Permanent Appropriations, 1987*, GAO/AFMD-87-44A (Washington, D.C.: July 17, 1987).

[20] U.S. General Accounting Office, *Updated 1987 Inventory of Accounts with Spending Authority and Permanent Appropriations*, GAO/OGC-98-23 (Washington, D.C.: Jan. 19, 1998); *Budget Issues: Inventory of Accounts With Spending Authority and Permanent Appropriations, 1996*, GAO/AIMD-96-79 (Washington, D.C.: May 31, 1996).

b. Entitlement Authority

Entitlement authority is statutory authority, whether temporary or permanent,

> "to make payments (including loans and grants), the budget authority for which is not provided for in advance by appropriation Acts, to any person or government if, under the provisions of the law containing that authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by that law."[21]

Entitlement authority is treated as spending authority during congressional consideration of the budget. In order to make entitlements subject to the reconciliation process, the Congressional Budget Act provides that proposed legislation providing new entitlement authority to become effective prior to the start of the next fiscal year will be subject to a point of order. 2 U.S.C. § 651(b)(1). Entitlement legislation, which would require new budget authority in excess of the allocation made pursuant to the most recent budget resolution, must be referred to the appropriations committees. *Id.* § 651(b)(2).

4. Types of Appropriations

Appropriations are classified in different ways for different purposes. Some are discussed elsewhere in this publication.[22] The following classifications, although phrased in terms of appropriations, apply equally to the broader concept of budget authority.

a. Classification Based on Duration[23]

1. *One-year appropriation*: An appropriation that is available for obligation only during a specific fiscal year. This is the most common type of appropriation. It is also known as a "fiscal year" or "annual" appropriation.

[21] 2 U.S.C. § 622(9)(A); *Glossary* at 44.

[22] Supplemental and deficiency appropriations are discussed in Chapter 6, section D; lump-sum and line-item appropriations in Chapter 6, section F; and continuing resolutions in Chapter 8.

[23] *Glossary* at 22–23.

2. *Multiple year appropriation*: An appropriation that is available for obligation for a definite period of time in excess of one fiscal year.

3. *No-year appropriation*: An appropriation that is available for obligation for an indefinite period. A no-year appropriation is usually identified by appropriation language such as "to remain available until expended."

b. Classification Based on Presence or Absence of Monetary Limit[24]

1. *Definite appropriation*: An appropriation of a specific amount of money.

2. *Indefinite appropriation*: An appropriation of an unspecified amount of money. An indefinite appropriation may appropriate all or part of the receipts from certain sources, the specific amount of which is determinable only at some future date, or it may appropriate "such sums as may be necessary" for a given purpose.

c. Classification Based on Permanency[25]

1. *Current appropriation*: An appropriation made by Congress in, or immediately prior to, the fiscal year or years during which it is available for obligation.

2. *Permanent appropriation*: A "standing" appropriation which, once made, is always available for specified purposes and does not require repeated action by Congress to authorize its use.[26] Legislation authorizing an agency to retain and use offsetting receipts tends to be permanent; if so, it is a form of permanent appropriation.

[24] *Glossary* at 22.

[25] *Glossary* at 24.

[26] This is similar to a no-year appropriation except that a no-year appropriation will be closed if there are no disbursements from the appropriation for two consecutive fiscal years, and if the head of the agency or the President determines that the purposes for which the appropriation was made have been carried out. 31 U.S.C. § 1555. In actual usage, the term "permanent appropriation" tends to be used more in reference to appropriations contained in permanent legislation, such as legislation establishing a revolving fund, while "no-year appropriation" is used more to describe appropriations found in appropriation acts.

d. Classification Based on Availability for New Obligations[27]

1. *Current or unexpired appropriation*: An appropriation that is available for incurring new obligations.

2. *Expired appropriation*: An appropriation that is no longer available to incur new obligations, although it may still be available for the recording and/or payment (liquidation) of obligations properly incurred before the period of availability expired.

3. *Canceled appropriation*: An appropriation whose account is closed, and is no longer available for obligation or expenditure for any purpose.

An appropriation may combine characteristics from more than one of the above groupings. For example, a "permanent indefinite" appropriation is open ended as to both period of availability and amount. Examples are 31 U.S.C. § 1304 (payment of certain judgments against the United States) and 31 U.S.C. § 1322(b)(2) (refunding amounts erroneously collected and deposited in the Treasury).

e. Reappropriation

The term "reappropriation" means congressional action to continue the availability, whether for the same or different purposes, of all or part of the unobligated portion of budget authority that has expired or would otherwise expire. Reappropriations are counted as budget authority in the first year for which the availability is extended.[28]

B. Some Basic Concepts

1. What Constitutes an Appropriation

The starting point is 31 U.S.C. § 1301(d), which provides:

> "A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the

[27] *Glossary* at 24. See also our discussion of the disposition of appropriation balances in Chapter 5, section D.

[28] *Glossary* at 23. *See also* 31 U.S.C. § 1301(b) (reappropriation for a different purpose is to be accounted for as a new appropriation).

law specifically states that an appropriation is made or that such a contract may be made."

Thus, the rule is that the making of an appropriation must be expressly stated. An appropriation cannot be inferred or made by implication. *E.g.*, 50 Comp. Gen. 863 (1971).

Regular annual and supplemental appropriation acts present no problems in this respect as they will be apparent on their face. They, as required by 1 U.S.C. § 105, bear the title "An Act making appropriations … ." There are situations in which statutes other than regular appropriation acts may be construed as making appropriations, however. *See*, *e.g.*, 31 U.S.C. § 1304(a) ("necessary amounts are appropriated to pay final judgments, awards, compromise settlements"); 31 U.S.C. § 1324 ("necessary amounts are appropriated to the Secretary of Treasury for refunding internal revenue collections").

An appropriation is a form of budget authority that makes funds available to an agency to incur obligations and make expenditures.[29] 2 U.S.C. § 622(2)(A)(i). *See also* 31 U.S.C. § 701(2)(C) ("authority making amounts available for obligation or expenditure"). Consequently, while the authority must be expressly stated, it is not necessary that the statute actually use the word "appropriation." If the statute contains a specific direction to pay and a designation of the funds to be used, such as a direction to make a specified payment or class of payments "out of any money in the Treasury not otherwise appropriated," then this amounts to an appropriation. 63 Comp. Gen. 331 (1984); 13 Comp. Gen. 77 (1933). *See also* 34 Comp. Gen. 590 (1955).

For example, a private relief act that directs the Secretary of the Treasury to pay, out of any money in the Treasury not otherwise appropriated, a specified sum of money to a named individual constitutes an appropriation. 23 Comp. Dec. 167, 170 (1916). Another example is B-160998, Apr. 13, 1978, concerning section 11 of the Federal Fire Prevention and Control Act of 1974,[30] which authorizes the Secretary of the Treasury to reimburse local fire departments or districts for costs incurred in fighting fires on federal

[29] We discuss the concept of budget authority and define the term appropriation in section A ("Appropriations and Related Terminology") of this chapter.

[30] Pub. L. No. 93-498, 88 Stat. 1535, 1543 (Oct. 29, 1974).

property. Since the statute directed the Secretary to make payments "from any moneys in the Treasury not otherwise appropriated" (*i.e.*, it contained both the specific direction to pay and a designation of the funds to be used), the Comptroller General concluded that section 11 constituted a permanent indefinite appropriation.

Both elements of the test must be present. Thus, a direction to pay without a designation of the source of funds is not an appropriation. For example, a private relief act that contains merely an authorization and direction to pay but no designation of the funds to be used does not make an appropriation. 21 Comp. Dec. 867 (1915); B-26414, Jan. 7, 1944.[31] Similarly, public legislation enacted in 1978 authorized the U.S. Treasury to make an annual prepayment to Guam and the Virgin Islands of the amount estimated to be collected over the course of the year for certain taxes, duties, and fees. While it was apparent that the prepayment at least for the first year would have to come from the general fund of the Treasury, the legislation was silent as to the source of the funds for the prepayments, both for the first year and for subsequent years. It was concluded that while the statute may have established a permanent authorization, it was not sufficient under 31 U.S.C. § 1301(d) to constitute an actual appropriation. B-114808, Aug. 7, 1979. (Congress subsequently made the necessary appropriation in Pub. L. No. 96-126, 93 Stat. 954, 966 (Nov. 27, 1979).)

The designation of a source of funds without a specific direction to pay is also not an appropriation. 67 Comp. Gen. 332 (1988).

Thus far, we have been talking about the authority to make disbursements from the general fund of the Treasury. There is a separate line of decisions establishing the proposition that statutes, which authorize the collection of fees and their deposit into a particular fund, and, which make the fund available for expenditure for a specified purpose, constitute continuing or permanent appropriations; that is, the money is available for obligation or expenditure without further action by Congress. Often it is argued that a law making moneys available from some source other than the general fund of the Treasury is not an appropriation. This view is wrong. Statutes establishing revolving funds and various special deposit funds and making

[31] A few early cases will be found that appear inconsistent with the proposition stated in the text. *E.g.*, 6 Comp. Dec. 514, 516 (1899); 4 Comp. Dec. 325, 327 (1897). These cases predate the enactment on July 1, 1902 (32 Stat. 552, 560) of what is now 31 U.S.C. § 1301(d) and should be disregarded.

amounts in those funds available for obligation and expenditure are permanent appropriations. The reason is that, under 31 U.S.C. § 3302(b), all money received for the use of the United States must be deposited in the general fund of the Treasury absent statutory authority for some other disposition.; B-271894, July 24, 1997. Once the money is in the Treasury, it can be withdrawn only if Congress appropriates it.[32] Therefore, the authority for an agency to obligate or expend collections without further congressional action amounts to a continuing appropriation or permanent appropriation of the collections. *E.g.*, *United Biscuit Co. v. Wirtz*, 359 F.2d 206, 212 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 971 (1966); 69 Comp. Gen. 260, 262 (1990; 73 Comp. Gen. 321 (1994).

Cases involving the "special fund" principle fall into two categories. In the first group, the question is whether a particular statute authorizing the deposit and expenditure of a class of receipts makes those funds available for the specified purpose or purposes without further congressional action. These cases, in other words, raise the basic question of whether the statute may be regarded as an appropriation. Cases answering this question in the affirmative include 59 Comp. Gen. 215 (1980) (mobile home inspection fees collected by the Secretary of Housing and Urban Development); B-228777, Aug. 26, 1988 (licensing revenues received by the Commission on the Bicentennial); B-204078.2, May 6, 1988, and B-257525, Nov. 30, 1994 (Panama Canal Revolving Fund); B-197118, Jan. 14, 1980 (National Defense Stockpile Transaction Fund); and B-90476, June 14, 1950. *See also* 1 Comp. Gen. 704 (1922) (revolving fund created in appropriation act remains available beyond end of fiscal year where not specified otherwise).

The second group of cases involves the applicability of statutory restrictions or other provisions that by their terms apply to "appropriated funds" or exemptions that apply to "nonappropriated funds." For example, fees collected from federal credit unions and deposited in a revolving fund for administrative and supervisory expenses have been regarded as appropriated funds for various purposes. 63 Comp. Gen. 31 (1983), *aff'd upon reconsideration*, B-210657, May 25, 1984 (payment of relocation expenses); 35 Comp. Gen. 615 (1956) (restrictions on reimbursement for certain telephone calls made from private residences). Other situations applying the "special fund as appropriation" principle are summarized below:

[32] U.S. Const. art. I, § 9, cl. 7, discussed in Chapter 1, section B.

- Various funds held to constitute appropriated funds for purposes of GAO's bid protest jurisdiction:[33] 65 Comp. Gen. 25 (1985) (funds received by National Park Service for visitor reservation services); 64 Comp. Gen. 756 (1985) (Tennessee Valley Authority power program funds); 57 Comp. Gen. 311 (1978) (commissary surcharges).

- Applicability of other procurement laws: *United Biscuit Co.*, *supra* (Armed Services Procurement Act applicable to military commissary purchases); B-217281-O.M., Mar. 27, 1985 (federal procurement regulations applicable to Pension Benefit Guaranty Corporation revolving funds); B-275669.2, July 30, 1997 (American Battle Monuments Commission must comply with the Federal Acquisition Regulations and Federal Property and Administrative Services Act).

- User fee toll charges collected by the Saint Lawrence Seaway Development Corporation are appropriated funds. However, many of the restrictions on the use of appropriated funds will nevertheless be inapplicable by virtue of the Corporation's organic legislation and its status as a corporation. B-193573, Jan. 8, 1979, *modified and aff'd*, B-193573, Dec. 19, 1979; B-217578, Oct. 16, 1986. The December 1979 decision noted that the capitalization of a government corporation, whether a lump-sum appropriation in the form of capital stock or the authority to borrow through the issuance of long-term bonds to the U.S. Treasury, consists of appropriated funds.

- User fees collected under the Tobacco Inspection Act are appropriated funds and as such are subject to restrictions on payment of employee health benefits. 63 Comp. Gen. 285 (1984).

- Customs Service duty collections are appropriations authorized to be used for administration and collection costs. B-241488, Mar. 13, 1991.

- The Prison Industries Fund is an appropriated fund subject to the General Services Administration's surplus property regulations. 60 Comp. Gen. 323 (1981).

Other cases in this category are 50 Comp. Gen. 323 (1970); 35 Comp. Gen. 436 (1956); B-191761, Sept. 22, 1978; and B-67175, July 16, 1947. In

[33] GAO regulations exempt nonappropriated fund procurements. 4 C.F.R. § 21.5(g).

each of the special fund cases cited above, the authority to make payments from the fund involved was clear from the governing legislation.

Finally, the cases cited above generally involve statutes that specify the fund to which the collections are to be deposited. This is not essential, however. A statute that clearly makes receipts available for obligation or expenditure without further congressional action will be construed as authorizing the establishment of such a fund as a necessary implementation procedure. 59 Comp. Gen. 215 (42 U.S.C. § 5419); B-226520, Apr. 3, 1987 (nondecision letter) (26 U.S.C. § 7475). *See also* 13 Comp. Dec. 700 (1907).

Two recent court decisions held that revolving funds do not constitute "appropriations" for purposes of determining whether those courts have jurisdiction over claims against the United States under the Tucker Act (28 U.S.C. § 1491). These decisions—*Core Concepts of Florida, Inc. v. United States*, 327 F.3d 1331 (Fed. Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3148 (Aug. 18, 2003), and *AINS, Inc. v. United States*, 56 Fed. Cl. 522 (2002)—concluded that GAO's view of revolving funds as continuing or permanent appropriations does not apply to issues of Tucker Act jurisdiction.[34] The Court of Appeals for the Federal Circuit, the Court of Federal Claims, and their predecessors traditionally hold that Tucker Act jurisdiction does not extend to "nonappropriated fund instrumentalities" that receive no traditional general revenue appropriations derived from the general fund of the Treasury.[35] *Core Concepts* and *AINS* dealt only with the issue of Tucker Act jurisdiction in this context and have no bearing on the status of revolving funds in the broader appropriations law context discussed above.[36]

[34] But see *MDB Communications, Inc. v. United States*, 53 Fed. Cl. 245 (2002), and *American Management Systems, Inc. v. United States*, 53 Fed. Cl. 525 (2002), two other recent decisions that do apply GAO's view that revolving funds are appropriations to support Tucker Act jurisdiction.

[35] *E.g.*, *Furash & Co. v. United States*, 252 F.3d 1336, 1342 (Fed. Cir. 2001); *Denkler v. United States*, 782 F.2d 1003 (Fed. Cir. 1986); *Aaron v. United States*, 51 Fed. Cl. 690 (2002); *L'Enfant Plaza Properties, Inc. v. United States*, 668 F.2d 1211 (Ct. Cl. 1982); *Kyer v. United States*, 369 F.2d 714, 718 (Ct. Cl. 1966), *cert. denied*, 387 U.S. 929 (1967).

[36] See, in this regard, *Core Concepts*, 327 F.3d at 1338, noting that GAO's position and the authorities it cites on the status of revolving funds "are not applicable to the non-appropriated funds doctrine [governing Tucker Act jurisdiction] in the same sense that they are applicable to federal appropriations law."

2. Specific *versus* General Appropriations

a. General Rule

An appropriation for a specific object is available for that object to the exclusion of a more general appropriation, which might otherwise be considered available for the same object, and the exhaustion of the specific appropriation does not authorize charging any excess payment to the more general appropriation, unless there is something in the general appropriation to make it available in addition to the specific appropriation.[37] In other words, if an agency has a specific appropriation for a particular item, and also has a general appropriation broad enough to cover the same item, it does not have an option as to which to use. It must use the specific appropriation. Were this not the case, agencies could evade or exceed congressionally established spending limits.

The cases illustrating this rule are legion.[38] Generally, the fact patterns and the specific statutes involved are of secondary importance. The point is that the agency does not have an option. If a specific appropriation exists for a particular item, then that appropriation must be used and it is improper to charge the more general appropriation (or any other appropriation) or to use it as a "back-up." A few cases are summarized as examples:

- A State Department appropriation for "publication of consular and commercial reports" could not be used to purchase books in view of a specific appropriation for "books and maps." 1 Comp. Dec. 126 (1894). The Comptroller of the Treasury referred to the rule as having been well established "from time immemorial." *Id.* at 127.

- The existence of a specific appropriation for the expenses of repairing the U.S. courthouse and jail in Nome, Alaska, precludes the charging of such expenses to more general appropriations such as "Miscellaneous expenses, U.S. Courts" or "Support of prisoners, U.S. Courts." 4 Comp. Gen. 476 (1924).

[37] *See, e.g.*, B-272191, Nov. 4, 1997.

[38] A few are 64 Comp. Gen. 138 (1984); 36 Comp. Gen. 526 (1957); 17 Comp. Gen. 974 (1938); 5 Comp. Gen. 399 (1925); B-289209, May 31, 2002; B-290011, Mar. 25, 2002.

- A specific appropriation for the construction of an additional wing on the Navy Department Building could not be supplemented by a more general appropriation to build a larger wing desired because of increased needs. 20 Comp. Gen. 272 (1940). *See* B-235086, Apr. 24, 1991 (a specific appropriation for the construction and acquisition of a building precludes the Forest Service from using a more general appropriation to pay for such a purchase). *See also* B-278121, Nov. 7, 1997.

- Appropriations of the District of Columbia Health Department could not be used to buy penicillin to be used for Civil Defense purposes because the District had received a specific appropriation for "all expenses necessary for the Office of Civil Defense." 31 Comp. Gen. 491 (1952).

Further, the fact that an appropriation for a specific purpose is included as an earmark in a general appropriation does not deprive it of its character as an appropriation for the particular purpose designated, and where such specific appropriation is available for the expenses necessarily incident to its principal purpose, such incidental expenses may not be charged to the more general appropriation. 20 Comp. Gen. 739 (1941). In the cited decision, a general appropriation for the Geological Survey contained the provision "including not to exceed $45,000 for the purchase and exchange … of … passenger-carrying vehicles." It was held that the costs of transportation incident to the delivery of the purchased vehicles were chargeable to the specific $45,000 appropriation and not to the more general portion of the appropriation. Similarly, a general appropriation for the Library of Congress contained the provision, "$9,619,000 is to remain available until expended for the acquisition of books, periodicals, newspapers and all other materials… ." The Comptroller General held that the $9,619,000 was an earmark requiring the Library to set aside that money to purchase books and other library materials. The earmark barred the Library from transferring or using those funds for another purpose. B-278121, *supra*. In deciding the proper appropriation to charge for administrative costs for Oil Pollution Act claims, the Comptroller General stated, "As a general rule, an appropriation for a specific object is available for that object to the exclusion of a more general appropriation which might otherwise be considered for the same object." B-289209, *supra* (citing 65 Comp. Gen. 881 (1986)); B-290005, July 1, 2002.

The rule has also been applied to expenditures by a government corporation from corporate funds for an object for which the corporation

had received a specific appropriation, where the reason for using corporate funds was to avoid a restriction applicable to the specific appropriation. B-142011, June 19, 1969.

Of course, the rule that the specific governs over the general is not peculiar to appropriation law. It is a general principle of statutory construction and applies equally to provisions other than appropriation statutes. *E.g.*, 62 Comp. Gen. 617 (1983); B-277905, Mar. 17, 1998; B-152722, Aug. 16, 1965. However, another principle of statutory construction is that two statutes should be construed harmoniously so as to give maximum effect to both wherever possible. In dealing with nonappropriation statutes, the relationship between the two principles has been stated as follows:

> "Where there is a seeming conflict between a general provision and a specific provision and the general provision is broad enough to include the subject to which the specific provision relates, the specific provision should be regarded as an exception to the general provision so that both may be given effect, the general applying only where the specific provision is inapplicable."

B-163375, Sept. 2, 1971. *See also* B-255979, Oct. 30, 1995.

As stated before, however, in the appropriations context, this does not mean that a general appropriation is available when the specific appropriation has been exhausted. Using the more general appropriation would be an unauthorized transfer (discussed later in this chapter) and would improperly augment the specific appropriation (discussed in Chapter 6).

b. Two Appropriations Available for Same Purpose

Although rare, there are situations in which either of two appropriations can be construed as available for a particular object, but neither can reasonably be called the more specific of the two. The rule in this situation is this: Where two appropriations are available for the same purpose, the agency may select which one to charge for the expenditure in question. Once that election has been made, the agency must continue to use the same appropriation for that purpose unless the agency at the beginning of the fiscal year informs the Congress of its intent to change for the next fiscal year. *See* U.S. General Accounting Office, *Unsubstantiated DOE Travel Payments*, GAO/RCED-96-58R (Washington, D.C.: Dec. 28, 1995). Of course, where statutory language clearly demonstrates congressional intent to make one appropriation available to supplement or increase a

different appropriation for the same type of work, both appropriations are available. *See* B-272191, Nov. 4, 1997 (Army permitted to use Operations and Maintenance (O&M) funds for property maintenance and repair work in Germany even though Real Property Maintenance, Defense (RPM,D) funds were available for the same work because Congress said the O&M funds were "in addition to the funds specifically appropriated for real property maintenance under the heading [RPM,D]").

3. Transfer and Reprogramming

For a variety of reasons, agencies have a legitimate need for a certain amount of flexibility to deviate from their budget estimates. Two ways to shift money are transfer and reprogramming. While the two concepts are related in this broad sense, they are nevertheless different.

a. Transfer

Transfer is the shifting of funds between appropriations.[39] For example, if an agency receives one appropriation for Operations and Maintenance and another for Capital Expenditures, a shifting of funds from either one to the other is a transfer.

The basic rule with respect to transfer is simple: Transfer is prohibited without statutory authority. The rule applies equally to (1) transfers from one agency to another,[40] (2) transfers from one account to another within the same agency,[41] and (3) transfers to an interagency or intra-agency working fund.[42] In each instance, statutory authority is required. An agency's erroneous characterization of a proposed transfer as a "reprogramming" is irrelevant. *See* B-202362, Mar. 24, 1981. Moreover, informal congressional approval of an unauthorized transfer of funds

[39] U.S. General Accounting Office, *A Glossary of Terms Used in the Federal Budget Process (Exposure Draft)*, GAO/AFMD-2.1.1 (Washington, D.C.: Jan. 1993), at 80.

[40] 7 Comp. Gen. 524 (1928); 4 Comp. Gen. 848 (1925); 17 Comp. Dec. 174 (1910). A case in which adequate statutory authority was found to exist is B-217093, Jan. 9, 1985 (transfer from Japan-United States Friendship Commission to Department of Education to partially fund a study of Japanese education).

[41] 70 Comp. Gen. 592 (1991); 65 Comp. Gen. 881 (1986); 33 Comp. Gen. 216 (1953); 33 Comp. Gen. 214 (1953); 17 Comp. Dec. 7 (1910); B-286661, Jan. 19, 2001; B-206668, Mar. 15, 1982; B-178205.80, Apr. 13, 1976; B-164912-O.M., Dec. 21, 1977.

[42] 26 Comp. Gen. 545, 548 (1947); 19 Comp. Gen. 774 (1940); 6 Comp. Gen. 748 (1927); 4 Comp. Gen. 703 (1925).

between appropriation accounts does not have the force and effect of law. B-248284.2, Sept. 1, 1992.

The rule applies even though the transfer is intended as a temporary expedient (for example, to alleviate a temporary exhaustion of funds) and the agency contemplates reimbursement. Thus, without statutory authority, an agency cannot "borrow" from another account or another agency. 36 Comp. Gen. 386 (1956); 13 Comp. Gen. 344 (1934); B-290011, Mar. 25, 2002. An exception to this proposition is 31 U.S.C. § 1534, under which an agency may temporarily charge one appropriation for an expenditure benefiting another appropriation of the same agency, as long as amounts are available in both appropriations and the accounts are adjusted to reimburse the appropriation initially charged during or as of the close of the same fiscal year. This statute was intended to facilitate "common service" activities. For example, an agency procuring equipment to be used jointly by several bureaus or offices within the agency funded under separate appropriations may initially charge the entire cost to a single appropriation and later apportion the cost among the appropriations of the benefiting components. *See generally* S. Rep. No. 89-1284 (1966).

The prohibition against transfer is codified in 31 U.S.C. § 1532, the first sentence of which provides:

> "An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law."

In addition to the express prohibition of 31 U.S.C. § 1532, an unauthorized transfer would violate 31 U.S.C. § 1301(a) (which prohibits the use of appropriations for other than their intended purpose); would constitute an unauthorized augmentation of the receiving appropriation; and could, if the transfer led to overobligating the receiving appropriation, result in an Antideficiency Act (31 U.S.C. § 1341) violation as well. *E.g.*, B-286929, Apr. 25, 2001; B-248284.2, Sept. 1, 1992; B-222009-O.M., Mar. 3, 1986; 15 Op. Off. Legal Counsel 74 (1991).

Some agencies have limited transfer authority either in permanent legislation or in appropriation act provisions. Such authority will commonly set a percentage limit on the amount that may be transferred from a given appropriation and/or the amount by which the receiving appropriation may be augmented. A transfer pursuant to such authority is, of course, entirely proper. B-290659, Oct. 31, 2002; B-167637, Oct. 11, 1973.

An example is 7 U.S.C. § 2257, which authorizes transfers between Department of Agriculture appropriations. The amount to be transferred may not exceed 7 percent of the "donor" appropriation, and the receiving appropriation may not be augmented by more than 7 percent except in extraordinary emergencies. Cases construing this provision include 33 Comp. Gen. 214; B-218812, Jan. 23, 1987; B-123498, Apr. 11, 1955; and B-218812-O.M., July 30, 1985. *See also* B-279886, Apr. 28, 1998 (noting 5 percent limit on transfer in Department of Justice appropriation).

If an agency has transfer authority of this type, its exercise is not precluded by the fact that the amount of the receiving appropriation had been reduced from the agency's budget request. B-151157, June 27, 1963. Also, the transfer statute is an independent grant of authority and, unless expressly provided otherwise, the percentage limitations do not apply to transfers under any separate transfer authority the agency may have. B-239031, June 22, 1990.

Another type of transfer authority is illustrated by 31 U.S.C. § 1531, which authorizes the transfer of unexpended balances incident to executive branch reorganizations, but only for purposes for which the appropriation was originally available. Cases discussing this authority include 31 Comp. Gen. 342 (1952) and B-92288 *et al.*, Aug. 13, 1971.

Statutory transfer authority does not require any particular "magic words." Of course the word "transfer" will help, but it is not necessary as long as the words that are used make it clear that transfer is being authorized. B-213345, Sept. 26, 1986; B-217093, *supra*; B-182398, Mar. 29, 1976 (letter to Senator Laxalt), *modified on other grounds by* 64 Comp. Gen. 370 (1985).

Some transfer statutes have included requirements for approval by one or more congressional committees. In light of the Supreme Court's decision in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), such "legislative veto" provisions are no longer valid. Whether the transfer authority to which the veto provision is attached remains valid depends on whether it can be regarded as severable from the approval requirement. This in turn depends on an evaluation, in light of legislative history and other surrounding circumstances, of whether Congress would have enacted the substantive authority without the veto provision. *See*, *e.g.*, 15 Op. Off. Legal Counsel 49 (1991) (the Justice Department Office of Legal Counsel (OLC) concluded that an unconstitutional legislative veto provision of the Selective Service Act was severable from the statute's grant of authority to

the President to obtain expedited delivery of military contracts); 6 Op. Off. Legal Counsel 520 (1982) (OLC concluded that a Treasury Department transfer provision was severable and therefore survived a legislative veto provision).

The precise parameters of transfer authority will, of course, depend on the terms of the statute which grants it. The analytical starting point is the second sentence of 31 U.S.C. § 1532:

> "Except as specifically provided by law, an amount authorized to be withdrawn and credited [to another appropriation account or to a working fund] is available for the same purpose and subject to the same limitations provided by the law appropriating the amount."

In a 2001 decision, the Comptroller General found that funds withdrawn from other agencies' appropriations and credited to the Library of Congress FEDLINK[43] revolving fund retained their time character and did not assume the time character of the FEDLINK revolving fund. B-288142, Sept. 6, 2001. The Library of Congress proposed retaining in the fund amounts of fiscal year money advanced by other agencies in earlier fiscal years when orders were placed and, to the extent the advances were not needed to cover the costs of the orders, applying the excess amounts to new orders placed in subsequent fiscal years. The Library pointed out that the law establishing the revolving fund made amounts in the fund available without fiscal year limitation. The Comptroller General concluded that "amounts withdrawn from a fiscal year appropriation and credited to a no year revolving fund, such as the FEDLINK revolving fund, are available for obligation only during the fiscal year of availability of the appropriation from which the amount was withdrawn." *Id.* The Comptroller General noted that section 1532 is a significant control feature protecting Congress's constitutional prerogatives of the purse. Placing time limits on the availability of appropriations is a fundamental means of congressional control because it permits Congress to periodically review a given agency's programs and activities. Given the significance of time restrictions in preserving congressional powers of the purse, GAO looks for clear

[43] Library of Congress Fiscal Operations Improvement Act of 2000, Pub. L. No. 106-481, § 103, 114 Stat. 2187, 2189 (Nov. 9, 2000), amended by the fiscal year 2002 Legislative Branch Appropriations, Pub. L. No. 107-68, 115 Stat. 560, 588–89 (Nov. 12, 2001), *codified at* 2 U.S.C. § 182c.

legislative expressions of congressional intent before interpreting legislation to override time limitations that Congress, through the appropriations process, has imposed on an agency's use of funds. The Comptroller General rejected the Library's view that the language in the FEDLINK statute overrode the time limitation imposed on funds transferred into FEDLINK because, until the Library had earned those amounts by performing the services ordered from the Library, these transferred amounts were not a part of the *corpus* of FEDLINK. *Id.*

The FEDLINK decision references a situation that GAO addressed in 1944 with regard to a no-year revolving fund called the Navy Procurement Fund. 23 Comp. Gen. 668 (1944). The Navy incorrectly believed that because the revolving fund was not subject to fiscal year limitation, advances to the fund made from annual appropriations were available until expended. A number of other GAO decisions, several predating the enactment of 31 U.S.C. § 1532, have made essentially the same point—that, except to the extent the statute authorizing a transfer provides otherwise, transferred funds are available for purposes permissible under the donor appropriation and are subject to the same limitations and restrictions applicable to the donor appropriation. An example of this is the Economy Act, 31 U.S.C. § 1535.[44]

Restrictions applicable to the receiving account but not to the donor account may or may not apply. Where transfers are intended to accomplish a purpose of the source appropriation (Economy Act transactions, for example), transferred funds have been held not subject to such restrictions. *E.g.*, 21 Comp. Gen. 254 (1941); 18 Comp. Gen. 489 (1938); B-35677, July 27, 1943; B-131580-O.M., June 4, 1957. However, for transfers intended to permit a limited augmentation of the receiving account (7 U.S.C. § 2257, for example), this principle is arguably inapplicable in view of the fundamentally different purpose of the transfer.

As noted above, in the context of working funds, the prohibition against transfer applies not only to interagency funds, but to the consolidation of all or parts of different appropriations of the same agency into a single fund as well. In a few instances, the "pooling" of portions of agency unit

[44] *E.g.*, 31 Comp. Gen. 109, 114–15 (1951); 28 Comp. Gen. 365 (1948); 26 Comp. Gen. at 548; 18 Comp. Gen. 489; 17 Comp. Gen. 900 (1938); 17 Comp. Gen. 73 (1937); 16 Comp. Gen. 545 (1936); B-167034-O.M., Jan. 20, 1970. We discuss the Economy Act in detail in Chapter 12, Volume III of the third edition of *Principles of Federal Appropriations Law.*

appropriations has been found authorized where necessary to implement a particular statute. In B-195775, Sept. 10, 1979, the Comptroller General approved the transfer of portions of unit appropriations to an agencywide pool to be used to fund the Merit Pay System established by the Civil Service Reform Act of 1978. The transfers, while not explicitly authorized in the statute, were seen as necessary to implement the law and carry out the legislative purpose. Following this decision, the Comptroller General held in 60 Comp. Gen. 686 (1981) that the Treasury Department could pool portions of appropriations made to several separate bureaus to fund an Executive Development Program also authorized by the Civil Service Reform Act. However, pooling that would alter the purposes for which funds were appropriated is an impermissible transfer unless authorized by statute. *E.g.*, B-209790-O.M., Mar. 12, 1985. It is also impermissible to transfer more than the cost of the goods or services provided to an ordering agency. 70 Comp. Gen. 592, 595 (1991).

The reappropriation of an unexpended balance for a different purpose is a form of transfer. Such funds cease to be available for the purposes of the original appropriation. 18 Comp. Gen. 564 (1938); A-79180, July 30, 1936. *Cf.* 31 U.S.C. § 1301(b) (reappropriation for different purpose to be accounted for as a new appropriation). If the reappropriation is of an amount "not to exceed" a specified sum, and the full amount is not needed for the new purpose, the balance not needed reverts to the source appropriation. 18 Comp. Gen. at 565.

The prohibition against transfer would not apply to "transfers" of an agency's administrative allocations within a lump-sum appropriation since the allocations are not legally binding.[45] This is a reprogramming, which we discuss below. Thus, where the then Department of Health, Education, and Welfare received a lump-sum appropriation covering several grant programs, it could set aside a portion of each program's allocation for a single fund to be used for "cross-cutting" grants intended to serve more than one target population, as long as the grants were for projects within the scope or purpose of the lump-sum appropriation. B-157356, Aug. 17, 1978.

b. Reprogramming

In 1985, the Deputy Secretary of Defense made the following statement:

[45] The agency must be careful that a transfer of administrative allocations does not, under its own fund control regulations, produce a violation of 31 U.S.C. § 1517(a), discussed further in Chapter 6.

> "The defense budget does not exist in a vacuum. There are forces at work to play havoc with even the best of budget estimates. The economy may vary in terms of inflation; political realities may bring external forces to bear; fact-of-life or programmatic changes may occur. The very nature of the lengthy and overlapping cycles of the budget process poses continual threats to the integrity of budget estimates. Reprogramming procedures permit us to respond to these unforeseen changes and still meet our defense requirements."[46]

The thrust of this statement, while made from the perspective of the Defense Department, applies at least to some extent to all agencies.

Reprogramming is the utilization of funds in an appropriation account for purposes other than those contemplated at the time of appropriation.[47] In other words, it is the shifting of funds from one object to another *within* an appropriation. The term "reprogramming" appears to have come into use in the mid-1950s although the practice, under different names, predates that time.[48]

The authority to reprogram is implicit in an agency's responsibility to manage its funds; no statutory authority is necessary. *See Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) ("After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."). *See also* 4B Op. Off. Legal Counsel 701 (1980) (discussing the Attorney General's authority to reprogram to avoid deficiencies); B-196854.3, Mar. 19, 1984 (Congress is "implicitly conferring the authority to reprogram" by enacting lump-sum appropriations). Indeed, reprogramming is usually a nonstatutory arrangement. This means that there is no general statutory provision either authorizing or prohibiting it,

[46] *Reprogramming Action Within the Department of Defense: Hearing Before the House Armed Services Committee* (Sept. 30, 1985) (remarks prepared for delivery by The Honorable William H. Taft IV, Deputy Secretary of Defense, unprinted).

[47] U.S. General Accounting Office, *A Glossary of Terms Used in the Federal Budget Process (Exposure Draft)*, GAO/AFMD-2.1.1 (Washington, D.C.: Jan. 1993), at 74; B-164912-O.M., Dec. 21, 1977.

[48] Louis Fisher, *Presidential Spending Power*, 76–77 (1975). Fisher also briefly traces the evolution of the concept.

and it has evolved largely in the form of informal (*i.e.*, nonstatutory) agreements between various agencies and their congressional oversight committees. These informal arrangements do not have the force and effect of law. *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 548 (Ct. Cl. 1980). See also 56 Comp. Gen. 201 (1976), holding that the Navy's failure to complete a form required by Defense Department reprogramming regulations was not sufficient to support a claim for proposal preparation costs by an unsuccessful bidder upon cancellation of the proposal.

Thus, as a matter of law, an agency is free to reprogram unobligated funds as long as the expenditures are within the general purpose of the appropriation and are not in violation of any other specific limitation or otherwise prohibited. *E.g.*, B-123469, May 9, 1955; B-279338, Jan. 4, 1999. This is true even though the agency may already have administratively allotted the funds to a particular object. 20 Comp. Gen. 631 (1941). In some situations, the agency's discretion may rise to the level of a duty. *E.g.*, *Blackhawk Heating & Plumbing*, 622 F.2d at 552 n.9 (satisfaction of obligations under a settlement agreement).

There are at present no reprogramming guidelines applicable to all agencies. As one might expect, reprogramming policies, procedures, and practices vary considerably among agencies.[49] In view of the nature of its activities and appropriation structure, the Defense Department has detailed and sophisticated procedures.[50]

In some cases, Congress has attempted to regulate reprogramming by statute, and of course any applicable statutory provisions control. B-283599.2, Sept. 29, 1999; B-279886, Apr. 28, 1998; B-164912-O.M., *supra*. For example, a provision in the fiscal year 2002 Defense Department appropriation act prohibits the use of funds to prepare or present a

[49] GAO reports in this area include: U.S. General Accounting Office, *Information on Reprogramming Authority and Trust Funds*, AIMD-96-102R (Washington, D.C.: June 7, 1996); *Economic Assistance: Ways to Reduce the Reprogramming Notification Burden and Improve Congressional Oversight*, GAO/NSIAD-89-202 (Washington, D.C.: Sept. 21, 1989) (foreign assistance reprogramming); *Budget Reprogramming: Opportunities to Improve DOD's Reprogramming Process*, GAO/NSIAD-89-138 (Washington, D.C.: July 24, 1989); *Budget Reprogramming: Department of Defense Process for Reprogramming Funds*, GAO/NSIAD-86-164BR (Washington, D.C.: July 16, 1986).

[50] *See* Department of Defense Financial Management Regulation 7000.14-R, vol. 3 ch. 6, *Reprogramming of DoD Appropriated Funds* (Aug. 1, 2000).

reprogramming request to the Appropriations Committees "where the item for which reprogramming is requested has been denied by the Congress."[51] The Comptroller General has construed this provision as prohibiting a reprogramming request that would have the effect of restoring funds which had been specifically deleted in the legislative process; that is, the provision is not limited to the denial of an entire project. *See* U.S. General Accounting Office, *Legality of the Navy's Expenditures for Project Sanguine During Fiscal Year 1974*, LCD-75-315 (Washington, D.C.: Jan. 20, 1975).

Under Defense's arrangement as reflected in its written instructions, reprogramming procedures apply to funding shifts between program elements, but not to shifts within a program element. Thus, the denial of a request to reprogram funds from one program element to another does not preclude a military department from shifting available funds within the element. 65 Comp. Gen. 360 (1986). The level at which reprogramming procedures and restrictions will apply depends on applicable legislation, if any, and the arrangements an agency has worked out with its respective committees.

In the absence of a statutory provision such as the Defense provision noted above, a reprogramming that has the effect of restoring funds deleted in the legislative process has been held not legally objectionable. B-195269, Oct. 15, 1979.

Reprogramming frequently involves some form of notification to the appropriations and/or legislative committees. In a few cases, the notification process is prescribed by statute. However, in most cases, the committee review process is nonstatutory and derives from instructions in committee reports, hearings, or other correspondence. Sometimes, in addition to notification, reprogramming arrangements also provide for committee approval. As in the case of transfer, under the Supreme Court's decision in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), statutory committee approval or veto provisions are no longer permissible. However, an agency may continue to observe committee approval procedures as part of its informal arrangements, although they would not be legally binding. B-196854.3, *supra*.

[51] Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8005, 115 Stat. 2230, 2247–48 (Jan. 10, 2002).

In sum, reprogramming procedures provide an element of congressional control over spending flexibility short of resort to the full legislative process. They are for the most part nonbinding, and compliance is largely a matter of "keeping faith" with the pertinent committees.

4. General Provisions: When Construed as Permanent Legislation

Appropriation acts, in addition to making appropriations, frequently contain a variety of provisions either restricting the availability of the appropriations or making them available for some particular use. Such provisions come in two forms: (a) "provisos" attached directly to the appropriating language and (b) general provisions. A general provision may apply solely to the act in which it is contained ("No part of any appropriation contained in this Act shall be used …"), or it may have general applicability ("No part of any appropriation contained in this or any other Act shall be used …").[52] General provisions may be phrased in the form of restrictions or positive authority.

Provisions of this type are no less effective merely because they are contained in appropriation acts. It is settled that Congress may repeal, amend, or suspend a statute by means of an appropriation bill, so long as its intention to do so is clear. *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992); *McHugh v. Rubin*, 220 F.3d 53, 57 (2nd Cir. 2000); *see also United States v. Dickerson*, 310 U.S. 554 (1940); *Cella v. United States*, 208 F.2d 783, 790 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *NLRB v. Thompson Products, Inc.*, 141 F.2d 794, 797 (9th Cir. 1944); B-300009, July 1, 2003; 41 Op. Att'y Gen. 274, 276 (1956).

Congress likewise can enact general or permanent legislation in appropriation acts, but again its intent to do so must be clear. This point was made as follows in *Building & Construction Trades Department, AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C. Cir.), *cert. denied*, 506 U.S. 915 (1992):

[52] In recent decades, general provisions of governmentwide applicability—the "this or any other act" provisions—have often been consolidated in the annual Treasury and General Government appropriation acts. *E.g.*, Pub. L. No. 108-7, div. J, title I, § 104, 117 Stat. 11, 437 (Feb. 20, 2003) (fiscal year 2003). Beginning in 2004, these provisions are now part of what is called the Transportation, Treasury, and Independent Agencies Appropriations Act. *See* H.R. 2989, 108th Cong. (passed by the House on September 9, 2003, and the Senate on October 23, 2003).

> "While appropriations are 'Acts of Congress' which can substantively change existing law, there is a very strong presumption that they do not … and that when they do, the change is only intended for one fiscal year."

In *Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 224 (1st Cir. 2003), the court cautioned:

> "Congress may create permanent, substantive law through an appropriations bill only if it is clear about its intentions. Put another way, Congress cannot rebut the presumption against permanence by sounding an uncertain trumpet."

As noted in Chapter 1, rules of both the Senate and the House of Representatives prohibit "legislating" in appropriation acts. However, this merely subjects the provision to a point of order and does not affect the validity of the legislation if the point of order is not raised, or is raised and not sustained. Thus, once a given provision has been enacted into law, the question of whether it is "general legislation" or merely a restriction on the use of an appropriation, that is, whether it might have been subject to a point of order, is academic.

This section deals with the question of when provisos or general provisions appearing in appropriation acts can be construed as permanent legislation.

Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the fiscal year covered. Thus, the rule is: A provision contained in an annual appropriation act is not to be construed to be permanent legislation unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent. The presumption can be overcome if the provision uses language indicating futurity or if the provision is of a general character bearing no relation to the object of the appropriation. 65 Comp. Gen. 588 (1986); 62 Comp. Gen. 54 (1982); 36 Comp. Gen. 434 (1956); 32 Comp. Gen. 11 (1952); 24 Comp. Gen. 436 (1944); 10 Comp. Gen. 120 (1930); 5 Comp. Gen. 810 (1926); 7 Comp. Dec. 838 (1901).

In analyzing a particular provision, the starting point in ascertaining Congress's intent is, as it must be, the language of the statute. The question to ask is whether the provision uses "words of futurity." The most common word of futurity is "hereafter" and provisions using this term have often been construed as permanent. For specific examples, see *Cella v. United*

States, 208 F.2d at 790; 70 Comp. Gen. 351 (1991); 26 Comp. Gen. 354, 357 (1946); 2 Comp. Gen. 535 (1923); 11 Comp. Dec. 800 (1905); B-108245, Mar. 19, 1952; B-100983, Feb. 8, 1951; B-76782, June 10, 1948. However, use of the word hereafter may not guarantee that an appropriation act provision will be found to constitute permanent law. Thus, in *Auburn Housing Authority v. Martinez*, 277 F.3d 138 (2nd Cir. 2002), the court declined to give permanent effect to a provision that included the word hereafter. The court acknowledged that hereafter generally denoted futurity, but held that this was not sufficient to establish permanence in the circumstances of that case. To read hereafter as giving permanence to one provision would have resulted in repealing another provision enacted in the same act.[53] The court concluded that this result was not what Congress had intended.

As *Auburn Housing Authority* indicates, mere use of the word hereafter may not be adequate as an indication of future effect to establish permanence. Other facts such as the precise location of the word hereafter and the sense in which it is used are also important. Moreover, the use of the word hereafter may not be sufficient, for example, if it appears only in an exception clause and not in the operative portion of the provision, B-228838, Sept. 16, 1987, or if it is used in a way that does not necessarily connote futurity beyond the end of the fiscal year. *Williams v. United States*, 240 F.3d 1019, 1063 (Fed. Cir. 2001).

Words of futurity other than hereafter have also been deemed sufficient. Thus, there is no significant difference in meaning between hereafter and "after the date of approval of this act." 65 Comp. Gen. at 589; 36 Comp. Gen. at 436; B-209583, Jan. 18, 1983. Using a specific date rather than a general reference to the date of enactment produces the same result. B-287488, June 19, 2001; B-57539, May 3, 1946. "Henceforth" may also do the job. B-209583, *supra*. So may specific references to future fiscal years. B-208354, Aug. 10, 1982. On the other hand, the word "hereinafter" was not considered synonymous with hereafter by the First Circuit Court of Appeals and was not deemed to establish a permanent provision. *Atlantic Fish Spotters Ass'n*, *supra*. Rather, the court held that hereinafter is

[53] The appropriation provision in *Auburn Housing Authority* was aimed at countering another provision in the very same act. Thus, the court reasoned that the presumption against repeal by implication was particularly strong in this case. *Id.* at 146. The court also contrasted the hereafter provision with another provision in the same act that was more explicit as to permanence. The latter provision read in part: "[T]his subsection shall apply to fiscal year 1999 and each fiscal year thereafter." *Id.* at 146–47.

universally understood to refer only to what follows in the same writing (*i.e.*, statute). 321 F.3d at 225–26.

In 24 Comp. Gen. 436, the Comptroller General viewed the words "at any time" as words of futurity in a provision which authorized reduced transportation rates to military personnel who were "given furloughs at any time." In that decision, however, the conclusion of permanence was further supported by the fact that Congress appropriated funds to carry out the provision in the following year as well and did not repeat the provision but merely referred to it.

The words "or any other act" in a provision addressing funds appropriated in or made available by "this or any other act" are not words of futurity. They merely refer to any other appropriation act for the same fiscal year. *Williams v. United States*, 240 F.3d at 1063; 65 Comp. Gen. 588; B-230110, Apr. 11, 1988; B-228838, *supra*; B-145492, Sept. 21, 1976.[54] *See also* A-88073, Aug. 19, 1937 ("this or any other appropriation"). Similarly, the words "notwithstanding any other provision of law" are not words of futurity and, standing alone, offer no indication as to the duration of the provision. B-271412, June 13, 1996; B-208705, Sept. 14, 1982.

The words "this or any other act" may be used in conjunction with other language that makes the result, one way or the other, indisputable. The provision is clearly not permanent if the phrase "during the current fiscal year" is added. *Norcross v. United States*, 142 Ct. Cl. 763 (1958). Addition of the phrase "with respect to any fiscal year" makes the provision permanent. B-230110, *supra*.

If words of futurity indicate permanence, it follows that a proviso or general provision that does not contain words of futurity will generally not be construed as permanent. 65 Comp. Gen. 588; 32 Comp. Gen. 11; 20 Comp. Gen. 322 (1940); 10 Comp. Gen. 120; 5 Comp. Gen. 810; 3 Comp. Gen. 319 (1923); B-209583, *supra*; B-208705, *supra*; B-66513, May 26, 1947; A-18614, May 25, 1927. The courts have applied the same analysis. *See United States v. Vulte*, 233 U.S. 509, 514 (1914); *Minis v. United States*, 40 U.S. (15 Pet.) 423 (1841); *Bristol-Myers Squibb Company v. Royce*

[54] One early case found the words "or any other act" sufficient words of futurity. 26 Comp. Dec. 1066 (1920). A later decision, B-37032, Oct. 5, 1943, regarded their effect as inconclusive. Both of these cases must be regarded as implicitly modified by the consistent position expressed in the more recent decisions.

Laboratories, Inc., 69 F.3d 1130, 1136 (Fed. Cir. 1995); *United States v. International Business Machines Corp.*, 892 F.2d 1006, 1009 (Fed. Cir. 1989); *NLRB v. Thompson Products, Inc.*, *supra*; *City of Hialeah v. United States Housing Authority*, 340 F. Supp. 885 (S.D. Fla. 1971).

In particular, the absence of the word hereafter is viewed as telling evidence that Congress did not intend a provision to be permanent. *E.g.*, *Building & Construction Trades Department*, 961 F.2d at 273; *International Business Machines Corp.*, *supra*; Department of Justice, Office of Legal Counsel Memorandum for James S. Gilliland, General Counsel, Department of Agriculture, *Severability and Duration of Appropriations Rider Concerning Frozen Poultry Regulations*, June 4, 1996. For example, the court in *Building & Construction Trades Department* concluded that the absence of the word hereafter in an appropriation provision was more significant than the inclusion of other language that might have indicated permanence.

As the preceding paragraphs indicate, the language of the statute is the crucial determinant. However, other factors may also be taken into consideration. Thus, the repeated inclusion of a provision in annual appropriation acts indicates that it is not considered or intended by Congress to be permanent. 32 Comp. Gen. 11; 10 Comp. Gen. 120; B-270723, Apr. 15, 1996; A-89279, Oct. 26, 1937; 41 Op. Att'y Gen. at 279–80. However, where adequate words of futurity exist, the repetition of a provision in the following year's appropriation act has been viewed simply as an "excess of caution." 36 Comp. Gen. at 436. This factor is of limited usefulness, since the failure to repeat in subsequent appropriation acts a provision that does not contain words of futurity can also be viewed as an indication that Congress did not consider it to be permanent and simply did not want it to continue. *See* 18 Comp. Gen. 37 (1938); A-88073, *supra*. Thus, if the provision does not contain words of futurity, then repetition or nonrepetition lead to the same result—that the provision is not permanent. If the provision does contain words of futurity, then nonrepetition indicates permanence but repetition, although it suggests nonpermanence, is inconclusive.

The inclusion of a provision in the United States Code is relevant as an indication of permanence but is not controlling. 36 Comp. Gen. 434; 24 Comp. Gen. 436. Failure to include a provision in the Code would appear to be of no significance. A reference by the codifiers to the failure to reenact a provision suggests nonpermanence. 41 Op. Att'y Gen. at 280–81.

Legislative history is also relevant, but has been used for the most part to support a conclusion based on the presence or absence of words of futurity. *See Cella v. United States*, 208 F.2d at 790 n.1; *NLRB v. Thompson Products*, 141 F.2d at 798; 65 Comp. Gen. 588; B-277719, Aug. 20, 1997; B-209583, *supra*; B-208705, *supra*; B-108245, *supra*; B-57539, *supra*. In B-192973, Oct. 11, 1978, a general provision requiring the submission of a report "annually to the Congress" was held not permanent in view of conflicting expressions of congressional intent. Legislative history by itself has not been used to find futurity where it is missing in the statutory language. *See Building & Construction Trades Department*, 961 F.2d at 274.

The degree of relationship between a given provision and the object of the appropriation act in which it appears or the appropriating language to which it is appended is a factor to be considered. If the provision bears no direct relationship to the appropriation act in which it appears, this is an indication of permanence. For example, a provision prohibiting the retroactive application of an energy tax credit provision in the Internal Revenue Code was found sufficiently unrelated to the rest of the act in which it appeared, a supplemental appropriations act, to support a conclusion of permanence. B-214058, Feb. 1, 1984. *See also* 62 Comp. Gen. at 56; 32 Comp. Gen. 11; 26 Comp. Gen. at 357; B-37032, *supra*; A-88073, *supra*. The closer the relationship, the less likely it is that the provision will be viewed as permanent. A determination under rules of the Senate that a proviso is germane to the subject matter of the appropriation bill will negate an argument that the proviso is sufficiently unrelated as to suggest permanence. B-208705, *supra*.

The phrasing of a provision as positive authorization rather than a restriction on the use of an appropriation is an indication of permanence, but usually has been considered in conjunction with a finding of adequate words of futurity. 36 Comp. Gen. 434; 24 Comp. Gen. 436. An early decision, 17 Comp. Dec. 146 (1910), held a proviso to be permanent based solely on the fact that it was not phrased as a restriction on the use of the appropriation to which it was attached, but this decision seems inconsistent with the weight of authority and certainly with the Supreme Court's decision in *Minis v. United States*, cited above.

Finally, a provision may be construed as permanent if construing it as temporary would render the provision meaningless or produce an absurd result. 65 Comp. Gen. 352 (1986); 62 Comp. Gen. 54; B-200923, Oct. 1, 1982. These decisions dealt with a general provision designed to prohibit cost-of-

living pay increases for federal judges "except as may be specifically authorized by Act of Congress hereafter enacted." Pub. L. No. 97-92, § 140, 95 Stat. 1183, 1200 (Dec. 15, 1981). The provision appeared in a fiscal year 1982 continuing resolution, which expired on September 30, 1982. The next applicable pay increase would have been effective October 1, 1982. Thus, if the provision were not construed as permanent, it would have been meaningless "since it would have been enacted to prevent increases during a period when no increases were authorized to be made." 62 Comp. Gen. at 56–57.[55] Similarly, a provision was held permanent in 9 Comp. Gen. 248 (1929) although it contained no words of futurity, because it was to become effective on the last day of the fiscal year and an alternative construction would have rendered it effective for only 1 day, clearly not the legislative intent. *See also* 65 Comp. Gen. at 590; B-214058, *supra*; B-270723, *supra*.

In sum, the six additional factors mentioned above are all relevant indicia of whether a given provision should be construed as permanent. However, the presence or absence of words of futurity remains the crucial factor, and the additional factors have been used for the most part to support a conclusion based primarily on this presence or absence. Four of the factors—occurrence or nonoccurrence in subsequent appropriation acts, inclusion in United States Code, legislative history, and phrasing as positive authorization—have never been used as the sole basis for finding permanence in a provision without words of futurity. The two remaining factors—relationship to rest of statute and meaningless or absurd result—can be used to find permanence in the absence of words of futurity, but the conclusion is almost invariably supported by at least one of the other factors, such as legislative history.

[55] In *Williams v. United States*, 240 F.3d at 1026, the Court of Appeals for the Federal Circuit held that the provision addressed in these decisions was not permanent, referring to the "unmistakable language of Public Law 97-92 … terminating the effect of Section 140 in 1982." The court did not address the consequence, if any, of Congress's use of the word hereafter. The court did concede, however, that "even if Section 140 did not expire as of September 30, 1982, the 1989 Act falls well within the specific exception in that statute for an 'Act of Congress hereafter enacted.'" *Id.* at 1027. The 1989 Act the court referred to is the Ethics Reform Act, Pub. L. No. 101-194, 103 Stat. 1716 (Nov. 30, 1989), which entitled federal judges to cost-of-living pay increases whenever federal employees received a cost-of-living increase. The 1989 Act was enacted after the series of GAO decisions was issued that addressed the fiscal year 1982 law.

C. Relationship of Appropriations to Other Types of Legislation

> "As usual, this court has been dealt the difficult hand which results when Congress does not get its 'Act[s]' together."

American Federation of Government Employees, Local 1945 v. Cheney, CV92-PT-2453-E, (N.D. Ala., Dec. 21, 1992) (Propst, J.), Slip Op at 8.

1. Distinction between Authorization and Appropriation

Appropriation acts must be distinguished from two other types of legislation: "enabling" or "organic" legislation and "appropriation authorization" legislation. Enabling or organic legislation is legislation that creates an agency, establishes a program, or prescribes a function, such as the Department of Education Organization Act or the Federal Water Pollution Control Act. While the organic legislation may provide the necessary authority to conduct the program or activity, it, with relatively rare exceptions, does not provide any money.

Appropriation authorization legislation, as the name implies, is legislation which authorizes the appropriation of funds to implement the organic legislation. It may be included as part of the organic legislation or it may be separate. As a general proposition, it too does not give the agency any actual money to spend. With certain exceptions (discussed in section B.1 of this chapter), only the appropriation act itself permits the withdrawal of funds from the Treasury. The principle has been stated as follows:

> "The mere authorization of an appropriation does not authorize expenditures on the faith thereof or the making of contracts obligating the money authorized to be appropriated."

16 Comp. Gen. 1007, 1008 (1937). Restated, an authorization of appropriations does not constitute an appropriation of public funds, but contemplates subsequent legislation by Congress actually appropriating the funds. 35 Comp. Gen. 306 (1955); 27 Comp. Dec. 923 (1921).[56]

Like the organic legislation, authorization legislation is considered and reported by the committees with legislative jurisdiction over the particular

[56] *See also* 67 Comp. Gen. 332 (1988); 37 Comp. Gen. 732 (1958); 26 Comp. Gen. 452 (1947); 15 Comp. Gen. 802 (1936); 4 Comp. Gen. 219 (1924); A-27765, July 8, 1929.

subject matter, whereas the appropriation bills are exclusively within the jurisdiction of the appropriations committees.

There is no general requirement, either constitutional or statutory, that an appropriation act be preceded by a specific authorization act. *E.g.*, 71 Comp. Gen. 378, 380 (1992). The existence of a statute (organic legislation) imposing substantive functions upon an agency that require funding for their performance is itself sufficient authorization for the necessary appropriations. B-173832, July 16, 1976; B-173832, Aug. 1, 1975; B-111810, Mar. 8, 1974. However, statutory requirements for authorizations do exist in a number of specific situations. An example is section 660 of the Department of Energy Organization Act, 42 U.S.C. § 7270 ("Appropriations to carry out the provisions of this chapter shall be subject to annual authorization"). Another example is 10 U.S.C. § 114(a), which provides that no funds may be appropriated for military construction, military procurement, and certain related research and development "unless funds therefor have been specifically authorized by law."

In addition, rules of the House of Representatives prohibit appropriations for expenditures not previously authorized by law. *See* Rule XXI(2), Rules of the House of Representatives. The effect of this Rule is to subject the offending appropriation to a point of order. A more limited provision exists in Rule XVI, Standing Rules of the Senate.

The majority of appropriations today are preceded by some form of authorization although, as noted, it is not statutorily required in all cases.

Authorizations take many different forms, depending in part on whether they are contained in the organic legislation or are separate. Authorizations contained in organic legislation may be "definite" (setting dollar limits either in the aggregate or for specific fiscal years) or "indefinite" (authorizing "such sums as may be necessary to carry out the provisions of this act"). An indefinite authorization serves little purpose other than to comply with House Rule XXI. Appropriation authorizations enacted as separate legislation resemble appropriation acts in structure, for example, the annual Department of Defense Authorization Acts.

An authorization act is basically a directive to Congress itself, which Congress is free to follow or alter (up or down) in the subsequent appropriation act. A statutory requirement for prior authorization is also essentially a congressional mandate to itself. Thus, for example, if Congress appropriates money to the Defense Department in violation of 10 U.S.C.

§ 114, there are no practical consequences. The appropriation is just as valid, and just as available for obligation, as if section 114 had been satisfied or did not exist.

In sum, the typical sequence is: (1) organic legislation; (2) authorization of appropriations, if not contained in the organic legislation; and (3) the appropriation act. While this may be the "normal" sequence, there are deviations and variations, and it is not always possible to neatly label a given piece of legislation. Consider, for example, the following:

> "The Secretary of the Treasury is authorized and directed to pay to the Secretary of the Interior … for the benefit of the Coushatta Tribe of Louisiana … out of any money in the Treasury not otherwise appropriated, the sum of $1,300,000."[57]

This is the first section of a law enacted to settle land claims by the Coushatta Tribe against the United States and to prescribe the use and distribution of the settlement funds. Applying the test described above in section B.1, it is certainly an appropriation—it contains a specific direction to pay and designates the funds to be used—but, in a technical sense, it is not an appropriation act. Also, it contains its own authorization. Thus, we have an authorization and an appropriation combined in a statute that is neither an authorization act (in the sense described above) nor an appropriation act. General classifications may be useful and perhaps essential, but they should not be expected to cover all situations.

2. Specific Problem Areas and the Resolution of Conflicts

a. Introduction

Appropriation acts, as we have seen, do not exist in a vacuum. They are enacted against the backdrop of program legislation and, in many cases, specific authorization acts. This section deals with two broad but closely related issues. First, what precisely can Congress do in an appropriation act? Is it limited to essentially "rubber stamping" what has previously been

[57] Pub. L. No. 100-411, § 1(a)(1), 102 Stat. 1097 (Aug. 22, 1988).

authorized? Second, what does an agency do when faced with what it perceives to be an inconsistency between an appropriation act and some other statute?

The remaining portions of this section raise these issues in a number of specific contexts. In this introduction, we present four important principles. The resolution of problems in the relationship of appropriation acts to other statutes will almost invariably lie in the application of one or more of these principles.

First, as a general proposition, appropriations made to carry out authorizing laws "are made on the basis that the authorization acts in effect constitute an adjudication or legislative determination of the subject matter." B-151157, June 27, 1963. Thus, except as specified otherwise in the appropriation act, appropriations to carry out enabling or authorizing laws must be expended in strict accord with the original authorization both as to the amount of funds to be expended and the nature of the work authorized. 36 Comp. Gen. 240, 242 (1956); B-258000, Aug. 31, 1994; B-220682, Feb. 21, 1986; B-204874, July 28, 1982; B-151157, *supra*; B-125404, Aug. 31, 1956. While it is true that one Congress cannot bind a future Congress, nor can it bind subsequent action by the same Congress, an authorization act is more than an academic exercise and its requirements must be followed unless changed by subsequent legislation.

Second, Congress is free to amend or repeal prior legislation as long as it does so directly and explicitly and does not violate the Constitution. It is also possible for one statute to implicitly amend or repeal a prior statute, but it is firmly established that "repeal by implication" is disfavored, and statutes will be construed to avoid this result whenever reasonably possible. *E.g.*, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189–90 (1978); *Morton v. Mancari*, 417 U.S. 535, 549 (1974); *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936); 72 Comp. Gen. 295, 297 (1993); 68 Comp. Gen. 19, 22–23 (1988); 64 Comp. Gen. 142, 145 (1984); 58 Comp. Gen. 687, 691–92 (1979); B-290011, Mar. 25, 2002; B-261589, Mar. 6, 1996; B-258163, Sept. 29, 1994; B-236057, May 9, 1990. Repeals by implication are particularly disfavored in the appropriations context. *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992).

A repeal by implication will be found only where "the intention of the legislature to repeal [is] clear and manifest." *Posadas*, 296 U.S. at 503; B-290011, *supra*; B-236057, *supra*. The principle that implied repeals are disfavored applies with special weight when it is asserted that a general

statute repeals a more specific statute. 72 Comp. Gen. at 297 and cases cited.

A corollary to the "cardinal rule" against repeal by implication, or perhaps another way of saying the same thing, is the rule of construction that statutes should be construed harmoniously so as to give maximum effect to both wherever possible. *E.g.*, *Posadas*, 296 U.S. at 503; *Strawser v. Atkins*, 290 F.3d 720 (4th Cir.), *cert. denied*, 537 U.S. 1045 (2002); 53 Comp. Gen. 853, 856 (1974); B-290011, *supra*; B-208593.6, Dec. 22, 1988. See B-258000, *supra*, for an example of harmonizing ambiguous appropriation and authorization provisions in order to effectuate congressional intent.

Third, if two statutes are in irreconcilable conflict, the more recent statute, as the latest expression of Congress, governs. As one court concluded in a statement illustrating the eloquence of simplicity, "[t]he statutes are thus in conflict, the earlier permitting and the later prohibiting," so the later statute supersedes the earlier. *Eisenberg v. Corning*, 179 F.2d 275, 277 (D.C. Cir. 1949). In a sense, the "last in time" rule is yet another way of expressing the repeal by implication principle. We state it separately to highlight its narrowness: it applies only when the two statutes cannot be reconciled in any reasonable manner, and then only to the extent of the conflict. *E.g.*, *Posadas*, 296 U.S. at 503; B-203900, Feb. 2, 1989; B-226389, Nov. 14, 1988; B-214172, July 10, 1984, *aff'd upon reconsideration*, 64 Comp. Gen. 282 (1985).

We will see later in this section that while the last in time rule can be stated with eloquent simplicity, its application is not always so simple.

The fourth principle we state in two parts:

First, despite the occasional comment to the contrary in judicial decisions (a few of which we will note later), Congress can and does "legislate" in appropriation acts. *E.g.*, *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979); *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974); *Eisenberg v. Corning*, *supra*; *Tayloe v. Kjaer*, 171 F.2d 343 (D.C. Cir. 1948). *See also* the *Dickerson*, *Cella*, and *Thompson Products* cases cited above in section B.4, and the discussion of the congressional power of the purse in Chapter 2, section B. It may well be that the device is "unusual and frowned upon." *Preterm*, 591 F.2d at 131; *Building & Construction Trades Department, AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C. Cir.), *cert. denied*, 506 U.S. 915 (1992) ("While appropriations are 'Acts of Congress'

which can substantively change existing law, there is a very strong presumption that they do not … and that when they do, the change is only intended for one fiscal year."). It also may well be that the appropriation act will be narrowly construed when it is in apparent conflict with authorizing legislation. *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1558 (D.C. Cir. 1984). Nevertheless, appropriation acts are, like any other statute, passed by both Houses of Congress and either signed by the President or enacted over a presidential veto. As such, and subject of course to constitutional strictures, they are "just as effective a way to legislate as are ordinary bills relating to a particular subject." *Friends of the Earth*, 485 F.2d at 9; *Envirocare of Utah Inc. v. United States*, 44 Fed. Cl. 474, 482 (1999).

Second, legislative history is not legislation. As useful and important as legislative history may be in resolving ambiguities and determining congressional intent, it is the language of the appropriation act, and not the language of its legislative history, that is enacted into law. *E.g.*, *Shannon v. United States*, 512 U.S. 573, 583 (1994) (declining to give effect to "legislative history that is in no way anchored in the text of the statute."). As the Supreme Court stated in a case previously cited, which we will discuss in more detail later:

> "Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress … ."

Tennessee Valley Authority v. Hill, 437 U.S. at 191; *see also Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075 (Fed. Cir. 2003).

These, then, are the "guiding principles" that will be applied in various combinations and configurations to analyze and resolve the problem areas identified in the remainder of this section. For the most part, our subsequent discussion will merely note the applicable principle(s). A useful supplemental reference on many of the topics we discuss is Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 Cath. U.L. Rev. 51 (1979).

b. Variations in Amount

(1) Appropriation exceeds authorization

Generally speaking, Congress is free to appropriate more money for a given object than the amount previously authorized. As the Comptroller General stated in a brief letter to a Member of Congress:

> "While legislation providing for an appropriation of funds in excess of the amount contained in a related authorization act apparently would be subject to a point of order under rule 21 of the Rules of the House of Representatives, there would be no basis on which we could question otherwise proper expenditures of funds actually appropriated."

B-123469, Apr. 14, 1955.

The governing principle was stated as follows in 36 Comp. Gen. 240, 242 (1956):

> "It is fundamental … that one Congress cannot bind a future Congress and that the Congress has full power to make an appropriation in excess of a cost limitation contained in the original authorization act. This authority is exercised as an incident to the power of the Congress to appropriate and regulate expenditures of the public money."

If we are dealing with a line-item appropriation or a specific earmark in a lump-sum appropriation, the quoted statement would appear beyond dispute. However, complications arise where the authorization for a given item is specific and a subsequent lump-sum appropriation includes a higher amount for that item specified only in legislative history and not in the appropriation act itself. In this situation, the rule that one Congress cannot bind a future Congress or later action by the same Congress must be modified somewhat by the rule against repeal by implication. The line of demarcation, however, is not precisely defined.

In 36 Comp. Gen. 240, Congress had authorized the construction of two bridges across the Potomac River "at a cost not to exceed" $7 million. A subsequent appropriation act made a lump-sum appropriation that included funds for the bridge construction (specified in legislative history but not in the appropriation act itself) in excess of the amount authorized. The decision concluded that the appropriation, as the latest expression of Congress on the matter, was available for expenditure. Similarly, it was

held in B-148736, Sept. 15, 1977, that the National Park Service could expend its lump-sum appropriation for planning and construction of parks even though the expenditures for specific parks would exceed amounts authorized to be appropriated for those parks.

Both of these cases were distinguished in 64 Comp. Gen. 282 (1985), which affirmed a prior decision, B-214172, July 10, 1984. Authorizing legislation for the Small Business Administration (SBA) provided specific funding levels for certain SBA programs. SBA's 1984 appropriation act contained a lump-sum appropriation for the programs which, according to the conference report, included amounts in excess of the funding levels specified in the authorization. Relying in part on *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), GAO concluded that the two statutes were not in conflict, that the appropriation did not implicitly repeal or amend the authorizations, and that the spending levels in the authorization were controlling. The two prior cases were distinguished as being limited in scope and dealing with different factual situations. 64 Comp. Gen. at 285. For example, it was clear in the prior cases that Congress was knowingly providing funds in excess of the authorization ceilings. In contrast, the SBA appropriation made explicit reference to the authorizing statute, thus suggesting that Congress did not intend that the appropriation be inconsistent with the authorized spending levels. *Id.* at 286–87.

(2) Appropriation less than authorization

Congress is free to appropriate less than an amount authorized either in an authorization act or in program legislation, again, as in the case of exceeding an authorization, at least where it does so directly. *E.g.*, 53 Comp. Gen. 695 (1974). This includes the failure to fund a program at all, that is, not to appropriate any funds. *United States v. Dickerson*, 310 U.S. 554 (1940).

A case in point is *City of Los Angeles v. Adams*, 556 F.2d 40 (D.C. Cir. 1977). The Airport and Airway Development Act of 1970 authorized airport development grants "in aggregate amounts not less than" specified dollar amounts for specified fiscal years, and provided an apportionment formula. Pub. L. No. 91-258, title I, 84 Stat. 219 (May 21, 1970). Subsequent appropriation acts included specific limitations on the aggregate amounts to be available for the grants, less than the amounts authorized. The court concluded that both laws could be given effect by limiting the amounts available to those specified in the appropriation acts, but requiring that

they be distributed in accordance with the formula of the authorizing legislation. In holding the appropriation limits controlling, the court said:

> "According to its own rules, Congress is not supposed to use appropriations measures as vehicles for the amendment of general laws, including revision of expenditure authorization… . Where Congress chooses to do so, however, we are bound to follow Congress's last word on the matter even in an appropriations law."

Id. at 48–49.

Relying on *City of Los Angeles v. Adams*, the court in *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), held that, while appropriations in amounts less than envisioned in authorization acts control, an agency must still adhere as much as possible to the authorizing statute in distributing such funds:

> "[I]t is clear that the Congress responsible for the ISDA [Indian Self-Determination Act] did not intend, in the case of insufficient funding, for the numerous detailed provisions of the Act to be shunted aside by a Secretary exercising total discretion in allocation of the funds. Nor, as the legislative history shows, did the 1995 Congress which appropriated insufficient funds intend for its shortfall to eviscerate the substantive provisions of the earlier Act."

87 F.3d at 1349 (emphasis in original).

Where the amount authorized to be appropriated is mandatory rather than discretionary, Congress can still appropriate less, or can suspend or repeal the authorizing legislation, as long as the intent to suspend or repeal the authorization is clear. The power is considerably diminished, however, with respect to entitlements that have already vested. The distinction is made clear in the following passage from the Supreme Court's decision in *United States v. Larionoff*, 431 U.S. 864, 879 (1977):

> "No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn… . It is quite a different matter, however,

> for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the congressional action would appear in a different constitutional light."

Several earlier cases provide concrete illustrations of what Congress can and cannot do in an appropriation act to reduce or eliminate a nonvested mandatory authorization. In *United States v. Fisher*, 109 U.S. 143 (1883), permanent legislation set the salaries of certain territorial judges. Congress subsequently appropriated a lesser amount, "in full compensation" for that particular year. The Court held that Congress had the power to reduce the salaries, and had effectively done so. "It is impossible that both acts should stand. No ingenuity can reconcile them. The later act must therefore prevail… ." *Id.* at 146. *See also United States v. Mitchell*, 109 U.S. 146 (1883). In the *Dickerson* case cited above, the Court found a mandatory authorization effectively suspended by a provision in an appropriation act prohibiting the use of funds for the payment in question "notwithstanding the applicable portions of" the authorizing legislation.

In the cases in the preceding paragraph, the "reduction by appropriation" was effective because the intent of the congressional action was unmistakable. The mere failure to appropriate sufficient funds is not enough. In *United States v. Langston*, 118 U.S. 389 (1886), for example, the Court refused to find a repeal by implication in "subsequent enactments which merely appropriated a less amount … and which contained no words that expressly, or by clear implication, modified or repealed the previous law." *Id.* at 394. A similar holding is *United States v. Vulte*, 233 U.S. 509 (1914). A failure to appropriate in this type of situation will prevent administrative agencies from making payment, but, as in *Langston* and *Vulte*, is unlikely to prevent recovery by way of a lawsuit. *See also Wetsel-Oviatt Lumber Co., Inc. v. United States*, 38 Fed. Cl. 563, 570–571 (1997); *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966); *Gibney v. United States*, 114 Ct. Cl. 38 (1949).

Thus, appropriating less than the amount of a nonvested mandatory authorization, including not appropriating any funds for it, will be effective under the "last in time" rule as long as the intent to suspend or repeal the authorization is clear. However, by virtue of the rule against repeal by implication, a mere failure to appropriate sufficient funds will not be construed as amending or repealing prior authorizing legislation.

Another complication arises when an authorization act creates what would otherwise be an entitlement to funds, but then makes that entitlement "subject to the availability of appropriations." A case in point is the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450–450n. The complex provisions of the Act in effect guarantee Indian tribes a certain level of reimbursement for their costs in administering federal programs. However, the Act makes this guarantee subject to the availability of appropriations and further provides that the Secretary of the Interior is not required to reduce program funding for other tribes or tribal organizations in order to satisfy this guarantee. *See* 25 U.S.C. § 450j-1(a) and (b). These provisions have spawned much litigation, including the *Ramah Navajo School Board* case, discussed previously.

The courts have agreed that the "subject to the availability of appropriations" language conditions the Act's entitlement, so that the reimbursement amounts intended by the Act must be reduced where Congress has clearly appropriated insufficient funds to meet them in full. See in addition to *Ramah*: *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075 (Fed. Cir. 2003) (Cherokee Nation II); *Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054 (10th Cir. 2002) (Cherokee Nation I); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Thompson*, 279 F.3d 660 (9th Cir. 2002); and *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000). However, the courts differ on whether Congress did or did not provide insufficient funds for particular fiscal years. *Compare Cherokee Nation II* with *Cherokee Nation I* and *Shoshone-Bannock*.

(3) Earmarks in authorization act

In Chapter 6, section B, we set forth the various types of language Congress uses in appropriation acts when it wants to "earmark" a portion of a lump-sum appropriation as either a maximum or a minimum to be spent on some particular object. These same types of earmarking language can be used in authorization acts.

A number of cases have considered the question of whether there is a conflict when an authorization establishes a minimum earmark ("not less than," "shall be available only"), and the related appropriation is a lump-sum appropriation which does not expressly mention the earmark. Is the agency in this situation required to observe the earmark? Applying the principle that an appropriation must be expended in accordance with the related authorization unless the appropriation act provides otherwise, GAO

has concluded that the agency must observe the earmark. 64 Comp. Gen. 388 (1985); B-220682, Feb. 21, 1986 ("an earmark in an authorization act must be followed where a lump sum is appropriated pursuant to the authorization"); B-207343, Aug. 18, 1982; B-193282, Dec. 21, 1978. *See also* B-131935, Mar. 17, 1986. This result applies even though following the earmark will drastically reduce the amount of funds available for nonearmarked programs funded under the same appropriation. 64 Comp. Gen. at 391. (These cases can also be viewed as another application of the rule against repeal by implication.)

If Congress expressly appropriates an amount at variance with a previously enacted authorization earmark, the appropriation will control under the last in time rule. For example, in 53 Comp. Gen. 695 (1974), an authorization act had expressly earmarked $18 million for the United Nations International Children's Emergency Fund (UNICEF) for specific fiscal years. A subsequent appropriation act provided a lump sum, out of which only $15 million was earmarked for UNICEF. The Comptroller General concluded that the $15 million specified in the appropriation act was controlling and represented the maximum available for UNICEF for that fiscal year.

c. Variations in Purpose

As noted previously, it is only the appropriation, and not the authorization by itself, that permits the incurring of obligations and the making of expenditures. It follows that an authorization does not, as a general proposition, expand the scope of availability of appropriations beyond what is permissible under the terms of the appropriation act. The authorized purpose must be implemented either by a specific appropriation or by inclusion in a broader lump-sum appropriation. Thus, an appropriation made for specific purposes is not available for related but more extended purposes contained in the authorization act but not included in the appropriation. 19 Comp. Gen. 961 (1940). *See also* 37 Comp. Gen. 732 (1958); 35 Comp. Gen. 306 (1955); 26 Comp. Gen. 452 (1947).

In addition to simply failing to appropriate funds for an authorized purpose, Congress can expressly restrict the use of an appropriation for a purpose or purposes included in the authorization. *E.g.*, B-24341, Apr. 1, 1942 ("whatever may have been the intention of the original enabling act it must give way to the express provisions of the later act which appropriated funds but limited their use").

Similarly, by express provision in an appropriation act, Congress can expand authorized purposes. In 67 Comp. Gen. 401 (1988), for example, an appropriation expressly included two mandatory earmarks for projects beyond the scope of the related authorization. Noting that "the appropriation language provides its own expanded authorization for these programs," GAO concluded that the agency was required to reserve funds for the two mandatory earmarks before committing the balance of the appropriation for discretionary expenditures.

Except to the extent Congress expressly expands or limits authorized purposes in the appropriation act, the appropriation must be used in accordance with the authorization act in terms of purpose. Thus, in B-125404, Aug. 31, 1956, it was held that an appropriation to construct a bridge across the Potomac River pursuant to a statute authorizing construction of the bridge and prescribing its location was not available to construct the bridge at a slightly different location even though the planners favored the alternate location. Similarly, in B-193307, Feb. 6, 1979, the Flood Control Act of 1970 authorized construction of a dam and reservoir for the Ellicott Creek project in New York. Subsequently, legislation was proposed to authorize channel construction instead of the dam and reservoir, but was not enacted. A continuing resolution made a lump-sum appropriation for flood control projects "authorized by law." The Comptroller General found that the appropriation did not repeal the prior authorization, and that therefore, the funds could not properly be used for the alternative channel construction.

d. Period of Availability

An authorization of appropriations, like an appropriation itself, may authorize appropriations to be made on a multiple year or no-year, as well as fiscal year, basis. The question we address here is the extent to which the period of availability specified in an authorization or enabling act is controlling. Congress can, in an appropriation act, enact a different period of availability than that specified in the authorization. The implications for an appropriation of language in the authorization of that appropriation specifying a period of availability for the appropriation being authorized is a matter of statutory construction.

Thus, an appropriation of funds "to remain available until expended" (no-year) was found controlling over a provision in the authorizing legislation that authorized appropriations on a 2-year basis. B-182101, Oct. 16, 1974. *See also* B-149372, B-158195, Apr. 29, 1969 (2-year appropriation of presidential transition funds held controlling notwithstanding provision in Presidential Transition Act of 1963, which authorized services and facilities

to former President and Vice President only for 6 months after expiration of term of office). In a 1982 decision, 61 Comp. Gen. 532, GAO reconciled an authorization act and an appropriation act by finding the appropriation to be a no-year appropriation, except to the extent the related authorization specified a lesser period of availability. The authorization act had authorized funds to be appropriated for a particular project "for fiscal year 1978." The fiscal year 1978 funds for that project were included in a larger lump sum appropriated "as authorized by law, to remain available until expended." In reconciling the two statutes, GAO concluded that funds for the project in question from the lump-sum appropriation were available for obligation only during fiscal year 1978.

Until 1971, the test GAO applied in cases like these was whether the appropriation language specifically referred to the authorization. If it did, then GAO considered the provisions of the authorization act—including any multiple year or no-year authorizations—to be incorporated by reference into the provisions of the appropriation act. This was regarded as sufficient to overcome 31 U.S.C. § 1301(c), which presumes that an appropriation is for one fiscal year unless the appropriation states otherwise, and to overcome the presumption of fiscal year availability derived from the enacting clause of the appropriation act. If the appropriation language did not specifically refer to the authorization act, the appropriation was held to be available only for the fiscal year covered by the appropriation act. 45 Comp. Gen. 508 (1966); 45 Comp. Gen. 236 (1965); B-147196, Apr. 5, 1965; B-127518, May 10, 1956; B-37398, Oct. 26, 1943. The reference had to be specific; the phrase "as authorized by law" was not enough. B-127518, May 10, 1956.

By 1971, however, Congress was enacting (and continues to enact) a general provision in all appropriation acts: "[n]o part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein." Now, if an appropriation act contains the provision quoted in the preceding paragraph, it will not be sufficient for an appropriation contained in that act to merely incorporate a multiple year or no-year authorization by reference. The effect of this general provision is to require the appropriation language to expressly provide for availability beyond one year in order to overcome the enacting clause. 50 Comp. Gen. 857 (1971).

The general provision resulted from the efforts of the House Committee on Appropriations in connection with the 1964 foreign aid appropriations bill.

In its report on that bill, the Committee first described then-existing practice:

> "The custom and practice of the Committee on Appropriations has been to recommend appropriations on an annual basis unless there is some valid reason to make the item available for longer than a one-year period. The most common technique in the latter instances is to add the words 'to remain available until expended' to the appropriation paragraph.
>
> "In numerous instances, … the Congress has in the underlying enabling legislation authorized appropriations therefor to be made on an 'available until expended' basis. When he submits the budget, the President generally includes the phrase 'to remain available until expended' in the proposed appropriation language if that is what the Executive wishes to propose. The Committee either concurs or drops the phrase from the appropriation language."

H.R. Rep. No. 88-1040, at 55 (1963). The Committee then noted a situation in the 1963 appropriation that had apparently generated some disagreement. The President had requested certain refugee assistance funds to remain available until expended. The report goes on to state:

> "The Committee thought the funds should be on a 1-year basis, thus the phrase 'to remain available until expended' was not in the bill as reported. The final law also failed to include the phrase or any other express language of similar import. Thus Congress took affirmative action to limit the availability to the fiscal year 1963 only."

Id. at 56. The Committee then quoted what is now 31 U.S.C. § 1301(c), and stated:

> "The above quoted 31 U.S.C. [§ 1301(c)] seems clearly to govern and, in respect to the instant class of appropriation, to require *the act making the appropriation to expressly* provide for availability longer than 1 year if the enacting clause limiting the appropriations in the law to a given fiscal year is to be overcome as to any specific appropriation

> therein made. And it accords with the rule of reason and ancient practice to retain control of such an elementary matter wholly within the terms of the law making the appropriation. The two hang together. But in view of the question in the present case and the possibility of similar questions in a number of others, consideration may have to be given to revising the provisions of 31 U.S.C. [§ 1301(c)] to make its scope and meaning crystal clear and perhaps update it as may otherwise appear desirable."

Id. (emphasis in original).

Section 1301(c) was not amended, but soon after the above discussion appeared, appropriation acts started including the general provision stating that "[n]o part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein." This added another ingredient to the recipe that had not been present in the earlier decisions, although it took several years before the new general provision began appearing in almost all appropriation acts.

When the issue arose again in a 1971 case, GAO considered the new appropriation act provision and the 1963 comments of the House Appropriations Committee. In that decision, GAO noted that "it seems evident that the purpose [of the new general provision] is to overcome the effect of our decisions … regarding the requirements of 31 U.S.C. [§ 1301(c)]," and further noted the apparent link between the discussion in House Report 1040 and the appearance of the new provision. 50 Comp. Gen. at 859. *See also* 58 Comp. Gen. 321 (1979); B-207792, Aug. 24, 1982. Thus, the appropriation act will have to expressly repeat the multiple year or no-year language of the authorization, or at least expressly refer to the specific section of the authorizing statute in which it appears.

Changes in the law from year to year may produce additional complications. For example, the National Historic Preservation Act, Pub. L. No. 89-665, § 103(b), 80 Stat. 915, 916 (Oct. 15, 1966) (authorization), provided that funds appropriated and apportioned to states would remain available for obligation for three fiscal years, after which time any unobligated balances would be reapportioned. This amounted to a no-year authorization. For several years, appropriations to fund the program were made on a no-year basis, thus permitting implementation of the authorization provision. Starting with fiscal year 1978, however, the appropriation act was changed and the funds were made available for two

fiscal years. *See* Pub. L. No. 95-74, 91 Stat. 289 (July 26, 1977). This raised the question of whether the appropriation act had the effect of overriding the apparently conflicting authorizing language, or if it meant merely that reapportionment could occur after two fiscal years instead of three, thus effectively remaining a no-year appropriation.

GAO concluded that the literal language and plain meaning of the appropriation act must govern. In addition to the explicit appropriation language, the appropriation acts contained the general provision restricting availability to the current fiscal year unless expressly provided otherwise therein. Therefore, any funds not obligated by the end of the 2-year period would expire and could not be reapportioned. B-151087, Feb. 17, 1982; B-151087, Sept. 15, 1981.

For purposes of the rule of 50 Comp. Gen. 857 and its progeny, it makes no difference whether the authorization is in an annual authorization of appropriations act or in permanent enabling legislation. It also appears to make no difference whether the authorization merely authorizes the longer period of availability or directs it. See, for example, 58 Comp. Gen. 321, *supra*, in which the general provision restricting availability to the current fiscal year, as the later expression of congressional intent, was held to override 25 U.S.C. § 13a, which provides that the unobligated balances of certain Indian assistance appropriations "shall remain available for obligation and expenditure" for a second fiscal year. *See also* 71 Comp. Gen. 39, 40 (1991); B-249087, June 25, 1992. Similarly, in *Dabney v. Reagan*, No. 82 Civ. 2231-CSH (S.D. N.Y. June 6, 1985), the court held that a 2-year period of availability specified in appropriation acts would override a "mandatory" no-year authorization contained in the Solar Energy and Energy Conservation Bank Act.

e. Authorization Enacted After Appropriation

Our discussion thus far has, for the most part, been in the context of the normal sequence—that is, the authorization act is passed before the appropriation act. Sometimes, however, consideration of the authorization act is delayed and it is not enacted until *after* the appropriation act. Determining the relationship between the two acts involves application of the same general principles we have been applying when the acts are enacted in the normal sequence.

The first step is to attempt to construe the statutes together in some reasonable fashion. To the extent this can be done, there is no real conflict, and the reversed sequence will in many cases make no difference. Earlier, for example, we discussed the rule that a specific earmark in an

authorization act must be followed when the related appropriation is an unspecified lump sum. In two of the cases cited for that proposition—B-220682, Feb. 21, 1986, and B-193282, Dec. 21, 1978—the appropriation act had been enacted prior to the authorization, a factor that did not affect the outcome.

In B-193282, for example, the 1979 Justice Department authorization act authorized a lump-sum appropriation to the Immigration and Naturalization Service (INS) and provided that $2 million "shall be available" for the investigation and prosecution of certain cases involving alleged Nazi war criminals. The 1979 appropriation act made a lump-sum appropriation to the INS but contained no specific mention of the Nazi war criminal item. The appropriation act was enacted on October 10, 1978, but the authorization act was not enacted until November. In response to a question as to the effect of the authorization provision on the appropriation, the Comptroller General advised that the two statutes could be construed harmoniously, and that the $2 million earmarked in the authorization act could be spent only for the purpose specified. It was further noted that the $2 million represented a minimum but not a maximum. B-193282, *supra*, *amplified by* B-193282, Jan. 25, 1979. This is the same result that would have been reached if the normal sequence had been followed.

Similarly, in B-226389, Nov. 14, 1988, a provision in the 1987 Defense Appropriation Act prohibited the Navy from including certain provisions in ship maintenance contracts. The 1987 authorization act, enacted after the appropriation, amended a provision in Title 10 of the United States Code to require the prohibited provisions. Application of the last in time rule would have negated the appropriation act provision. However, it was possible to give effect to both provisions by construing the appropriation restriction as a temporary exemption from the permanent legislation in the authorization act. Again, this is the same result that would have been reached if the authorization act were enacted first.

If the authorization and appropriation cannot be reasonably reconciled, the last in time rule will apply just as it would under the normal sequence, except here the result will be different because the authorization is the later of the two. A 1989 case will illustrate. The 1989 Treasury Department appropriation act contained a provision prohibiting placing certain components of the Department under the oversight of the Treasury Inspector General. A month later, Congress enacted legislation placing those components under the Inspector General's jurisdiction and

transferring their internal audit staffs to the Inspector General "notwithstanding any other provision of law." But for the "notwithstanding" clause, it might have been possible to use the same approach as in B-226389 and find the appropriation restriction a temporary exemption from the new permanent legislation. In view of that clause, however, GAO found that the two provisions could not be reconciled, and concluded that the Inspector General legislation, as the later enactment, superseded the appropriation act provision. B-203900, Feb. 2, 1989.

Two other examples of invoking the last in time rule can be found in dueling Defense Department authorization and appropriation act provisions. In one case, the Defense appropriations act for 1992 directed the Defense Department to extend a contract relating to the Civilian Heath and Medical Program for Uniformed Services (CHAMPUS) program for another year. However, the defense authorization act for 1992 countermanded that mandate and permitted the Defense Department to award a new contract. In B-247119, Mar. 2, 1992, the Comptroller General had little difficulty concluding that the two provisions were irreconcilably in conflict. Indeed, the legislative history demonstrated that the drafters of the appropriation and authorization acts sought to trump each other on this point as their two bills proceeded through Congress. The more difficult issue was how to apply the last in time rule to the case. The complication was that, while Congress had completed action on the authorization bill first (1 day before the appropriation bill), the President acted in the opposite order—signing the appropriation bill into law 9 days before he signed the authorization bill. Noting that the date on which the President signs a bill is clearly the date it becomes law, the Comptroller General held that the authorization act was the later in time, and thus, its provisions controlled.

The other case involved competing provisions in the Defense authorization and appropriation acts for fiscal year 1993. Section 351(a) of the authorization act (Pub. L. No. 102-484, 106 Stat. 2377), which the President signed into law on October 23, 1992, required the use of competitive procedures before Defense took action to consolidate certain maintenance activities at a single depot. Section 9152 of the appropriation act (Pub. L. No. 102-396, 106 Stat. 1943), which the President had signed several weeks earlier on October 6, provided that, notwithstanding section 351(a) of the authorization act, no funds could be used to prevent or delay the depot consolidation. In the ensuing litigation, the court ultimately determined that the two provisions could be reconciled. *American Federation of Government Employees*, *Local 1945 v. Cheney*, CV92-PT-2453-E (N.D.

Ala., Dec. 21, 1992). However, citing B-247119 among other sources, the court added that if the provisions were irreconcilable, the later in time would prevail. In this connection, the court noted that the tension between the two provisions apparently stemmed from efforts by individual Members of Congress to protect federal facilities within their districts and observed:

> "There is perhaps even more reason to apply the more objective standards of 'last enacted prevails' and/or the requirement of a 'clear manifestation of intent to repeal' when the legislation is more significantly influenced by individual Congressmen than by the 'intent' of Congress."

AFGE, *Local 1945*, Slip Op. at 24.

Just as with any other application of the last in time rule, the later enactment prevails only to the extent of the irreconcilable conflict. B-61178, Oct. 21, 1946 (specific limitations in appropriation act not superseded by after-enacted authorization absent indication that authorization was intended to alter provisions of prior appropriation).

Sometimes, application of the standard principles fails to produce a simple answer. For example, Congress appropriated $75 million for fiscal year 1979 for urban formula grants "as authorized by the Urban Mass Transportation Act of 1964." When the appropriation was enacted, legislation was pending—and was enacted 3 months after the appropriation—repealing the existing formula and replacing it with a new and somewhat broader formula. The new formula provision specified that it was to be applicable to "sums appropriated pursuant to subparagraph (b) of this paragraph." On the one hand, since the original formula had been repealed, it could no longer control the use of the appropriation. Yet on the other hand, funds appropriated 3 months prior to passage of the new formula could not be said to have been appropriated "pursuant to" the new act. Hence, neither formula was clearly applicable to the $75 million. The Comptroller General concluded that the $75 million earmarked for the grant program had to be honored and that it should be distributed in accordance with those portions of the new formula that were "consistent with the terms of the appropriation," that is, the funds should be used in accordance with those elements of the new formula that had also been reflected in the original formula. B-175155, July 25, 1979.

f. Two Statutes Enacted on Same Day

The Supreme Court has said that the doctrine against repeal by implication is even more forceful "where the one act follows close upon the other, at

the same session of the Legislature." *Morf v. Bingaman*, 298 U.S. 407, 414 (1936); *see also Auburn Housing Authority v. Martinez*, 277 F.3d 138, 145 (2nd Cir. 2002); B-277905, Mar. 17, 1998. This being the case, the doctrine reaches perhaps its strongest point, and the "last in time" rule is correspondingly at its weakest, when both statutes are enacted on the same day. Except in the very rare case in which the intent of one statute to affect the other is particularly manifest, it makes little sense to apply a last in time concept where the time involved is a matter of hours, or as in one case (B-79243, Sept. 28, 1948), 7 minutes. Thus, the starting point is the presumption—applicable in all cases but even stronger in this situation—that Congress intended both statutes to stand together. 67 Comp. Gen. 332, 335 (1988); B-204078.2, May 6, 1988.

When there is an apparent conflict between an appropriation act and another statute enacted on the same day, the approach is to make every effort to reconcile the statutes so as to give maximum effect to both. In some cases, it will be found that there is no real conflict. In 67 Comp. Gen. 332, for example, one statute authorized certain Commodity Credit Corporation appropriations to be made in the form of current, indefinite appropriations, while the appropriation act, enacted on the same day, made line-item appropriations. There was no conflict because the authorization provision was a directive to Congress itself that Congress was free to disregard, subject to a possible point of order, when making the actual appropriation. Similarly, there was no inconsistency between an appropriation act provision, which required that Panama Canal Commission appropriations be spent only in conformance with the Panama Canal Treaty of 1977 and its implementing legislation, and an authorization act provision, enacted on the same day, requiring prior specific authorizations. B-204078.2, *supra*.

In other cases, applying traditional rules of statutory construction will produce reconciliation. For example, if one statute can be said to be more specific than the other, they can be reconciled by applying the more specific provision first, with the broader statute then applying to any remaining situations. *See* B-231662, Sept. 1, 1988; B-79243, *supra*.

Legislative history may also help. In B-207186, Feb. 10, 1989, for example, authorizing legislation extended the life of the Solar Energy and Energy Conservation Bank to March 15, 1988. The 1988 appropriation, enacted on the same day, made a 2-year appropriation for the Bank. Not only were there no indications of any intent for the appropriation to have the effect of extending the Bank's life, there were specific indications to the contrary.

Thus, GAO regarded the appropriation as available, in theory for the full 2-year period, except that the authority for anyone to obligate the appropriation would cease when the Bank went out of existence.

The most extreme situation, and one in which the last in time rule by definition cannot possibly apply, is two conflicting provisions in the same statute. Even here, the approaches outlined above will usually prove successful. *See*, *e.g.*, B-211306, June 6, 1983. We have found only one case, 26 Comp. Dec. 534 (1920), in which two provisions in the same act were found irreconcilable. One provision in an appropriation act appropriated funds to the Army for the purchase of land; another provision a few pages later in the same act expressly prohibited the use of Army appropriations for the purchase of land. The Comptroller of the Treasury concluded, in a very brief decision, that the prohibition nullified the appropriation. The advantage of this result, although not stated this way in the decision, is that Congress would ultimately have to resolve the conflict and it is easier to make expenditures that have been deferred than to recoup money after it has been spent.

The fact that two allegedly conflicting provisions were contained in the same statute influenced the court to reconcile them in *Auburn Housing Authority*, *supra*. The funding restriction provision used the word "hereafter," which, as the court acknowledged, ordinarily connotes permanence. However, the court nonetheless held that this provision applied only for the duration of the fiscal year and did not constitute an implied repeal of the other provision. The opinion observed in this regard:

> "Given the unique circumstances of this case, the court is not convinced that the mere presence of the word 'hereafter' in section 226 clearly demonstrates Congress's intent to repeal section 519(n). This could be a different case if sections 226 and 519(n) appeared in separate statutes, but that is not the question we consider in the instant appeal."

277 F.3d at 146.

g. Ratification by Appropriation

"Ratification by appropriation" is the doctrine by which Congress can, by the appropriation of funds, confer legitimacy on an agency action that was questionable when it was taken. Clearly Congress may ratify that which it could have authorized. *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 301–02 (1937). It is also settled that Congress may manifest its ratification by the appropriation of funds. *Greene v. McElroy*, 360 U.S. 474,

504–06 (1959); *Ex Parte Endo*, 323 U.S. 283, 303 n.24 (1944); *Brooks v. Dewar*, 313 U.S. 354, 360–61 (1941).

Having said this, however, we must also emphasize that "ratification by appropriation is not favored and will not be accepted where prior knowledge of the specific disputed action cannot be demonstrated clearly." *District of Columbia Federation of Civic Ass'ns v. Airis*, 391 F.2d 478, 482 (D.C. Cir. 1968); *Associated Electric Cooperative, Inc. v. Morton*, 507 F.2d 1167, 1174 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 830 (1975); *American Legion v. Derwinski*, 827 F. Supp. 805, 809 (D.D.C. 1993), *aff'd*, 54 F.3d 789 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1041 (1996).

Thus, a simple lump-sum appropriation, without more, will generally not afford sufficient basis to find a ratification by appropriation. *Endo*, 323 U.S. at 303 n.24; *Airis*, 391 F.2d at 481–82; *Wade v. Lewis*, 561 F. Supp. 913, 944 (N.D. Ill. 1983); B-213771, July 10, 1984. The appropriation "must plainly show a purpose to bestow the precise authority which is claimed." *Endo*, 323 U.S. at 303 n.24. *Accord: Schism v. United States*, 316 F.3d 1259, 1289–1290 (Fed. Cir. 2002), *cert. denied*, ___ U.S. ___, 123 S. Ct. 2246 (2003) ("ratification ordinarily cannot occur in the appropriations context unless the appropriations bill itself expressly allocates funds for a specific agency or activity"); *A-1 Cigarette Vending, Inc. v. United States*, 49 Fed. Cl. 345, 354 (2001), *aff'd sub nom.* 304 F.3d 1349 (Fed. Cir. 2002), *cert. denied sub nom.* ___ U.S. ___, 123 S. Ct. 1570 (2003) ("[S]imply because the lack of an appropriation demonstrates a lack of authority does not mean that an appropriation by itself will create such authority… . [A] general appropriation of funds for an overall program is not sufficient to bestow authority upon a particular aspect of an agency's program.").

Some courts have used language which, when taken out of context, implies that appropriations cannot serve to ratify prior agency action. *E.g.*, *Concerned Residents of Buck Hill Falls v. Grant*, 537 F.2d 29, 35 n.12 (3rd Cir. 1976); *University of the District of Columbia Faculty Ass'n v. Board of Trustees of the University of the District of Columbia*, 994 F. Supp. 1, 10 (D.D.C. 1998). Nevertheless, while the doctrine may not be favored, it does exist. The courts demonstrate their reluctance to apply this doctrine by giving extra scrutiny to alleged ratifications by appropriation. Their reluctance to find such ratifications probably stems from a more general judicial aversion to interpreting appropriation acts as changing substantive law. Thus, the court observed in *Thomas v. Network Solutions, Inc.*, 2 F. Supp. 2d 22, 32 at n.12 (D.D.C. 1998), *aff'd*, 176 F.3d 500 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000) (citations omitted):

> " [I]t is well recognized that Congress does not normally perform legislative functions—such as ratification—through appropriations bills… . This does not mean that Congress cannot effect a ratification through an appropriations bill, but it does mean that Congress must be especially clear about its intention to do so."

We turn now to some specific situations in which the doctrine of ratification by appropriation has been accepted or rejected.

Presidential reorganizations have generated perhaps the largest number of cases. Generally, when the President has created a new agency or has transferred a function from one agency to another, and Congress subsequently appropriates funds to the new agency or to the old agency for the new function, the courts have found that the appropriation ratified the presidential action. *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947); *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147 (1937). The transfer to the Equal Employment Opportunity Commission (EEOC) in 1978 of enforcement responsibility for the Age Discrimination in Employment Act and the Equal Pay Act produced a minor flood of litigation. The cases were complicated by the existence of a legislative veto issue, with the ratification issue having to be faced only if the reorganization authority were found severable from the legislative veto. Although the courts were not uniform, a clear majority found that the subsequent appropriation of funds to the EEOC ratified the transfer. *EEOC v. Dayton Power & Light Co.*, 605 F. Supp. 13 (S.D. Ohio 1984); *EEOC v. Delaware Dept. of Health & Social Services*, 595 F. Supp. 568 (D. Del. 1984); *EEOC v. New York*, 590 F. Supp. 37 (N.D. N.Y. 1984); *EEOC v. Radio Montgomery, Inc.*, 588 F. Supp. 567 (W.D. Va. 1984); *EEOC v. City of Memphis*, 581 F. Supp. 179 (W.D. Tenn. 1983); *Muller Optical Co. v. EEOC*, 574 F. Supp. 946 (W.D. Tenn. 1983), *aff'd on other grounds*, 743 F.2d 380 (6th Cir. 1984). *Contra EEOC v. Martin Industries*, 581 F. Supp. 1029 (N.D. Ala.), *appeal dismissed*, 469 U.S. 806 (1984); *EEOC v. Allstate Insurance Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983), *appeal dismissed*, 467 U.S. 1232 (1984). Congress resolved any doubt by enacting legislation in 1984 to expressly ratify all prior reorganization plans implemented pursuant to any reorganization statute.[58]

[58] Pub. L. No. 98-532, 98 Stat. 2705 (Oct. 19, 1984), *codified at* 5 U.S.C. § 906 note.

Another group of cases that has refused to find ratification by appropriation concern proposed construction projects funded under lump-sum appropriations where the effect would be either to expand the scope of a prior congressional authorization or to supply an authorization required by statute but not obtained. *Libby Rod & Gun Club v. Poteat*, 594 F.2d 742 (9th Cir. 1979); *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245 (D.D.C. 1977); *Atchison, Topeka & Santa Fe Railway Co v. Callaway*, 382 F. Supp. 610 (D.D.C. 1974); B-223725, June 9, 1987.

A few additional cases in which ratification by appropriation was found are summarized below:

- The Tennessee Valley Authority (TVA) had asserted the authority to construct power plants. TVA's position was based on an interpretation of its enabling legislation that the court found consistent with the purpose of the legislation although the legislation itself was ambiguous. The appropriation of funds to TVA for power plant construction ratified TVA's position. *Young v. Tennessee Valley Authority*, 606 F.2d 143 (6th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980).

- The authority of the Postmaster General to conduct a mail transportation experiment was ratified by the appropriation of funds to the former Post Office Department under circumstances showing that Congress was fully aware of the experiment. The court noted that existing statutory authority was broad enough to encompass the experiment and that nothing prohibited it. *Atchison, Topeka & Santa Fe Railway Co. v. Summerfield*, 229 F.2d 777 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 926 (1956).

- The authority of the Department of Justice to retain private counsel to defend federal officials in limited circumstances, while not explicitly provided by statute, is regarded as ratified by the specific appropriation of funds for that purpose. 2 Op. Off. Legal Counsel 66 (1978).

- Another Office of Legal Counsel opinion described instances in which Congress has ratified by appropriation the use of United States combat forces. The opinion concludes on this point:

> "In sum, basic principles of constitutional law—and, in particular, the fact that Congress may express approval through the appropriations process—and historical practice in the war powers area, as well as the bulk of the case law

> and a substantial body of scholarly opinion, support the conclusion that Congress can authorize hostilities through its use of the appropriations power. Although it might be the case that general funding statutes do not necessarily constitute congressional approval for conducting hostilities, this objection loses its force when the appropriations measure is directly and conspicuously focused on specific military action."[59]

Note that in all of the cases in which ratification by appropriation was approved, the agency had at least an arguable legal basis for its action. *See also Airis*, 391 F.2d at 481 n.20; B-232482, June 4, 1990. The doctrine has not been used to excuse violations of law. Also, when an agency action is constitutionally suspect, the courts will require that congressional action be particularly explicit. *Greene v. McElroy*, 360 U.S. at 506–07; *Martin Industries*, 581 F. Supp. at 1033–37; *Muller Optical Co.*, 574 F. Supp. at 954.

In B-285725, Sept. 29, 2000, the Comptroller General condensed the foregoing principles into this test for ratification by appropriation:

> "To conclude that Congress through the appropriations process has ratified agency action, three factors generally must be present. First, the agency takes the action pursuant to at least arguable authority; second, the Congress has specific knowledge of the facts; and third, the appropriation of funds clearly bestows the claimed authority."

The opinion in B-285725 rejected an assertion by the District of Columbia government that Congress had ratified certain funding practices that otherwise violated the Antideficiency Act, 31 U.S.C. § 1341. Specifically, it held that information contained in the District's budget justifications and said to constitute notice to Congress (1) lacked clarity and precision, (2) did not create any awareness that could be imputed to Congress as a whole, and (3) was not reflected in any legislative language that could reasonably be viewed as authorizing the practices in question.

[59] *Authorization for Continuing Hostilities in Kosovo*, unpublished OLC opinion, Dec. 19, 2000.

h. Repeal by Implication

We have on several occasions referred to the rule against repeal by implication. The leading case in the appropriations context is *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (hereafter *TVA v. Hill*). In that case, Congress had authorized construction of the Tellico Dam and Reservoir Project on the Little Tennessee River, and had appropriated initial funds for that purpose. Subsequently, Congress passed the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 *et seq*. Under the provisions of that Act, the Secretary of the Interior declared the "snail darter," a 3-inch fish, to be an endangered species. It was eventually determined that the Little Tennessee River was the snail darter's critical habitat and that completion of the dam would result in extinction of the species. Consequently, environmental groups and others brought an action to halt further construction of the Tellico Project. In its decision, the Supreme Court held in favor of the plaintiffs, notwithstanding the fact that construction was well under way and that, even after the Secretary of the Interior's actions regarding the snail darter, Congress had continued to make yearly appropriations for the completion of the dam project.

The appropriation involved was a lump-sum appropriation that included funds for the Tellico Dam but made no specific reference to it. However, passages in the reports of the appropriations committees indicated that those committees intended the funds to be available notwithstanding the Endangered Species Act. The Court held that this was not enough. The doctrine against repeal by implication, the Court said, applies with even greater force when the claimed repeal rests solely on an appropriation act:

> "When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden."

Id. at 190. Noting that "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress" (*id.* at 191), the Court held that the unspecified inclusion of the Tellico Dam funds in a lump-sum appropriation was not sufficient to constitute a repeal by implication of the Endangered Species Act insofar as it related to that project.[60] In other words, the doctrine of ratification by appropriation

[60] Less than 4 months after the Court's decision, Congress enacted legislation exempting the Tellico project from the Endangered Species Act. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 5, 92 Stat. 3751, 3761 (Nov. 10, 1978).

we discussed in the preceding section does not apply, at least when the appropriation is an otherwise unspecified lump sum, where the effect would be to change an existing statutory requirement.

TVA v. Hill is important because it is a clear and forceful statement from the Supreme Court. In terms of the legal principle involved, however, the Court was breaking little new ground. A body of case law from the lower courts had already laid the legal foundation. One group of cases, for example, had established the proposition that the appropriation of funds does not excuse noncompliance with the National Environmental Policy Act. *Environmental Defense Fund v. Froehlke*, 473 F.2d 346 (8th Cir. 1972); *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971); *National Audubon Society v. Andrus*, 442 F. Supp. 42 (D.D.C. 1977); *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971). Cases supporting the general proposition of *TVA v. Hill* in other contexts were also not uncommon. *See Associated Electric Cooperative, Inc. v. Morton*, 507 F.2d 1167 (D.C. Cir.), *cert. denied*, 423 U.S. 830 (1974); *District of Columbia Federation of Civic Ass'ns v. Airis*, 391 F.2d 478 (D.C. Cir. 1968); *Maiatico v. United States*, 302 F.2d 880 (D.C. Cir. 1962).

Some subsequent cases applying the concept of *TVA v. Hill* (although not all citing that case) include *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984); 64 Comp. Gen. 282 (1985); B-208593.6, Dec. 22, 1988; B-213771, July 10, 1984; B-204874, July 28, 1982; and B-193307, Feb. 6, 1979. In B-204874, for example, the Comptroller General advised that the otherwise unrestricted appropriation of coal trespass receipts to the Bureau of Land Management did not implicitly amend or repeal the provisions of the Federal Land Policy and Management Act prescribing the use of such funds.

In reading the cases, one will encounter the occasional sweeping statement such as "appropriations acts cannot change existing law," *National Audubon Society v. Andrus*, 442 F. Supp. at 45. Such statements can be misleading, and should be read in the context of the facts of the particular case. It is clear from *TVA v. Hill*, together with its ancestors and its progeny, that Congress cannot legislate by legislative history. It seems equally clear that the appropriation of funds, without more, is not sufficient to overcome a statutory requirement. If, however, instead of an unrestricted lump sum, the appropriation in *TVA v. Hill* had provided a specific line-item appropriation for the Tellico project, together with the words "notwithstanding the provisions of the Endangered Species Act," it is

difficult to see how a court could fail to give effect to the express mandate of the appropriation.

Thus, the message is not that Congress cannot legislate in an appropriation act. It can, and we have previously cited a body of case law to that effect. The real message is that, if Congress wants to use an appropriation act as the vehicle for suspending, modifying, or repealing a provision of existing law, it must do so advisedly, speaking directly and explicitly to the issue.

The Supreme Court conveyed this message succinctly in *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992) (citations omitted), holding that—

> "[A]lthough repeals by implication are especially disfavored in the appropriations context, Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly."

In *Robertson*, the Court found an implied repeal by appropriation act to be clear and explicit.

Subsequent judicial decisions, of course, apply the *Robertson* approach to alleged implied repeals by appropriation. Since the issue is one of basic statutory construction, the courts naturally reach different results depending on the particular statutory language involved. For example, *Pontarelli v. United States Department of the Treasury*, 285 F.3d 216 (3rd Cir. 2002), held that an annual appropriation restriction enacted for many years stating that "[n]one of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)" clearly superseded the provision in Title 18 of the United States Code. *Pontarelli* cites many other decisions that reached the same conclusion with respect to this particular appropriation language. Another case finding a clear implied repeal by appropriation is *Bald Eagle Ridge Protection Ass'n, Inc. v. Mallory*, 119 F. Supp. 2d 473 (M.D. Pa. 2000), *aff'd*, 275 F.3d 33 (3rd Cir. 2001).

Examples of cases that reconciled the appropriation and other statutory provisions, and thus found no implied repeal include: *Strawser v. Atkins*, 290 F.3d 720 (4th Cir.), *cert. denied*, 537 U.S. 1045 (2002); *Auburn Housing Authority v. Martinez*, 277 F.3d 138 (2nd Cir. 2002); *Firebaugh Canal Co. v. United States*, 203 F.3d 568 (9th Cir. 2000); *Ramey v.*

Stevedoring Services of America, 134 F.3d 954 (9th Cir. 1998); *Environmental Defense Center v. Babbitt*, 73 F.3d 867 (9th Cir. 1995).

Still other cases hold that appropriation restrictions alleged to be permanent in superseding other laws were effective only for a fiscal year. *E.g.*, *Auburn Housing Authority*, *supra*; *Building & Construction Trades Department*, *AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C. Cir.), *cert. denied*, 506 U.S. 915 (1992). In a related context, the court in *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 911 (2002), disagreed with a series of Comptroller General decisions and held that appropriation language enacted in 1982 that required specific congressional authorization for pay raises for judges was not permanent legislation but expired at the end of fiscal year 1982.

i. Lack of Authorization

As we have previously noted, there is no general statutory requirement that appropriations be preceded by specific authorizations, although they are required in some instances. Where authorizations are not required by law, Congress may, subject to a possible point of order, appropriate funds for a program or object that has not been previously authorized or which exceeds the scope of a prior authorization, in which event the enacted appropriation, in effect, carries its own authorization and is available to the agency for obligation and expenditure. *E.g.*, 67 Comp. Gen. 401 (1988); B-219727, July 30, 1985; B-173832, Aug. 1, 1975.

It has also been held that, as a general proposition, the appropriation of funds for a program whose funding authorization has expired, or is due to expire during the period of availability of the appropriation, provides sufficient legal basis to continue the program during that period of availability, absent indication of contrary congressional intent. 65 Comp. Gen. 524 (1986); 65 Comp. Gen. 318, 320–21 (1986); 55 Comp. Gen. 289 (1975); B-131935, Mar. 17, 1986; B-137063, Mar. 21, 1966. The result in these cases follows in part from the fact that the total absence of appropriations authorization legislation would not have precluded the making of valid appropriations for the programs. *E.g.*, B-202992, May 15, 1981. In addition, as noted, the result is premised on the conclusion, derived either from

legislative history or at least the absence of legislative history to the contrary, that Congress did not intend for the programs to terminate.[61]

There are limits on how far this principle can be taken, depending on the particular circumstances. One illustration is B-207186, Feb. 10, 1989. A 1988 continuing resolution provided funds for the Solar Bank, to remain available until September 30, 1989. Legislation enacted on the same day provided for the Bank to terminate on March 15, 1988. Based in part on legislative history indicating the intent to terminate the Bank on the specified sunset date, GAO distinguished prior decisions in which appropriations were found to authorize program continuation and concluded that the appropriation did not authorize continuation of the Solar Bank beyond March 15, 1988.

The Comptroller General's decision in 71 Comp. Gen. 378 (1992) provides another variant. Section 8 of the Civil Rights Commission's authorizing act stated that "the provisions of this Act shall terminate on September 30, 1991." While Congress was actively working on reauthorization legislation for the Commission toward the end of fiscal year 1991, this legislation was not enacted until after September 30, 1991. Nevertheless, Congress had enacted a continuing resolution for the early part of fiscal year 1992 that specifically included funding for the Commission. The Comptroller General first observed that the line of cases discussed above permitting programs to continue after expiration of their authorization did not apply. Unlike the mere authorization lapse in those cases, the statute here provided that the Commission would "terminate" on September 30. The Comptroller General also distinguished the Solar Bank case, discussed above, since the provision for termination of the Commission was enacted long before the continuing resolution that provided for the Commission's funding after September 30. In the final analysis, the decision held that the funding provision for the Commission was irreconcilable with the section 8 termination provision and effectively suspended the operation of section 8. In reaching this conclusion, the decision noted the clear intent of Congress that the

[61] Congressional practice also firmly supports this conclusion since Congress appropriates huge sums each year to fund programs with expired authorizations. According to the Congressional Budget Office (CBO), appropriations for which specific authorizations had expired have ranged between about $90 billion and about $120 billion in recent fiscal years. *Unauthorized Appropriations and Senate Resolution 173: Hearing Before the Senate Committee on Rules and Administration*, 108th Cong. 3 (July 9, 2003) (statement by CBO Director Douglas Holtz-Eakin).

Commission continue to operate without interruption after September 30, 1991.

A device Congress has used on occasion to avoid this type of problem is an "automatic extension" provision under which funding authorization is automatically extended for a specified time period if Congress has not enacted new authorizing legislation before it expires. An example is discussed in B-214456, May 14, 1984.

Questions concerning the effect of appropriations on expired or about-to-expire authorizations have tended to arise more frequently in the context of continuing resolutions. The topic is discussed further, including several of the cases cited above, in Chapter 8.

Where specific authorization is statutorily required, the case may become more difficult. In *Libby Rod & Gun Club v. Poteat*, 594 F.2d 742 (9th Cir. 1979), the court held that a lump-sum appropriation available for dam construction was not, by itself, sufficient to authorize a construction project for which specific authorization had not been obtained as required by 33 U.S.C. § 401. The court suggested that *TVA v. Hill* and similar cases do not "mandate the conclusion that courts can never construe appropriations as congressional authorization," although it was not necessary to further address that issue in view of the specific requirement in that case. *Poteat*, 594 F.2d at 745–46. The result would presumably have been different if Congress had made a specific appropriation "notwithstanding the provisions of 33 U.S.C. § 401." It should be apparent that the doctrines of repeal by implication and ratification by appropriation are relevant in analyzing issues of this type.

D. Statutory Interpretation: Determining Congressional Intent

> "[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute."

Greenwood v. United States, 350 U.S. 366, 374 (1956) (Frankfurter, J.).

1. The Goal of Statutory Construction[62]

As we have noted elsewhere, an appropriation can be made only by means of a statute. In addition to providing funds, the typical appropriation act includes a variety of general provisions. Anyone who works with appropriations matters will also have frequent need to consult authorizing and program legislation. It should thus be apparent that the interpretation of statutes is of critical importance to appropriations law.[63]

The objective of this section is to provide a brief overview, designed primarily for those who do not work extensively with legislative materials. The cases we cite are but a sampling, selected for illustrative purposes or for a particularly good judicial statement of a point. The literature in the area is voluminous, and readers who need more than we can provide are encouraged to consult one of the established treatises such as Sutherland's *Statutes and Statutory Construction* (hereafter "Sutherland").[64]

The goal of statutory construction is simply stated: to determine and give effect to the intent of the enacting legislature. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 542 (1940); 55 Comp. Gen. 307, 317 (1975); 38 Comp. Gen. 229 (1958). While the goal may be simple, the means of achieving it are complex and often controversial. The primary vehicle for determining legislative intent is the language of the statute itself. There is an established body of principles, known as "canons" of construction, that are designed to aid in arriving at the best interpretation of statutory language. The statute's legislative history also is usually consulted to aid in the effort.

At this point, it is important to recognize that the concept of "legislative intent" is in many cases a fiction. Where not clear from the statutory language itself, it is often impossible to ascribe an intent to Congress as a

[62] There is a technical distinction between "interpretation" (determining the meaning of words) and "construction" (application of words to facts). 2A Sutherland, *Statutes and Statutory Construction* § 45.04 (6th ed. 2000). The distinction, as Sutherland points out, has little practical value. We use the terms interchangeably, as does Sutherland.

[63] "But if Congress has all the money of the United States under its control, it also has the whole English language to give it away with… ." 9 Op. Att'y Gen. 57, 59 (1857).

[64] We will refer to the 6th edition, edited by Professor Norman J. Singer and published in 2000.

whole.[65] As we will note later, a committee report represents the views of that committee. Statements by an individual legislator represent the views of that individual. Either may, but do not necessarily or inherently, reflect a broader congressional perception.

Even interpretive aids that rely on the statutory language itself do not provide hard and fast rules that can pinpoint congressional intent with scientific precision. One problem is that, more often than not, a statute has no obvious meaning that precisely answers a particular issue in dispute before the courts, the Comptroller General, or another decision maker. If the answers were that obvious, most of the cases discussed in this section would never have arisen.

The reality is that there probably is (and was) no actual "congressional intent" with respect to most specific issues that find their way to the courts, GAO, or other forums. In all likelihood, Congress did not affirmatively consider these specific issues for purposes of forming an intent about them. Necessarily, Congress writes laws in fairly general terms that convey broad concepts, principles, and policies. It leaves administering agencies and courts to fill in the gaps. Indeed, Congress sometimes deliberately leaves issues ambiguous because it lacks a sufficient consensus to resolve them in the law.

To point out the challenges in statutory interpretation, however, is by no means to denigrate the process. Applying the complex maze of interpretive aids, imperfect as they may be, serves the essential purpose of providing a common basis for problem solving and determining what the law is.

This in turn is important for two reasons. First, everyone has surely heard the familiar statement that our government is a government of laws and not of men.[66] This means that you have a right to have your conduct governed and judged in accordance with identifiable principles and standards, not by the whim of the decision maker. The law should be reasonably predictable. A lawyer's advice that a proposed action is or is not permissible amounts to

[65] *E.g.*, *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318 (1897): "Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act."

[66] "The government of the United States has been emphatically termed a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

a reasoned and informed judgment as to what a court is likely to do if the action is challenged. While this can never be an absolute guarantee, it once again must be based on identifiable principles and standards. Conceding its weaknesses, the law of statutory construction represents an organized approach for doing this.

Second, predictability is important in the enactment of statutes as well. Congress legislates against the background of the rules and principles that make up the law of statutory construction, and must be able to anticipate how the courts will apply them in interpreting the statutes it enacts.[67]

2. The "Plain Meaning" Rule

> "The Court's task is to construe not English but congressional English."

Commissioner of Internal Revenue v. Acker, 361 U.S. 87, 95 (1959) (Frankfurter, J., dissenting).

a. In General

By far the most important rule of statutory construction is this: You start with the language of the statute. Countless judicial decisions reiterate this rule. *E.g.*, *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992); *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 300 (1989). The primary vehicle for Congress to express its intent is the words it enacts into law. As stated in an early Supreme Court decision:

> "The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used … ."

[67] *See McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction."); *Finley v. United States*, 490 U.S. 545, 556 (1989) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").

Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845). A somewhat better known statement is from *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."

If the meaning is clear from the language of the statute, there is no need to resort to legislative history or any other extraneous source. As the Supreme Court observed in *Connecticut National Bank v. Germain*:

> "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there… . When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."

503 U.S. at 253–254 (citations and quotation marks omitted). *See also Hartford Underwriters Insurance Co.*, *supra*; *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *Mallard*, 490 U.S. 296; *United States v. Ron Pair Enterprises*, *Inc.*, 489 U.S. 235, 241 (1989); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978); 56 Comp. Gen. 943 (1977); B-287158, Oct. 10, 2002; B-290021, July 15, 2002; B-288173, June 13, 2002; B-288658, Nov. 30, 2001.

This is the so-called "plain meaning" rule. If the meaning is "plain," that's the end of the inquiry and you apply that meaning. The unanimous opinion in *Robinson v. Shell Oil Co.* stated the rule as follows:

> "Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language and 'the statutory scheme is coherent and consistent.'…
>
> "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific

> context in which that language is used, and the broader context of the statute as a whole."

519 U.S. at 340–341 (citations omitted).

The plain meaning rule thus embodies the universal view that interpretations of a statute should be anchored in, and flow from, the statute's text. Its application to a particular statutory provision turns on subjective judgments over which reasonable and intelligent people will differ.

An example of this is *Smith v. United States*, 508 U.S. 223 (1993), in which the Justices agreed that the case should be resolved on the basis of the statute's plain meaning, but reached sharply divergent conclusions as to what that plain meaning was. In *Smith*, the defendant had traded his gun for illegal drugs. He was convicted under a statute that provided enhanced penalties for the "use" of a firearm "during and in relation to … [a] drug trafficking crime." The majority affirmed his conviction, reasoning that exchanging a firearm for drugs constituted a "use" of the firearm within the plain meaning of the statute—that is, use in the sense of employ. Three Justices dissented, contending vehemently that the plain meaning of the statute covered only the use of a firearm for its intended purpose as a weapon.[68]

b. The Plain Meaning Rule *versus* Legislative History

The extent to which sources outside the statute itself, particularly legislative history, should be consulted to help shed light on the statutory scheme has been the subject of much controversy in recent decades. One school of thought, most closely identified with Supreme Court Justice Antonin Scalia, holds that resort to legislative history is *never* appropriate. This approach is sometimes viewed as a variant of the plain meaning rule.[69] A more widely expressed statement of the plain meaning rule is that legislative history can be consulted but only if it has first been determined that the statutory language is "ambiguous"—that is, that there is no plain meaning.

[68] The federal circuits had likewise split on the plain meaning of this statute prior to the *Smith* decision. *See Smith*, 508 U.S. at 227.

[69] *See* Eric S. Lasky, *Perplexing Problems with Plain Meaning*, 27 Hofstra L. Rev. 891 (1999); R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 25 Pepp. L. Rev. 37 (1997). Professor Kelso describes Justice Scalia's approach as "new textualism."

As a practical matter, however, courts generally examine the legislative history as an integral part of statutory construction. Thus, Sutherland observes:

> "[I]t has been said, usually a court looks into the legislative history to clear up some statutory ambiguity… but such ambiguity is not the *sine qua non* for judicial inquiry into legislative history … the plain meaning rule is not to be used to thwart or distort the intent of Congress by excluding from consideration enlightening material from the legislative files… ."

2A Sutherland, § 48:01, at 412–413 (citations and quotation marks omitted).

In other words, like all "rules" of statutory construction, the plain meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.), quoted in *Watt v. Alaska*, 451 U.S. 259, 266 (1981). In another often-quoted statement, the Supreme Court said:

> "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"

United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543–44 (1940), as quoted in *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976) (footnotes omitted).

Indeed, the Supreme Court, like other courts, routinely consults the legislative history even if the statutory language seems unambiguous.[70] One example is *Conroy v. Aniskoff*, 507 U.S. 511 (1993), in which the Court found the relevant statute to be "unambiguous, unequivocal, and unlimited." *Id.* at 514. Nevertheless, Justice Stevens, writing for the Court,

[70] "[S]hortly before Justice Scalia's appointment, the Justices consulted the legislative records in almost every case involving the interpretation of a statute. Today, despite years of Justice Scalia's advocation for the plain meaning rule, 'legislative history is [still] used by at least one Justice in virtually every decision of the Supreme Court in which the meaning of a federal statute is at issue.'" *Lasky, supra*, at 896 (footnotes omitted).

examined the legislative history in detail to confirm that its literal reading of the statute was not absurd, illogical, or contrary to congressional intent. Justice Scalia, however, wrote a spirited concurring opinion that described the inquiry into the legislative history as "a waste of research time and ink" as well as a "disruptive lesson in the law." *Id.* at 519.

3. The Limits of Literalism: Errors in Statutes and "Absurd Consequences"

> "There is no surer way to misread any document than to read it literally."

Guiseppi v. Walling, 144 F.2d 608, 624 (2nd Cir. 1944) (Learned Hand, J.).

Even the strictest adherence to the plain meaning rule does not justify application of the literal terms of a statute in all cases. There are two well-established exceptions. The first is that statutory language will not be enforced literally when that language is the product of an obvious drafting error. In such cases, courts (and other decision makers) will, in effect, rewrite the statute to correct the error and conform the statute to the obvious intent.

The second exception is the frequently cited canon of construction that statutory language will not be interpreted literally if doing so would produce an "absurd consequence" or "absurd result," that is, one that the legislature, presumably, could not have intended.

a. Errors in Statutes

(1) Drafting errors

A statute may occasionally contain what is clearly a technical or typographical error which, if read literally, could alter the meaning of the statute or render execution effectively impossible. In such a case, if the legislative intent is clear, the intent will be given effect over the erroneous language. One recent example is *Chickasaw Nation v. United States*, 534 U.S. 84 (2001). The decision turned on the effect of a parenthetical reference to the Tax Code that had been included in the Indian Gaming Regulatory Act. After examining the structure and language of the Indian Gaming Regulatory Act as a whole, as well as its legislative history, the Court concluded that the parenthetical reference was "simply a drafting mistake"—specifically, the failure to delete a cross-reference from an earlier version of the bill—and declined to give it any effect. *Chickasaw Nation*, 534 U.S. at 91.

In a number of other cases, courts have followed the same approach by correcting obvious printing or typographical errors. *See United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993); *Ronson Patents Corp. v. Sparklets Devices, Inc.*, 102 F. Supp. 123 (E.D. Mo. 1951); *Fleming v. Salem Box Co.*, 38 F. Supp. 997 (D. Ore. 1940); *Neely v. State of Arkansas*, 877 S.W.2d 589 (Ark.1994); *Pressman v. State Tax Commission*, 102 A.2d 821 (Md. 1954); *Johnson v. United States Gypsum Co.*, 229 S.W.2d 671 (Ark. 1950); *Baca v. Board of Commissioners of Bernalillo County*, 62 P. 979 (N.M. 1900).[71]

Comptroller General decisions have likewise repaired obvious drafting errors. In one situation, a supplemental appropriation act provided funds to pay certain claims and judgments as set forth in Senate Document 94-163. Examination of the documents made it clear that the reference should have been to Senate Document 94-164, as Senate Document 94-163 concerned a wholly unrelated subject. The manifest congressional intent was held controlling, and the appropriation was available to pay the items specified in Senate Document 94-164. B-158642-O.M., June 8, 1976. The same principle had been applied in a very early decision in which an 1894 appropriation provided funds for certain payments in connection with an election held on "November fifth," 1890. The election had in fact been held on November 4. Recognizing the "evident intention of Congress," the decision held that the appropriation was available to make the specified payments. 1 Comp. Dec. 1 (1894). *See also* 11 Comp. Dec. 719 (1905); 8 Comp. Dec. 205 (1901); 1 Comp. Dec. 316 (1895).

Other decisions follow the same approach. *See, e.g.*, 64 Comp. Gen. 221 (1985) (erroneous use of the word "title" instead of "subchapter"); B-261579, Nov. 1, 1995 (mistaken cross-reference to the wrong section of another law); B-127507, Dec. 10, 1962 (printing error causing the statute to refer to "section 12" of a certain township for inclusion in a national forest, rather than "section 13").

[71] *United States National Bank of Oregon* is a particularly interesting case, which concerned whether Congress had repealed a provision of law originally enacted in 1918. The issue turned on the effect, if any, to be given the placement of quotation marks in a later statute that allegedly constituted the repeal. Upon detailed examination of the overall statutory scheme and its evolution over many decades, the Court concluded that the quotation marks were misplaced as a result of a drafting error. Therefore, the 1918 provision had not been repealed.

The Justice Department's Office of Legal Counsel applied Comptroller General decisions in an opinion dated May 21, 1996, that addressed an obvious problem with the application of an appropriations act.[72] The act required the United States Information Agency to move an office to south Florida "not later than April 1, 1996," and made funds available for that purpose. However, the act was not signed into law until April 26, 1996. Recognizing that the act could not be implemented as written, the opinion concluded that the funds remained available to finance the move after April 1.

(2) Error in amount appropriated

A 1979 decision illustrates one situation in which the above rule will not apply. A 1979 appropriation act contained an appropriation of $36 million for the Inspector General of the Department of Health, Education, and Welfare. The bills as passed by both Houses and the various committee reports specified an appropriation of only $35 million. While it seemed apparent that the $36 million was the result of a typographical error, it was held that the language of the enrolled act signed by the President must control and that the full $36 million had been appropriated. The Comptroller General did, however, inform the Appropriations Committees. 58 Comp. Gen. 358 (1979). *See also* 2 Comp. Dec. 629 (1896); 1 Bowler, First Comp. Dec. 114 (1894).

However, if the amount appropriated is a total derived from adding up specific sums enumerated in the appropriation act, then the amount appropriated will be the amount obtained by the correct addition, notwithstanding the specification of an erroneous total in the appropriation act. 31 U.S.C. § 1302; 2 Comp. Gen. 592 (1923).

b. Avoiding "Absurd Consequences"

Departures from strict adherence to the statutory text go beyond cases involving drafting and typographical errors. In fact, it is more common to find cases in which the courts do not question that Congress meant to choose the words it did, but conclude that it could not have meant them to apply literally in a particular context. The generally accepted principle here is that the literal language of a statute will not be followed if it would

[72] Department of Justice Office of Legal Counsel Memorandum for David W. Burke, Chairman, Broadcasting Board of Governors, *Relocation Deadline Provision Contained in the 1996 Omnibus Consolidated Rescissions and Appropriations Act*, May 21, 1996.

produce a result demonstrably inconsistent with clearly expressed congressional intent.

The case probably most frequently cited for this proposition is *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), which gives several interesting examples. One of those examples is *United States v. Kirby*, 74 U.S. (7 Wall.) 482 (1868), in which the Court held that a statute making it a criminal offense to knowingly and willfully obstruct or retard a driver or carrier of the mails did not apply to a sheriff arresting a mail carrier who had been indicted for murder. Another is an old English ruling that a statute making it a felony to break out of jail did not apply to a prisoner who broke out because the jail was on fire. *Holy Trinity*, 143 U.S. at 460–61. An example from early administrative decisions might be 24 Comp. Dec. 775 (1918), holding that an appropriation for "messenger boys" was available to hire "messenger girls."[73]

In cases decided after *Holy Trinity*, the Court has emphasized that departures from the plain meaning rule are justified only in "rare and exceptional circumstances," such as the illustrations used in *Holy Trinity*. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). *See also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 n.33 (1978) (citing *Crooks v. Harrelson* with approval; hereafter *TVA v. Hill*).

This exception to the plain meaning rule is also sometimes phrased in terms of avoiding absurd consequences. *E.g.*, *United States v. Ryan*, 284 U.S. 167, 175 (1931). As the dissenting opinion in *TVA v. Hill* points out (437 U.S. at 204 n.14), there is a bit of confusion in this respect in that *Crooks*—again, cited with approval by the majority in *TVA v. Hill*—explicitly states that avoiding absurd consequences is not enough, although the Court has used the absurd consequence formulation in post-*Crooks* cases such as *Ryan*. In any event, as a comparison of the majority and dissenting opinions in *TVA v. Hill* will demonstrate, the absurd consequences test is not always easy to apply in that what strikes one person as absurd may be good law to another.

[73] The decision had nothing to do with equality of the sexes; the "boys" were all off fighting World War I.

The case of *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *vacated on reh'g en banc*, 165 F.3d 1297, *cert. denied*, 527 U.S. 1024 (1999), provides another illustration of this point. Ms. Singleton was convicted of various crimes following testimony against her by a witness who had received a plea bargain in exchange for his testimony. She maintained that her conviction was tainted because the plea bargain constituted a violation of 18 U.S.C. § 201(c)(2), which provides in part:

> "Whoever … directly or indirectly … promises anything of value to any person, … because of the testimony under oath or affirmation given or to be given by such person as a witness upon trial … before any court … shall be fined under this title or imprisoned for not more than two years, or both."

A three judge panel of the Tenth Circuit agreed and reversed her conviction. They held that the word "whoever" by its plain terms applied to the federal prosecutor and, just as plainly, the plea bargain promised something of value because of testimony to be given as a witness upon trial.

The full Tenth Circuit vacated the panel's ruling and reinstated the conviction. The majority held that the panel's construction of the statute was "patently absurd" and contradicted long-standing prosecutorial practice. 165 F.3d at 1300. The three original panel members remained unconvinced and dissented. Far from being "absurd," they viewed their construction as a "straight-forward interpretation" of the statute that honored important constitutional values. One such value, they said, was "the proper role of the judiciary as the law-interpreting, rather than lawmaking, branch of the federal government." *Id.* at 1309.

While the absurd consequences rule must be invoked with care, it does have useful applications. The Comptroller General invoked this rule in holding that an appropriation act proviso requiring competition in the award of certain grants did not apply to community development block grants, which were allocated by a statutory formula. B-285794, Dec. 5, 2000 ("Without an affirmative expression of such intent, we are unwilling to read the language of the questioned proviso in a way that would clearly produce unreasonable and impractical consequences."). *See also* B-260759, May 2, 1995 (rejecting a literal reading of a statutory provision that would defeat its purpose and produce anomalous results).

4. Statutory Aids to Construction

The remainder of this section discusses various sources to assist in determining the meaning of statutory language, plain or otherwise. We start with sources that are contained in the statute being construed or in other statutes that provide interpretive guidance for general application. The main advantage of these statutory aids is that, as laws themselves, they carry authoritative weight. Their main disadvantage is that, while useful on occasion, they have limited scope and address relatively few issues of interpretation.

a. Definitions, Effective Dates, and Severability Clauses

Statutes frequently contain their own set of definitions for terms that they use. Obviously, these definitions take precedence over other sources to the extent that they apply.

A statute may also contain an effective date provision that sets forth a date (or dates) when it will become operative. These provisions are most frequently used when Congress intends to delay or phase in the effectiveness of a statute in whole or in part. The general rule, even absent an effective date provision, is that statutes take effect on the date of their enactment and apply prospectively. *See*, *e.g.*, B-300866, May 30, 2003, and authorities cited. Therefore, effective date provisions are unnecessary if the normal rule is intended. (Later in this chapter we will discuss more complicated issues concerning the retroactive application of statutes.)

Another provision sometimes included is a so-called "severability" clause. The purpose of this provision is to set forth congressional intent in the unhappy event that part of a statute is held to be unconstitutional. The clause states whether or not the remainder of the statute should be "severed" from the unconstitutional part and continue to be operative. Again, the general rule is that statutes will be considered severable absent a provision to the contrary or some other clear indication of congressional intent that the whole statute should fall if part of it is declared unconstitutional. Thus, the clause is unnecessary in the usual case. However, the absence of a severability clause will not create a presumption against severability. *See*, *e.g.*, *New York v. United States*, 505 U.S. 144, 186–187 (1992).

b. The Dictionary Act

Chapter 1 of Title 1 of the United States Code, §§ 1–8, commonly known as the "Dictionary Act," provides certain rules of construction and definitions that apply generally to federal statutes. For example, section 1 provides in part:

> "In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> * * * * * *
>
> "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals … ."

Occasionally, the courts use the Dictionary Act to resolve questions of interpretation. *E.g.*, *United States v. Reid*, 206 F. Supp. 2d 132 (D. Mass. 2002) (an aircraft is not a "vehicle" for purposes of the USA PATRIOT Act); *United States v. Belgarde*, 148 F. Supp. 2d 1104 (D. Mont.), *aff'd*, 300 F.3d 1177 (9th Cir. 2001) (a government agency, which the defendant was charged with burglarizing, is not a "person" for purposes of the Major Crimes Act). Courts also hold on occasion that the Dictionary Act does not apply. *See Rowland v. California Men's Colony*, 506 U.S. 194 (1993) (context refutes application of the Title 1, United States Code, definition of "person").

c. Effect of Codification

Congress regularly passes laws that "codify," or enact into positive law, the contents of various titles of the United States Code. The effect of such codifications is to make that United States Code title the official evidence of the statutory language it contains.[74] Codification acts typically delete obsolete provisions and make other technical and clarifying changes to the statutes they codify. Codification acts usually include language stating that they should not be construed as making substantive changes in the laws they replace. *See*, *e.g.*, Pub. L. No. 97-258, § 4(a), 96 Stat. 877, 1067 (1982) (codifying Title 31 of the United States Code); 69 Comp. Gen. 691 (1990).[75]

[74] If *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993), discussed above, had involved codified provisions of law, the Court's task would have been much easier. In fact, the case probably would never have arisen.

[75] Background information about the nature and status of codification efforts can be found on the Web site of the Office of the Law Revision Counsel, U.S. House of Representatives: http://uscode.house.gov.

5. Canons of Statutory Construction

As discussed previously, under the plain meaning rule—the overriding principle of statutory construction—the meaning of a statute must be anchored in its text. Over the years, courts have developed a host of conventions or guidelines for ascertaining the meaning of statutory text that are usually referred to as "canons" of construction. They range from broad principles that apply in virtually every case (such as the canon that statutes are construed as a whole) to narrow rules that apply in limited contexts.

Like all other aids to construing statutes, the canons represent rules of thumb that are often useful but do not lend themselves to mechanistic application or slavish adherence. As the Supreme Court observed in *Chickasaw Nation v. United States*:

> "[C]anons are not mandatory rules. They are guides that need not be conclusive… . They are designed to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force."

534 U.S. 84, 94 (2001) (citations and quotation marks omitted).

One problem with the canons is that they often appear to contradict each other. In a frequently cited law review article, Professor Karl Llewellyn presented an analysis demonstrating that for many canons, there was an offsetting canon to the opposite effect.[76]

Recognizing their limitations, this section will briefly describe some of the more frequently invoked canons.

a. Construe the Statute as a Whole

We start with one canon that virtually always applies and is rarely if ever contradicted. As Sutherland puts it:

[76] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are To Be Construed*, 3 Vand. L. Rev. 395 (1950). The Supreme Court has recognized the contradictory nature of canons. *E.g.*, *Circuit City Stores*, *Inc. v. Adams*, 532 U.S. 105, 115 (2001) ("Canons of construction need not be conclusive and are often countered, of course, by some maxim pointing in a different direction."); *Landgraf v. USI Film Products*, 511 U.S. 244, 263 (1994) ("It is not uncommon to find 'apparent tension' between different canons of statutory construction. As Professor Llewellyn famously illustrated, many of the traditional canons have equal opposites.").

> "A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole."

2A Sutherland, § 46:05 at 154.

Like all other courts, the Supreme Court follows this venerable canon. *E.g.*, *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 217 (2001) ("it is, of course, true that statutory construction 'is a holistic endeavor' and that the meaning of a provision is 'clarified by the remainder of the statutory scheme'"); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 569 (1995) ("the Act is to be interpreted as a symmetrical and coherent regulatory scheme, one in which the operative words have a consistent meaning throughout"); *Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("[a]mbiguity is a creature not of definitional possibilities but of statutory context").

The Court elaborated on this canon in *FDA v. Brown & Williamson Tobacco Corp.*, noting as well that the "holistic" approach may embrace more than a single statute:

> "[A] reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context… . It is a fundamental canon 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… . A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, … and fit, if possible, all parts into an harmonious whole… . Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand."

529 U.S. at 132–133 (citations and quotation marks omitted).

Comptroller General decisions, of course, also follow this canon:

> "In interpreting provisions of a statute, we follow the settled rule of statutory construction that provisions with unambiguous language and specific directions may not be construed in any manner that will alter or extend their plain meaning… . However, if giving effect to the plain meaning of words in a statute leads to an absurd result which is clearly unintended and at variance with the policy of the legislation as a whole, the purpose of the statute rather than its literal words will be followed… . Consequently, statutory phrases and individual words cannot be viewed in isolation."

B-287158, Oct. 10, 2002 (citations omitted).[77]

The following decisions illustrate applications of the "whole statute" rule:

- B-290125.2, B-290125.3, Dec. 18, 2002 (redacted): Viewed in isolation, the phrase "notwithstanding any other provision of law" might be read as exempting a procurement from GAO's bid protest jurisdiction under the Competition in Contracting Act. However, when the statute is read as a whole, as it must be, it does not exempt the procurement from the Act.

- B-286661, Jan. 19, 2001: The Department of Energy's interpretation of the statutory phrase "expenses of privatization" conflicts with the plain meaning of the statute as a whole as well as the legislative history.

- B-261522, Sept. 29, 1995: The statute as a whole supports the Social Security Administration's contention that it can use wage data collected by the Internal Revenue Service in certifying wages to the Secretary of the Treasury.

b. Give Effect to All the Language: No "Surplusage"

Closely related to the "whole statute" canon is the canon that all words of a statute should be given effect, if possible. The theory is that all of the words have meaning since Congress does not include unnecessary language, or "surplusage."

[77] This decision held that, absent a specific appropriation, the Railroad Retirement Board had no obligation to repay certain funds that had been transferred to it from the Treasury. While the statute that transferred the funds characterized them as a "loan," it also clearly provided that repayment was required only if an appropriation was enacted for that purpose.

The courts and the Comptroller General regularly invoke the "no surplusage" canon. Some examples follow:

- *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995): Words in a statute will not be treated as "utterly without effect" even if the consequence of giving them effect is to render the statute unconstitutional.

- *Ratzlaf v. United States*, 510 U.S. 135, 140–141 (1994): The no surplusage canon applies with even greater weight when the arguably surplus words are part of the elements of a crime. In this case, the Court declined to treat as surplusage the word "willfully" in a statute that subjected to criminal penalties anyone willfully violating certain prohibitions.

- 70 Comp. Gen. 351 (1991): Appropriation act language stating that none of the funds provided in this or any other act shall hereafter be used for certain purposes constitutes permanent legislation. The argument that the word hereafter should be construed only to mean that the provision took effect on the date of its enactment is unpersuasive. Since statutes generally take effect on their date of enactment, this construction would inappropriately render the word hereafter superfluous.

- B-261522, Sept. 29, 1995: The Social Security Act requires the Social Security Administration to calculate employee wage data "in accordance with such reports" of wages filed by employers with the Internal Revenue Service (IRS). The "such reports" language cannot be read as referring only to a particular report that the IRS no longer requires since this would render the language meaningless, contrary to established maxims of statutory construction.

Although frequently invoked, the no surplusage canon is less absolute than the "whole statute" canon. One important caveat, previously discussed, is that words in a statute will be treated as surplus and disregarded if they were included in error. *E.g.*, *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (emphasis in original):

> "The canon requiring a court to give effect to each word '*if possible*' is sometimes offset by the canon that permits a court to reject words 'as surplusage' if 'inadvertently inserted or if repugnant to the rest of the statute …'"

c. Apply the Common Meaning of Words

When words used in a statute are not specifically defined, they are generally given their "plain" or ordinary meaning rather than some obscure usage. *E.g.*, *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995); *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 476 (1994); *Mallard v. United States*, 490 U.S. 296, 301 (1989); 70 Comp. Gen. 705 (1991); 38 Comp. Gen. 812 (1959); B-261193, Aug. 25, 1995.

One commonsense way to determine the plain meaning of a word is to consult a dictionary. *E.g.*, *Mallard*, 490 U.S. at 301; *American Mining Congress v. EPA*, 824 F.2d 1177, 1183–84 & n.7 (D.C. Cir. 1987). Thus, the Comptroller General relied on the dictionary in B-251189, Apr. 8, 1993, to hold that business suits did not constitute "uniforms," which would have permitted the use of appropriated funds for their purchase. *See also* B-261522, Sept. 29, 1995.

As a perusal of any dictionary will show, words often have more than one meaning.[78] The plain meaning will be the ordinary, everyday meaning. *E.g.*, *Mallard*, 490 U.S. at 301; 38 Comp. Gen. 812 (1959). If a word has more than one ordinary meaning and the context of the statute does not make it clear which is being used, there may well be no plain meaning for purposes of that statute. *See Smith v. United States*, 508 U.S. 223 (1993), discussed previously.

d. Give a Common Construction to the Same or Similar Words

When Congress uses the same term in more than one place in the same statute, it is presumed that Congress intends for the same meaning to apply absent evidence to the contrary. *E.g.*, *United States v. Cleveland Indians Baseball Club*, 532 U.S. 200, 213 (2001); *Ratzlaf v. United States*, 510 U.S. 135 (1994). The Comptroller General stated the principle as follows in 29 Comp. Gen. 143, 145 (1949), a case involving the term "pay and allowances":

> "[I]t is a settled rule of statutory construction that it is reasonable to assume that words used in one place in a legislative enactment have the same meaning in every other place in the statute and that consequently other sections in which the same phrase is used may be resorted to as an aid in determining the meaning thereof; and, if the meaning of

[78] "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.).

> the phrase is clear in one part of the statute and in others doubtful or obscure, it is in the latter case given the same construction as in the former."

A corollary to this principle is that when Congress uses a different term, it intends a different meaning. *E.g.*, 56 Comp. Gen. 655, 658 (1977) (term "taking line" presumed to have different meaning than "taking area," which had been used in several other sections in the same statute).

Several different canons of construction revolve around these seemingly straightforward notions. Before discussing some of them, it is important to note once more that these canons, like most others, may or may not make sense to apply in particular settings. Indeed, the basic canon that the same words have the same meaning in a statute is itself subject to exceptions. In *Cleveland Indians Baseball Club*, the Court cautioned:

> "Although we generally presume that identical words used in different parts of the same act are intended to have the same meaning, … the presumption is not rigid, and the meaning [of the same words] well may vary with the purposes of the law."

532 U.S. at 213 (citations and quotation marks omitted). To drive the point home, the Court quoted the following admonition from a law review article:

> "The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them … has all the tenacity of original sin and must constantly be guarded against."

Id. Of course, all bets are off if the statute clearly uses the same word differently in different places. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 343 (1997) ("[o]nce it is established that the term 'employees' includes former employees in some sections, but not in others, the term standing alone is necessarily ambiguous").

Two canons are frequently applied to the use of similar—but not identical—words in a statute when they are part of the same phrase. These canons are known as "*ejusdem generis*," or "of the same kind," and "*noscitur a sociis*," loosely meaning that words are known by the company they keep.

In *Washington State Department of Social and Health Services v. Guardianship Estate of Keffeler*, 537 U.S. 371 (2003), the issue was whether the state's retention of Social Security Act benefits to cover some of its costs for providing foster care violated a provision of the Act that shielded benefits from "execution, levy, attachment, garnishment, or other legal process." The Court noted that, under the two canons—

> " 'where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.'"

537 U.S. at 379, quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114–115 (2001). Applying the canons, the Court held that the state's receipt of the Social Security benefits as a "representative payee" did not constitute "other legal process" within the Act's meaning. It reasoned that, based on the accompanying terms, "other legal process" required at a minimum the use of some judicial or quasi-judicial process.

Gustafson v. Alloyd Co., 513 U.S. 561, 573–74 (1995), concerned the scope of statute that defined the term "prospectus" to mean—

> "any prospectus, notice, circular, advertisement, letter, or communication, written or by radio or television, which offers any security for sale or confirms the sale of any security."

Applying *noscitur a sociis* to the list of items in section 12(2), the Court held that the definition of "prospectus" connoted some sort of public offering of a security and, therefore, did not extend to private sales agreements.

The Court also invoked the *noscitur* canon in *Gutierrez v. Ada*, 528 U.S. 250, 254–255 (2000), to construe the term "any election":

> "The reference to 'any election' is preceded by two references to gubernatorial election and followed by four. With 'any election' so surrounded, what could it refer to except an election for Governor and Lieutenant Governor, the subject of such relentless repetition? To ask the question is merely to apply an interpretive rule as familiar outside the

> law as it is within, for words and people are known by their companions."

Another familiar canon dealing with word patterns in statutes is "*expressio unius est exclusio alterius*," meaning that the expression of one thing is the exclusion of another. Sutherland describes this canon as simply embodying the commonsense notion that when people say one thing, they generally do not mean something else. 2A Sutherland, § 45:14. As usual, care must be used in applying this canon. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149 (2003); *United States v. Vonn*, 535 U.S. 55 (2002). The Court observed in *Vonn*:

> "At best, as we have said before, the canon that expressing one item of a commonly associated group or series excludes another left unmentioned is only a guide, whose fallibility can be shown by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion of its common relatives."

537 U.S. at 65 (citations omitted).

e. Punctuation, Grammar, Titles, and Preambles Are Relevant but Not Controlling

Punctuation, grammar, titles, and preambles are part of the statutory text. As such, they are fair game for consideration in construing statutes. However, as discussed below, they carry less weight than the substantive terms of the statute. The common principle that applies to these sources is that they can be consulted to help resolve ambiguities in the substantive text, but they cannot be used to introduce ambiguity that does not otherwise exist.

Punctuation and Grammar. Punctuation may be taken into consideration when no better evidence exists. For example, whether an "except" clause is or is not set off by a comma may help determine whether the exception applies to the entire provision or just to the portion immediately preceding the "except" clause. *E.g.*, B-218812, Jan. 23, 1987. Punctuation was a relevant factor in the majority opinion in *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241–42 (1989). A number of additional cases, which we do not repeat here, are cited in Justice O'Connor's dissenting opinion, 489 U.S. at 249.

On the other hand, punctuation or the lack of it should never be the controlling factor. As the Supreme Court stated in *United States National*

Bank of Oregon v. Independent Insurance Agents of America, Inc., 508 U.S. 439, 454 (1993), "a purported plain-meaning analysis based only on punctuation is necessarily incomplete and runs the risk of distorting a statute's true meaning." In that case, the Court disregarded an interpretation based on the placement of quotation marks in a statute, finding that all other evidence in the statute pointed to a different interpretation.

Likewise, a statute's grammatical structure is useful but not conclusive. In *Arcadia, Ohio v. Ohio Power Co.*, 498 U.S. 73 (1991), the Court devoted considerable attention to the placement of the word "or" in a series of clauses. It questioned the interpretation proffered by one of the parties that would have given the language an awkward effect, noting: "In casual conversation, perhaps, such absentminded duplication and omission are possible, but Congress is not presumed to draft its laws that way." *Arcadia, Ohio*, 498 U.S. at 79. By contrast, in *Nobelman v. American Savings Bank*, 508 U.S. 324, 330 (1993), the Court rejected an interpretation, noting: "We acknowledge that this reading of the clause is quite sensible as a matter of grammar. But it is not compelled."

Titles and Headings. The title of a statute is relevant in determining its scope and purpose. By "title" in this context we mean the line on the slip law immediately following the words "An Act," as distinguished from the statute's "popular name," if any. For example, Public Law 97-177, 96 Stat. 85 (May 21, 1982), is "An Act [t]o require the Federal Government to pay interest on overdue payments, and for other purposes" (title); section 1 says that the act may be cited as the "Prompt Payment Act" (popular name). A public law may or may not have a popular name; it always has a title.

The title of an act may not be used to change the plain meaning of the enacting clauses. It is evidence of the act's scope and purpose, however, and may legitimately be taken into consideration to resolve ambiguities. *E.g.*, *Lapina v. Williams*, 232 U.S. 78, 92 (1914); *White v. United States*, 191 U.S. 545, 550 (1903); *Church of the Holy Trinity v. United States*, 143 U.S. 457, 462–63 (1892); *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386 (1805); 36 Comp. Gen. 389 (1956); 19 Comp. Gen. 739, 742 (1940). To illustrate, in *Church of the Holy Trinity*, the Court used the title of the statute in question, "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States," as support for its conclusion that the statute was not

intended to apply to professional persons, specifically in that case, ministers and pastors.[79]

The same considerations apply to a statute's popular name and to the headings, or titles, of particular sections of the statute. *See Immigration & Naturalization Service v. St. Cyr*, 533 U.S. 289, 308–309 (2001); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998). In *St. Cyr*, the Supreme Court concluded that a section entitled "Elimination of Custody Review by *Habeas Corpus*" did not, in fact, eliminate *habeas corpus* jurisdiction. It found that the substantive terms of the section were less definitive than the title.

Preambles. Federal statutes often include an introductory "preamble" or "purpose" section before the substantive provisions in which Congress sets forth findings, purposes, or policies that prompted it to adopt the legislation. Such preambles have no legally binding effect. However, they may provide indications of congressional intent underlying the law. Sutherland states with respect to preambles:

> "[T]he settled principle of law is that the preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms. In case any doubt arises in the enacted part, the preamble may be resorted to to help discover the intention of the law maker."

2A Sutherland, § 47:04 at 221–222.[80]

f. Avoid Constructions That Pose Constitutional Problems

It is well settled that courts will attempt to avoid a construction of a statute that would render the statute unconstitutional. *E.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) and the host of precedents it cites in observing:

[79] The utility of this principle will, of course, depend on the degree of specificity in the title. Its value has been considerably diminished by the practice, found in many recent statutes such as the Prompt Payment Act noted above, of adding on the words "and for other purposes."

[80] An interesting use of a preamble arose in *Association of American Railroads v. Surface Transportation Board*, 237 F.3d 676 (D.C. Cir. 2001). Recognizing that the preamble lacked operative effect, the court nonetheless held that it was arbitrary and capricious for the agency to construe the statute without at least considering the policy set out in its preamble.

> "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress… . This cardinal principle … has for so long been applied by this Court that it is beyond debate… . [T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. This approach not only reflects the prudential concern that constitutional issues not be needlessly confronted, but also recognizes that Congress, like this Court, is bound by and swears an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." (Citations and quotation marks omitted.)

As the Court put it in *Immigration & Naturalization Service v. St. Cyr*, 533 U.S. 289, 300 (2001), where an alternative to a constitutionally problematic interpretation "is fairly possible, … we are obligated to construe the statute to avoid such problems." (Citations and quotation marks omitted.)

Two cases arising under the Federal Advisory Committee Act (known as "FACA"), 5 U.S.C. App. §§ 1 *et seq.*, illustrate the lengths to which courts will go to avoid constitutional problems. In *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989), the Court held that the Justice Department did not "utilize" within the meaning of FACA an American Bar Association committee that reported to the Department on federal judicial nominees and rated their qualifications. Taking its lead from *Public Citizen*, the Court of Appeals for the District of Columbia Circuit held in *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993), that the First Lady was a full-time officer or employee of the federal government within the meaning of the Act. Therefore, a task force she chaired was exempt from FACA under a provision of the Act that excluded "any committee which is composed wholly of full-time officers or employees of the Federal Government." The constitutional issue in both *Public Citizen* and *Association of American Physicians & Surgeons* was whether application of FACA to the advisory committees involved in those cases would violate separation of powers by

infringing upon the President's ability to obtain advice in the performance of his constitutional responsibilities.[81]

However, there are outer limits to interpretations designed to avoid constitutional problems. *See Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) ("[t]hat doctrine [of avoidance] enters in only 'where a statute is susceptible of two constructions'"); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995) ("[t]o avoid a constitutional question by holding that Congress enacted, and the President approved, a blank sheet of paper would indeed constitute 'disingenuous evasion'").

6. Legislative History

a. Uses and Limitations

The term "legislative history" refers to, and is comprised of, the body of congressionally generated written documents relating to a bill from the time of introduction to the time of enactment. As we will discuss, there are at least two basic ways to use legislative history. One is to examine the documents that make up the legislative history in order to determine what they say about the meaning and intent of the legislation. The other is to examine the evolution of the bill's language through the legislative process. Changes made to a bill during its consideration are often instructive in determining its final meaning.

Legislative history is always relevant in the sense that it is never "wrong" to look at it. Thus, as previously noted, most cases purporting to apply the plain meaning rule also review legislative history—if for no other reason than to establish that nothing in that history contradicts the court's view of what the plain meaning is. The converse of the plain meaning rule is that it is legitimate and proper to resort to legislative history when the meaning of the statutory language is not plain on its face. Again, we start with an early

[81] The majority opinion in *Association of American Physicians & Surgeons* placed heavy reliance on *Public Citizen*, noting that "[t]he Court adopted, we think it is fair to say, an extremely strained construction of the word 'utilized' in order to avoid the constitutional question." 997 F.2d at 906. Both *Public Citizen* and *Association of American Physicians & Surgeons* drew strongly worded concurring opinions along the same lines. The concurrences maintained that FACA clearly applied by its plain terms to the respective groups, but that its application was unconstitutional as so applied.

Supreme Court passage, this one a famous statement by Chief Justice John Marshall:

> "Where the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived … ."

United States v. Fisher, 6 U.S. (2 Cranch) 358, 386 (1805). *See also United States v. Donruss Co.*, 393 U.S. 297, 302–03 (1969); *Caminetti v. United States*, 242 U.S. 470, 490 (1917) (legislative history "may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation").

It is entirely proper to use legislative history to seek guidance on the purpose of a statute (to see, for example, what kinds of problems Congress wanted to address), or to confirm the apparent plain meaning, or to resolve ambiguities. A classic example of the latter is a statute using the words "science" or "scientific." Either term, without more, does not tell you whether the statute applies to the social sciences as well as the physical sciences. *E.g.*, *American Kennel Club*, *Inc. v. Hoey*, 148 F.2d 920, 922 (2nd Cir. 1945); B-181142, Aug. 5, 1974 (GAO recommended that the term "science and technology" in a bill be defined to avoid this ambiguity). If the statute does not include a definition, you would look next to the legislative history.

The use becomes improper when the line is crossed from using legislative history to resolve things that are not clear in the statutory language to using it to rewrite the statute. *E.g.*, *Shannon v. United States*, 512 U.S. 573, 583 (1994) (declining to give effect to "a single passage of legislative history that is in no way anchored in the text of the statute"); *Ratzlaf v. United States*, 510 U.S. 135, 147–148 (1994) (declining to "resort to legislative history to cloud a statutory text that is clear"). The Comptroller General put it this way:

> "[A]s a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that history for the purpose of writing into the law that which is not there."

55 Comp. Gen. 307, 325 (1975).

A recent Comptroller General decision illustrates this point. An appropriation rider sponsored by Senator McCain prohibited the Air Force from using funds to lease certain aircraft "under any contract entered into under any procurement procedures other than pursuant to" the Competition in Contracting Act (CICA), Pub. L. No. 98-369, 98 Stat. 1175 (July 18, 1984), classified generally to 41 U.S.C. §§ 251 *et seq.* In a floor statement on the bill, Senator McCain said that his language would require "full and open competition" for the aircraft and preclude a "sole source" award. However, CICA clearly does not require full and open competition or prohibit sole-source awards. Therefore, the Comptroller General upheld the Air Force's award of a sole-source contract:

> "Since section 8147, by its plain terms, only requires compliance with CICA, and does not provide that competitive procedures must be used for the Boeing transport/VIP aircraft procurement, we find no basis for reading such a requirement into the provision."

B-291805, Mar. 26, 2003.

b. Components and Their Relative Weight

In discussing legislative history, we will first consider use of the explanatory documents that go into it. These documents fall generally into three categories: committee reports, floor debates, and hearings. For probative purposes, they bear an established relationship to one another. Let us emphasize before proceeding, however, that listing items of legislative history in an "order of persuasiveness" is merely a guideline. The evidentiary value of any piece of legislative history depends on its relationship to other available legislative history and, most importantly, to the language of the statute.

(1) Committee reports

The most authoritative single source of legislative history is the conference report. *E.g.*, *United States v. Commonwealth Energy System & Subsidiary Cos.*, 235 F.3d 11, 16 (1st Cir. 2000); *Resolution Trust Corp. v. Gallagher*, 10 F.3d 416, 421 (7th Cir. 1993); *Squillacote v. United States*, 739 F.2d 1208, 1218 (7th Cir. 1984); B-142011, Apr. 30, 1971. *See also Bay View, Inc. v. United States*, 278 F.3d 1259, 1264 (Fed. Cir. 2001), *cert. denied*, 537 U.S. 826 (2002). This is especially true if the statutory language in question was drafted by the conference committee. The reason the conference report occupies the highest rung on the ladder is that it must be voted on and adopted by both houses of Congress and thus is the only

legislative history document that can be said to reflect the will of both houses.*Commissioner of Internal Revenue v. Acker*, 361 U.S. 87, 94 (1959) (Frankfurter, J., dissenting).

Next in sequence are the reports of the legislative committees that considered the bill and reported it out to their respective houses. The Supreme Court has consistently been willing to rely on committee reports when otherwise appropriate. *E.g.*, *Demore v. Hyung Joon Kim*, 538 U.S. 510, 123 S. Ct. 1708, 1714–1716 (2003); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 543–544 (2001); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921); *United States v. St. Paul, Minneapolis & Manitoba Railway Co.*, 247 U.S. 310, 318 (1918); *Lapina v. Williams*, 232 U.S. 78, 90 (1914).

However, material in committee reports, even a conference report, will ordinarily not be used to controvert clear statutory language. *Squillacote*, 739 F.2d at 1218; *Hart v. United States*, 585 F.2d 1025 (Ct. Cl. 1978); B-278121, Nov. 7, 1997; B-33911, B-62187, July 15, 1948.

The following excerpt from a colloquy between Senators Armstrong and Dole demonstrates why committee reports must be used with caution:

> "Mr. ARMSTRONG. Mr. President, did members of the Finance Committee vote on the committee report?
>
> "Mr. DOLE. No.
>
> "Mr. ARMSTRONG. Mr. President, the reason I raise the issue is not perhaps apparent on the surface… . The report itself is not considered by the Committee on Finance. It was not subject to amendment by the Committee on Finance. It is not subject to amendment now by the Senate.
>
> …
>
> "I only wish the record to reflect that this is not statutory language. It is not before us. If there were matter within this report which was disagreed to by the Senator from Colorado or even by a majority of all Senators, there would be no way for us to change the report. I could not offer an amendment tonight to amend the committee report.

> "… [F]or any jurist, administrator, bureaucrat, tax practitioner, or others who might chance upon the written record of this proceeding, let me just make the point that this is not the law, it was not voted on, it is not subject to amendment, and we should discipline ourselves to the task of expressing congressional intent in the statute."[82]

Notwithstanding the imperfections of the system, in those cases where there is a need to resort to legislative history, committee reports remain generally recognized as the best source. In this regard, Sutherland observes:

> "Increasingly, courts have turned to reports of standing committees for aid in interpretation. This movement has coincided with an improvement in the preparation of reports by standing committees and their counsel."

2A Sutherland, § 48:06 at 445.

(2) Floor debates

Proceeding downward on the ladder, after committee reports come floor debates. Statements made in the course of floor debates have traditionally been regarded as suspect in that they are "expressive of the views and motives of individual members." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921). In addition—

> "[I]t is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did, and those who spoke might differ from each other… "

United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318 (1897). Some of the earlier cases, such as *Trans-Missouri Freight*, indicate that floor debates should never be taken into consideration. Under the more

[82] 128 Cong. Rec. 16918–19 (1982), quoted in *Hirschey v. Federal Energy Regulatory Commission*, 777 F.2d 1, 7 n.1 (D.C. Cir. 1985) (Scalia, J., concurring).

modern view, however, they may be considered, the real question being the weight they should receive in various circumstances.

Floor debates are less authoritative than committee reports. *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Zuber v. Allen*, 396 U.S. 168, 186 (1969); *United States v. O'Brien*, 391 U.S. 367, 385 (1968); *United States v. United Automobile Workers*, 352 U.S. 567, 585 (1957); *Bay View, Inc. v. United States*, 278 F.3d 1259, 1264 (Fed. Cir. 2001), *cert. denied*, 537 U.S. 826 (2002). It follows that they will not be regarded as persuasive if they conflict with explicit statements in more authoritative portions of legislative history such as committee reports. *United States v. Wrightwood Dairy Co.*, 315 U.S. 110, 125 (1942); B-114829, June 27, 1975. Conversely, they will carry more weight if they are mutually reenforcing. *National Data Corp. & Subsidiaries v. United States*, 50 Fed. Cl. 24, 32, n.14 (2001), *aff'd*, 291 F.3d 1381 (Fed. Cir.), *cert. denied*, 537 U.S. 1045 (2002).[83]

Debates will carry considerably more weight when they are the only available legislative history as, for example, in the case of a post-report floor amendment. *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159, 169–70 (1985); *Preterm, Inc. v. Dukakis*, 591 F.2d 121, 128 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979). Indeed, the *Preterm* court suggested that "heated and lengthy debates" in which "the views expressed were those of a wide spectrum" of Members might be more valuable in discerning congressional intent than committee reports, "which represent merely the views of [the committee's] members and may never have come to the attention of Congress as a whole." *Preterm*, 591 F.2d at 133.

The weight to be given statements made in floor debates varies with the identity of the speaker. Thus, statements by legislators in charge of a bill, such as the pertinent committee chairperson, have been regarded as "in the nature of a supplementary report" and receive somewhat more weight. *United States v. St. Paul, Minneapolis & Manitoba Railway Co.*, 247 U.S. 310, 318 (1918). *See also McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 493–94 (1931) (statements by Members "who were not in charge of the bill" were "without weight"); *Duplex v. Deering*, 254 U.S. at 474–75;

[83] "Here … we are faced not with a single, idle [Member] statement, but rather a pattern of statements—and one that is consistent not only with the Conference Committee Report's emphasis … but also the statute's language itself." *Id.*

NLRB v. Thompson Products, Inc., 141 F.2d 794, 798 (9th Cir. 1944). The Supreme Court's statement in *St. Paul Railway Co.* gave rise to the entirely legitimate practice of "making" legislative history by preparing questions and answers in advance, to be presented on the floor and answered by the Member in charge of the bill.[84]

Statements by the sponsor of a bill are also entitled to somewhat more weight. *E.g.*, *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 394–95 (1951); *Ex Parte Kawato*, 317 U.S. 69, 77 (1942); *Bedroc Limited v. United States*, 50 F. Supp.2d 1001, 1006 (D. Nev. 1999), *aff'd*, 314 F.3d 1080 (9th Cir. 2002). However, they are not controlling. *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979).

Statements by the opponents of a bill expressing their "fears and doubts" generally receive little, if any, weight. *Shell Oil Co. v. Iowa Department of Revenue*, 488 U.S. 19, 29 (1988); *Schwegmann*, 341 U.S. at 394. However, even the statements of opponents may be "relevant and useful," although not authoritative, in certain circumstances, such as where the supporters of a bill make no response to opponents' criticisms. *Arizona v. California*, 373 U.S. 546, 583 n.85 (1963); *Parlane Sportswear Co. v. Weinberger*, 513 F.2d 835, 837 (1st Cir. 1975); *Bentley v. Arlee Home Fashions, Inc.*, 861 F. Supp. 65, 67 (E.D. Ark. 1994).

Where Senate and House floor debates suggest conflicting interpretations and there is no more authoritative source of legislative history available, it is legitimate to give weight to such factors as which house originated the provision in question and which house has the more detailed and "clear cut" history. *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956); 49 Comp. Gen. 411 (1970).

(3) Hearings

Hearings occupy the bottom rung on the ladder. They are valuable for many reasons: they help define the problem Congress is addressing; they present opposing viewpoints for Congress to consider; and they provide the opportunity for public participation in the lawmaking process. As legislative history, however, they are the least persuasive form. The reason is that they reflect only the personal opinion and motives of the witness. It

[84] The origin and use of this device were explained in a floor statement by former Senator Morse on March 26, 1964. *See* 110 Cong. Rec. 6423 (1964).

is more often than not impossible to attribute these opinions and motives to anyone in Congress, let alone Congress as a whole, unless more authoritative forms of legislative history expressly adopt them. As one court has stated, an isolated excerpt from the statement of a witness at hearings "is not entitled to consideration in determining legislative intent." *Pacific Insurance Co. v. United States*, 188 F.2d 571, 572 (9th Cir. 1951). "It would indeed be absurd," said another court, "to suppose that the testimony of a witness by itself could be used to interpret an act of Congress." *SEC v. Collier*, 76 F.2d 939, 941 (2nd Cir. 1935).

There is one significant exception. Testimony by the government agency that recommended the bill or amendment in question, and which often helped draft it, is entitled to special weight. *Shapiro v. United States*, 335 U.S. 1, 12 n.13 (1948); *SEC v. Collier*, 76 F.2d at 941.

Also, testimony at hearings can be more valuable as legislative history if it can be demonstrated that the language of a bill was revised in direct response to that testimony. Relevant factors include the presence or absence of statements in more authoritative history linking the change to the testimony; the proximity in time of the change to the testimony; and the precise language of the change as compared to what was offered in the testimony. *See Premachandra v. Mitts*, 753 F.2d 635, 640–41 (8th Cir. 1985). *See also Allen v. State Board of Elections*, 393 U.S. 544, 566–68 (1969); *SEC v. Collier*, 76 F.2d at 940, 941.

c. Post-enactment Statements

Observers of the often difficult task of discerning congressional intent occasionally ask, isn't there an easier way to do this? Why don't you just call the sponsor or the committee and ask what they had in mind? The answer is that post-enactment statements have virtually no weight in determining prior congressional intent. The objective of statutory construction is to ascertain a collective intent, not an individual's intent or, worse yet, an individual's characterization of the collective intent. It is impossible to demonstrate that the substance of a *post hoc* statement reflects the intent of the pre-enactment Congress, unless it can be corroborated by pre-enactment statements, in which event it would be unnecessary. Or, as the Supreme Court has said:

> "Since such statements cannot possibly have informed the vote of the legislators who earlier enacted the law, there is no more basis for considering them than there is to conduct postenactment polls of the original legislators."

Pittston Coal Group v. Sebben, 488 U.S. 105, 118–19 (1988). *See also Gustafson v. Alloyd Co.*, 513 U.S. 561, 580 (1995) ("If legislative history is to be considered, it is preferable to consult the documents prepared by Congress when deliberating."); 2A Sutherland, § 48:04 (to be considered legislative history, material should be generally available to legislators and relied on by them in passing the bill).

In expressing their unwillingness to consider post-enactment statements, courts have not viewed the identity of the speaker (sponsor, committee, committee chairman, *etc.*) or the form of the statement (report, floor statement, letter, affidavit, *etc.*) to be relevant. There are numerous cases in which the courts, and particularly the Supreme Court, have expressed the unwillingness to give weight to post-enactment statements. *See*, *e.g.*, *Bread Political Action Committee v. Federal Election Commission*, 455 U.S. 577, 582 n.3 (1982); *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 170 (1968); *Haynes v. United States*, 390 U.S. 85, 87 n.4 (1968). *See also General Instrument Corp. v. FCC*, 213 F.3d 724, 733 (D.C. Cir. 2000) (referring to post-enactment statements as "legislative future" rather than legislative history); *Cavallo v. Utica-Watertown Health Insurance Co.*, 3 F. Supp. 2d 223, 230 (N.D. N.Y. 1998).

Courts have not found expressions of intent concerning previously enacted legislation that are made in committee reports or floor statements during the consideration of subsequent legislation to be relevant either. *E.g.*, *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996) ("the view of a later Congress cannot control the interpretation of an earlier enacted statute"); *Huffman v. Office of Personnel Management*, 263 F.3d 1341, 1354 (Fed. Cir. 2001) (post-enactment statements made in the legislative history of the 1994 amendments have no bearing in determining the legislative intent of the drafters of the 1978 and 1989 legislation).

GAO naturally follows the principle that post-enactment statements do not constitute legislative history. *E.g.*, 72 Comp. Gen. 317 (1993); 54 Comp. Gen. 819, 822 (1975). Likewise, the Office of Legal Counsel has virtually conceded that presidential signing statements fall within the realm of post-

enactment statements that carry no weight as legislative history. *See* 17 Op. Off. Legal Counsel 131 (1993).[85]

As with all other principles relating to statutory interpretation, the rule against consideration of post-enactment statements is not absolute. Even post-enactment material may be taken into consideration, despite its very limited value, when there is absolutely nothing else. *See* B-169491, June 16, 1980.

d. Development of the Statutory Language

As previously noted, examination of legislative history includes not only what the drafters of a bill said about it, but also what they did to it as the bill progressed through the enactment process. Changes made to a bill may provide insight into what the final language means. For example, the deletion from the final version of language that was in the original bill may suggest an intent to reject what was covered by that language. *See generally* 2A Sutherland, § 48:04. The same is true of language offered in an amendment that was defeated. *Id.*, § 48:18.

The courts consider the evolution of legislative language in different contexts. See, for example:

- *Chickasaw Nation v. United States*, 534 U.S. 84, 91 (2001): The original Senate bill applied both to taxation and to reporting and withholding. The final version applied only to reporting and withholding, thereby suggesting that a cross-reference to another law dealing with taxation was left in by error.

- *Landgraf v. USI Film Products*, 511 U.S. 244, 255–256 (1994): The President vetoed a 1990 version of a civil rights bill in part because he objected to the bill's broad retroactivity provisions. This indicates that the absence of comparable retroactivity provisions in the version of the bill enacted in 1991 was not an oversight, but rather part of a political compromise.

See also Resolution Trust Corp. v. Gallagher, 10 F.3d 416 423 (7th Cir. 1993); *Davis v. United States*, 46 Fed. Cl. 421 (2000).

[85] While this opinion stopped short of attempting "finally to decide" the matter, it presented several powerful arguments against the validity of signing statements as legislative history but no arguments in favor of their use for this purpose.

As always, care must be exercised when interpreting language changes in a bill, particularly when the accompanying documents do not discuss them. Unless the legislative history explains the reason for the omission or deletion or the reason is clear from the context, drawing conclusions is inherently speculative. Perhaps Congress did not want that particular provision; perhaps Congress felt it was already covered in the same or other legislation. Absent an explanation, the effect of such an omission or deletion is inconclusive. *Fox v. Standard Oil Co.*, 294 U.S. 87, 96 (1935); *Southern Packaging & Storage Co. v. United States*, 588 F. Supp. 532, 549 (D.S.C. 1984); 63 Comp. Gen. 498, 501–02 (1984); 63 Comp. Gen. 470, 472 (1984).

7. Presumptions and "Clear Statement" Rules

In a perhaps growing number of specific areas, courts apply extra scrutiny in construing statutes that they regard as departing from traditional norms of legislation. In these areas, the courts require a greater than usual showing that Congress did, in fact, mean to depart from the norm. Typically, the courts will raise the bar by imposing a "presumption" that must be overcome in order to establish that Congress intended the departure. Alternatively but to the same effect, courts sometimes require a "clear statement" by Congress that it intended the departure.

Such presumptions and clear statement rules have been described as "substantive canons" as opposed to "linguistic canons" since, rather than aiding in the interpretation of statutory language *per se*, they are designed to protect "substantive values drawn from the common law, federal statutes, or the United States Constitution."[86] A few examples are given below.

a. Presumption in Favor of Judicial Review

There is a "strong presumption" in favor of judicial review of administrative actions. *E.g.*, *Demore v. Hyung Joon Kim*, 538 U.S. 510, 123 S. Ct. 1708 (2003); *Immigration & Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001); *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479 (1991); *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667 (1986). In *Bowen*, the Court stated the presumption as follows:

[86] William N. Eskridge, Jr., and Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992).

> "We begin with the strong presumption that Congress intends judicial review of administrative action. From the beginning, 'our cases [have established] that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.'"

476 U.S. at 670, quoting *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967).

The Court in *Bowen* went on to note that the presumption of reviewability can be rebutted:

> "Subject to constitutional constraints, Congress can, of course, make exceptions to the historic practice whereby courts review agency action. The presumption of judicial review is, after all, a presumption, and like all presumptions used in interpreting statutes, may be overcome by, *inter alia*, specific language or specific legislative history that is a reliable indicator of congressional intent or a specific congressional intent to preclude judicial review that is fairly discernable in the detail of the legislative scheme."

Id. at 672–673 (quotation marks omitted).

Later decisions indicate that a particularly strong showing is required to establish a congressional intent to preclude judicial review of constitutional claims through *habeas corpus* petitions. *See Demore* and *St. Cyr*, *supra*. Thus, the Court observed in *St. Cyr*, 533 U.S. at 299:

> "Implications from statutory text or legislative history are not sufficient to repeal habeas jurisdiction; instead, Congress must articulate specific and unambiguous statutory directives to effect repeal."

Finally, it is important to note one area in which the usual presumption in favor of judicial review becomes a presumption *against* judicial review: exercises of discretion by the President. In *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the Supreme Court held that the President is not an "agency" for purposes of the Administrative Procedure Act (APA); therefore, presidential actions are not subject to judicial review under the

APA. The Court recognized that the general definition of "agency" in the APA (5 U.S.C. § 551(1)) covered "each authority of the Government of the United States" and that the President was not explicitly excluded from this definition. However, the Court held:

> "Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA. *We would require an express statement by Congress before assuming it intended the President's performance of his statutory duties to be reviewed for abuse of discretion.*"

505 U.S. at 800–801 (emphasis supplied).

Several subsequent cases have followed and extended *Franklin*. *See Dalton v. Specter*, 511 U.S. 462 (1994); *Tulare County v. Bush*, 185 F. Supp. 2d 18 (D.D.C. 2001), *aff'd*, 306 F.3d 1138 (D.C. Cir. 2002), *reh'g en banc denied*, 317 F.3d 227 (D.C. Cir.), *cert. denied*, ____ U.S. ___, 71 U.S.L.Week 3724 (Oct. 6, 2003).[87]

b. Presumption against Retroactivity

As noted previously, statutes and amendments to statutes generally are construed to apply prospectively only (that is, from their date of enactment or other effective date if one is specified). However, while Congress generally has the power to enact retroactive statutes, [88] the Supreme Court has held:

> "Retroactivity is not favored in the law. Thus, congressional enactments … will not be construed to have retroactive effect unless their language requires this result."

Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988).

[87] The "express statement" rule does not, however, extend to judicial review of the constitutionality of presidential actions. *Dalton*, 511 U.S. at 469, 473–474; *Franklin*, 505 U.S. at 801.

[88] One exception is the Constitution's prohibition against "*ex post facto*" laws (U.S. Const. art. I, § 9, cl. 3), which precludes penal statutes from operating retroactively. Another exception, based on separation of powers considerations, prevents Congress from enacting laws that have the effect of requiring federal courts to reopen final judgments. *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995).

The Court reaffirmed the presumption against retroactivity of statutes in several recent decisions. *E.g.*, *Immigration & Naturalization Service v. St. Cyr*, 533 U.S. 289 (2001); *Martin v. Hadix*, 527 U.S. 343 (1999); *Lindh v. Murphy*, 521 U.S. 320 (1997); *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). In *Landgraf*, the Court elaborated on the policies supporting the presumption against retroactivity:

> "Because it accords with widely held intuitions about how statutes ordinarily operate, a presumption against retroactivity will generally coincide with legislative and public expectations. Requiring clear intent assures that Congress itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits. Such a requirement allocates to Congress responsibility for fundamental policy judgments concerning the proper temporal reach of statutes, and has the additional virtue of giving legislators a predictable background rule against which to legislate."

511 U.S. at 272–273.

Landgraf also resolved the "apparent tension" between the presumption against retroactivity in its *Bowen* line of decisions and another decision, *Bradley v. Richmond School Board*, 416 U.S. 696 (1974), which held that when a law changes subsequent to the judgment of a lower court, an appellate court must apply the new law, that is, the law in effect when it renders its decision, unless applying the new law would produce "manifest injustice" or unless there is statutory direction or legislative history to the contrary.[89] It affirmed that the presumption embraces statutes that have "genuinely" retroactive effect, by which it meant statutes that apply new

[89] Previously, the Court had acknowledged but left unresolved the "apparent tension" between *Bradley* and *Bowen*. *See Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 837 (1990).

standards "affecting substantive rights, liabilities, or duties" to conduct that occurred prior to their enactment. 511 U.S. at 277–278.[90]

By way of summary, the Supreme Court in *Landgraf* set forth the following test for determining whether the presumption against retroactivity applies:

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

Id. at 280.

The Comptroller General also applies the traditional rule that statutes are not construed to apply retroactively unless a retroactive construction is required by their express language or by necessary implication or unless it is demonstrated that this is what Congress clearly intended. 64 Comp. Gen. 493 (1985); 38 Comp. Gen. 103 (1958); 34 Comp. Gen. 404 (1955); 28 Comp. Gen. 162 (1948); 16 Comp. Gen. 1051 (1937); 7 Comp. Gen. 266 (1927); 5 Comp. Gen. 381 (1925); 2 Comp. Gen. 267 (1922); 26 Comp. Dec. 40 (1919); B-205180, Nov. 27, 1981; B-191190, Feb. 13, 1980; B-162208, Aug. 28, 1967.

[90] Specifically, the Court held that a provision of the Civil Rights Act of 1991 that created a new cause of action for certain civil rights violations could not be added to a lawsuit pending at the time the 1991 Act was signed into law since the conduct involved in that lawsuit occurred before the 1991 Act was enacted. On the other hand, "procedural" changes, such as provisions for jury trials in certain civil rights actions, ordinarily could apply to lawsuits pending at the time of enactment. (In this case, however, the provision for jury trial would not apply since it was limited to the newly created cause of action.)

This rule was recently applied to a statute (Pub. L. No. 107-103, § 605, 115 Stat. 976, 1000 (Dec. 27, 2001)) that authorized the United States Court of Appeals for Veterans Claims to reimburse its employees for a portion of their professional liability insurance payments. Since nothing in the statute or its legislative history indicated that the statute was to have retroactive effect, the Comptroller General held that the statute did not authorize reimbursement for insurance payments made prior to December 27, 2001. B-300866, May 30, 2003.

Another line of cases has dealt with a different aspect of retroactivity. GAO is reluctant to construe a statute to retroactively abolish or diminish rights that had accrued before its enactment unless this was clearly the legislative intent. For example, the Tax Reduction Act of 1975 authorized $50 "special payments" to certain taxpayers. Legislation in 1977 abolished the special payments as of its date of enactment. GAO held in B-190751, Apr. 11, 1978, that payments could be made where payment vouchers were validly issued before the cutoff date but lost in the mail. Similarly, payments could be made to eligible claimants whose claims had been erroneously denied before the cutoff but were later found valid. B-190751, Sept. 26, 1980.

c. Federalism Presumptions

Under the Constitution's Supremacy Clause (U.S. Const. art. VI, cl. 2), Congress, when acting within the scope of its own assigned constitutional authority, can preempt state and local laws. As the Court noted in *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604 (1991), "[t]he ways in which federal law may pre-empt state law are well established and in the first instance turn on congressional intent." Specifically, Congress may preempt either by an explicit statutory provision or by establishing a federal statutory scheme that is so pervasive as to leave no room for supplementation by the states. In either event, however, the Court stated:

> "When considering pre-emption, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'"

501 U.S. at 605, quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

The Court continues to apply the "clear and manifest purpose" test to preemption cases. *See City of Columbus v. Ours Garage and Wrecker Service, Inc.*, 536 U.S. 424 (2002). In *City of Columbus*, the Court construed a statute that included an explicit preemption provision; the

issue concerned its scope. Acknowledging that the language could be read to preempt safety regulation by local governments, the Court refused to find preemption:

> "[R]eading [the statute's] set of exceptions in combination, and with a view to the basic tenets of our federal system pivotal in Mortier, we conclude that the statute does not provide the requisite 'clear and manifest indication that Congress sought to supplant local authority.'"

536 U.S. at 434.

There also is a presumption against construing federal statutes to abrogate the immunity from suit that states enjoy under the Eleventh Amendment to the United States Constitution. Congress must make its intent to abrogate such immunity "unmistakably clear in the language of the statute." *See Nevada Department of Human Resources v. Hibbs*, ___ U.S. ___, 123 S. Ct. 1972, 1976 (2003); *Hoffman v. Connecticut Department of Income Maintenance*, 492 U.S. 96, 101 (1989) and cases cited. The necessary unmistakable intent to preempt was supplied by the express language of the statute in *Hibbs*, but such intent was found lacking in *Hoffman*.

Finally, the Court fashioned a "plain statement" rule based on federalism principles in considering whether the federal Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621 *et seq.*, superseded a state constitutional provision for the mandatory retirement of judges at age 70. *Gregory v. Ashcroft*, 501 U.S. 452 (1991). The Act's definition of "employer" included state and local governments;[91] however, its definition of "employee" excluded an "appointee at the policymaking level." The Court held that this exclusion covered judges and, therefore, they were not subject to the Act. Recognizing that the Act's language was at best ambiguous on this point, the Court reasoned:

> "'[A]ppointee at the policymaking level,' particularly in the context of the other exceptions that surround it, is an odd way for Congress to exclude judges; a plain statement that judges are not 'employees' would seem the most efficient

[91] The Supreme Court has since held that the ADEA does not validly abrogate the states' sovereign immunity under the Eleventh Amendment. *Raygor v. Regents of the University of Minnesota*, 534 U.S. 533 (2002); *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000).

> phrasing. But in this case we are not looking for a plain statement that judges are excluded. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included."

501 U.S. at 467 (emphasis in original).

d. Presumption against Waiver of Sovereign Immunity

There is a strong presumption against waiver of the federal government's immunity from suit. The courts have repeatedly held that waivers of sovereign immunity must be "unequivocally expressed." *E.g.*, *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992); *Shoshone Indian Tribe of the Wind River Reservation, Wyoming v. United States*, 51 Fed. Cl. 60 (2001) and cases cited. Legislative history does not help for this purpose. The relevant statutory language in Nordic Village was ambiguous and could have been read, evidently with the support of the legislative history, to impose monetary liability on the United States. The Court rejected such a reading, applying instead the same approach as described above in its federalism jurisprudence:

> "[L]egislative history has no bearing on the ambiguity point. As in the Eleventh Amendment context, see *Hoffman*, *supra*, … the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there, it cannot be supplied by a committee report."

503 U.S. at 37.

Chapter 3

Agency Regulations and Administrative Discretion

A. Agency Regulations 3-2
1. The Administrative Procedure Act 3-3
   a. The Informal Rulemaking Process 3-4
   b. Informal Rulemaking: When Required 3-9
   c. Additional Requirements for Rulemaking 3-13
2. Regulations May Not Exceed Statutory Authority 3-16
3. "Force and Effect of Law" 3-18
4. Waiver of Regulations 3-20
5. Amendment of Regulations 3-24
6. Retroactivity 3-26

B. Agency Administrative Interpretations 3-28
1. Interpretation of Statutes 3-28
2. Interpretation of Agency's Own Regulations 3-37

C. Administrative Discretion 3-40
1. Introduction 3-40
2. Discretion Is Not Unlimited 3-42
3. Failure or Refusal to Exercise Discretion 3-45
4. Regulations May Limit Discretion 3-47
5. Insufficient Funds 3-49

Agency Regulations and Administrative Discretion

This chapter deals with certain topics in administrative law that, strictly speaking, are not "appropriations law" or "fiscal law." Nevertheless, the material covered is so pervasive in all areas of federal law, appropriations law included, that a brief treatment in this publication is warranted. We caution that it is not our purpose to present an administrative law treatise, but rather to highlight some important "crosscutting" principles that appear in various contexts in many other chapters. The case citations should be viewed as an illustrative sampling.

A. Agency Regulations

As a conceptual starting point, agency regulations fall into three broad categories. First, every agency head has the authority, largely inherent but also authorized generally by 5 U.S.C. § 301,[1] to issue regulations to govern the internal affairs of the agency. Regulations in this category may include such subjects as conflicts of interest, employee travel, and delegations to organizational components. This statute is nothing more than a grant of authority for what are called "housekeeping" regulations. *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979); *Smith v. Cromer*, 159 F.3d 875, 878 (4th Cir. 1998), *cert. denied*, 528 U.S. 826 (1999); *NLRB v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961). It confers "administrative power only." *United States v. George*, 228 U.S. 14, 20 (1913); 54 Comp. Gen. 624, 626 (1975). Thus, the statute merely grants agencies authority to issue regulations that govern their own internal affairs; it does not authorize rulemaking that creates substantive legal rights. *Schism v. United States*, 316 F.3d 1259, 1278–1284 (Fed. Cir. 2002), *cert. denied*, ___ U.S. ___, 123 S. Ct. 2246 (2003).

Second, agencies also have inherent authority to issue procedural rules to govern their internal processes as well as "interpretive" rules that express the agency's policy positions or views in a way that does not bind outside parties or the agency itself. See Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.2 at 306 (4th ed. 2000), citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) and other cases.

[1] "The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property…."

The third category consists of so-called "legislative" or "statutory" regulations. Regulations in this category, which can only be issued pursuant to a specific statutory grant of authority, create rights and obligations and address other substantive matters in ways that have the force and effect of law. [2] In effect, these regulations constitute the exercise of authority delegated to the agency by law to further "legislate" by fleshing out the underlying statute that the agency is charged with implementing. As discussed in section B of this chapter, the scope and specificity of such a congressional delegation of legislative authority to an agency will often determine how much deference the courts will accord to the agency's regulations and to the agency's interpretation of the laws it implements.

It is not unusual for Congress to grant agencies statutory authority to issue such regulations. When Congress enacts a new program statute, it typically does not prescribe every detail of the statute's implementation but leaves it to the administering agency to "fill in the gaps" by regulation. *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843–844 (1984); *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). There are many reasons for this. It is often not possible to foresee in advance every detail that ought to be covered. In other cases, there may be a need for flexibility in implementation that is simply not practical to detail in the legislation. In many cases, Congress prefers to legislate a policy in terms of broad standards, leaving the details of implementation to the agency with program expertise. Finally, it is much easier for an agency to amend a regulation to reflect changing circumstances than it would be for Congress to have to go back and amend the basic legislation. Thus, agency legislative regulations have become an increasingly vital element of federal law.

1. The Administrative Procedure Act

The key statute governing the issuance of agency regulations is the Administrative Procedure Act (APA), originally enacted in 1946 and now codified in Title 5 of the United States Code, primarily sections 551–559

[2] Legislative or statutory regulations of this type have traditionally been called "statutory regulations," as distinguished from "administrative regulations," such as those issued under 5 U.S.C. § 301. *E.g.*, 21 Comp. Dec. 482 (1915). While the legislative/statutory *versus* administrative terminology may be convenient shorthand in some contexts, its significance has been largely superseded by the Administrative Procedure Act.

(administrative procedure) and 701–706 (judicial review).[3] The APA deals with two broad categories of administrative action: rulemaking and adjudication. Our concern here is solely with the rulemaking portions.

a. The Informal Rulemaking Process

The APA uses the term "rule" rather than "regulation." In the context of the APA, the issuance of a regulation is called "rulemaking." The term "rule" is given a very broad definition in 5 U.S.C. § 551(4):

> " '[R]ule' means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency …."

It is apparent from this definition that a great many agency issuances, regardless of what the agency chooses to call them, are rules.

The APA prescribes two types of rulemaking, which have come to be known as "formal" and "informal." Formal rulemaking under the APA involves a trial-type hearing (witnesses, depositions, transcript, *etc.*) and is governed by 5 U.S.C. §§ 556 and 557. This more rigorous, and today relatively uncommon, procedure is required only where the governing statute requires that the proceeding be "on the record." 5 U.S.C. § 553(c); *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973).

Most agency regulations are the product of informal rulemaking—the notice and comment procedures prescribed by 5 U.S.C. § 553. The first step in this process is the publication of a proposed regulation in the *Federal Register*. The *Federal Register* is a daily publication printed and distributed by the Government Printing Office. 44 U.S.C. § 1504.[4] Publication of a document in the *Federal Register* constitutes legal notice of its contents. 44 U.S.C.

[3] For an excellent summary of the APA, together with a useful bibliography, see *Federal Administrative Procedure Sourcebook* (3rd ed. 2000), published by the American Bar Association's Section on Administrative Law and Regulatory Practice. The *Sourcebook* is particularly useful because it reprints in full the 1947 *Attorney General's Manual on the Administrative Procedure Act*, which has been called the government's "most authoritative interpretation of the APA." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 218 (1988) (Justice Scalia, concurring).

[4] Indispensable though it may be, the *Federal Register* has been termed "voluminous and dull." *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 387 (1947) (Justice Jackson, dissenting).

§ 1507; *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947); 63 Comp. Gen. 293 (1984); B-242329.2, Mar. 12, 1991.[5]

The agency then allows a period of time during which interested parties may participate in the process, usually by submitting written comments, although oral presentations are sometimes permitted. Next, the agency considers and evaluates the comments submitted, and determines the content of the final regulation, which is also published in the *Federal Register*, generally at least 30 days prior to its effective date. 5 U.S.C. §§ 553(b)–(d).

The agency is also required to publish a "concise general statement" of the basis and purpose of the regulation. 5 U.S.C. § 553(c). This is commonly known as the preamble, the substance of which appears in the *Federal Register* under the heading "Supplementary Information."

The preamble is extremely important since it is the primary means for a reviewing court to evaluate compliance with section 553. The courts have cautioned not to read the terms "concise" and "general" too literally. *Automotive Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968). Rather, the preamble must be adequate—

> "to respond in a reasoned manner to the comments received, to explain how the agency resolved any significant problems raised by the comments, and to show how that resolution led the agency to the ultimate rule."

Rodway v. Department of Agriculture, 514 F.2d 809, 817 (D.C. Cir. 1975). *See also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir.), *cert. denied*, 434 U.S. 829 (1977); *Automotive Parts*, 407 F.2d at 338. As one court stated, "the agencies do not have quite the prerogative of obscurantism reserved to the legislatures." *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2nd Cir. 1977). The preamble does not have to address every item included in the comments. *Id.; Automotive Parts*, 407 F.2d at 338. However, Professor Pierce cautions that, over time, the courts have come to focus increasing scrutiny on the preamble as the venue for agencies to demonstrate that their regulations are not "arbitrary and capricious":

[5] Internet notice is not an acceptable substitute for publication in the *Federal Register*. *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 763 (D.C. Cir. 2001).

> "No court today would uphold a major agency rule that incorporates only a 'concise and general statement of basis and purpose.' To have any reasonable prospect of obtaining judicial affirmance of a major rule, an agency must set forth the basis and purpose of the rule in a detailed statement, often several hundred pages long, in which the agency refers to the evidentiary basis for all factual predicates, explains its method of reasoning from factual predicates to the expected effects of the rule, relates the factual predicates and expected effects of the rule to each of the statutory goals or purposes the agency is required to further or to consider, responds to all major criticisms contained in the comments on its proposed rule, and explains why it has rejected at least some of the most plausible alternatives to the rule it has adopted. Failure to fulfill one of these judicially prescribed requirements of a 'concise general statement of basis and purpose' has become the most frequent basis for reversal of agency rules."

Richard J. Pierce, Jr.,*Administrative Law Treatise*, § 7.4 at 442 (4th ed. 2000) (citations omitted).

As discussed later in this section, Congress and the President also have increasingly imposed requirements governing the development of agency regulations that must be addressed in the preamble.

The preamble normally accompanies publication of the final regulation, although this is not required as long as it is sufficiently close in time to make clear that it is in fact contemporaneous and not a "*post hoc* rationalization." *Action on Smoking & Health v. Civil Aeronautics Board*, 713 F.2d 795, 799 (D.C. Cir. 1983); *Tabor v. Joint Board for Enrollment of Actuaries*, 566 F.2d 705, 711 n. 14 (D.C. Cir. 1977).

Apart from questions of judicial review, the preamble serves another highly important function. It provides, as its title in the *Federal Register* indicates, useful supplementary information. Viewed from this perspective,

the preamble serves much the same purpose with respect to a regulation as legislative history does with respect to a statute.[6]

Codifications of agency regulations are issued in bound and permanent form in the Code of Federal Regulations. The "C.F.R." is supplemented or republished at least once a year. 44 U.S.C. § 1510. Unfortunately, with rare exceptions, the preamble does not accompany the regulations into the C.F.R., but is found only in the original *Federal Register* issuance. The C.F.R. does, however, give the appropriate *Federal Register* citation. Regulations on the use of the *Federal Register* and the C.F.R. are found in 1 C.F.R. ch. I.

Agencies may supplement the APA procedures, but are not required to unless directed by statute. The Supreme Court has admonished that a court should:

> "not stray beyond the judicial province to explore the procedural format or to impose upon the agency its own notion of which procedures are 'best' or most likely to further some vague, undefined public good."

Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 549 (1978). The Court repeated its caution the following year in *Chrysler Corp. v. Brown*, 441 U.S. 281, 312–13 (1979).

The Court of Appeals for the District of Columbia Circuit, in *Home Box Office, Inc. v. FCC*, provided the following summary of the APA's informal rulemaking requirements:

> "The APA sets out three procedural requirements: notice of the proposed rulemaking, an opportunity for interested persons to comment, and 'a concise general statement of (the) basis and purpose' of the rules ultimately adopted…. As interpreted by recent decisions of this court, these procedural requirements are intended to assist judicial review as well as to provide fair treatment for persons affected by a rule…. To this end there must be an *exchange*

[6] The "legislative history" analogy may be extended to unpublished agency documents used in the preparation of a regulation, which may be relevant in resolving ambiguities in the regulation. *See Deluxe Check Printers, Inc. v. United States*, 5 Cl. Ct. 498, 500–01 (1984).

> of views, information and criticism between interested persons and the agency…. Consequently, the notice required by the APA, or information subsequently supplied to the public, must disclose in detail the thinking that has animated the form of a proposed rule and the data upon which that rule is based…. Moreover, a dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by the public….”

567 F.2d at 35–36 (emphasis added).

In the Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (Nov. 29, 1990), codified at 5 U.S.C. §§ 561–570a, Congress enacted a framework for agencies to consult with interested parties in the development of regulations.[7] Under this legislation, a proposed regulation is drafted by a committee composed of representatives of the agency and other interested parties. An agency may use this procedure if it determines, among other things, that there are a limited number of identifiable interests that will be significantly affected by the regulation, and that there is a reasonable likelihood that a committee can reach a consensus without unreasonably delaying the rulemaking process. Once the proposed regulation is developed in this manner, it remains subject to the APA’s notice and comment requirements. The negotiated rulemaking procedure is optional; an agency’s decision to use or not use it is not subject to judicial review. Furthermore, use of the procedure does not entitle the regulation to any greater deference than it would otherwise receive. 5 U.S.C. § 570; *see also Center for Law & Education v. United States Department of Education*, 209 F. Supp. 2d 102, 106–107 (D.D.C. 2002).

Whatever form they take, consultations with interested parties in the development of regulations cannot undercut the notice and comment procedures of the APA. The Comptroller General has found that an agreement to issue, with specified content, a regulation otherwise subject to the APA not only violates the APA but is invalid as contrary to public

[7] Congress originally provided, in section 5 of Public Law 101-648, for the Negotiated Rulemaking Act to expire 6 years after its date of enactment. However, the Administrative Dispute Resolution Act of 1996, Pub. L. No. 104-320, § 11, 110 Stat. 3870, 3873–3874 (Oct. 19, 1996), repealed section 5 and made the Act permanent. Public Law 104-320 also required the President to designate an agency or interagency committee to encourage and facilitate negotiated rulemaking.

policy. B-212529, May 31, 1984. In effect, a promise to issue a regulation with specified content amounts to a promise to disregard any adverse public comments received, clearly a violation of the APA. Likewise, in *USA Group Loan Services, Inc. v. Riley*, 82 F.3d 708, 714 (7th Cir. 1996), the court held that agreements reached between interested parties and agency officials through consultations pursuant to the Negotiated Rulemaking Act are not legally binding, since to enforce them would "extinguish notice and comment rulemaking."

b. Informal Rulemaking: When Required

A great many things are required by one statute or another to be published in the *Federal Register*. One example is "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D). Privacy Act notices are another example. 5 U.S.C. § 552a(e)(4). Other items required or authorized to be published in the *Federal Register* are specified in 44 U.S.C. § 1505. However, the mere requirement to publish something in the *Federal Register* is not, by itself, a requirement to use APA procedures.

As a starting point, anything that falls within the definition of a "rule" in 5 U.S.C. § 551(4) and for which formal rulemaking is not required, is subject to the informal rulemaking procedures of 5 U.S.C. § 553 unless exempt. This statement is not as encompassing as it may seem, since section 553 itself provides several very significant exemptions. These exemptions, according to a line of decisions by the U.S. Court of Appeals for the District of Columbia Circuit, will be "narrowly construed and only reluctantly countenanced." *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001); *Asiana Airlines v. Federal Aviation Administration*, 134 F.3d 393, 396–397 (D.C. Cir. 1998); *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission*, 969 F.2d 1141, 1144 (D.C. Cir. 1992); *New Jersey Department of Environmental Protection v. EPA*, 626 F.2d 1038, 1045 (D.C. Cir. 1980).[8] Be that as it may, they appear in the statute and cannot be disregarded. For example, section 553 does not apply to matters "relating to agency management or

[8] In *Utility Solid Waste Activities Group*, the court held that the "good cause" exemption in section 553(b) does not allow an agency to forego notice and comment when correcting a technical error in a regulation. 236 F.3d at 754–55. Likewise, the court held that agencies have no "inherent power" to correct such technical errors outside of the APA procedures. *Id.* at 752–54.

personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2).

Several agencies have published in the *Federal Register* a statement committing themselves to follow APA procedures with respect to matters that would otherwise be exempt from APA rulemaking. To the extent an agency has done this, it has voluntarily waived the benefit of the exemption and must follow the APA. *E.g.*, *Flagstaff Medical Center, Inc. v. Sullivan*, 962 F.2d 879, 886 (9th Cir. 1992); *Alcaraz v. Block*, 746 F.2d 593 (9th Cir. 1984); *Humana of South Carolina, Inc. v. Califano*, 590 F.2d 1070 (D.C. Cir. 1978); *Rodway v. Department of Agriculture*, 514 F.2d 809 (D.C. Cir. 1975); *Abbs v. Sullivan*, 756 F. Supp. 1172, 1188 (W.D. Wis. 1990); *Herron v. Heckler*, 576 F. Supp. 218 (N.D. Cal. 1983); *Ngou v. Schweiker*, 535 F. Supp. 1214 (D. D.C. 1982); B-202568, Sept. 11, 1981.[9] If an agency has not waived its exemption with respect to the specified matters, it need not follow the APA. *California v. EPA*, 689 F.2d 217 (D.C. Cir. 1982); *City of Grand Rapids v. Richardson*, 429 F. Supp. 1087 (W.D. Mich. 1977).[10]

Another significant exemption, found in 5 U.S.C. § 553(b), is for "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." Again, much litigation has ensued over whether a given regulation is "substantive" or "legislative," in which event section 553 applies, or whether it is "interpretative," in which event it does not. *See, e.g.*, *ANR Pipeline Co. v. Federal Energy Regulatory Commission*, 205 F.3d 403 (D.C. Cir. 2000); *Caruso v. Blockbuster-Sony Music Entertainment Centre at the Waterfront*, 193 F.3d 730 (3rd Cir. 1999); *Paralyzed Veterans of America v. District of Columbia Arena L.P.*, 117 F.3d 579 (D.C. Cir. 1997), *cert. denied*, 523 U.S. 1003 (1998); *Hoctor v. Department of Agriculture*, 82 F.3d 165 (7th Cir. 1996); *Health*

[9] An agency does not, however, waive the benefit of APA exemptions simply by following an informal practice of voluntarily issuing otherwise exempt regulations through APA notice and comment procedures. Such a practice does not estop the agency from later invoking the exemption. *See, e.g.*, *Malek-Marzban v. Immigration & Naturalization Service*, 653 F.2d 113 (4th Cir. 1981), discussed in section A.5 of this chapter.

[10] The exemption may be unavailable to particular agencies or programs, in whole or in part, by virtue of some other statute. For example, Congress has required the Department of Energy to follow the APA with respect to public property, loans, grants, or contracts, although the Department of Energy may waive notice and comment upon finding that strict compliance is likely to cause serious harm to the public health, safety, or welfare. 42 U.S.C. §§ 7191(b)(3), (e).

Insurance Association of America, Inc. v. Shalala, 23 F.3d 412 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1147 (1995); *American Mining Congress v. Mine Safety & Health Administration*, 995 F.2d 1106 (D.C. Cir. 1993).

The agency's own characterization of a regulation is the "starting point" for the analysis. *Professionals & Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995); *Metropolitan School District of Wayne Township, Marion County, Indiana v. Davila*, 969 F.2d 485, 489 (7th Cir. 1992), *cert. denied*, 507 U.S. 949 (1993). However, the agency's characterization, while relevant, is not controlling. *E.g.*, *Davila; General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1074 (1985); *American Frozen Food Institute, Inc. v. United States*, 855 F. Supp. 388, 396 (C.I.T. 1994) ("The court must focus on the intended legal effect of the rule adopted, not the stated intent of the agency, to determine whether a rule is legislative or interpretive.").

The case law is not entirely consistent in the criteria used to determine whether a regulation is legislative or interpretive. Professor Pierce points to the District of Columbia Circuit's decision in *American Mining Congress*, cited above, as an exemplary opinion that has been followed in several other circuits. Based largely on *American Mining Congress*, he recommends a test consisting of the following four questions:

> "(1) whether in the absence of the rule there would not be an adequate legislative basis for enforcement action or other agency action to confer benefits or ensure the performance of duties;
>
> (2) whether the legislative rule the agency is claiming to interpret is too vague or open-ended to support the interpretative rule;
>
> (3) whether the agency had explicitly invoked its legislative authority; or
>
> (4) whether the rule effectively amends a prior legislative rule."

If the answer to any of these questions is yes, the rule is legislative rather than interpretative. Richard J. Pierce, *Administrative Law Treatise*, § 6.4 at 345 (4th ed. 2000).[11]

While contests over the applicability of 5 U.S.C. § 553 frequently center on whether a regulation is legislative or interpretive, they can arise in many other contexts as well. Agency issuances may be called many things besides regulations: manuals, handbooks, instruction memoranda, *etc.* For purposes of determining applicability of the APA, the test is the substance and effect of the document rather than what the agency chooses to call it. *E.g.*, *Guardian Federal Savings & Loan Ass'n v. Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978); *Herron v. Heckler*, 576 F. Supp. at 230; *Saint Francis Memorial Hospital v. Weinberger*, 413 F. Supp. 323, 327 (N.D. Cal. 1976). As we will discuss later in this section and in section B of this chapter, a functional analysis of the nature of these varied agency issuances not only dictates whether APA rulemaking procedures apply to them, but also determines their legal effects on the agency and outside parties as well as the extent to which courts will defer to any statutory interpretations that they embody.

A regulation that is subject to 5 U.S.C. § 553, but which is issued in violation of the required procedures (including a nonexistent or inadequate preamble), stands an excellent chance of being invalidated. If so, the court may simply declare the regulation invalid, or "void." *E.g.*, *Chemical Manufacturers Ass'n v. EPA*, 28 F.3d 1259 (D.C. Cir. 1994); *W.C. v. Bowen*, 807 F.2d 1502 (9th Cir. 1987); *National Nutritional Foods Ass'n v. Mathews*, 557 F.2d 325, 338 (2nd Cir. 1977). In the alternative, the court may "vacate" the regulation and remand it to the agency for further proceedings in compliance with the APA, the extent of the further proceedings depending on the degree of noncompliance. *E.g.*, *Tabor v. Joint Board for Enrollment of Actuaries*, 566 F.2d 705, 712 (D.C. Cir. 1977); *Rodway v. Department of Agriculture*, 514 F.2d 809, 817 (D.C. Cir. 1975); *Detroit Edison Co. v. EPA*, 496 F.2d 244, 249 (6th Cir. 1974).

[11] Originally, Judge Stephen F. Williams, author of the *American Mining Congress* opinion, had included as an additional factor whether the rule was published in the C.F.R. However, Professor Pierce notes that Judge Williams greatly downplayed this factor in a subsequent opinion, noting that publication in the C.F.R. provides only a "snippet of evidence" that a rule is legislative. *See Health Insurance Association of America, Inc.*, 23 F.3d at 423. Professor Pierce likewise discounts this factor since many interpretative rules are published in the C.F.R. Pierce, *Administrative Law Treatise*, § 6.4 at 344–345.

Increasingly, however, courts decline to vacate defective regulations on remand if they conclude that the agency can fairly readily correct the deficiency or if other considerations militate against nullifying the regulation. *E.g.*, *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392 (9th Cir. 1995); *American Medical Ass'n v. Reno*, 57 F.3d 1129 (D.C. Cir. 1995); *Allied Signal, Inc. v. United States Nuclear Regulatory Commission*, 988 F.2d 146 (D.C. Cir. 1993); *Independent United States Tanker Owners Committee v. Dole*, 809 F.2d 847 (D.C. Cir.), *cert. denied*, 484 U.S. 819 (1987).[12] Finally, a court may sever the invalid portions of a regulation on remand and leave intact the portions of the regulation that are not affected by the reversal. *E.g.*, *Davis County Solid Waste Management v. EPA*, 108 F.3d 1454 (D.C. Cir. 1997).

c. Additional Requirements for Rulemaking

Within the context of APA rulemaking, Congress and the President have imposed a series of requirements that, in effect, regulate the regulators. For the most part, these requirements do not limit or otherwise affect the application of the APA.[13] Rather, they seek primarily to ensure that certain consequences of agency regulations—such as costs, benefits, and other impacts—are fully considered and explained as part of the normal APA rulemaking process.

The following are examples of some of these statutory requirements:

- *The National Environmental Policy Act*, 42 U.S.C. §§ 4321 *et seq.*, requires agencies to prepare an environmental impact statement for "major Federal actions [including regulations] significantly affecting the quality of the human environment . . ."

- *The Paperwork Reduction Act*, 44 U.S.C. §§ 3501 *et seq.*, generally requires agencies to provide 60 days advance notice and obtain

[12] Three recent cases illustrate the considerations courts apply in deciding what remedy is appropriate in the case of regulations found to be defective: *American Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1086 (D.C. Cir. 2001) (rule vacated); *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1380–81 (Fed. Cir. 2001) (rule not vacated); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1047–53 (D.C. Cir. 2002) (one rule before the court vacated; another not vacated).

[13] There are, however, a number of so-called "hybrid rulemaking" statutes that do directly affect the APA by imposing additional (or different) substantive or procedural requirements for certain regulations. Some of these statutes are listed in Pierce, *Administrative Law Treatise* § 7.7 at 486. They include the Occupational Safety and Health Act, the Consumer Product Safety Act, and the Toxic Substances Control Act of 1977.

approval from the Office of Management and Budget's Office of Information and Regulatory Affairs for regulations that involve the collection of information (including recordkeeping requirements) from 10 or more nonfederal persons. The Act requires the agency to demonstrate that the collection of information is needed for performance of the agency's functions and is not unnecessarily duplicative or burdensome.

- *The Regulatory Flexibility Act*, 5 U.S.C. §§ 601–612, requires agencies to conduct a "regulatory flexibility analysis" of proposed regulations that would have a significant economic impact on a substantial number of "small entities," for example, small businesses. The analysis must consider, among other things, alternative ways of accomplishing the objective of the regulation in a way that would minimize its impact on small entities.[14]

- *Title II of the Unfunded Mandates Reform Act*, 2 U.S.C. §§ 1531–1538, generally requires agencies to prepare a written assessment of the impact of a regulation containing a federal mandate that may impose costs in excess of $100 million per year on state, local, or tribal governments, or on the private sector.

- *The so-called "Congressional Review Act" (CRA)*, 5 U.S.C. §§ 801–808, requires agencies to submit a report on each final rule to Congress and to the Comptroller General before the rule takes effect.[15] The report is to include: a copy of the rule; a copy of any cost-benefit analysis of the rule; an explanation of any actions the agency has taken with respect to the Regulatory Flexibility Act and the Unfunded Mandates Reform Act, discussed above; and any actions the agency has taken with respect to other relevant statutes or relevant executive orders (some of which are mentioned hereafter). The Act defines "major rules" as, among other things, those having an annual economic impact of $100 million or

[14] The Act, originally enacted in 1980, was amended in 1996 to make certain agency actions subject to judicial review. *See* 5 U.S.C. § 611.

[15] The CRA, 5 U.S.C. § 804(3), generally applies the broad APA definition of rule in 5 U.S.C. § 551, and, therefore, is not limited to regulations that are subject to rulemaking under the APA. However, the CRA definition has its own exceptions, which are similar to some of the exemptions from rulemaking under the APA. For illustrative opinions on what agency issuances are or are not "rules" covered by the CRA, see B-292045, May 19, 2003, and B-281575, Jan. 20, 1999. The CRA also exempts from its coverage Federal Reserve System rules concerning monetary policy. 5 U.S.C. § 807.

more. 5 U.S.C. § 804(2). In the case of major rules, the agency generally must delay the effective date of the rule for 60 days pending congressional review. The Comptroller General must report to Congress on the agency's compliance with applicable procedural requirements with respect to each major rule. The CRA further provides expedited procedures whereby Congress may reject a rule submitted to it by enactment of a joint resolution of disapproval.[16]

Like Congress, Presidents have also imposed additional requirements governing various aspects of the rulemaking process, primarily by the use of executive orders. The following list is illustrative but by no means exhaustive:[17]

- *Executive Order No. 12630 ("Governmental Actions and Interference with Constitutionally Protected Property Rights")* prescribes policies and procedures to ensure that actions potentially impacting property rights in a manner requiring compensation under the Fifth Amendment are undertaken on a well-reasoned basis. 53 Fed. Reg. 8859 (Mar. 15, 1988), 5 U.S.C. § 601 note.

- *Executive Order No. 12866 ("Regulatory Planning and Review")* establishes a number of procedural and analytical requirements governing agency rulemaking, including review of certain rules by the Office of Management and Budget's Office of Information and Regulatory Affairs. 58 Fed. Reg. 51735 (Sept. 30, 1993), as amended by Exec. Order No. 13258, 67 Fed. Reg. 9385 (Feb. 28, 2002), 5 U.S.C. § 601 note.

- *Executive Order No. 12988 ("Civil Justice Reform")* promotes clear drafting of rules with respect to a number of legal issues in order to avoid burdening the courts with litigation over unnecessary ambiguities. For example, section 3(b)(2) of the order requires that rules specify in clear language what, if any, preemptive and retroactive

[16] The CRA's joint resolution disapproval mechanism, which requires either the President's signature or enactment over a presidential veto, has been used only once—to nullify, early in the George W. Bush Administration, an ergonomics regulation that was promulgated during the waning days of the Clinton Administration. *See* Pub. L. No. 107-5, 115 Stat. 7 (Mar. 20, 2001).

[17] This list includes several executive orders currently in effect that apply to broad categories of agency regulations. Other executive orders (and statutes) govern regulations in more discrete subject areas.

effects the rules should be given. It also requires that rules provide a clear legal standard of conduct for affected parties. 61 Fed. Reg. 4729 (Feb. 7, 1996), 28 U.S.C. § 519 note.

- *Executive Order No. 13132 ("Federalism")* sets policies and procedural requirements for regulations (and other agency actions) that have significant implications in relation to state and local governments. 64 Fed. Reg. 43255 (Aug. 10, 1999), 5 U.S.C. § 601 note.

- *Executive Order No. 13272 ("Proper Consideration of Small Entities in Agency Rulemaking")* establishes policies and procedures to facilitate compliance with the Regulatory Flexibility Act, discussed above. 67 Fed. Reg. 53461 (Aug. 16, 2002), 5 U.S.C. § 601 note.

2. Regulations May Not Exceed Statutory Authority

It is a fundamental proposition that agency regulations are bound by the limits of the agency's statutory and organic authority. An often quoted statement of the principle appears in the Supreme Court's decision in *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936):

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is not the power to make law—for no such power can be delegated by Congress—but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity."

This truism is reflected in a host of subsequent judicial and administrative decisions. *E.g.*, *Health Insurance Ass'n of America, Inc. v. Shalala*, 23 F.3d 412, 416 (D.C. Cir. 1994); *Killip v. Office of Personnel Management*, 991 F.2d 1564, 1569 (Fed. Cir. 1993), and cases cited. Thus, as the *Killip* court put it:

> "Though an agency may promulgate rules or regulations pursuant to authority granted by Congress, no such rule or

regulation can confer on the agency any greater authority than that conferred under the governing statute."[18]

To take an example of particular relevance to this publication, an agency may not expend public funds or incur a liability to do so based on a regulation, unless the regulation is implementing authority given to the agency by law. A regulation purporting to create a liability on the part of the government not supported by statutory authority is invalid and not binding on the government. *Atchison, Topeka & Santa Fe Railroad Co. v. United States*, 55 Ct. Cl. 339 (1920); *Holland-America Line v. United States*, 53 Ct. Cl. 522 (1918), *rev'd on other grounds*, 254 U.S. 148 (1920); *Illinois Central Railroad Co. v. United States*, 52 Ct. Cl. 53 (1917). *See also* B-201054, Apr. 27, 1981, discussed below. In other words, the authority to obligate or expend public funds cannot be created by regulation; Congress must confer that basic authority. *See also Harris v. Lynn*, 555 F.2d 1357 (8th Cir.), *cert. denied*, 434 U.S. 927 (1977) (agency cannot extend benefits by regulation to a class of persons not included within the authorizing statute); *Tullock v. State Highway Commission of Missouri*, 507 F.2d 712, 716–17 (8th Cir. 1974); *Pender Peanut Corp. v. United States*, 20 Cl. Ct. 447, 455 (1990) (monetary penalty not authorized by statute cannot be imposed by regulation).

Further illustrations may be found in the following decisions of the Comptroller General:

- Where the program statute provided that federal grants "shall be" a specified percentage of project construction costs, the grantor agency could not issue regulations providing a mechanism for reducing the grants below the specified percentage. 53 Comp. Gen. 547 (1974).

- Where a statute provided that administrative costs could not exceed a specified percentage of funds distributed to states under an allotment

[18] Obviously, this principle applies as well to agency issuances that do not even rise to the level of legislative regulations. If agency in-house publications are inconsistent with "governing statutes and regulations of the highest or higher dignity, *e.g.*, regulations published in the *Federal Register*, they do not bind the government, and persons relying on them do so at their peril." *Fiorentino v. United States*, 607 F.2d 963, 968 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1083 (1980). It is equally obvious that publishing an agency manual in accordance with the requirements of the APA cannot enhance the agency's status so as to permit it to create substantive rights in violation of a statute. *Hamlet v. United States*, 63 F.3d 1097, 1104–05 (Fed. Cir. 1995), *cert. denied*, 517 U.S. 1155 (1996).

formula, the administering agency could not amend its regulations to relieve states of liability for over expenditures or to raise the ceiling. B-178564, July 19, 1977, *aff'd* 57 Comp. Gen. 163 (1977).

- Absent a clear statutory basis, an agency may not issue regulations establishing procedures to accept government liability or to forgive indebtedness based on what it deems to be fair or equitable. B-201054, *supra*. *See also* B-118653, July 15, 1969.

See also B-288266, Jan. 27, 2003 (agencies should not incur obligations for food and light refreshments in reliance on a General Services Administration (GSA) travel regulation for which GSA has no authority); 62 Comp. Gen. 116 (1983); 56 Comp. Gen. 943 (1977); B-201706, Mar. 17, 1981.

3. "Force and Effect of Law"

A very long line of decisions holds that legislative or statutory regulations that are otherwise valid (*i.e.*, within the bounds of the agency's statutory authority) have the force and effect of law. *E.g.*, 53 Comp. Gen. 364 (1973); 43 Comp. Gen. 31 (1963); 37 Comp. Gen. 820 (1958); 33 Comp. Gen. 174 (1953); 31 Comp. Gen. 193 (1951); 22 Comp. Gen. 895 (1943); 15 Comp. Gen. 869 (1936); 2 Comp. Gen. 342 (1922); 21 Comp. Dec. 482 (1915); B-248439 *et al.*, Oct. 22, 1992. The thrust of these decisions is that the regulations are binding on all concerned, the issuing agency included, and that the agency cannot waive their application on an *ad hoc* or situational basis.

In *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), the Supreme Court provided detailed instruction as to when an agency regulation is entitled to the force and effect of law. The regulation "must have certain substantive characteristics and be the product of certain procedural requisites." 441 U.S. at 301. Specifically, the Court listed three tests that must be met:

- The regulation must be a substantive or legislative regulation affecting individual rights or obligations. Regulations that are interpretative only generally will not qualify.[19]

- The regulation must be issued pursuant to, and subject to any limitations of, a statutory grant of authority. For purposes of this test, 5 U.S.C. § 301 does not constitute a sufficient grant of authority. 441 U.S. at 309–11.

- The regulation must be issued in compliance with any procedural requirements imposed by Congress. This generally means the APA, unless the regulation falls within one of the exemptions previously discussed.[20]

A regulation that meets these three tests will be given the force and effect of law. A regulation with the force and effect of law is "binding on courts in a manner akin to statutes" (*Chrysler Corp.*, 441 U.S. at 308); it has the same legal effect "as if [it] had been enacted by Congress directly" (*Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380, 385 (1947)); it "is as binding on a court as if it were part of the statute" (*Joseph v. United States Civil Service Commission*, 554 F.2d at 1153); it is "as binding on the courts as any statute enacted by Congress" (*Production Tool Corp. v. Employment & Training Administration*, 688 F.2d at 1165). *See also Stinson v. United States*, 508 U.S. 36, 40–42 (1993).

This is strong language. It cautions a reviewing court (or reviewing administrative agency) not to substitute its own judgment for that of the

[19] This of course is the same distinction discussed earlier with respect to the applicability of informal rulemaking procedures under the Administrative Procedure Act (APA). It has been pointed out that the term "legislative" is preferable to "substantive" because the latter can become confused with another distinction occasionally encountered, substantive *versus* procedural, which has little value in the present context. A legislative rule may be procedural, and an interpretative rule may be substantive in the sense that it does not deal with an issue of procedure. *See Joseph v. United States Civil Service Commission*, 554 F.2d 1140, 1153 n.24 (D.C. Cir. 1977). Whichever term is used, the terminology can be misleading, as pointed out in *Production Tool Corp. v. Employment & Training Administration*, 688 F.2d 1161, 1166 (7th Cir. 1982). Indeed, any attempt to force fit the wide range of agency issuances into neat categories by using such labels appears problematic. *See generally* Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.1 ("What is a Rule") (4th ed. 2000).

[20] See, for example, B-226499, Apr. 1, 1987, holding that an unpublished notice purporting to amend a published regulation did not have the force and effect of law.

agency, and not to invalidate a regulation merely because it would have interpreted the law differently. A regulation with the force and effect of law is controlling, subject to the "arbitrary and capricious" standard of the APA (5 U.S.C. § 706). *Batterton v. Francis*, 432 U.S. 416, 425–26 (1977); *Georgia Pacific Corp. v. Occupational Safety & Health Administration*, 25 F.3d 999, 1003–1004 (11th Cir. 1994); *Metropolitan School District of Wayne Township, Marion County, Indiana v. Davila*, 969 F.2d 485, 490 (7th Cir. 1992); *Guardian Federal Savings & Loan Ass'n v. Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 664–65 (D.C. Cir. 1978).

A regulation will generally be found arbitrary and capricious—

> "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co., 463 U.S. 29, 43 (1983).

For cases applying the *Chrysler* standards in determining that various regulations do or do not have the force and effect of law, see *Qwest Communications International, Inc. v. FCC*, 229 F.3d 1172, 1180 (D.C. Cir. 2000); *United States v. Alameda Gateway Ltd.*, 213 F.3d 1161, 1168 (9th Cir. 2000); *Horner v. Jeffrey*, 823 F.2d 1521 (Fed. Cir. 1987); *St. Mary's Hospital, Inc. v. Harris*, 604 F.2d 407 (5th Cir. 1979); *Intermountain Forest Industry Ass'n v. Lyng*, 683 F. Supp. 1330 (D. Wyo. 1988).

4. Waiver of Regulations

When you ask whether an agency can waive a regulation, you are really asking to what extent an agency is bound by its own regulations. If a given regulation binds the issuing agency, then the agency should not be able to grant *ad hoc* waivers, unless the governing statute has given it that authority and the agency has built it into the regulation.

As discussed previously, a legislative regulation with the force and effect of law that was issued in compliance with the Administrative Procedure Act (APA) and the statute it implements clearly binds the issuing agency. The courts treat such a regulation essentially the same as a statute; thus, the agency cannot waive the regulation any more than it could waive the

statute. See section A.3 of this chapter and cases cited. The underlying philosophy—still valid—was expressed as follows in a 1958 GAO decision:

> "Regulations must contain a guide or standard alike to all individuals similarly situated, so that anyone interested may determine his own rights or exemptions thereunder. The administrative agency may not exercise discretion to enforce them against some and to refuse to enforce them against others."

37 Comp. Gen. 820, 821 (1958); *see also* B-243283.2, Sept. 27, 1991.[21]

Sometimes legislative regulations or the statutes they implement do explicitly authorize "waivers" in certain circumstances. Here, of course, the waiver authority is an integral part of the underlying statutory or regulatory scheme. Accordingly, courts give effect to such waiver provisions and, indeed, they may even hold that an agency's failure to consider or permit waiver is an abuse of discretion. However, the courts usually accord considerable deference to agency decisions on whether or not to grant discretionary waivers. For illustrative cases, see *People of the State of New York & Public Service Commission of the State of New York v. FCC*, 267 F.3d 91 (2nd Cir. 2001); *BellSouth Corporation v. FCC*, 162 F.3d 1215 (D.C. Cir. 1999); *Rauenhorst v. United States Department of Transportation*, 95 F.3d 715 (8th Cir. 1996).

[21] Of course, the government has "prosecutorial discretion" in deciding whether and how to pursue enforcement actions. *See* section B.4 of this chapter. This is different from the point being made in the text, which is that an agency cannot follow its regulation when it feels like it and not follow it when it does not feel like it.

While duly promulgated legislative regulations are almost always[22] held to be binding absent a statutory or regulatory provision for waiver, the results are much less definitive when one enters the realm of "nonlegislative" regulations and other agency issuances. As discussed previously, these may include regulations that were published in the *Federal Register* under APA procedures but which are classified as interpretative. They also include a variety of non-*Federal Register* documents, such as manuals, handbooks, and internal agency products, some of which may not amount to "regulations" in any obvious sense.

As a general proposition, nonlegislative regulations and other agency products do not impose legally binding obligations on the agencies that issue them any more than they impose legally enforceable rights or obligations on parties outside of the agency. This makes sense since, at least conceptually, nonlegislative products—in contrast to legislative regulations—by definition do not carry the force and effect of law. *See generally* Pierce, *Administrative Law Treatise* §§ 6.1 and 6.6.

Nonlegislative regulations are particularly open to waiver where the regulations are for the primary benefit of the agency and failure to follow them would not adversely affect private parties. *See*, *e.g.*, 60 Comp. Gen. 208, 210 (1981) (an agency could waive its internal guidelines prescribing the specific evidence required to demonstrate a grantee's financial responsibility when the agency was otherwise satisfied that the government's interests were adequately protected). An interesting variation occurred in *Health Systems Agency of Oklahoma*, *Inc. v. Norman*, 589 F.2d 486 (10th Cir. 1978). An application for designation as a health systems agency was submitted to the then Department of Health,

[22] *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970), is occasionally cited (and criticized) as an aberrant case in which the Supreme Court permitted an agency to ignore a legislative regulation. *See* Richard J. Pierce, Jr., *Administrative Law Treatise*, § 6.6 at 355 (4th ed. 2000). In *American Farm Lines*, the Court upheld the Interstate Commerce Commission's grant of an application for temporary operating authority notwithstanding that the application did not include all the specific information items required by the agency's regulations. However, it is not clear that the Court viewed the regulations as legislative or substantive in nature. Rather, the Court observed that the regulations were "not intended primarily to confer important procedural benefits upon individuals," but were "mere aids to the exercise of the agency's independent discretion." 397 U.S. at 538–39. The Court added that "there is no reason to exempt this case from the general principle that '[i]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it.'" *Id.* at 539 (citations omitted).

Education, and Welfare (HEW) 55 minutes past the deadline announced in the *Federal Register*, because the applicant's representative overslept. HEW refused to accept the application. Finding that the deadline was not statutory, that its purpose was the orderly transaction of business, and that internal HEW guidelines permitted some discretion in waiving the deadline, the court held HEW's refusal to be an abuse of discretion.

On the other hand, there is a substantial body of case law holding that agencies are bound by certain nonlegislative rules. The most significant line of cases here—*United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), and its progeny—are discussed later in this chapter.[23] These cases generally hold that agencies are bound by procedural requirements that they voluntarily impose on themselves when noncompliance with those requirements could prejudice individuals who are facing potential adverse action by the agency.

Beyond the *Accardi* line of cases, courts seem to assess the binding effect (if any) of nonlegislative pronouncements more generally in terms of whether the pronouncement amounts to a "regulation" by which the agency "intends" to be bound. *Thorpe v. Housing Authority of Durham*, 393 U.S. 268 (1969); *New England Tank Industries of New Hampshire, Inc. v. United States*, 861 F.2d 685 (Fed. Cir. 1988); *Fairington Apartments of Lafayette v. United States*, 7 Cl. Ct. 647 (1985).[24] Intent to be bound is ascertained by examining "the provision's language, its context, and any available extrinsic evidence." *Chiron Corp. & PerSeptive Biosystems, Inc. v. National Transportation Safety Board*, 198 F.3d 935, 944 (D.C. Cir. 1999); *Doe v. Hampton*, 566 F.2d 265, 281 (D.C. Cir. 1977). The Comptroller General likewise has rejected a "form over substance" approach that turns on what an agency chooses to call its regulation. As stated in one GAO decision:

> "That the Bureau's policy and procedure memoranda were never intended as 'regulations' is of no particular import

[23] See section C.4 of this chapter entitled "Regulations May Limit Discretion."

[24] In this specific context, the answer to that question determines only whether the pronouncement is binding on the agency. It does not necessarily follow that something found to be a regulation should have been published under APA procedures or that it has the force and effect of law on parties outside the agency. These are separate (although related) questions that have their own tests and standards.

since whether or not they are such must be determined by their operative nature."

43 Comp. Gen. 31, 34 (1963).

In assessing the binding nature of a nonlegislative regulation or other agency document, the language of the document itself is obviously an important starting point. *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 537–38 (D.C. Cir. 1986); *City of Williams v. Dombeck*, 151 F. Supp. 2d 9 (D.D.C. 2001). Other factors that may provide some indication of intent, although they are not dispositive, are whether the item has been published in the *Federal Register* (failure to do so suggests an intent that the item be nonbinding), and, more significantly, whether it has been published in the Code of Federal Regulations (under 44 U.S.C. § 1510, the C.F.R. is supposed to contain only documents with "legal effect"). *Brock*, 796 F.2d at 538–39.

For further reading on this interesting and still evolving topic of what agency products have binding effect, see: William R. Anderson, *Informal Agency Advice—Graphing the Critical Analysis*, 54 Admin. L. Rev. 595 (2002); Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 Admin. L. J. Am. U. 1 (1994); Joshua I. Schwartz, *The Irresistible Force Meets the Immovable Object: Estoppel Remedies for an Agency's Violation of Its Own Regulations or Other Misconduct*, 44 Admin. L. Rev. 653 (1992); Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own 'Laws,'* 64 Tex. L. Rev. 1 (1985); and Note, *Violations by Agencies of Their Own Regulations*, 87 Harv. L. Rev. 629 (1974).

5. Amendment of Regulations

It has long been recognized that the authority to issue regulations includes the authority to amend or revoke those regulations, at least prospectively. *E.g.*, 21 Comp. Dec. 482, 484 (1915). This commonsense proposition is reflected in the Administrative Procedure Act's (APA) definition of rulemaking as the "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). An amendment to a regulation, like the parent regulation itself, must of course remain within the bounds of the agency's statutory authority. B-221779, Mar. 24, 1986; B-202568, Sept. 11, 1981.

As the APA's definition of rulemaking makes clear, an amendment to a regulation is subject to the APA to the same extent as the parent regulation. Thus, if a regulation is required to follow the notice and comment

procedures of 5 U.S.C. § 553, an amendment or repeal of that regulation must generally follow the same procedures. *Utility Solid Waste Activities Group v. EPA*, 236 F.3d 749 (D.C. Cir. 2001); *Consumer Energy Council of America v. Federal Energy Regulatory Commission*, 673 F.2d 425, 446 (D.C. Cir. 1982), *aff'd and cert. denied*, 463 U.S. 1216 (1983); *Detroit Edison Co. v. EPA*, 496 F.2d 244 (6th Cir. 1974); *Citibank, Federal Savings Bank v. Federal Deposit Insurance Corp.*, 836 F. Supp. 3, 7 (D.D.C. 1993); B-221779, *supra*.

If a regulation is subject to the APA's informal rulemaking requirements, an unpublished agency document that purports to amend that regulation is invalid. *Utility Solid Waste Activities Group*, 236 F.3d at 754; *Fiorentino v. United States*, 607 F.2d 963, 968 (Ct. Cl. 1979), *cert. denied*, 444 U.S. 1083 (1980); 65 Comp. Gen. 439 (1986); B-226499, Apr. 1, 1987.

It is possible to have a regulation subject to 5 U.S.C. § 553 with an amendment to that regulation that falls within one of the exemptions, in which event the amendment need not comply with the APA procedures. *See Detroit Edison*, 496 F.2d at 245, 249; B-202568, Sept. 11, 1981; 5 Op. Off. Legal Counsel 104 (1981).

If a parent regulation is exempt from compliance with the APA but the agency has, without formally waiving the exemption, published it under APA procedures anyway, the voluntary compliance will not operate as a waiver. The agency may subsequently amend or repeal the regulation without following the APA. *Baylor University Medical Center v. Heckler*, 758 F.2d 1052 (5th Cir. 1985); *Malek-Marzban v. Immigration & Naturalization Service*, 653 F.2d 113 (4th Cir. 1981); *Washington Hospital Center v. Heckler*, 581 F. Supp. 195 (D.D.C. 1984). Thus, in *Malek-Marzban* the Immigration and Naturalization Service (INS) had issued a regulation without advance notice and comment, citing the "foreign affairs" exception from APA rulemaking requirements in 5 U.S.C. § 553(a)(1). The court held that the agency was not bound to follow APA rulemaking procedures in this case even though it had voluntarily used such procedures for past regulations that were likewise subject to the foreign affairs exception:

> "We are not persuaded by the petitioners' argument that the INS is estopped from asserting the foreign affairs exception because it has routinely complied with the APA rulemaking requirements in the past. Voluntarily submitting a policy decision involving a foreign affairs function to rulemaking

> procedures is commendable, but it does not restrict an agency's prerogatives when circumstances require swift action."

653 F.2d at 116.[25]

6. Retroactivity

A number of decisions have pointed out that amendments to regulations should be prospective only. *E.g.*, 35 Comp. Gen. 187 (1955); 32 Comp. Gen. 315 (1953); 2 Comp. Gen. 342 (1922); 21 Comp. Dec. 482 (1915). The theory is that amendments should not affect rights or reliance accruing under the old regulation. While these are still crucial concerns, the law is not quite that simple.

At the outset, it may be useful to understand the difference between "primary" and "secondary" retroactivity. Primary retroactivity changes the *past* legal consequences of past actions. Secondary retroactivity changes the *future* legal consequences of past actions. *See generally Bowen v. Georgetown University Hospital*, 488 U.S. 204, 219–20 (1988) (Justice Scalia, concurring).

To take a concrete illustration, when Individual Retirement Accounts (IRA) were first authorized, most people could take an income tax deduction for amounts deposited into an IRA, up to a statutory ceiling. A few years later, Congress changed the law to eliminate the deduction for persons covered by certain types of retirement plans. This is an example of secondary retroactivity. Persons affected by the amendment could no longer deduct IRA contributions in the future, but the deductions they had taken in the past were not affected. (A purely prospective amendment would have applied only to new IRAs opened on or after the effective date of the amendment.) If Congress had attempted to invalidate deductions taken prior to the amendment, this would have been primary retroactivity.

Although statutes are generally presumed to operate prospectively, Congress has the authority to make its laws retroactive (in both the primary and the secondary sense) subject, of course, to such constitutional limitations as due process, the impairment of contracts, and the prohibition

[25] Cases such as *Malek-Marzban* are distinguishable from those discussed previously in section A.1.b of this chapter. The section A.1.b cases involve situations in which an agency formally waived the benefit of APA exemptions for its regulations.

against "*ex post facto*" laws.[26] The same cannot be said of agency regulations.

There is no blanket prohibition on secondary retroactivity in agency regulations, subject to the "arbitrary or capricious" standard of the APA. *See Bowen*, 488 U.S. at 220; *Celtronix Telemetry v. FCC*, 272 F.3d 585 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 923 (2002); *United States Airwaves, Inc. v. FCC*, 232 F.3d 227 (D.C. Cir. 2000). With respect to primary retroactivity, however, the *Bowen* Court held that:

> "[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms."

Id. at 208. *See also Orrego v. 833 West Buena Joint Venture*, 943 F.2d 730, 736 (7th Cir. 1991).

The *Bowen* decision has been criticized, but it has never been overruled. *See* Richard J. Pierce, Jr., *Administrative Law Treatise* § 6.7 (4th ed. 2000 & 2003 Supp.). Thus, agencies generally cannot engage in rulemaking that involves primary retroactivity without specific statutory authority. There may be some room for exceptions even from the strict proscription of the *Bowen* rule, based on a balancing of interests in a particular case. *See Bowen*, 488 U.S. at 224–25; *Citizens to Save Spencer County v. EPA*, 600 F.2d 844, 879–81 (D.C. Cir. 1979); *Saint Francis Memorial Hospital v. Weinberger*, 413 F. Supp. 323, 332–33 (N.D. Cal. 1976). Reduced stringency may also be appropriate in the case of a policy statement,[27] or certain interpretative rules.[28] Furthermore, rules that are held to merely clarify prior rules do not run afoul of the Bowen prohibition against retroactivity. *See Clay v. Johnson*, 264 F.3d 744 (7th Cir. 2001).

[26] See Chapter 2, section D.5 for a discussion of retroactivity with respect to statutes.

[27] *E.g.*, *Iowa Power & Light Co. v. Burlington Northern, Inc.*, 647 F.2d 796, 812 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

[28] *E.g.*, *Farmers Telephone Co. v. FCC*, 184 F.3d 1241 (10th Cir. 1999); *Caterpillar Tractor Co. v. United States*, 589 F.2d 1040, 1043 (Ct. Cl. 1978); *but see Health Insurance Ass'n of America v. Shalala*, 23 F.3d 412 (D.C. Cir. 1994).

The prohibition on retroactivity in rulemaking does not apply to adjudication. *Bowen*, 488 U.S. at 220–21 (concurring opinion). In the context of adjudication, retroactivity is measured against a standard of reasonableness and a balancing of interests. *E.g.*, *Laborers' International Union of North America*, *AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375 386–395 (3rd Cir.), *cert. denied*, 513 U.S. 946 (1994); *Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Commission*, 606 F.2d 1094, 1116 n.77 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 920 (1980) and 447 U.S. 922 (1980); *NLRB v. Majestic Weaving Co.*, 355 F.2d 854 (2nd Cir. 1966); *Shell Oil Co. v. Kleppe*, 426 F. Supp. 894, 908 (D. Colo. 1977). As suggested above, the extent to which a balancing approach might justify exceptions from the *Bowen* rule with respect to regulations remains to be determined.

B. Agency Administrative Interpretations

> "There is more ado to interpret interpretations than to interpret the things, and more books upon books than upon all other subjects; we do nothing but comment upon one another."

Michel Eyquem, seigneur de Montaigne, *Book iii*, *Chap. xiii*, *Of Experience.*

> "We begin our analysis with the language of the exemption itself which, at the critical part, is as clear as mud."

In re Whalen, 73 B.R. 986, 988 (C.D. Ill. 1987).

1. Interpretation of Statutes

The interpretation of a statute, by regulation or otherwise, by the agency Congress has charged with the responsibility for administering it, is entitled to considerable weight. This principle is really a matter of common sense. An agency that works with a program from day to day develops an expertise that should not be lightly disregarded. Even when dealing with a new law, Congress does not entrust administration to a particular agency without reason, and this decision merits respect. This, in addition to

fundamental fairness, is why GAO considers it important to obtain agency comments wherever possible before rendering a decision.[29]

In the often-cited case of *Udall v. Tallman*, 380 U.S. 1, 16 (1965), the Supreme Court stated the principle this way:

> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."

In what is now recognized as one of the key cases in determining how much "deference" is due an agency interpretation, *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Court formulated its approach to deference in terms of two questions. The first question is "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If it has, the agency must of course comply with clear congressional intent, and regulations to the contrary will be invalidated. Thus, before you ever get to questions of deference, it must first be determined that the regulation is not contrary to the statute, a question of delegated authority rather than deference. "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Id.* at 843 n.9.

Once you cross this threshold, that is, once you determine that "the statute is silent or ambiguous with respect to the specific issue," the question becomes "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. The Court went on to say:

> "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.

[29] GAO's desire for agency comments applies to audit reports as well as legal decisions. However, in view of the fundamental differences between the two products, the process differs. For GAO's policy for audit reports, see U.S. General Accounting Office, *GAO's Agency Protocols*, GAO-03-232SP (Washington, D.C.: Dec. 2, 2002). For a legal decision, GAO's typical practice is to solicit the agency's position on the legal issue(s) involved before a draft is ever written. A "development letter" is used to document facts, refine legal issues, and obtain the agency's perspective on the law and its implementation. Accordingly, draft legal decisions are not submitted for comment.

> Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."

Id. at 843–44 (footnotes omitted).

Reiterating the traditional deference concept, the Court then said that the proper standard of review is not whether the agency's construction is "inappropriate," but merely whether it is "a reasonable one." *Id.* at 844–45.

When the agency's interpretation is in the form of a regulation with the force and effect of law, the deference, as we have seen, is at its highest.[30] The agency's position is entitled to *Chevron* deference and should be upheld unless it is arbitrary or capricious. There should be no question of substitution of judgment. If the agency position can be said to be reasonable or to have a rational basis within the statutory grant of authority, it should stand, even though the reviewing body finds some other position preferable. *See Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36 (2002); *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 20–21 (2000); *American Telephone & Telegraph Corp. v. Iowa Utility Board*, 525 U.S. 366 (1999). *Chevron* deference is also given to authoritative agency positions in formal adjudication. *See Immigration & Naturalization Service v. Aguirre-Aguirre*, 526 U.S. 415 (1999) (holding that a Bureau of Indian Affairs statutory interpretation developed in case-by-case formal adjudication should be accorded *Chevron* deference). For an extensive list of Supreme Court cases giving *Chevron* deference to agency statutory interpretations found in rulemaking or formal adjudication, see *United States v. Mead Corp.*, 533 U.S. 218, 231 at n.12 (2001).

When the agency's interpretation is in the form of an interpretative regulation, manual, handbook, *etc.*—anything short of a regulation with the

[30] "When Congress has 'explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation,' and any ensuing regulation is binding in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001), quoting *Chevron*, 467 U.S. at 843–44.

force and effect of law or formal adjudication—the standard of review has traditionally been somewhat lessened, and it is here that the question of deference really comes into play. In the past, deference in this context has not been a fixed concept, but has been variable, depending on the interplay of several factors.[31] The Supreme Court explained the approach as follows in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944):

> "We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority [*i.e.*, the statements in question were not regulations with the force and effect of law], do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

Courts have found that the degree of weight to be given an agency administrative interpretation varies with several factors:

- The nature and degree of expertise possessed by the agency. *Barnhart v. Walton*, 535 U.S. 212 (2002); *Batterton v. Francis*, 432 U.S. at 425 n.9; *NLRB v. Oklahoma Fixture Co.*, 332 F.3d 1284 (10th Cir. 2003); *Schuetz v. Banc One Mortgage Corp.*, 292 F.3d 1004, 1012 (9th Cir. 2002); *Herman v. Springfield Massachusetts Area, Local 497, American Postal Workers Union, AFL-CIO*, 201 F.3d 1, 5 (1st Cir. 2000).

[31] The basic premise that an agency interpretation is entitled to some largely undefined degree of deference had consistently been espoused by the Supreme Court for well over a century and a half. *See, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 315 (1979); *Batterton v. Francis*, 432 U.S. 416, 424–25 (1977); *General Electric Co. v. Gilbert*, 429 U.S. 125, 141 (1976) (referring to the quoted passage from Skidmore, infra text, as the "most comprehensive statement of the role of interpretative rulings"); *United States v. Philbrick*, 120 U.S. 52, 59 (1887); *Hahn v. United States*, 107 U.S. 402, 406 (1882); *United States v. Pugh*, 99 U.S. 265, 269 (1878); *United States v. Moore*, 95 U.S. 760, 763 (1877); *Edwards' Lessee v. Darby*, 25 U.S. (12 Wheat.) 206, 210 (1827).

- The duration and consistency of the interpretation. *Good Samaritan Hospital v. Shalala*, 508 U.S. 402, 417 (1993); *Chrysler Corp.*, 441 U.S. at 315; *Batterton*, 432 U.S. at 425 n.9; *Skidmore*, 323 U.S. at 140; *Zeigler Coal Co. v. Director, Office of Workers' Compensation Programs, Department of Labor*, 326 F.3d 894, 901 (7th Cir. 2003); *Herman*, 201 F.3d at 5; *United States v. Occidental Chemical Corp.*, 200 F.3d 143, 151–52 (1999); *Reich v. Gateway Press*, 13 F.3d 685, 692–93 (1994); B-284610, Mar. 3, 2000. While consistency may not always be a virtue, inconsistency will not help your case in court. *See Equal Employment Opportunity Commission v. Arabian American Oil Co.*, 499 U.S. 244 (1991) (superseded by statute); *Immigration & Naturalization Service v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987).

- The soundness and thoroughness of reasoning underlying the position. *Skidmore*, 323 U.S. at 140; *Arriaga v. Florida Pacific Farms, L.L.C.*, 305 F.3d 1228, 1239 (11th Cir. 2002).

- Evidence (or lack thereof) of congressional awareness of, and acquiescence in, the administrative position. *United States v. American Trucking Ass'n*, 310 U.S. 534, 549–50 (1940); *Helvering v. Winmill*, 305 U.S. 79, 82–3 (1938); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 313–15 (1933); *Collins v. United States*, 946 F.2d 864 (Fed. Cir. 1991); *Davis v. Director, Office of Workers' Compensation Programs, Department of Labor*, 936 F.2d 1111, 1115–16 (10th Cir. 1991); 41 Op. Att'y Gen. 57 (1950); B-114829-O.M., July 17, 1974.

"[I]ncreasingly muddled" Supreme Court decisions on the scope of Chevron have left unclear the amount of deference due less formal pronouncements like interpretive rules and informal adjudications.[32] In 2000, the Supreme Court appeared to resolve the issue of how much deference was due these less formal pronouncements. The Court distinguished less formal pronouncements that "lack the force of law" from statutory interpretations in legislative rules and formal adjudications, holding that actions other than orders that are issued through use of the notice and comment procedure are only entitled to *Skidmore* deference. *Christensen v. Harris County*, 529 U.S. 576 (2000). However, the Supreme Court later retreated from this position in *Mead Corp.*, 533 U.S. 218, holding that *Chevron* deference may

[32] Richard J. Pierce, Jr., *Administrative Law Treatise*, 10 (4th ed. 2003 Supp.).

extend to statutory interpretations beyond those contained in legislative rules and adjudications where there is "a comparable congressional intent" to give such interpretations the force of law.

More recent decisions further indicate that *Chevron* deference may extend beyond legislative rules and formal adjudications. Most notably, the Supreme Court observed in *dicta* in *Barnhart v. Walton*, 535 U.S. at 222, that *Mead Corp.* "denied [any] suggestion" in *Christensen* that *Chevron* deference was limited to interpretations adopted through formal rulemaking. The *Barnhart* opinion went on to say that:

> "In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency interpretation here at issue."

Id. at 222.[33]

At least one court has viewed this passage from *Barnhart* as suggesting a merger between *Chevron* deference and the *Skidmore* approach of varying the deference an agency receives based on a number of factors. *See Krzalic v. Republic Title Co.*, 314 F.3d 875, 878–79 (7th Cir. 2002), *cert. denied*, ___ U.S. ___, 123 S. Ct. 2641 (2003).

Circuit court decisions have added to the confusion. *See James v. Von Zemenszky*, 301 F.3d 1364 (Fed. Cir. 2002) (ignoring *Barnhart* factors because the agency statutory interpretation contained in a directive and handbook "f[e]ll within the class of informal agency interpretations that do not ordinarily merit *Chevron* deference"); *Federal Election Commission v. National Rifle Ass'n*, 254 F.3d 173 (D.C. Cir. 2001) (holding that Federal Election Committee (FEC) advisory opinions are entitled to *Chevron* deference); *Matz v. Household International Tax*

[33] Justice Scalia, in his separate opinion in *Barnhart*, and other commentators have criticized this statement as unnecessary and indicated that this statement may pose a new but imprecise test for the applicability of *Chevron*. *See Barnhart*, 535 U.S. at 226 (Scalia, J., concurring); Pierce, *Administrative Law Treatise*, at 8.

Reduction Investment Plan, 265 F.3d 572 (7th Cir. 2001) (holding that an Internal Revenue Service (IRS) statutory interpretation in an *amicus* brief, supported by an IRS Revenue Ruling and agency manual, was not entitled to *Chevron* deference); *Klinedinst v. Swift Investments, Inc.*, 260 F.3d 1251 (11th Cir. 2001) (holding that a Department of Labor handbook was not due *Chevron* deference); *Teambank v. McClure*, 279 F.3d 614 (8th Cir. 2001) (holding that Office of the Controller of the Currency informal adjudications are due *Chevron* deference); *In re Sealed Case*, 223 F.3d 775 (D.C. Cir. 2000) (holding that FEC's probable cause determinations are entitled to *Chevron* deference). As Professor Pierce notes:

> "After *Mead*, it is possible to know only that legislative rules and formal adjudications are always entitled to *Chevron* deference, while less formal pronouncements like interpretative rules and informal adjudications may or may not be entitled to *Chevron* deference. The deference due a less formal pronouncement seems to depend on the results of judicial application of an apparently open-ended list of factors that arguably qualify as 'other indication[s] of a comparable congressional intent' to give a particular type of agency pronouncement the force of law."[34]

For illustrations of how GAO has applied the deference principle in recent decisions, see:

- 69 Comp. Gen. 274 (1990) (holding that the Defense Personnel Support Center's long-standing interpretation of a Department of Defense appropriation act provision is entitled to deference).

- B-290744, Sept. 13, 2002 (declining to apply *Chevron* or *Skidmore* deference to the Federal Highway Administration's interpretation of a statute because the interpretation was not a reasonable construction of the statute).

- B-288658, Nov. 30, 2001 (finding that neither *Chevron* nor *Skidmore* deference was due a Department of Agriculture interpretation of a statute because the agency interpretation did not derive from a rulemaking or adjudication and generally lacked "persuasive weight").

[34] Pierce, *Administrative Law Treatise*, at 6–7.

- B-286800, Feb. 21, 2001 (finding that a Department of Defense interpretation of its regulation deserves great weight, that the agency's interpretation of its regulations was reasonable, and viewing as significant the fact that the agency was consistent in its interpretation).

- B-286661, Jan. 19, 2001 (declining to apply principle of deference to a Department of Energy statutory interpretation because it was not based on a reasonable interpretation of the statute).

- B-286026, June 12, 2001 (applying *Chevron* deference to Office of Personnel Management's guidance on the Government Employees Training Act).

- B-285066.2, Aug. 9, 2000 (applying *Chevron* deference to Department of Housing and Urban Development's interpretation of the Operation Safe Home appropriation as making funds available for gun buybacks).

In the past, an agency's litigating position was not accorded any deference unless that position was also expressed in the regulations, rulings, or administrative practice of the agency. *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212 (1988). Some recent cases, however, have given some deference to an agency's statutory interpretation developed only in the course of litigation. For example, in *Brown v. United States*, 327 F.3d 1198 (D.C. Cir. 2003), the court did not reach the question of whether an agency's statutory interpretation developed in the course of litigation was due *Chevron* deference, holding that the interpretation prevailed under *Skidmore*. *See also Vernazza v. SEC*, 327 F.3d 851 (9th Cir. 2003) (agency's statutory interpretation advanced in enforcement action is not entitled to *Chevron* deference, but is entitled to *Skidmore* deference); *Chao v. Russell P. Le Frois Builder, Inc.*, 291 F.3d 219 (2nd Cir. 2002) (holding that the Secretary of Labor's statutory interpretation set forth only in litigation was not due *Chevron* deference, but merited *Skidmore* deference).

The deference principle does not apply to an agency's interpretation of a statute that is not part of its program or enabling legislation or is a statute of general applicability. *See Adams v. SEC*, 287 F.3d 183 (D.C. Cir. 2002); *Contractor's Sand & Gravel v. Federal Mine Safety & Health Commission*, 199 F.3d 1335 (D.C. Cir. 2000); *Association of Civilian Technicians v. Federal Labor Relations Authority*, 200 F.3d 590 (9th Cir. 2000).

As noted above, a regulation with the force and effect of law merits *Chevron* deference. In this connection, it is necessary to elaborate somewhat on one of the tests in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979)—that the regulation be issued pursuant to a statutory grant of 'legislative' (*i.e.*, rulemaking) authority. How specific must the statutory delegation be? *Chrysler* itself provides somewhat conflicting signals. In one place, in the course of listing the three tests for determining if a regulation has the force and effect of law, the Court gives as an example the proxy rules of the Securities and Exchange Commission (SEC). *Chrysler*, 441 U.S. at 302–03. These are issued under the explicit delegation of 15 U.S.C. § 78n, which authorizes the SEC to issue proxy rules. Yet in another place, the Court said:

> "This is not to say that any grant of legislative authority to a federal agency by Congress must be specific before regulations promulgated pursuant to it can be binding on courts in a manner akin to statutes. What is important is that the reviewing court reasonably be able to conclude that the grant of authority contemplates the regulations issued."

Chrysler, 441 U.S. at 308.

While a court is certainly more likely to find that *Chevron* deference is due when the delegation of authority is specific, courts have also found that more general delegations are entitled to *Chevron* deference. *See United States v. Haggar Apparel Co.*, 526 U.S. 380 (1999) (holding that *Chevron* deference was due to a Customs Service regulation interpreting a statute that required the Court of International Trade to "reach the correct decision" in determining the proper classification of goods). A good example is the deference that courts have accorded to IRS regulations. The Secretary of the Treasury has general authority to "prescribe all needful rules and regulations" to administer the Internal Revenue Code. 26 U.S.C. § 7805. In addition, various other provisions of the Internal Revenue Code authorize the issuance of regulations dealing with specific topics. Regulations issued under the general authority of 26 U.S.C. § 7805—statutory though they may be—are not given the force and effect of law, and have often been accorded less deference than regulations issued under one of the more specific provisions. *See United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 24 (1982); *Rowan Cos. v. United States*, 452 U.S. 247, 252–53 (1981); *E. Norman Peterson Marital Trust v. Commissioner of Internal Revenue*, 78 F.3d 795, 798 (2nd Cir. 1996); *Nalle v. Commissioner of Internal Revenue*, 997 F.2d 1134, 1138 (5th Cir. 1993); *McDonald v.*

Commissioner of Internal Revenue, 764 F.2d 322, 328 (5th Cir. 1985); *Gerrard v. United States Office of Education*, 656 F. Supp. 570, 574 n.4 (N.D. Cal. 1987); *Lima Surgical Associates, Inc. v. United States*, 20 Cl. Ct. 674, 679 n.8 (1990). In some recent cases, however, courts have given *Chevron* deference to IRS regulations issued through notice and comment rulemaking under the general authority of section 7805. *Atlantic Mutual Insurance Co. v. Commissioner of Internal Revenue*, 523 U.S. 382 (1998); *Kikalos v. Commissioner of Internal Revenue*, 190 F.3d 791 (7th Cir. 1999); *Redlark v. Commissioner of Internal Revenue*, 141 F.3d 936 (9th Cir. 1998); *Bankers Life & Casualty Co. v. United States*, 142 F.3d 973 (7th Cir. 1998); *Tate & Lyle, Inc. v. Commissioner of Internal Revenue*, 87 F.3d 99 (3rd Cir. 1996).

We began this chapter by noting the increasing role of agency regulations in the overall scheme of federal law. We conclude this discussion with the observation that this enhanced role makes continued litigation on the issues we have outlined inevitable. The proliferation and complexity of case law perhaps lends credence to Professor Davis's mild cynicism:

> "Unquestionably one of the most important factors in each decision on what weight to give an interpretative rule is the degree of judicial agreement or disagreement with the rule."[35]

2. Interpretation of Agency's Own Regulations

The principle of giving considerable deference to the administering agency's interpretation of a statute applies at least with equal force to an agency's interpretation of its own regulations. The *Udall v. Tallman Court*, after making the statement quoted at the beginning of this section, went on to state that "[w]hen the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order." *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

Perhaps the strongest statement is found in a 1945 Supreme Court decision, *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413–14:

> "Since this involves an interpretation of an administrative regulation a court must necessarily look to the

[35] 2 *Administrative Law Treatise* § 7:13 (2nd ed. 1979).

> administrative construction of the regulation if the meaning of the words used is in doubt. The intention of Congress or the principles of the Constitution in some situations may be relevant in the first instance in choosing between various constructions. But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[36]

A good illustration of how all of this can work is found in B-222666, Jan. 11, 1988. The Defense Security Assistance Agency (DSAA) is responsible for issuing instructions and procedures for Foreign Military Sales (FMS) transactions. These appear in the Security Assistance Management Manual. A disagreement arose between DSAA and an Army operating command as to whether certain "reports of discrepancy," representing charges for nonreceipt by customers, should be charged to the FMS trust fund (which would effectively pass the losses on to all FMS customers) or to Army appropriated funds. DSAA took the latter position. GAO reviewed the regulation in question, and found it far from clear on this point. The decision noted that "both of the conflicting interpretations in this case appear to have merit, and both derive support from portions of the regulation." However, while the regulation may have been complex, the solution to the problem was fairly simple. DSAA wrote the regulation and GAO, citing the standard from the *Bowles* case, could not conclude that DSAA's position was plainly erroneous or inconsistent with the regulation. Therefore, DSAA's interpretation must prevail. *See Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87 (1995); *Thomas Jefferson University v. Shalala*, 512 U.S. 504 (1994); *Stinson v. United States*, 508 U.S. 36 (1993); *Williams v. United States*, 503 U.S. 193 (1992); *Immigration & Naturalization Service v. Stanisic*, 395 U.S. 62, 72 (1969); *Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5th Cir. 2003); *Tozzi v. Department of Health & Human Services*, 271 F.3d 301 (D.C. Cir. 2001); *Legal Environmental Assistance Foundation v. EPA*, 276 F.3d 1253 (11th Cir. 2001); 72 Comp. Gen. 241 (1993); 57 Comp. Gen. 347 (1978); 56 Comp. Gen. 160 (1976); B-279250 (May 26, 1998). *See also McLean Hospital Corp. v. United States*, 26 Cl. Ct. 1144 (1992) (holding that an agency

[36] While this determines the controlling interpretation, the propriety of that interpretation does not automatically follow. As the Court went on to caution in the very next sentence, "[t]he legality of the result reached by this process, of course, is quite a different matter." *Bowles*, 325 U.S. at 414.

interpretation of a regulation is not entitled to deference when it violates the plain meaning of the regulation).

Just as with the interpretation of statutes, inconsistency in the application of a regulation will significantly diminish the deference courts are likely to give the agency's position. *E.g.*, *Western States Petroleum Ass'n v. EPA*, 87 F.3d 280 (9th Cir. 1996); *Murphy v. United States*, 22 Cl. Ct. 147, 154 (1990).

Several recent court decisions have held that agency interpretations of regulations are subject to some degree of deference even if they derive from "mere litigating positions" rather than formal rules or adjudications. *See Auer v. Robbins*, 519 U.S. 452 (1997); *Bigelow v. Department of Defense*, 217 F.3d 875 (D.C. Cir. 2000), *cert. denied*, 532 U.S. 971 (2001); *National Wildlife Federation v. Browner*, 127 F.3d 1126 (D.C. Cir. 1997); *Bradberry v. Director, Office of Workers' Compensation, Department of Labor*, 117 F.3d 1361 (11th Cir. 1997). In this context, some courts have begun to refer to "*Auer* deference." *See Christensen v. Harris County*, 529 U.S. 576, 577 (2000); *Moore v. Hannon Food Service*, 317 F.3d 489, 494–95 (5th Cir. 2003); *League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1189 (9th Cir. 2002); *Drake v. Federal Aviation Administration*, 291 F.3d 59, 68 (D.C. Cir. 2002). *See also Wells Fargo Bank of Texas v. James*, 321 F.3d 488, 494 (5th Cir. 2003) ("*Auer v. Robbins* offer[s] the standard to be used where an agency interprets its own regulation."). In order to warrant *Auer* deference, the text of a regulation must fairly support the agency's interpretation. *See Christiansen*, 529 U.S. at 577; *Drake*, 291 F.3d at 68; *Wells Fargo Bank of Texas v. James*, 321 F.3d at 494; *Ashtabula County Medical Center v. Thompson*, 191 F. Supp. 2d 884, 888 (N.D. Ohio 2002). Thus, *Auer* will not apply if the plain and unambiguous language of the regulation is at odds with the agency's interpretation. In such a case, the agency's "interpretation" really amounts to a *de facto* amendment of the regulation.

In limited contexts, some recent court decisions have suggested that a somewhat lesser degree of deference than that in *Bowles* applies to agency interpretations of their regulations. For example, a series of decisions have applied a lesser degree of deference to ambiguous agency regulations. *See Director, Office of Workers' Compensation Programs, Department of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Mission Group Kansas, Inc. v. Riley*, 146 F.3d 775 (10th Cir. 1998). Another line of circuit court decisions accords less deference to agency interpretations of regulations that impose penalties. *See Walker Stone Co. v. Secretary of*

Labor, 156 F.3d 1076 (10th Cir. 1998); *Stillwater Mining Co. v. Federal Mine Safety & Health Review Commission*, 142 F.3d 1179 (9th Cir. 1998); *United States v. Chrysler Corp.*, 158 F.3d 1350 (D.C. Cir. 1998); *United States v. Apex Oil Co.*, 132 F.3d 1287 (9th Cir. 1997).

C. Administrative Discretion

> "[S]ome play must be allowed to the joints if the machine is to work."

Tyson & Brother v. Banton, 273 U.S. 418, 446 (1927) (Justice Holmes, dissenting).

1. Introduction

Throughout this publication, the reader will encounter frequent references to administrative discretion. The concept of discretion implies choice or freedom of judgment, and appears in a variety of contexts. There are many things an agency does every day that involve making choices and exercising discretion.

One type of discretion commonly occurs in the context of purpose availability. A decision may conclude that an appropriation is legally available for a particular expenditure if the agency, in its discretion, determines that the expenditure is a suitable means of accomplishing an authorized end.

To put this another way, there is often more than one way to do something, and reasonable minds may differ as to which way is the best. The thing to keep in mind from the legal perspective is that if a given choice is within the actor's legitimate range of discretion, then, whatever else it may be, it is not illegal. For example, as we will see in Chapter 4, an agency has discretionary authority to provide refreshments at award ceremonies under the Government Employees Incentive Awards Act, 31 U.S.C. §§ 4501–4507. Agency A may choose to do so while agency B chooses not to. Under this type of discretion, agency B's reasons are irrelevant. It may simply not want to spend the money. As a matter of law, both agencies are correct.

Another type of discretion is implicit in all of the preceding discussions of agency regulations. This type occurs when Congress charges an agency with responsibility for implementing a program or statute, but leaves much of the detail to the agency. In the course of carrying out the program or

statute, the agency may be required to make various decisions, some of which may be expressly committed to agency discretion by the governing statute. Subject to certain fundamental concepts of administrative law, the agency is free to make those decisions in accordance with the sound exercise of discretion. *See Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843–844, 865–66 (1984).

Under the Administrative Procedure Act (APA), action that is "committed to agency discretion by law" is not subject to judicial review. 5 U.S.C. § 701(a)(2). As the Supreme Court has pointed out, this is a "very narrow exception" applicable in "rare instances" where, quoting from the APA's legislative history, "statutes are drawn in such broad terms that in a given case there is no law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). As noted, the "no law to apply" exception is uncommon, and most exercises of discretion will be found reviewable at least to some extent.[37] *See Drake v. Federal Aviation Administration*, 291 F.3d 59 (D.C. Cir. 2002); *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002); *City of Los Angeles v. Department of Commerce*, 307 F.3d 859 (9th Cir. 2002); *Diebold v. United States*, 947 F.2d 787 (6th Cir. 1992).

This being said, however, the presumption of reviewability is at its strongest in constitutional and *habeas corpus* matters. As Professor Pierce has noted, *Overton Park* is the "high water mark of the Court's presumption of reviewability" and "[s]ubsequent decisions have both weakened the presumption where it continues to exist and narrowed the scope of the presumption."[38] For demonstrations of the weakening of the presumption of reviewability, see:

- *Shalala v. Illinois Council on Long Term Care, Inc.*, 529 U.S. 1 (2000) (debating whether there is a "presumption in favor of preenforcement review" or a presumption against preclusion of all review);

[37] However, agency inaction in declining to initiate enforcement or other regulatory action is subject to "a presumption of unreviewability," although that presumption is rebuttable. *Heckler v. Chaney*, 470 U.S. 821 (1985). Another obvious exception is if a statute explicitly precludes judicial review. *See Jordan Hospital, Inc. v. Shalala*, 276 F.3d 72 (1st Cir. 2002); *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092 (D.C. Cir. 2001) (construction of World War II memorial); *Ismailov v. Reno*, 263 F.3d 851 (8th Cir. 2001) (refusal to extend deadline for asylum application).

[38] Richard J. Pierce, Jr., *Administrative Law Treatise*, 1269–70 (4th ed. Supp. 2003).

- *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994) (holding that a comprehensive administrative review procedure under the Federal Mine Safety and Health Amendments Act revealed a congressional intent to preclude judicial review);

- *Dalton v. Specter*, 511 U.S. 462 (1994) ("where, as here, a statute commits decisionmaking to the President's discretion, judicial review of his decision is not available");

- *Lincoln v. Vigil*, 508 U.S. 182 (1993) (holding that allocation of funds under a lump-sum appropriation is traditionally committed to agency discretion and, therefore, not subject to judicial review under the APA absent more specific restrictions);

- *Lopez v. Federal Aviation Administration*, 318 F.3d 242 (D.C. Cir. 2003) and *Steenholdt v. Federal Aviation Administration*, 314 F.3d 633 (D.C. Cir. 2003) (holding that the Federal Aviation Administration's (FAA) rescission or nonrenewal of designation of individuals to inspect aircraft is committed to agency discretion by law and nonreviewable under a statute that allows FAA to rescind such a designation "at any time for any reason the Administrator considers appropriate").

At this point, we should emphasize that these introductory comments are largely oversimplified; they are intended merely to lay a foundation for a discussion of the principles that follow.

2. Discretion Is Not Unlimited

To say that an agency has freedom of choice in a given matter does not mean that there are no limits to that freedom. Discretion is not unbridled license. The decisions have frequently pointed out that discretion means legal discretion, not unlimited discretion. The point was stated as follows in 18 Comp. Gen. 285, 292 (1938):

> "Generally, the Congress in making appropriations leaves largely to administrative discretion the choice of ways and means to accomplish the objects of the appropriation, but, of course, administrative discretion may not transcend the statutes, nor be exercised in conflict with law, nor for the accomplishment of purposes unauthorized by the appropriation …."

See also 72 Comp. Gen. 310, 311 (1993); 35 Comp. Gen. 615, 618 (1956); 4 Comp. Gen. 19, 20 (1924); 7 Comp. Dec. 31 (1900); 5 Comp. Dec. 151 (1898); B-253338, Nov. 23, 1993; B-130288, Feb. 27, 1957; B-49169, May 5, 1945; A-24916, Nov. 5, 1928.

In *Lincoln v. Vigil*, 508 U.S. 182 (1993), the Supreme Court concluded that, absent statutory elaboration, decisions about how to allocate funds within a lump-sum appropriation are committed to agency discretion by law. The Court noted that "the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way." *Id.* at 191. Therefore, the Court held that judicial review of the agency's decision to discontinue a program that had been previously funded through a lump-sum appropriation was precluded. (See Chapter 6 for a more detailed discussion of the availability of appropriations.) *See also* 55 Comp. Gen. 307 (1975); B-278121, Nov. 7, 1997.

Discretion must be exercised before the obligation is incurred. Approval after the fact is merely a condoning of what has already been done and does not constitute the exercise of discretion. 22 Comp. Gen. 1083 (1943); 14 Comp. Gen. 698 (1935); A-57964, Jan. 30, 1935. (This point should not be confused with an agency's occasional ability to ratify an otherwise unauthorized act. See, for example, the discussion of *quantum meruit* claims in Chapter 12 in Volume III of the second edition of *Principles of Federal Appropriations Law*.)

One way to illustrate the concept of "legal discretion" is to visualize a person standing in the center of a circle. The circumference of the circle represents the limits of discretion, imposed either by law or by the difficult to define but nonetheless real concept of "public policy."[39] The person is free to move in any direction, to stay near the center or to venture close to the perimeter, even to brush against it, but must stay within the circle. If our actor crosses the line of the circumference, he has exceeded or, to use the legal term, "abused" his discretion.

When GAO is performing its audit function, it may criticize a particular exercise of discretion as ill-conceived, inefficient, or perhaps wasteful.

[39]*See, e.g.*, *L'Orange v. Medical Protective Co.*, 394 F.2d 57 (6th Cir. 1968) (court may invalidate an act as "contrary to public policy" in the sense of being "injurious to the public," even where the act may not be expressly prohibited by statute).

From the legal standpoint, however, there is no illegal expenditure as long as the actor remains within the circle. We may also note that the size of the circle may vary. For example, as we will see in Chapter 14 (Volume III of the third edition of *Principles of Federal Appropriations Law*), government corporations frequently have a broader range of discretion than noncorporate agencies.

When Congress wishes to confer discretion unrestrained by other law, its practice has been to include the words "notwithstanding the provisions of any other law" or similar language. 14 Comp. Gen. 578 (1935). Even this is not totally unfettered, however. For example, even this broad authority would not, at least as a general proposition, be sufficient to permit violation of the criminal laws. Also, agency power to act is always bound by the Constitution. Short of an amendment to the Constitution itself, no statute, however explicit, can be construed to authorize constitutional violations.

In addition, depending on the context and circumstances, federal laws of general applicability may be found to remain applicable. *See District of Columbia Federation of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1265 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 1030 (1972) (provision of Federal-Aid Highway Act directing construction of a bridge "notwithstanding any other provision of law" did not render inapplicable certain federal statutes regarding protection of historic sites); B-290125.2, B-290125.3, Dec. 18, 2002 (finding that statutory directions governing certain aspects of an agency procurement "notwithstanding any other provision of law" do not override GAO's bid protest jurisdiction under the Competition in Contracting Act).

An example of a statute permitting action without regard to other laws is 50 U.S.C. § 1431, under which the President may authorize an agency with national defense functions to enter into or modify contracts "without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever he deems that such action would facilitate the national defense." Provisions of this type are not self-executing but contemplate specific administrative determinations in advance of the proposed action. In other words, the "other provisions of law" continue to apply unless and until waived by an authorized official. 35 Comp. Gen. 545 (1956). *See also* 22 Comp. Gen. 400 (1942).

3. Failure or Refusal to Exercise Discretion

Where a particular action or decision is committed to agency discretion by law, the agency is under a legal duty to actually exercise that discretion. In one line of cases, the principle has evolved that the failure or refusal to exercise discretion committed by law to the agency is itself an abuse of discretion. As the following cases demonstrate, the fact of exercising discretion and the particular results of that exercise are two very different things.

We start with a Supreme Court decision, *Work v. United States ex rel. Rives*, 267 U.S. 175 (1925). That case involved section 5 of the Dent Act, ch. 94, 40 Stat. 1272, 1274 (Mar. 2, 1919), under which Congress authorized the Secretary of the Interior to compensate a class of people who incurred losses in furnishing supplies or services to the government during World War I. The Secretary's determinations on particular claims were to be final and conclusive. The statute "was a gratuity based on equitable and moral considerations" (*id.* at 181), vesting the Secretary with the ultimate power to determine which losses should be compensated.

The plaintiff in *Rives* had sought *mandamus* to compel the Secretary to consider and allow a claim for a specific loss incurred as a result of the plaintiff's obtaining a release from a contract to buy land. The Secretary had previously denied the claim because he had interpreted the statute as not embracing money spent on real estate. In holding that the Secretary had done all that was required by law, the Court cited and distinguished a line of cases—

> "in which a relator in mandamus has successfully sought to compel action by an officer who has discretion concededly conferred on him by law. The relator [plaintiff] in such cases does not ask for a decision any particular way but only that it be made one way or the other."

Id. at 184.

The Secretary had made a decision on the claim, had articulated reasons for it, and had not exceeded the bounds of his statutory authority. That was enough. A court could compel the Secretary to actually exercise his discretion, that is, to act on a claim one way or the other, but could not compel him to exercise that discretion to achieve a particular result.

In *Simpkins v. Davidson*, 302 F. Supp. 456 (S.D. N.Y. 1969), the plaintiff sued to compel the Small Business Administration (SBA) to make a loan to him. The court found that the plaintiff was entitled to submit an application, and to have the SBA consider that application and reach a decision on whether or not to grant the loan. However, he had no right to the loan itself, and the court could not compel the SBA to exercise its discretion to achieve a specific result. A very similar case on this point is *Dubrow v. Small Business Administration*, 345 F. Supp. 4 (C.D. Cal. 1972). *See also* B-226121-O.M., Feb. 9, 1988, citing and applying these cases.

Another case involved a provision of the Farm and Rural Development Act that authorized the Secretary of Agriculture to forgo foreclosure on certain delinquent loans. The plaintiffs were a group of farmers who alleged that the Secretary had refused to consider their requests. The district court held that the Secretary was required to consider the requests. *Matzke v. Block*, 542 F. Supp. 1107 (D. Kans. 1982). "When discretion is vested in an administrative agency, the refusal to exercise that discretion is itself an abuse of discretion." *Id.* at 1115. The Court of Appeals for the Tenth Circuit affirmed that portion of the decision in *Matzke v. Block*, 732 F.2d 799 (10th Cir. 1984), stating at page 801:

> "The word 'may,' the Secretary 'may' permit deferral, is, in our view, a reference to the discretion of the Secretary to grant the deferral upon a showing by a borrower. It does not mean as the Secretary argues that he has the discretion whether or not to implement the Act at all and not to consider any 'requests' under the statutory standards."

The Comptroller General applied these principles in 62 Comp. Gen. 641 (1983). The Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721, gives agencies discretionary authority to consider and settle certain employee personal property claims. An agency asked whether it had discretion to adopt a policy of refusing all claims submitted to it under the Act. No, the concept of administrative discretion does not extend that far, replied the Comptroller. While GAO would not purport to tell another agency which claims it should or should not consider—that part was discretionary—the decision noted that "a blanket refusal to consider all claims is, in our opinion, not the exercise of discretion" (*id.* at 643), and held "that an agency has the duty to actually exercise its discretion and that this duty is not satisfied by a policy of refusing to consider all claims" (*id.* at 645). Thus, for example, an agency would be within its discretion to make and announce a policy decision not to consider claims of certain

types, such as claims for stolen cash, or to impose monetary ceilings on certain types of property, or to establish a minimum amount for the filing of claims. What it cannot do is disregard the statute in its entirety.

Additional cases illustrating this concept are *California v. Settle*, 708 F.2d 1380 (9th Cir. 1983); *Rockbridge v. Lincoln*, 449 F.2d 567 (9th Cir. 1971); and *Jacoby v. Schuman*, 568 F. Supp. 843 (E.D. Mo. 1983).

Several other cases, however, have suggested that the refusal of an agency to consider the exercise of its discretion will be subject to judicial review only where that refusal stems from a legal error by the agency (*e.g.*, the agency wrongly concludes that it lacks jurisdiction or authority to exercise discretion) or where its refusal to exercise discretion can be tied to a statutory or constitutional violation. *See Immigration & Naturalization Service v. St. Cyr*, 533 U.S. 289, 307 (2001); *Gutierrez-Chavez v. Immigration & Naturalization Service*, 298 F.3d 824 (9th Cir. 2002); *Byrd v. Moore*, 252 F. Supp. 2d 293 (W.D. N.C. 2003).

4. Regulations May Limit Discretion

By issuing regulations, an agency may voluntarily (and perhaps even inadvertently) limit its own discretion. A number of cases have held that an agency must comply with its own regulations, even if the action is discretionary by statute.

The leading case is *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954). The Attorney General had been given statutory discretion to suspend the deportation of aliens under certain circumstances, and had, by regulation, given this discretion to the Board of Immigration Appeals. The Supreme Court held that, regardless of what the situation would have been if the regulations did not exist, the Board was required under the regulations to exercise its own judgment, and it was improper for the Attorney General to attempt to influence that judgment, in this case, by issuing a list of "unsavory characters" he wanted to have deported. "In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner." *Id.* at 267. Of course, the Attorney General could always amend his regulations, but an amendment could operate prospectively only.

Awards under the Government Employees Incentive Awards Act, 5 U.S.C. §§ 4501–4507, as we will discuss in Chapter 4, are wholly discretionary. In a 1982 decision, GAO reviewed Army regulations which provided that "awards will be granted" if certain specified criteria were met, and noted

that the Army had circumscribed its own discretion by committing itself to make an award if those conditions were met. B-202039, May 7, 1982. Reviewing Air Force regulations under similar legislation applicable to military personnel, the Court of Claims noted in *Griffin v. United States*, 215 Ct. Cl. 710, 714 (1978):

> "Thus, we think that the Secretary may have originally had uncontrolled and unreviewable discretion … but as he published procedures and guidelines, as he received responsive suggestions, as he implemented them and through his subordinates passed upon compensation claims, we think by his choices he surrendered some of his discretion, and the legal possibility of abuse of discretion came into the picture."

Another group of cases in this category are those, previously noted in section A.1 of this chapter, in which an agency has waived an exemption from the APA and was held bound by that waiver.

For additional authority on the proposition that an agency can, by regulation, restrict otherwise discretionary action, see *United States v. Nixon*, 418 U.S. 683 (1974); *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Service v. Dulles*, 354 U.S. 363 (1957); *United States v. Morgan*, 193 F.3d 252 (4th Cir. 1999); Clarry v. United States, 85 F.3d 1041 (2nd Cir. 1996); *Waldron v. Immigration & Naturalization Service*, 17 F.3d 511, 519 (2nd Cir. 1994); *Montilla v. Immigration & Naturalization Service*, 926 F.2d 162 (2nd Cir. 1991); 67 Comp. Gen. 471 (1988).

Recent case law has recognized a number of limits, caveats, and nuances to the *Accardi* doctrine. While there are occasional exceptions, the doctrine generally will not be applied to bind an agency by its informal rules, policies, or other issuances that the court concludes are intended to provide internal guidance rather than to confer rights or benefits on the public. *See Farrell v. Department of the Interior*, 314 F.3d 584, 591 (Fed. Cir. 2002) (holding that agency statement that was not formally promulgated is not binding on the agency unless the agency intended to be bound by it). Even if a court concludes that a rule, or policy document, is binding on the agency under *Accardi*, the court may not invalidate the agency action if it concludes that the departure from the rule was nonprejudicial or "harmless error." *See Wilkinson v. Legal Services Corp.*, 27 F. Supp. 2d 32 (D.D.C. 1998). In addition, the courts are very reluctant to apply *Accardi* to criminal proceedings or exercises of prosecutorial-type discretion such as

an agency decision not to initiate an enforcement action. *See Carranza v. Immigration & Naturalization Service*, 277 F.3d 65, 68 (1st Cir. 2002); *United States v. Lee*, 274 F.3d 485 (8th Cir. 2001); *United States v. Shakir*, 113 F. Supp. 2d 1182 (M.D. Tenn. 2000); *United States v. Briscoe*, 69 F. Supp. 2d 738, 747 (D. V.I. 1999), *aff'd*, 234 F.3d 1266 (3rd Cir. 2000); *Nichols v. Reno*, 931 F. Supp. 748 (D. Colo. 1996); *Walker v. Reno*, 925 F. Supp. 124 (N.D. N.Y. 1995).

5. Insufficient Funds

Congress occasionally legislates in such a manner as to restrict its own subsequent funding options. An example is contract authority, described in Chapter 2. Another example is entitlement legislation not contingent upon the availability of appropriations. A well-known example here is social security benefits. Where legislation creates, or authorizes the administrative creation of, binding legal obligations without regard to the availability of appropriations, a funding shortfall may delay actual payment but does not authorize the administering agency to alter or reduce the "entitlement."

In the far more typical situation, however, Congress merely enacts a program and authorizes appropriations. For any number of reasons—budgetary constraints, changes in political climate, *etc.*—the actual funding may fall short of original expectations. What is an agency to do when it finds that it does not have enough money to accommodate an entire class of beneficiaries? Obviously, it can ask Congress for more. However, as any program administrator knows, asking and getting are two different things. If the agency cannot get additional funding and the program legislation fails to provide guidance, there is solid authority for the proposition that the agency may, within its discretion, establish reasonable classifications, priorities, and/or eligibility requirements, as long as it does so on a rational and consistent basis.[40]

The concept was explained by the Supreme Court in *Morton v. Ruiz*, 415 U.S. 199, 230–31 (1974), a case involving an assistance program administered by the Bureau of Indian Affairs (BIA):

[40] Even under an entitlement program, an agency could presumably meet a funding shortfall by such measures as making prorated payments, but such actions would be only temporary pending receipt of sufficient funds to honor the underlying obligation. The recipient would remain legally entitled to the balance.

> "[I]t does not necessarily follow that the Secretary is without power to create reasonable classifications and eligibility requirements in order to allocate the limited funds available to him for this purpose. [Citations omitted.] Thus, if there were only enough funds appropriated to provide meaningfully for 10,000 needy Indian beneficiaries and the entire class of eligible beneficiaries numbered 20,000, it would be incumbent upon the BIA to develop an eligibility standard to deal with this problem, and the standard, if rational and proper, might leave some of the class otherwise encompassed by the appropriation without benefits. But in such a case the agency must, at a minimum, let the standard be generally known so as to assure that it is being applied consistently and so as to avoid both the reality and the appearance of arbitrary denial of benefits to potential beneficiaries."

In *Suwannee River Finance, Inc. v. United States*, 7 Cl. Ct. 556 (1985), the plaintiff sued for construction differential subsidy payments under the Merchant Marine Act, administered by the Maritime Administration (MarAd). In response to a sudden and severe budget reduction, MarAd had cut off all subsidies for nonessential changes after a specified date, and had notified the plaintiff to that effect. Noting that "[a]fter this budget cut, MarAd obviously could no longer be as generous in paying subsidies as it had been before," the court held MarAd's approach to be "a logical, effective and time-honored method for allocating the burdens of shrinking resources" and well within its administrative discretion. *Id.* at 561.

Another illustration is *Ramah Navajo School Board v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), concerning the Secretary of the Interior's allocation of funds to Indian tribes where an appropriations shortfall prevented the full allocation contemplated by the authorizing statute. The court held that the Secretary's determination of how to allocate funds in the face of a funding shortfall was subject to judicial review, reversing the district court's opinion that had relied on *Lincoln v. Vigil*, and that the Secretary had exceeded his statutory authority. For additional case law on this point, see *Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054 (10th Cir. 2002); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Secretary, Department of Health & Human Services*, 279 F.3d 660 (9th Cir. 2002); *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999).

An illustration from the Comptroller General's decisions is B-202568, Sept. 11, 1981. Due to a severe drought in the summer of 1980, the Small Business Administration (SBA) found that its appropriation was not sufficient to meet demand under the SBA's disaster loan program. Rather than treating applicants on a "first come, first served" basis, SBA amended its regulations to impose several new restrictions, including a ceiling of 60 percent of actual physical loss. GAO reviewed SBA's actions and found them completely within the agency's administrative discretion.

In a 1958 case, Congress had, by statute, directed the Interior Department to transfer $2.5 million from one appropriation to another. Congress had apparently been under the impression that the "donor" account contained a sufficient unobligated balance. The donor account in fact had ample funds if both obligated and unobligated funds were counted, but had an unobligated balance of only $1.3 million. The Interior Department was in an impossible position. It could not liquidate obligations in both accounts. If it transferred the full $2.5 million, some valid obligations under the donor appropriation would have to wait; if it transferred only the unobligated balance, it could not satisfy the entire obligation under the receiving account. First, GAO advised that the transfer would not violate the Antideficiency Act (31 U.S.C. § 1341) since it was not only authorized but directed by statute. As to which obligation should be liquidated first—that is, which could be paid immediately and which would have to await a supplemental appropriation—the best answer GAO could give was that "the question is primarily for determination administratively." In other words, there was no legally mandated priority, and all the agency could do was use its best judgment. GAO added, however, that it might be a good idea to first seek some form of congressional clarification. 38 Comp. Gen. 93 (1958).

An early case, 22 Comp. Dec. 37 (1915), considered the concept of prorating. Congress had appropriated a specific sum for the payment of a designated class of claims against the Interior Department. When all claims were filed and determined, the total amount of the allowed claims exceeded the amount of the appropriation. The question was whether the amount appropriated could be prorated among the claimants.

The Comptroller of the Treasury declined to approve the prorating, concluding that "action should be suspended until Congress shall declare its wishes by directing a pro rata payment …or by appropriating the additional amount necessary to full payment." *Id.* at 40. If the decision was saying merely that the agency should attempt to secure additional funds—or at least explore the possibility—before taking administrative action that would

reduce payments to individual claimants, then it is consistent with the more recent case law and remains valid to that extent. If, however, it was suggesting that the agency lacked authority to prorate without specific congressional sanction, then it is clearly superseded by *Morton v. Ruiz* and the other cases previously cited. There is no apparent reason why prorating should not be one of the discretionary options available to the agency along with the other options discussed in the various cases. It has one advantage in that each claimant will receive at least something.

A conceptually related situation is a funding shortfall in an appropriation used to fund a number of programs. Again, the agency must allocate its available funds in some reasonable fashion. Mandatory programs take precedence over discretionary ones.[41] Within the group of mandatory programs, more specific requirements should be funded first, such as those with specific time schedules, with remaining funds then applied to the more general requirements. B-159993, Sept. 1, 1977; B-177806, Feb. 24, 1978 (nondecision letter). These principles apply equally, of course, to the allocation of funds between mandatory and nonmandatory expenditures within a single-program appropriation. *E.g.*, 61 Comp. Gen. 661, 664 (1982).

Other cases recognizing an agency's discretion in coping with funding shortfalls are *City of Los Angeles v. Adams*, 556 F.2d 40, 49–50 (D.C. Cir. 1977), and *McCarey v. McNamara*, 390 F.2d 601 (3rd Cir. 1968).

[41] A "mandatory program," as we use the term here, should not be confused with the entitlement programs previously noted. A mandatory program is simply one that Congress directs (rather than merely authorizes) the agency to conduct, but within the limits of available funding. Entitlement programs would take precedence over these mandatory programs.

Availability of Appropriations: Purpose

A. General Principles 4-6
1. Introduction: 31 U.S.C. § 1301(a) 4-6
2. Determining Authorized Purposes 4-9
a. Statement of Purpose 4-9
b. Specific Purpose Stated in Appropriation Act 4-11
3. New or Additional Duties 4-14
4. Termination of Program 4-17
a. Termination Desired 4-17
b. Reauthorization Pending 4-18
B. The "Necessary Expense" Doctrine 4-19
1. The Theory 4-19
a. Relationship to the Appropriation 4-22
b. Expenditure Otherwise Prohibited 4-27
c. Expenditure Otherwise Provided For 4-29
2. General Operating Expenses 4-30
a. Training 4-30
b. Travel 4-31
c. Postage Expenses 4-32
d. Books and Periodicals 4-33
e. Miscellaneous Items Incident to the Federal Workplace 4-33
C. Specific Purpose Authorities and Limitations 4-35
1. Introduction 4-35
2. Attendance at Meetings and Conventions 4-36
a. Government Employees 4-37
(1) Statutory framework 4-37
(2) Inability to attend 4-40
(3) Federally sponsored meetings 4-41
(4) Rental of space in District of Columbia 4-42
(5) Military personnel 4-43
b. Nongovernment Personnel 4-44
(1) 31 U.S.C. § 1345 4-44
(2) Invitational travel 4-47
(3) Use of grant funds 4-50
3. Attorney's Fees 4-51
a. Introduction 4-51
b. Hiring of Attorneys by Government Agencies 4-52
c. Suits Against Government Officers and Employees 4-55
d. Suits Unrelated to Federal Employees 4-67
e. Claims by Federal Employees 4-68
(1) Discrimination proceedings 4-68
(2) Other employee claims 4-70
f. Criminal Justice Act 4-74

(1) Types of actions covered 4-75
(2) Miscellaneous cases 4-76
g. Equal Access to Justice Act 4-77
h. Contract Matters 4-82
(1) Bid protests 4-82
(2) Contract disputes 4-84
i. Public Participation in Administrative Proceedings: Funding of Intervenors 4-85
4. Compensation Restrictions 4-92
a. Dual Compensation 4-93
b. Employment of Aliens 4-93
c. Forfeiture of Annuities and Retired Pay 4-96
(1) General principles 4-96
(2) The Alger Hiss case 4-97
(3) Types of offenses covered 4-98
(4) Related statutory provisions 4-99
5. Entertainment—Recreation—Morale and Welfare 4-100
a. Introduction 4-100
(1) Application of the rule 4-101
(2) What is entertainment? 4-102
b. Food for Government Employees 4-103
(1) Working at official duty station under unusual conditions 4-104
(2) Government Employees Training Act 4-107
(3) Award ceremonies 4-116
(4) Cafeterias and lunch facilities 4-119
c. Entertainment for Government Employees Other Than Food 4-120
(1) Miscellaneous cases 4-120
(2) Cultural awareness programs 4-120
d. Entertainment of Nongovernment Personnel 4-123
e. Recreational and Welfare Facilities for Government Personnel 4-126
(1) The rules: older cases and modern trends 4-126
(2) Child care 4-130
f. Reception and Representation Funds 4-135
6. Fines and Penalties 4-140
7. Firefighting and Other Municipal Services 4-146
a. Firefighting Services: Availability of Appropriations 4-146
b. Federal Fire Prevention and Control Act of 1974 4-150
c. Other Municipal Services 4-151
8. Gifts and Awards 4-155

a. Gifts 4-155
b. Contests 4-161
(1) Entry fees 4-161
(2) Government-sponsored contests 4-162
c. Awards 4-164
9. Guard Services: Anti-Pinkerton Act 4-171
a. Evolution of the Law Prior to 57 Comp. Gen. 524 4-171
b. 57 Comp. Gen. 524 and the Present State of the Law 4-174
10. Insurance 4-175
a. The Self-Insurance Rule 4-175
b. Exceptions to the Rule 4-179
(1) Departments and agencies generally 4-179
(2) Government corporations 4-183
c. Specific Areas of Concern 4-183
(1) Property owned by government contractors 4-183
(2) Use of motor vehicles 4-184
(3) Losses in shipment 4-186
(4) Bonding of government personnel 4-187
11. Lobbying and Related Matters 4-188
a. Introduction 4-188
b. Penal Statutes 4-189
c. Appropriation Act Restrictions 4-196
(1) Origin and general considerations 4-196
(2) Self-aggrandizement 4-199
(3) Covert propaganda 4-202
(4) Pending legislation: overview 4-203
(5) Cases involving “grassroots” lobbying violations 4-207
(6) Pending legislation: cases in which no violation was f ound 4-210
(7) Pending legislation: Providing assistance to private lobbying groups 4-213
(8) Promotion of legislative proposals: Prohibited activity short of grass roots lobbying 4-215
(9) Dissemination of political or misleading information . 4-218
d. Lobbying with Grant Funds 4-219
e. Informational Activities 4-227
f. Advertising and the Employment of Publicity Experts 4-229
(1) Commercial advertising 4-229
(2) Advertising of government programs, products, or services 4-230
(3) Publicity experts 4-232
12. Membership Fees 4-234

a. 5 U.S.C. § 5946 4-234
b. Attorneys 4-240
13. Personal Expenses and Furnishings 4-242
a. Introduction 4-242
b. Business or Calling Cards 4-243
c. Health, Medical Care and Treatment 4-245
(1) Medical care 4-245
(2) Purchase of health-related items 4-250
(3) The Rehabilitation Act 4-253
d. Office Furnishings (Decorative Items) 4-256
e. Personal Qualification Expenses 4-258
f. Photographs 4-261
g. Seasonal Greeting Cards and Decorations 4-262
(1) Greeting cards 4-262
(2) Seasonal decorations 4-263
h. Traditional Ceremonies 4-263
i. Wearing Apparel 4-265
j. Miscellaneous Personal Expenses 4-271
(1) Commuting and parking 4-271
(2) Flexiplace 4-273
(3) Miscellaneous employee expenses 4-274
14. Rewards 4-276
a. Rewards to Informers 4-276
(1) Reward as “necessary expense” 4-276
(2) Payments to informers: Internal Revenue Service 4-278
(3) Payments to informers: Customs Service 4-280
b. Missing Government Employees 4-281
c. Lost or Missing Government Property 4-282
d. Contractual Basis 4-283
e. Rewards to Government Employees 4-285
15. State and Local Taxes 4-286
a. Introduction 4-286
b. Tax on Business Transactions Where the Federal Government Is a Party 4-289
(1) General principles 4-289
(2) Public utilities 4-295
c. Property-Related Taxes 4-296
d. Taxes Paid by Federal Employees 4-301
(1) Parking taxes 4-302
(2) Hotel and meal taxes 4-303
(3) Tolls 4-305
(4) State and local income withholding taxes 4-306

(5) Possessory interest taxes 4-306
(6) Occupational license fees 4-306
e. Refund and Recovery of Tax Improperly Paid 4-307
16. Telephone Services 4-308
a. Telephone Service to Private Residences 4-308
(1) The statutory prohibition and its major exception 4-308
(2) Funds to which the statute applies 4-310
(3) What is a private residence? 4-311
(4) Application of the general rule 4-312
(5) Exceptions 4-314
b. Long-distance Calls 4-319
c. Mobile or Cellular Phones 4-319

Availability of Appropriations: Purpose

A. General Principles

1. Introduction: 31 U.S.C. § 1301(a)

This chapter introduces the concept of the "availability" of appropriations. The decisions are often stated in terms of whether appropriated funds are or are not "legally available" for a given obligation or expenditure. This is simply another way of saying that a given item is or is not a legal expenditure. Whether appropriated funds are legally available for something depends on three things:

1. the purpose of the obligation or expenditure must be authorized;

2. the obligation must occur within the time limits applicable to the appropriation; and

3. the obligation and expenditure must be within the amounts Congress has established.

Thus, there are three elements to the concept of availability: purpose, time, and amount. All three must be observed for the obligation or expenditure to be legal. Availability as to time and amount will be covered in Chapters 5 and 6. This chapter discusses availability as to purpose.

One of the fundamental statutes dealing with the use of appropriated funds is 31 U.S.C. § 1301(a):

> "Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law."

Simple, concise, and direct, this statute was originally enacted in 1809 (ch. 28, § 1, 2 Stat. 535, (Mar. 3, 1809)) and is one of the cornerstones of congressional control over the federal purse. Because money cannot be paid from the Treasury except under an appropriation (U.S. Const. art. I, § 9, cl. 7), and because an appropriation must be derived from an act of Congress, it is for Congress to determine the purposes for which an appropriation may be used. Simply stated, 31 U.S.C. § 1301(a) says that public funds may be used only for the purpose or purposes for which they were appropriated. It prohibits charging authorized items to the wrong appropriation, and unauthorized items to any appropriation. Anything less

would render congressional control largely meaningless. An earlier Treasury Comptroller was of the opinion that the statute did not make any new law, but merely codified what was already required under the Appropriations Clause of the Constitution. 4 Lawrence, First Comp. Dec. 137, 142 (1883).

Administrative applications of the purpose statute can be traced back almost to the time the statute was enacted. See, for example, 36 Comp. Gen. 621, 622 (1957), which quotes part of a decision dated February 21, 1821. In an 1898 decision captioned "Misapplication of Appropriations," the Comptroller of the Treasury talked about 31 U.S.C. § 1301(a) in these terms:

> "It is difficult to see how a legislative prohibition could be expressed in stronger terms. The law is plain, and any disbursing officer disregards it at his peril."

4 Comp. Dec. 569, 570 (1898).

The starting point in applying 31 U.S.C. § 1301(a) is that, absent a clear indication to the contrary, the common meaning of the words in the appropriation act and the program legislation it funds governs the purposes to which the appropriation may be applied. To illustrate, the Comptroller General held in 41 Comp. Gen. 255 (1961) that an appropriation available for the "replacement" of state roads damaged by nearby federal dam construction could be used only to restore those roads to their former condition, not for improvements such as widening. Similarly, funds provided for the modification of existing dams for safety purposes could not be used to construct a new dam, even as part of an overall safety strategy. B-215782, Apr. 7, 1986.

If a proposed use of funds is inconsistent with the statutory language, the expenditure is improper, even if it would result in substantial savings or other benefits to the government. Thus, while the Federal Aviation Administration (FAA) could construct its own roads needed for access to FAA facilities, it could not contribute a share for the improvement of county-owned roads, even though the latter undertaking would have been much less expensive. B-143536, Aug. 15, 1960. *See also* 39 Comp. Gen. 388 (1959).

The limitation in 31 U.S.C. § 1301(a) applies to revolving funds. GAO has held that revolving funds are appropriations, and, accordingly, that the

legal principles governing appropriations also apply to revolving funds. *See* B-247348, June 22, 1992; B-240914, Aug. 14, 1991. *See also* 63 Comp. Gen. 110, 112 (1983), and decisions cited therein.

The concept of purpose permeates much of this publication. Thus, many of the rules discussed in Chapter 2 relate to purpose. For example:

- A specific appropriation must be used to the exclusion of a more general appropriation that might otherwise have been viewed as available for the particular item. Chapter 2, section B.2.

- Transfer between appropriations is prohibited without specific statutory authority, even where reimbursement is contemplated. Chapter 2, section B.3.

It follows that deliberately charging the wrong appropriation for purposes of expediency or administrative convenience, with the expectation of rectifying the situation by a subsequent transfer from the right appropriation, violates 31 U.S.C. § 1301(a). 36 Comp. Gen. 386 (1956); 26 Comp. Gen. 902, 906 (1947); 19 Comp. Gen. 395 (1939); 14 Comp. Gen. 103 (1934); B-248284.2, Sept. 1, 1992; B-104135, Aug. 2, 1951; B-97772, May 18, 1951.[1] The fact that the expenditure would be authorized under some other appropriation is irrelevant. Charging the "wrong" appropriation, unless authorized by some statute such as 31 U.S.C. § 1534, violates the purpose statute. For several examples, see U.S. General Accounting Office, *Improper Accounting for Costs of Architect of the Capitol Projects*, PLRD-81-4 (Washington, D.C.: Apr. 13, 1981).

The transfer rule illustrates the close relationship between 31 U.S.C. § 1301(a) and statutes relating to amount such as the Antideficiency Act, 31 U.S.C. § 1341. An unauthorized transfer violates 31 U.S.C. § 1301(a) because the transferred funds would be used for a purpose other than that for which they were originally appropriated. B-279886, Apr. 28, 1998; B-278121, Nov. 7, 1997; B-248284.2, Sept. 1, 1992. If the receiving appropriation is exceeded, the Antideficiency Act is also violated. Further, informal congressional approval of an unauthorized transfer of funds between appropriation accounts does not have the force and effect of law. B-278121 and B-248284.2, *supra*.

[1]The situation dealt with in B-97772 and B-104135, advances of travel expenses to government employees serving as witnesses, is now authorized by 5 U.S.C. § 5751.

Although every violation of 31 U.S.C. § 1301(a) is not automatically a violation of the Antideficiency Act, and every violation of the Antideficiency Act is not automatically a violation of 31 U.S.C. § 1301(a), cases frequently involve elements of both. Thus, an expenditure in excess of an available appropriation violates both statutes. The reason the purpose statute is violated is that, unless the disbursing officer used personal funds, he or she must necessarily have used money appropriated for other purposes. 4 Comp. Dec. 314, 317 (1897). The relationship between purpose violations and the Antideficiency Act is explored further in Chapter 6.

Brief mention should also be made of the axiom that an agency cannot do indirectly what it is not permitted to do directly. Thus, an agency cannot use the device of a contract, grant, or agreement to accomplish a purpose it could not do by direct expenditure. *See* 18 Comp. Gen. 285 (1938) (contract stipulation to pay wages in excess of Davis-Bacon Act rates held unauthorized). *See also* B-259499, Aug. 22, 1995 (agreement to provide personal services to agency that is not authorized to contract for personal services is not authorized under the Economy Act).

Similarly, a grant of funds for unspecified purposes would be improper. 55 Comp. Gen. 1059, 1062 (1976). Settlements cannot include benefits that the agency does not have authority to provide. *See* B-247348, June 22, 1992 (broad authority to provide remedies for claims arising under Title VII of the Civil Rights Act does not permit an agency to provide unauthorized benefits). *See also* B-239592, Aug. 23, 1991.

2. Determining Authorized Purposes

a. Statement of Purpose

Where does one look to find the authorized purposes of an appropriation? The first place, of course, is the appropriation act itself and its legislative history. If the appropriation is general, it may also be necessary to consult the legislation authorizing the appropriation, if any, and the underlying program or organic legislation, together with their legislative histories.

The actual language of the appropriation act is always of paramount importance in determining the purpose of an appropriation. Every appropriation has one or more purposes in the sense that Congress does not provide money for an agency to do with as it pleases, although purposes

are stated with varying degrees of specificity. One end of the spectrum is illustrated by this old private relief act:

> "[T]he Secretary of the Treasury …is hereby, authorized and directed to pay to George H. Lott, a citizen of Mississippi, the sum of one hundred forty-eight dollars …."

Act of March 23, 1896, ch. 71, 29 Stat. 711.

This is one extreme. There is no need to look beyond the language of the appropriation; it was available to pay $148 to George H. Lott, and for absolutely nothing else. Language this specific leaves no room for administrative discretion. For example, the Comptroller General has held that language of this type does not authorize reimbursement to an agency where the agency erroneously paid the individual before the private act had been passed. In this situation, the purpose for which the appropriation was made had ceased to exist. B-151114, Aug. 26, 1964.

At the other extreme, smaller agencies may receive only one appropriation. The purpose of the appropriation will be to enable the agency to carry out all of its various authorized functions. For example, the Consumer Product Safety Commission receives but a single appropriation "for necessary expenses of the Consumer Product Safety Commission."[2] To determine permissible expenditures under this type of appropriation, it would be necessary to examine all of the agency's substantive legislation, in conjunction with the "necessary expense" doctrine discussed later in this chapter.

Between the two extremes are many variations. A common form of appropriation funds a single program. For example, the Interior Department receives a separate appropriation to carry out the Payments in Lieu of Taxes Act (PILT), 31 U.S.C. § 6901–6904.[3] While the appropriation is specific in the sense that it is limited to PILT payments and associated

[2] *E.g.*, Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2003, Pub. L. No. 108-7, div. K, 117 Stat. 11, 474, 506 (Feb. 20, 2003).

[3] *E.g.*, Department of the Interior and Related Agencies Appropriations Act, 2003, Pub. L. No. 108-7, div. F, title I, 117 Stat. 11, 216, 218 (Feb. 20, 2003) ("For expenses necessary to implement the Act of October 20, 1976 . . ., $220,000,000, of which not to exceed $400,000 shall be available for administrative expenses.").

administrative expenses, it is nevertheless necessary to look beyond the appropriation language and examine the PILT statute to determine authorized expenditures.

Once the purposes have been determined by examining the various pieces of legislation, 31 U.S.C. § 1301(a) comes into play to restrict the use of the appropriation to these purposes only, together with one final generic category of payments—payments authorized under general legislation applicable to all or a defined group of agencies and not requiring specific appropriations. For example, legislation enacted in 1982 amended 12 U.S.C. § 1770 to authorize federal agencies to provide various services, including telephone service, to employee credit unions. Pub. L. No. 97-320, § 515, 96 Stat. 1469, 1530 (Oct. 15, 1982). Prior to this legislation, an agency would have violated 31 U.S.C. § 1301(a) by providing telephone service to a credit union, even on a reimbursable basis, because this was not an authorized purpose under any agency appropriation. 60 Comp. Gen. 653 (1981). The 1982 amendment made the providing of special services to credit unions an authorized agency function, and hence an authorized purpose, which it could fund from unrestricted general operating appropriations. 66 Comp. Gen. 356 (1987). Similarly, a recently enacted statute gives agencies the discretion to use appropriated funds to pay the expenses their employees incur for obtaining professional credentials. 5 U.S.C. § 5757(a). *See also* B-289219, Oct. 29, 2002. Prior to this legislation, agencies could not use appropriated funds to pay fees incurred by their employees in obtaining professional credentials. *See*, *e.g.*, 47 Comp. Gen. 116 (1967). Other examples are interest payments under the Prompt Payment Act (31 U.S.C. §§ 3901-3907) and administrative settlements less than $2,500 under the Federal Tort Claims Act (28 U.S.C. §§ 2671 *et seq.*).

b. Specific Purpose Stated in Appropriation Act

Where an appropriation specifies the purpose for which the funds are to be used, 31 U.S.C. § 1301(a) applies in its purest form to restrict the use of the funds to the specified purpose. For example, an appropriation for topographical surveys in the United States was not available for topographical surveys in Puerto Rico. 5 Comp. Dec. 493 (1899). Similarly, an appropriation to install an electrical generating plant in the customhouse building in Baltimore could not be used to install the plant in a nearby post office building, even though the plant would serve both buildings and thereby reduce operating expenses. 11 Comp. Dec. 724 (1905). An appropriation for the extension and remodeling of the State Department building was not available to construct a pneumatic tube delivery system between the State Department and the White House. 42 Comp. Gen. 226 (1962). In another example involving a line-item

appropriation for a grant project, because the funds were made available for a specific grantee in a specific amount to accomplish a specific purpose, the agency could not grant less than Congress has directed by using some of the appropriation to pay its administrative costs. 72 Comp. Gen. 317 (1993); 69 Comp. Gen. 660, 662 (1990). And, as noted previously, an appropriation for the "replacement" of state roads could not be used to make improvements on them. 41 Comp. Gen. 255 (1961).

It is well settled, but warrants repeating, that even an expenditure that may be reasonably related to a general appropriation may not be paid out of that appropriation where the expenditure falls specifically within the scope of another appropriation. 63 Comp. Gen. 422 (1984); B-300325, Dec. 13, 2002; B-290005, July 1, 2002. It is also well settled that when two appropriations are available for the same purpose, the agency must select which to use, and that once it has made an election, the agency must continue to use the same appropriation for that purpose unless the agency, at the beginning of the fiscal year, informs Congress of its intent to change for the next fiscal year. B-272191, Nov. 4, 1997. *See also*, 68 Comp. Gen. 337 (1989); 59 Comp. Gen. 518 (1980). An exception to this requirement is when Congress specifically authorizes the use of two appropriation accounts. B-272191, *supra* (statutory language makes clear that Congress intended that the "funds appropriated to the Secretary [of the Army] for operation and maintenance" in the fiscal year 1993 Defense Appropriations Act are "[i]n addition to …the funds specifically appropriated for real property maintenance under the heading [RPM,D]" in that appropriation act).

The following cases will further illustrate the interpretation and application of appropriation acts denoting a specific purpose to which the funds are to be dedicated. In each of the examples, the appropriation in question was the U.S. Forest Service's appropriation for the construction and maintenance of "Forest Roads and Trails."

In 37 Comp. Gen. 472 (1958), the Forest Service sought to construct airstrips on land in or adjacent to national forests. The issue was the extent to which the costs could be charged to the Roads and Trails appropriation as opposed to other Forest Service appropriations such as "Forest Protection and Utilization." At hearings before the appropriations committees, Forest Service officials had announced their intent to charge most of the landing fields to the Roads and Trails appropriation. The appropriation act in question provided that "appropriations available to the Forest Service for the current fiscal year shall be available for" construction of the landing fields up to a specified dollar amount, but the item was not

mentioned in any of the individual appropriations. GAO concluded that the proposal to indiscriminately charge the landing fields to Roads and Trails would violate 31 U.S.C. § 1301(a). The Roads and Trails appropriation could be used for only those landing fields that were directly connected with and necessary to accomplishing the purposes of that appropriation. Landing fields not directly connected with the purposes of the Roads and Trails appropriation, for example, airstrips needed to assist in firefighting in remote areas, had to be charged to the appropriation to which they were related, such as Forest Protection and Utilization. The mere mention of intent at the hearings was not sufficient to alter the availability of the appropriations.

Later, in 53 Comp Gen. 328 (1973), the Comptroller General held that the Forest Roads and Trails appropriation could not be charged with the expense of closing roads or trails and returning them to their natural state, such activity being neither "construction" nor "maintenance."

Again, in B-164497(3), Feb. 6, 1979, GAO decided that the Forest Service could not use the Roads and Trails appropriation to maintain a part of a federally constructed scenic highway on Forest Service land in West Virginia, although the state was prevented from maintaining it because the scenic highway was closed to commercial traffic. The Roads and Trails account was improper to charge with the maintenance because the term "forest road" was statutorily defined as a service or access road "necessary for the protection, administration, and utilization of the [national forest] system and the use and development of its resources." The highway, a scenic parkway reserved exclusively for recreational and passenger travel through a national forest, was not the type of forest road the appropriation was available to maintain. The decision further noted, however, that the Forest Protection and Utilization appropriation was somewhat broader and could be used for the contemplated maintenance.

A 1955 case illustrates a type of expenditure that could properly be charged to the Roads and Trails account. Construction of a timber access road on a national forest uncovered a site of old Indian ruins. Since the road construction itself was properly chargeable to the Roads and Trails appropriation, the Forest Service could use the same appropriation to pay the cost of archaeological and exploratory work necessary to obtain and preserve historical data from the ruins before they were destroyed by the

construction. (Rerouting was apparently not possible.) B-125309, Dec. 6, 1955.[4]

In any case, an appropriation serves as a limitation, or more accurately, a series of limitations relating to time and amount in addition to purpose. In some situations, an appropriation is simultaneously a grant of authority. For example, 5 U.S.C. § 3109 authorizes agencies to procure the services of experts and consultants, but only "[w]hen authorized by an appropriation or other statute." In contrast with the statute authorizing services for credit unions noted earlier, 5 U.S.C. § 3109 by itself does not authorize an agency to spend general operating appropriations to hire consultants. Unless an agency has received this authority somewhere in its permanent legislation, the hiring of consultants under section 3109 is an authorized purpose only if it is specified in the agency's appropriation act.

3. New or Additional Duties

Appropriation acts tend to be bunched at certain times of the year while substantive legislation may be enacted any time. A frequently recurring situation is where a statute is passed imposing new duties on an agency but not providing any additional appropriations. The question is whether implementation of the new statute must wait until additional funds are appropriated, or whether the agency can use its existing appropriations to carry out the new function, either pending receipt of further funding through the normal budget process or in the absence of additional appropriations (assuming in either case the absence of contrary congressional intent).

The rule is that existing agency appropriations that generally cover the type of expenditures involved are available to defray the expenses of new or additional duties imposed by proper legal authority. The test for availability is whether the duties imposed by the new law bear a sufficient relationship to the purposes for which the previously enacted appropriation was made so as to justify the use of that appropriation for the new duties.

For example, in the earliest published decision cited for the rule, the Comptroller General held that the Securities and Exchange Commission could use its general operating appropriation for fiscal year 1936 to

[4] The protection of archaeological data is now provided by statute. *See* 16 U.S.C.§ 469a-1 and the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa *et seq.*

perform additional duties imposed on it by the later enacted Public Utility Holding Company Act of 1935 (49 Stat. 803 (Aug. 26, 1935)). 15 Comp. Gen. 167 (1935).

Similarly, the Interior Department could use its 1979 "Departmental Management" appropriation to begin performing duties imposed by the Public Utilities Regulatory Policies Act of 1978,[5] and to provide reimbursable support costs for the Endangered Species Committee and Review Board created by the Endangered Species Act Amendments of 1978.[6] Both statutes were enacted after the Interior Department's 1979 appropriation. B-195007, July 15, 1980.

The rule has also been applied to additional duties imposed by executive order. 32 Comp. Gen. 347 (1953); 30 Comp. Gen. 258 (1951). Additional cases are 30 Comp. Gen. 205 (1950); B-290011, Mar. 25, 2002; B-211306, June 6, 1983; B-153694, Oct. 23, 1964.

A variation occurred in 54 Comp. Gen. 1093 (1975). The unexpended balance of a Commerce Department appropriation, which had been used to administer a loan guarantee program and to make collateral protection payments under the Trade Expansion Act of 1962, 19 U.S.C. §§ 1901–1920 (1970), was transferred to a similar but new program by the Trade Act of 1974.[7] The 1974 statute repealed the earlier provisions. This meant that the transferred funds could no longer be used for expenses under the 1962 act—including payments on guarantee commitments—even though that was the purpose for which they were originally appropriated, unless the expenditures could also be viewed as relating to the Commerce Department's functions under the 1974 act. Applying the rationale of the later-imposed duty cases, the Comptroller General concluded that the purposes of the two programs were sufficiently related so that the Commerce Department could continue to use the transferred funds to make collateral protection payments and to honor guarantees made under the 1962 act.

A related question is the extent to which an agency may use current appropriations for preliminary administrative expenses in preparation for

[5]Pub. L. No. 95-617, 92 Stat. 3117 (Nov. 9, 1978), *codified at* 43 U.S.C. §§ 2001 *et seq.*

[6]Pub. L. No. 95-632, 92 Stat. 3751 (Nov. 10, 1978), *codified at* 16 U.S.C. §§ 1536 *et seq.*

[7] Pub. L. No. 93-618, § 602(e), 88 Stat. 1978, 2072 (Jan. 3, 1975).

implementing a new law, prior to the receipt of substantive appropriations for the new program. Again, the appropriation is available provided it is sufficiently broad to embrace expenditures of the type contemplated. Thus, the National Science Foundation could use its fiscal year 1967 appropriations for preliminary expenses of implementing the National Sea Grant College and Program Act of 1966,[8] enacted after the appropriation, since the purposes of the new act were basically similar to the purposes of the appropriation. 46 Comp. Gen. 604 (1967). The preliminary tasks in that case included such things as development of policies and plans, issuance of internal instructions, and the establishment of organizational units to administer the new program.

Similarly, the Bureau of Land Management could use current appropriations to determine fair market value and to initiate negotiations with owners in connection with the acquisition of mineral interests under the Cranberry Wilderness Act,[9] even though actual acquisitions could not be made until funding was provided in appropriation acts. B-211306, June 6, 1983. *See also* B-153694, Oct. 23, 1964; B-153694, Sept. 2, 1964.

Where Congress has not made a specific appropriation available to fund additional or new duties and an existing appropriation is used based upon a determination that the new duties bear a sufficient relationship to the purpose for which the existing appropriation was made, the agency may not reimburse the existing appropriation that was used once the new appropriation is available. 30 Comp. Gen. 258 (1951); B-290011, *supra.* The shifting of money from one appropriation to another in the absence of statutory authority is prohibited by 31 U.S.C. § 1532.[10] Compare B-300673, July 3, 2003, where GAO concluded that the Chief Administrative Officer (CAO) for the House of Representatives was allowed to use the CAO fiscal year 2003 Salaries and Expenses appropriation to reimburse the House of Representatives Child Care Center revolving fund for certain payments incurred by the Center at the beginning of fiscal year 2003 during a period covered by a continuing resolution, before enactment of the fiscal year 2003 appropriation. In this case, CAO's fiscal year 2003 appropriation expressly

[8] Pub. L. No. 89-688, 80 Stat. 998 (Oct. 15, 1966).

[9] Pub. L. No. 97-466, 96 Stat. 2538 (Jan. 13, 1983).

[10] Section 1532 provides in pertinent part, "[a]n amount available under law may be withdrawn from one appropriation account and credited to another …only when authorized by law."

directed that it cover the Center director's salary and employees' training costs for fiscal year 2003 and thereafter. Under the plain meaning of the appropriation language, the CAO appropriation was the proper one to charge for all expenses incurred in fiscal year 2003.

4. Termination of Program

a. Termination Desired

If Congress appropriates money to implement a program, can the agency use that money to terminate the program? (Expenses of terminating a program could include such things as contract termination costs and personnel reduction-in-force expenses.) If implementation of the program is mandatory, the answer is no. In 1973, for example, the administration attempted to terminate certain programs funded by the Office of Economic Opportunity (OEO), relying in part on the fact that it had not requested any funds for OEO for 1974. The programs in question were funded under a multiple year authorization that directed that the programs be carried out during the fiscal years covered by the authorization. The U.S. District Court for the District of Columbia held that funds appropriated to carry out the programs could not be used to terminate them. *Local 2677, American Federation of Government Employees v. Phillips*, 358 F. Supp. 60 (D.D.C. 1973). The court cited 31 U.S.C. § 1301(a) as one basis for its holding. *Id.* at 76 n.17. *See also* 63 Comp. Gen. 75, 78 (1983).

Where the program is nonmandatory, the agency has more discretion, but there are still limits. In B-115398, Aug. 1, 1977, the Comptroller General advised that the Air Force could terminate B-1 bomber production, which had been funded under a lump-sum appropriation and was not mandated by any statute. Later cases have stated the rule that an agency may use funds appropriated for a program to terminate that program where (1) the program is nonmandatory and (2) the termination would not result in curtailment of the overall program to such an extent that it would no longer be consistent with the scheme of applicable program legislation. 61 Comp. Gen. 482 (1982) (Department of Energy could use funds appropriated for fossil energy research and development to terminate certain fossil energy programs); B-203074, Aug. 6, 1981. Several years earlier, GAO had held that the closing of all Public Health Service hospitals would exceed the Surgeon General's discretionary authority because a major portion of the Public Health Service Act would effectively be inoperable without the Public Health Service hospital system. B-156510, Feb. 23, 1971; B-156510, June 7, 1965.

The concepts are further illustrated in a series of cases involving the Clinch River Nuclear Breeder Reactor. In 1977, the administration proposed using funds appropriated for the design, development, construction, and operation of the reactor to terminate the project. Construction of a breeder reactor had been authorized, but not explicitly mandated, by statute. As contemplated by the program legislation, the Energy Research and Development Administration, the predecessor of the Department of Energy, had submitted program criteria for congressional approval. GAO reviewed the statutory scheme, found that the approved program criteria were "as much a part of [the authorizing statute] as if they were explicitly stated in the statutory language itself," and concluded that use of program funds for termination was unauthorized. B-115398, June 23, 1977.[11] Two subsequent opinions reached the same conclusion, supported further by a provision in a 1978 supplemental appropriation act that specifically earmarked funds for the reactor. B-164105, Mar. 10, 1978; B-164105, Dec. 5, 1977.

By 1983 the situation had changed. Congressional support for the reactor had eroded considerably, no funds were designated for it for fiscal year 1984, and it became apparent that further funding for the project was unlikely. In light of these circumstances, GAO revisited the termination question and concluded that the Department of Energy now had a legal basis to use 1983 funds to terminate the project in accordance with the project justification data that provided for termination in the event of insufficient funds to permit effective continuation. 63 Comp. Gen. 75 (1983).

b. Reauthorization Pending

Another variation occurs when an entity's enabling legislation is set to expire and Congress shows signs of extending or reauthorizing the entity, but has not yet provided funds or authority to continue. For example, the U.S. Advisory Commission on Intergovernmental Relations (ACIR) was statutorily authorized to give continuing attention to intergovernmental problems. In 1995, ACIR was statutorily terminated effective September 30, 1996. About 2 months before ACIR was to terminate, Congress enacted legislation giving ACIR a new responsibility to provide research and a report under a contract with the National Gambling Impact Study Commission. Although Congress continued ACIR's existence beyond fiscal year 1996 for the limited purpose of providing research for the Gambling

[11]GAO reached this conclusion prior to the Supreme Court's decision in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983).

Commission, Congress appropriated no funds for fiscal year 1997. ACIR had separate statutory authority, 42 U.S.C. § 4279, to receive and expend unrestricted contributions made to ACIR from state governments. In B-274855, Jan. 23, 1997, GAO held that this statute constituted an appropriation (a permanent, indefinite appropriation[12]) separate from ACIR's annually enacted fiscal year appropriation, and that from October 1, 1996, until such time as ACIR was awarded the research contract, ACIR could use its unconditional state government contributions.

Another situation may occur when an entity's authorizing legislation is set to terminate and Congress provides an appropriation but does not reauthorize the entity until months later. In 71 Comp. Gen. 378 (1992), the U.S. Commission on Civil Rights was set to terminate by operation of law on September 30, 1991. The Commission was not reauthorized until November 26, 1991. However, during the interim and prior to the expiration date, Congress provided the Commission with appropriations for fiscal year 1992. Once a termination or sunset provision for an entity becomes effective, the agency ceases to exist and no new obligations may be incurred after the termination date.[13] However, when Congress desires to extend, amend, suspend, or repeal a statute, it can accomplish its purpose by including the requisite language in an appropriations or other act of Congress. After viewing the legislative actions, in their entirety, on the Commission's reauthorization and appropriation bills, GAO determined that Congress clearly intended for the Commission to continue to operate after September 30, 1991. GAO held that the specific appropriation provided to the Commission served to suspend its termination until the Commission was reauthorized.

B. The "Necessary Expense" Doctrine

1. The Theory

The preceding discussion establishes the primacy of 31 U.S.C. § 1301(a) in any discussion of purpose availability. The next point to emphasize is that

[12] See Chapter 2 for a discussion of permanent, indefinite appropriations.

[13] 71 Comp. Gen. at 380 n.7, citing *inter alia* B-182081, Jan. 26, 1977, *aff'd upon reconsideration*, B-182081, Feb. 14, 1979.

31 U.S.C. § 1301(a) does not require, nor would it be reasonably possible, that every item of expenditure be specified in the appropriation act. While the statute is strict, it is applied with reason.

The spending agency has reasonable discretion in determining how to carry out the objects of the appropriation. This concept, known as the "necessary expense doctrine," has been around almost as long as the statute itself. An early statement of the rule is contained in 6 Comp. Gen. 619, 621 (1927):

> "It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law, or unless it is manifestly evident from various precedent appropriation acts that Congress has specifically legislated for certain expenses of the Government creating the implication that such expenditures should not be incurred except by its express authority."

The necessary expense rule is really a combination of two slightly different but closely related concepts:

1. An appropriation made for a specific object is available for expenses necessarily incident to accomplishing that object unless prohibited by law or otherwise provided for. For example, an appropriation to erect a monument at the birthplace of George Washington could be used to construct an iron fence around the monument where administratively deemed necessary to protect the monument. 2 Comp. Dec. 492 (1896). Likewise, an appropriation to purchase bison for consumption covers the slaughtering and processing of the bison as well as the actual purchase. B-288658, Nov. 30, 2001.

2. Appropriations, even for broad categories such as salaries, frequently use the term "necessary expenses." As used in this context, the term refers to "current or running expenses of a miscellaneous character arising out of and directly related to the agency's work." 38 Comp. Gen. 758, 762 (1959); 4 Comp. Gen. 1063, 1065 (1925).

Although the theory is identical in both situations, the difference is that expenditures in the second category relate to somewhat broader objects.

The Comptroller General has never established a precise formula for determining the application of the necessary expense rule. In view of the vast differences among agencies, any such formula would almost certainly be unworkable. Rather, the determination must be made essentially on a case-by-case basis.

In addition to recognizing the differences among agencies when applying the necessary expense rule, we act to maintain a vigorous body of case law responsive to the changing needs of government. In this regard, our decisions indicate a willingness to consider changes in societal expectations regarding what constitutes a necessary expense. This flexibility is evident, for example, in our analysis of whether an expenditure constitutes a personal or an official expense. As will be discussed more fully later in the chapter, use of appropriations for such an expenditure is determined by continually weighing the benefit to the agency, such as the recruitment and retention of a dynamic workforce and other considerations enabling efficient, effective, and responsible government. We recognize, however, that these factors can change over time. B-286026, June 12, 2001 (overruling GAO's earlier decisions based on reassessment of the training opportunities afforded by examination review courses); B-280759, Nov. 5, 1998 (overruling GAO's earlier decisions on the purchase of business cards). *See also* 71 Comp. Gen. 527 (1992) (eldercare is not a typical employee benefit provided to the nonfederal workforce and not one that the federal workforce should expect); B-288266, Jan. 27, 2003 (GAO explained it remained "willing to reexamine our case law" regarding light refreshments if it is shown to frustrate efficient, effective, and responsible government).

When applying the necessary expense rule, an expenditure can be justified after meeting a three-part test:

1. The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available.

2. The expenditure must not be prohibited by law.

3. The expenditure must not be otherwise provided for, that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.

E.g., 63 Comp. Gen. 422, 427–28 (1984); B-240365.2, Mar. 14, 1996; B-230304, Mar. 18, 1988.

a. Relationship to the Appropriation

The first test—the relationship of the expenditure to the appropriation—is the one that generates by far the lion's share of questions. On the one hand, the rule does not require that a given expenditure be "necessary" in the strict sense that the object of the appropriation could not possibly be fulfilled without it. Thus, the expenditure does not have to be the only way to accomplish a given object, nor does it have to reflect GAO's perception of the best way to do it. Yet on the other hand, it has to be more than merely desirable or even important. *E.g.*, 34 Comp. Gen. 599 (1955); B-42439, July 8, 1944. An expenditure cannot be justified merely because some agency official thinks it is a good idea, nor can it be justified simply because it is a practice engaged in by private business. *See* B-288266, Jan. 27, 2003.

The important thing is not the significance of the proposed expenditure itself or its value to the government or to some social purpose in abstract terms, but the extent to which it will contribute to accomplishing the purposes of the appropriation the agency wishes to charge. For example, the Forest Service can use its appropriation for "Forest Protection and Utilization" to buy plastic litterbags for use in a national forest. 50 Comp. Gen. 534 (1971). *See also* 72 Comp. Gen. 73 (1992) (the Environmental Protection Agency (EPA) can purchase buttons promoting indoor air quality for its conference since the message conveyed is related to EPA's mission); 71 Comp. Gen. 28 (1991) (the Internal Revenue Service (IRS) can cover cost of its employees filing electronic tax returns because it trains employees); B-257488, Nov. 6, 1995 (the Food and Drug Administration is permitted to purchase "No Red Tape" buttons to promote employee efficiency and effectiveness and thereby the agency's purpose). However, operating appropriations of the Equal Employment Opportunity Commission (EEOC) are not available to pay IRS the taxes due on judgment proceeds recovered by EEOC in an enforcement action. While the payment would further a purpose of the IRS, it would not contribute to fulfilling the

purposes of the EEOC appropriation. 65 Comp. Gen. 800 (1986).[14] *See also* 70 Comp. Gen. 248 (1991) (purchasing T-shirts for Combined Federal Campaign (CFC) contributors is not permitted because T-shirts are not essential to achieving the authorized purpose of CFC).

If the basic test is the relationship of the expenditure to the appropriation sought to be charged, it should be apparent that the "necessary expense" concept is a relative one. As stated in 65 Comp. Gen. 738, 740 (1986):

> "We have dealt with the concept of 'necessary expenses' in a vast number of decisions over the decades. If one lesson emerges, it is that the concept is a relative one: it is measured not by reference to an expenditure in a vacuum, but by assessing the relationship of the expenditure to the specific appropriation to be charged or, in the case of several programs funded by a lump-sum appropriation, to the specific program to be served. It should thus be apparent that an item that can be justified under one program or appropriation might be entirely inappropriate under another, depending on the circumstances and statutory authorities involved."

The evident difficulty in stating a precise rule emphasizes the role and importance of agency discretion. It is in the first instance up to the administrative agency to determine that a given item is reasonably necessary to accomplishing an authorized purpose. Once the agency makes this determination, GAO will normally not substitute its own judgment for that of the agency. In other words, the agency's administrative determination of necessity will be given considerable deference.

Generally, the interpretation of a statute by the agency that Congress has charged with the responsibility for administering it is entitled to considerable weight. This discretion, however, is not without limits. The agency's interpretation must be reasonable and must be based on a permissible construction of the statute. *United States v. Mead Corp.*, 533 U.S. 218, 226–238 (2001); *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See also* B-286661, Jan. 19, 2001 (expansive

[14] It should be noted, however, that settlement payments in discrimination suits could be paid from an agency's general operating funds when the suit and settlement are incident to the agency's operation. B-257334, June 30, 1995.

definition exceeds the bounds of the Privatization Act and violates the requirement of 31 U.S.C. § 1301(a)).

The standard GAO uses in evaluating purpose availability is summarized in the following passage from B-223608, Dec. 19, 1988:

> "When we review an expenditure with reference to its availability for the purpose at issue, the question is not whether we would have exercised that discretion in the same manner. Rather, the question is whether the expenditure falls within the agency's legitimate range of discretion, or whether its relationship to an authorized purpose or function is so attenuated as to take it beyond that range."

A decision on a "necessary expense" question therefore involves (1) analyzing the agency's appropriations and other statutory authority to determine whether the purpose is authorized and (2) evaluating the adequacy of the administrative justification, to decide whether the agency has properly exercised, or exceeded, its discretion.

The role of discretion in purpose availability is further complicated by the fact that not all federal establishments have the same range of discretion. For example, a government corporation with the authority to determine the character and necessity of its expenditures has, by virtue of its legal status, a broader measure of discretion than a "regular" agency. But even this discretion is not unlimited and is bound at least by considerations of sound public policy. *See* 14 Comp. Gen. 755 (1935), *aff'd upon reconsideration*, A-60467, June 24, 1936.

Two decisions involving the Bonneville Power Administration (BPA) will illustrate. In 1951, the Interior Department asked whether funds appropriated to BPA could be used to enter into a contract to conduct a survey to determine the feasibility of "artificial nucleation and cloud modification" (artificial rainmaking in English) for a portion of the Columbia River drainage basin. If the amount of rainfall during the dry season could be significantly increased by this method, the amount of marketable power for the region would be enhanced. Naturally, BPA did not have an appropriation specifically available for rainmaking. However, in view of BPA's statutory role in the sale and disposition of electric power in the region, GAO concluded that the expenditure was authorized. B-104463, July 23, 1951.

The Interior Department then asked whether, assuming the survey results were favorable, BPA could contract with the rainmakers. GAO thought this was going too far and questioned whether BPA's statutory authority to encourage the widest possible use of electric energy really contemplated artificial rainmaking. GAO emphasized that the expenditure would be improper for a department or agency with the "ordinary authority usually granted" to federal agencies. However, the legislative history of BPA's enabling statute indicated that Congress intended that it have a degree of freedom similar to public corporations and that it be largely free from "the requirements and restrictions ordinarily applicable to the conduct of Government business." Therefore, while the Comptroller General expressly refused to "approve" the rainmaking contract, he felt compelled to hold that BPA's funds were legally available for it. B-105397, Sept. 21, 1951.

For the typical federal department or agency, the range of discretion will be essentially the same, with variations in the kinds of things justifiable under the necessary expense umbrella stemming from program differences. For example, necessary expenses for an agency with law enforcement responsibilities may include items directly related to that authority, which would be inappropriate for agencies without law enforcement functions. Thus, the Immigration and Naturalization Service could use its Salaries and Expenses appropriation to purchase and install lights, automatic warning devices, and observation towers along the boundary between the United States and Mexico. 29 Comp. Gen. 419 (1950). *See also* 7 Comp. Dec. 712 (1901). Similarly, in B-204486, Jan. 19, 1982, the Federal Bureau of Investigation could buy insurance on an undercover business not so much to insure the property, but to enhance the credibility of the operation.

The procurement of evidence is also authorized as a necessary expense for an agency with law enforcement responsibilities. For example, Forest Service appropriations could be used to pay towing and storage charges for a truck seized as evidence of criminal activities in a national forest. B-186365, Mar. 8, 1977. *See also* 27 Comp. Gen. 516 (1948); 26 Comp. Dec. 780, 783 (1920); B-56866, Apr. 22, 1946. Also, the Customs Service could use its operating appropriations to cover the cost of extending its psychological assessment and referral services to its employees' family members adversely affected by work-related incidents arising from law enforcement activities involving death or serious injury to its employee in the line of duty. B-270446, Feb. 11, 1997.

Cases involving fairs and expositions provide further illustration. For the most part, when Congress desires federal participation in fairs or

expositions, it has been authorized by specific legislation. *See*, *e.g.*, B-160493, Jan. 16, 1967 (legislation authorized federal participation in HemisFair 1968 in San Antonio). For another example, United States participation in the 1927 International Exposition in Seville, Spain, was specifically authorized by statute. *See* 10 Comp. Gen. 563, 564 (1931).

However, specific statutory authority is not essential. If participation is directly connected with and is in furtherance of the purposes for which a particular appropriation has been made, and an appropriate administrative determination is made to that effect, the appropriation is available for the expenditure. B-290900, Mar. 18, 2003 (Bureau of Land Management (BLM) may use its appropriated funds to pay its share of the cost to produce a brochure that educates the public regarding lighthouse preservation because the brochure supports BLM in meeting its responsibility under its lighthouse preservation program); B-286457, Jan. 29, 2001 (demolition of old air traffic control tower that would obstruct the view from the new one is directly connected with and in furtherance of the construction of a new tower such that the demolition expenses are covered by Federal Aviation Administrations appropriation act for tower construction); B-280440, Feb. 26, 1999 (Immigration and Naturalization Service's (INS) Salaries and Expenses appropriation is available to purchase medals to be worn by uniformed employees of the Border Patrol division of INS to commemorate the division's 75th anniversary). *See also* 16 Comp. Gen. 53 (1936); 10 Comp. Gen. 282 (1930); 7 Comp. Gen. 357 (1927); 4 Comp. Gen. 457 (1924).[15] Authority to disseminate information will generally provide adequate justification. *E.g.*, 7 Comp. Gen. 357; 4 Comp. Gen. 457. In addition, an agency may use appropriated funds to provide prizes to individuals to further the collection of information necessary to accomplish the agency's statutory mandate.[16] *See*, *e.g.*, 70 Comp. Gen. 720 (1991); B-286536, Nov. 17, 2000; B-230062, Dec. 22, 1988.

In the absence of either statutory authority or an adequate justification under the necessary expense doctrine, the expenditure, like any other expenditure, is illegal. Thus, the Department of Housing and Urban

[15] A few early cases purporting to require specific authority, such as 2 Comp. Gen. 581 (1923), must be regarded as implicitly modified by the later cases.

[16] GAO cases cautioned that when the award of prizes contained elements of a lottery, which may be prohibited by certain federal statutes, state laws, and regulations, the agency should consult with the Department of Justice to ensure that its proposal is not a prohibited lottery before spending any appropriated funds.

Development (HUD) had no authority to finance participation at a trade exhibition in the Soviet Union where HUD's primary purpose was to enhance business opportunities for American companies. 68 Comp. Gen. 226 (1989); B-229732, Dec. 22, 1988. Regardless of whether it may or may not have been a good idea, commercial trade promotion is not one of the purposes for which Congress appropriates money to HUD.

No discussion would be complete without some mention of the "marauding woodpecker" case. It appears that in 1951, marauding woodpeckers were causing considerable damage to government-owned transmission lines and the Southwestern Power Administration, Interior Department (Interior) wanted to buy guns with which to shoot the woodpeckers. Interior first went to the Army, but the Army advised that the types of guns and ammunition desired were not available, so Interior next came to GAO. The Comptroller General held that, if administratively determined to be necessary to protect the transmission lines, Interior could buy the guns and ammunition from the Southwestern Power Administration's construction appropriation. The views of the woodpeckers were not solicited. B-105977, Dec. 3, 1951. Actually, this was not a totally novel issue. Several years earlier, GAO had approved the use of an Interior Department "maintenance of range improvements" appropriation for the control of coyotes, rodents, and other "predatory animals." A-82570, Dec. 30, 1936. *See also* A-82570, B-120739, Aug. 21, 1957.[17]

b. Expenditure Otherwise Prohibited

The second test under the necessary expense doctrine is that the expenditure must not be prohibited by law. As a general proposition, neither a necessary expense rationale nor the "necessary expense" language

[17] Everyone loves a good animal case. Unfortunately, the animals in most GAO decisions are dead or, as in the cases cited in the text, soon to become dead. Readers interested more in amusement than precedent might also check out 7 Comp. Gen. 304 (1927) (removal of a horse "found dead lying on its back in a hole"); 18 Comp. Gen. 109 (1938) (another dead horse); B-86211, July 26, 1949 (death of hogs allegedly caused by being fed garbage purchased from Navy installation; it was pointed out that other hogs had eaten the same government-furnished garbage and managed to survive);; B-47255, Feb. 6, 1945 (burial of three dead bulls); B-37205, Oct. 19, 1943 (mule fell off cable swing bridge); A-92649, Apr. 22, 1938 (still another dead horse); B-115434-O.M., June 19, 1953 (agency borrowed a bull from another agency for breeding purposes, then had it slaughtered when it became vicious). These cases are being memorialized here because they will probably never be cited anywhere else. Insects do not escape either. *See* 34 Comp. Gen. 236 (1954) (grasshopper control in national forests). With the third edition of this volume, GAO is pleased to report our first fish case. *See* 70 Comp. Gen. 720 (1991) (rate of fish migration measured by fisherman returning government fish tags from fish presumed dead or to have at least had a very bad day).

in an appropriation act can be used to overcome a statutory prohibition. *E.g.*, B-277905, Mar. 17, 1998 (expenditure for installation and maintenance of water pipelines to support a military base golf course not permissible because such expenditure is specifically prohibited by 10 U.S.C. § 2246, which prohibit the use of appropriated funds to "equip, operate, or maintain" a golf course); B-247348, June 22, 1992 (detail of Government Printing Office employee to Library of Congress not permissible because 44 U.S.C. § 316 prohibits details for "duties not pertaining to the work of public printing and binding"). In 38 Comp. Gen. 758 (1959) and 4 Comp. Gen. 1063 (1925), the Comptroller General held that the necessary expense language did not overcome the prohibition in 41 U.S.C. § 12 against contracting for public buildings or public improvements in excess of appropriations for the specific purpose. In large measure, this is little more than an application of the rule against repeal by implication discussed in Chapter 2, section C.2.h.

There are exceptions where applying the rule would make it impossible to carry out a specific appropriation. A very small group of cases stands for the proposition that, where a specific appropriation is made for a specific purpose, an expenditure that is "absolutely essential" to accomplishing the specific object may be incurred even though the expenditure would otherwise be prohibited. In order for this exception to apply, the expenditure must literally be absolutely essential in the sense that the object of the appropriation could not be accomplished without it. Also, the rule would not apply to the use of a more general appropriation.

For example, in 2 Comp. Gen. 133 (1922), *modifying* 2 Comp. Gen. 14 (1922), an appropriation to provide airmail service between New York, Chicago, and San Francisco was held available to construct hangars and related facilities at a landing field in Chicago notwithstanding the requirement for a specific appropriation in 41 U.S.C. § 12. The reason was that it would have been impossible to provide the service, and hence, to accomplish the purpose of the appropriation, without erecting the facilities. *See also* 17 Comp. Gen. 636 (1938) and 22 Comp. Dec. 317 (1916). (The 1938 decision cites the rule but the decision itself is an ordinary necessary expense case.)

An 1899 case, 6 Comp. Dec. 75, provides another good illustration of the concept. The building housing the Department of Justice (Justice) had become unsafe and overcrowded. Congress enacted legislation to authorize and fund the construction of a new building. The statute specifically provided that the new building be constructed on the site of the old

building, but did not address the question of how Justice would function during the construction period. The obvious solution was to rent another building until the new one was ready, but 40 U.S.C. § 34 prohibited the rental of space in the District of Columbia except under an appropriation specifically available for that purpose, and Justice had no such appropriation. On the grounds that any other result would be absurd, the Comptroller of the Treasury held that Justice could rent interim space notwithstanding the statutory prohibition. While the decision was not couched in terms of the expenditure being "absolutely essential," it said basically the same thing. Since Justice could not cease to function during the construction period, the appropriation for construction of the new building could not be fulfilled without the expenditure for interim space.

c. Expenditure Otherwise Provided For

The third test is that an expenditure cannot be authorized under a necessary expense theory if it is otherwise provided for under a more specific appropriation or statutory funding mechanism. It is well settled that even an expenditure that may be reasonably related to a general appropriation may not be paid out of that appropriation where the expenditure falls specifically within the scope of another appropriation. *See, e.g.*, B-291241, Oct. 8, 2002; B-290005, July 1, 2002; B-289209, May 31, 2002.

The fact that the more specific appropriation may be exhausted is immaterial. Thus, in B-139510, May 13, 1959, the Navy could not use its shipbuilding appropriation to deepen a channel in the Singing River near Pascagoula, Mississippi, to permit submarines then under construction to move to deeper water. The reason was that this was a function for which funds were traditionally appropriated to the Corps of Engineers, not the Navy. The fact that appropriations had not been made in this particular instance was irrelevant.

Similarly, the Navy could not use appropriations made for the construction or procurement of vessels and aircraft to provide housing for civilian employees engaged in defense production activities because funds for that purpose were otherwise available. 20 Comp. Gen. 102 (1940).

In another case, Federal Prison Industries could use its revolving fund to build industrial facilities incident to a federal prison, or to build a residential camp for prisoners employed in federal public works projects, but could not use that fund to construct other prison facilities because such construction was statutorily provided for elsewhere. B-230304, Mar. 18, 1988.

In these cases, the existence of a more specific source of funds, or a more specific statutory mechanism for getting them, is the governing factor and overrides the "necessary expense" considerations.

2. General Operating Expenses

An illustration of how the necessary expense concept works common to all agencies is the range of expenditures permissible under general operating appropriations. All agencies, regardless of program differences, have certain things in common. Specifically, they all have employees, occupy space in buildings, and maintain an office environment. To support these functions, they incur a variety of administrative expenditures. Some are specifically authorized by statute; others flow logically from the requirements of maintaining a workforce.

All agencies receive general operating appropriations for these administrative expenses. Depending largely on the size of the agency, they may be separate lump-sum appropriations or may be combined with program funds. The most common (but not the only) form of general operating appropriation is entitled "Salaries and Expenses (S&E)." Although an S&E appropriation may contain earmarks, for the most part it does not specify the types of "expenses" for which it is available. Employee salaries, together with related items such as agency contributions to health insurance and retirement, of course, comprise the bulk of an S&E appropriation. This section summarizes some of the other items chargeable to S&E funds as necessary expenses of running the agency that are not covered elsewhere in this chapter.

a. Training

Training of government employees is governed by the Government Employees Training Act, 5 U.S.C. chapter 41, aspects of which are discussed in several places in this chapter. The authority of the Government Employees Training Act is broad, but it is not unlimited. For example, tryouts for the U.S. Olympic Shooting Team do not constitute training under the Act. 68 Comp. Gen. 721 (1989). Nor do routine meetings, however formally structured, qualify as training. 68 Comp. Gen. 606 (1989). *See also* 68 Comp. Gen. 604 (1989); B-272280, May 29, 1997 (examination expenses that substitute for a college course are covered where the skipped course is part of an approved training program for which the agency would otherwise pay).

For an entity not covered by the definition of "agency" in the Act, the authority to conduct training is limited. The particular training program must be (1) necessary to carry out the purpose for which the appropriation

is made, (2) for a period of brief duration, and (3) special in nature. 36 Comp. Gen. 621 (1957) (including extensive citations to earlier decisions). *See also* 68 Comp. Gen. 127 (1988).

Training of nonfederal personnel, where necessary to the implementation of a federal program, is a straightforward "necessary expense" question under the relevant program appropriation. *E.g.*, 18 Comp. Gen. 842 (1939).

In B-148826, July 23, 1962, the Comptroller General held that the Defense Department could pay $1 each to students participating in a civil defense training course as consideration for a release from liability.

b. Travel

Reimbursement for travel expenses incurred on official travel is now authorized by statute. *E.g.*, 5 U.S.C. § 5702. However, even before the legislation was enacted, expenses incurred on authorized official travel were reimbursable as a necessary expense. 4 Comp. Dec. 475 (1898).

Of course there are limits, and expenses are reimbursable only to the extent authorized by statute and implementing regulations. Thus, in an early case, expenses of a groom and valet incurred by an Army officer in Belgium could not be regarded as necessary travel expenses and therefore could not be reimbursed from Army appropriations. 21 Comp. Dec. 627 (1915).

Senior-level officials frequently travel for political purposes. As the Justice Department has pointed out, it is often impossible to neatly categorize travel as either purely business or purely political. To the extent it is possible to distinguish, appropriated funds should not be used for political travel. 6 Op. Off. Legal Counsel 214 (1982). GAO has conducted occasional reviews in this area, and has commented on the lack of legally binding guidelines against which to evaluate particular expenditures. *E.g.*, U.S. General Accounting Office, *Review of White House and Executive Agency Expenditures for Selected Travel, Entertainment, and Personnel Costs*, AFMD-81-36 (Washington, D.C.: Mar. 6, 1981); *Review of the Propriety of White House and Executive Agency Expenditures for Selected Travel, Entertainment, and Personnel Costs*, FGMSD-81-13 (Washington, D.C.: Oct. 20, 1980).

Finally, there are situations in which expenses of congressional travel may be charged to the appropriations of other agencies. Under 31 U.S.C. § 1108(g):

> "Amounts available under law are available for field examinations of appropriation estimates. The use of the amounts is subject only to regulations prescribed by the appropriate standing committees of Congress."

Thus, travel expenses of congressional committee members and staff incident to "field examinations" of appropriation requests may be charged to the agency whose programs and budget are being examined. B-214611, Apr. 17, 1984; B-129650, Jan. 2, 1957. Before the above provision was enacted as permanent legislation, similar provisions had appeared for many years in various appropriation acts. *See* 6 Comp. Gen. 836 (1927); 23 Comp. Dec. 493 (1917).

Travel expenses of congressional spouses (Members and staff) may not be paid from appropriated funds. B-204877, Nov. 27, 1981.

Federal employees may retain promotional travel benefits, including frequent flyer miles or upgrades, when the benefits are earned as a result of official travel and if the promotional item is obtained under the same terms as those offered the general public and at no additional cost to the government. Pub. L. No. 107-107, div. A, title XI, § 1116, 115 Stat. 1012, 1241 (Dec. 28, 2001).

c. Postage Expenses

Agencies are required to reimburse the Postal Service for mail sent by or to them as penalty mail.[18] Reimbursement is to be made "out of any appropriations or funds available to them." 39 U.S.C. § 3206(a). This statute amounts to an exception to the general purpose statute, 31 U.S.C. § 1301(a), in that the expenditure may be charged to any appropriation available to the agency. Penalty mail costs do not have to be charged to the particular bureau or activity that generated the cost. 33 Comp. Gen. 206 (1953). By virtue of this statutory authority, the use of appropriations for one component of an agency to pay penalty mail costs of another component funded under a separate appropriation does not constitute an unauthorized transfer of appropriations. 33 Comp. Gen. 216 (1953). The same principle applies to reimbursement for registry fees. 36 Comp. Gen. 239 (1956).

[18] Penalty mail means official mail, other than franked mail, which is authorized by law to be transmitted in the mail without prepayment of postage. 32 U.S.C. § 3201(1).

d. Books and Periodicals

Expenditures for books and periodicals are evaluated under the necessary expense rule. Thus, the American Battle Monuments Commission could use its Salaries and Expenses (S&E) appropriation to buy books on military leaders to help it decide what people and events to memorialize. 27 Comp. Gen. 746 (1948).[19]

The National Science Foundation could subscribe to a publication called "Supervisory Management" to be used as training material in a supervisory training program under the Government Employees Training Act. If determined necessary to the course, the subscription could be paid from the Foundations S&E appropriation. 39 Comp. Gen. 320 (1959). Similarly, the Interior Department's Mining Enforcement and Safety Administration could subscribe to the "Federal Employees News Digest" if determined to be necessary in carrying out the agency's statutory functions. 55 Comp. Gen. 1076 (1976).

Subsequently, when the Federal Employees News Digest came under some criticism, it became necessary to explain that a decision such as 55 Comp. Gen. 1076 is neither an endorsement of a particular publication nor an exhortation for agencies to buy it. It is merely a determination that the purchase is legally authorized. B-185591, Feb. 7, 1985.

In B-171856, Mar. 3, 1971, the Interior Department was permitted to purchase newspapers to send to a number of Inuit families in Alaska. Members of the families had been transported to Washington state to help in fighting a huge fire, and the newspapers were seen as necessary to keep the families advised of the status of the operation and also as a measure to encourage future volunteerism.

e. Miscellaneous Items Incident to the Federal Workplace

We have viewed certain civic, charitable, and similar community support activities involving limited use of agency resources and employee time as permissible expenses. For instance, agencies may spend their appropriations, within reason, to cooperate with government-sanctioned charitable fund-raising campaigns, including such things as permitting solicitation during working hours, preparing campaign instructions, and distributing campaign materials. 67 Comp. Gen. 254 (1988) (Combined Federal Campaign). *See also* B-155667, Jan. 21, 1965; B-154456, Aug. 11,

[19] Decisions in this area prior to 1946 applying a stricter standard, such as 21 Comp. Gen. 339 (1941) and 22 Comp. Dec. 317 (1916), should be disregarded as they reflected prohibitory legislation enacted on March 15, 1898 (30 Stat. 316) and repealed in 1946.

1964; B-119740, July 29, 1954. Similarly, some use of employee time and agency equipment can occur to carry out limited National Guard and Reserve functions or to assist with adopt-a-school programs. 71 Comp. Gen. 469 (1992); B-277678, Jan. 4, 1999. This authority, however, does not extend to giving T-shirts to Combined Federal Campaign contributors. 70 Comp. Gen. 248 (1991).

An agency may use its general operating appropriations to fund limited amounts of promotional material in support of the United States savings bond campaign. B-225006, June 1, 1987.

Support that agencies are authorized by law to provide to federal credit unions may, if administratively determined to be necessary, include automatic teller machines. 66 Comp. Gen. 356 (1987). The justification was adequate in that case because the facility in question operated on three shifts 7 days a week and the credit union could not remain open to accommodate workers on all shifts.

The Salaries and Expenses appropriation of the Internal Revenue Service (IRS) could be used to procure credit bureau reports if administratively determined to be necessary in connection with investigating applicants for employment with IRS. B-117975, Dec. 29, 1953.

IRS was authorized to undertake employee counseling and referral programs related to eldercare. The expenditure was justified under 5 U.S.C. § 7901, which authorized "preventative programs related to health." 71 Comp. Gen. 527 (1992). Similar mental health referrals are discussed at length in section C.13 of this chapter addressing personal expenses.

Outplacement assistance to employees may be regarded as a legitimate matter of agency personnel administration if the expenditures are found to benefit the agency and are reasonable in amount. 68 Comp. Gen. 127 (1988); B-272040, Oct. 29, 1997. The Government Employees Training Act authorizes training in preparation for placement in another federal agency under conditions specified in the statute. 5 U.S.C. § 4103(b).

Otherwise unrestricted operating appropriations are available to protect a government official who has been threatened or is otherwise in danger, if the agency determines that the risk impairs the official's ability to carry out his or her duties and hence adversely affects the efficient functioning of the agency. For example, the U.S. Customs Service may use appropriated funds to purchase home and automobile security devices for agents stationed in

Puerto Rico and the U.S. Virgin Islands where they are needed as a result of the agent's law enforcement activities. B-251710, July 7, 1993. *See also* 71 Comp. Gen. 4 (1991). Also, certain officials, specified in 18 U.S.C. § 3056(a), are entitled to Secret Service protection. 54 Comp. Gen. 624 (1975), *modified by* 55 Comp. Gen. 578 (1975).

Payment of an honorarium to an invited guest speaker (other than a government employee) is permissible under a necessary expense rationale. *See* A-69906, Mar. 16, 1936 (payment of an honorarium by an agency of the District of Columbia government was found to be an allowable administrative expense). *See also* B-20517, Sept. 24, 1941.

Fees for the notarization of documents are properly payable from appropriated funds where no government notary is available. B-33846, Apr. 27, 1943.

An agency's appropriations are not available to reimburse the Civil Service Retirement Fund for losses due to overpayments to a retired employee resulting from the agency's erroneous processing of information. 54 Comp. Gen. 205 (1974).

The Federal Reserve Board could not match employee contributions to an employee savings plan established by the Board. B-174174, Sept. 24, 1971.

C. Specific Purpose Authorities and Limitations

1. Introduction

This section will explore a number of specific topics concerning purpose availability. Sections C.2 through C.16 cover areas that have generated considerable activity over the years and require a somewhat detailed presentation. While our topic selection is designed to highlight certain restrictions, our objective is to describe what is authorized as well as what is unauthorized. Most of the topics are a mixture of both.

Restrictions on the purposes for which appropriated funds may be spent come from a variety of sources. Some may stem from the Constitution itself. An example is the prohibition on paying certain state and local taxes,

discussed in section C.15. Others are found in permanent legislation, such as the restrictions on residential and long distance telephone service discussed in section C.16.

A common source of purpose restrictions is the appropriation act itself. Restrictions are often included as provisos to the appropriating language or as general provisions or "riders." For example, B-202716, Oct. 29, 1981, construes an appropriation act restriction prohibiting the use of Legal Services Corporation funds for the representation of illegal aliens. Another example is the restriction on "publicity and propaganda" expenditures found in some appropriation acts, discussed in section C.11.

Finally, a number of restrictions have evolved from decisions of the Comptroller General and his predecessor, the Comptroller of the Treasury. An example is the government's policy on self-insurance, section C.10. The restrictions that have evolved administratively usually date back to the nineteenth century, are firmly embedded in appropriations law, and for the most part have been recognized by Congress at least implicitly by the practice of legislating the occasional exception.

Purpose restrictions will commonly prohibit the use of funds for an item except "under specific statutory authority," or except under "an appropriation specifically available therefore," or similar language. The "specific authority" needed to create an exception in these situations need not be found in the appropriation act itself, but may be contained in authorizing or enabling legislation as long as it is clearly applicable to the appropriation sought to be charged. 23 Comp. Gen. 859 (1944); 16 Comp. Gen. 773 (1937).

2. Attendance at Meetings and Conventions

Meetings have become a way of life in contemporary American society and the federal bureaucracy is no exception. It seems that there are meetings on just about everything. Quite often they can be very useful. They can also be expensive. It is no surprise that lots of meetings are held in places like Honolulu and San Francisco. This section will explore when appropriated funds may be used to send people, government employees and others, to meetings. Congress has passed a number of statutes in this area and the cases usually involve the interpretation and application of the various statutory provisions. For purposes of this discussion, the term "meeting" includes other designations such as conference, congress, convention, seminar, symposium, and workshop; what the particular gathering is called is irrelevant.

a. Government Employees

(1) Statutory framework

To understand the law in this area, it is necessary to understand the interrelationship of several statutes. Listed in the order of their enactment, they are: 5 U.S.C. § 5946, 31 U.S.C. § 1345, 5 U.S.C. § 4109, and 5 U.S.C. § 4110. This interrelationship is best seen by outlining the statutory evolution.

The first piece of legislation was enacted in 1912. As relevant here, section 8 of the Act of June 26, 1912 (Pub. L. No. 201, ch. 182, 37 Stat. 139, 184), prohibited the payment, without specific statutory authority, of the expenses of attendance of an individual at meetings or conventions of members of a society or association. With exceptions to be noted below, this statute is now found at 5 U.S.C. § 5946. For the most part, it has always been viewed as applying to attendance by federal employees at nonfederally sponsored meetings. *See*, *e.g.*, B-140912, Nov. 24, 1959.

There were many early cases under the 1912 statute. Since the prohibition is directed at meetings of a "society or association," other types of meetings were not covered. Thus, the Federal Power Commission could, if determined to be in the furtherance of authorized activities, send a representative to the World Power Conference (in Basle, Switzerland) since it was not a meeting of a "society or association." 5 Comp. Gen. 834 (1926). Similarly, the statute did not prohibit travel by U.S. Attorneys "to attend a conference of attorneys not banded together into a society or association, but called together for one meeting only for conference in a matter bearing directly on their official duties." 1 Comp. Gen. 546 (1922).

However, if a given gathering was viewed as a meeting or convention of a society or association, the expenses were consistently disallowed. *E.g.*, 16 Comp. Gen. 252 (1936); 5 Comp. Gen. 599 (1926), *aff'd*, 5 Comp. Gen. 746 (1926); 3 Comp. Gen. 883 (1924). GAO often told agencies in those days that if they thought attendance would be in the interest of the government, they should present the matter to Congress. *E.g.*, 5 Comp. Gen. at 747. In fact Congress granted specific authority to a number of agencies (for an example, see B-136324, Aug. 1, 1958), and later, as will be seen below, enacted general legislation that renders 5 U.S.C. § 5946, as it relates to attendance at meetings, of very limited applicability.

The next congressional venture in this field was Public Resolution No. 2, 74th Congress, ch. 4, 49 Stat. 19 (Feb. 2, 1935), aimed primarily at restricting the use of appropriated funds to pay expenses of nongovernment persons

at conventions. This statute, now codified at 31 U.S.C. § 1345, provides in relevant part:

> "Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting. This section does not prohibit—
>
> "(1) an agency from paying the expenses of an officer or employee of the United States Government carrying out an official duty; . . ."

Significantly, 31 U.S.C. § 1345 does not apply to government employees in the discharge of official duties. Thus, as of 1935, attendance by private parties at government expense was prohibited by 31 U.S.C. § 1345; attendance by government employees was prohibited by the 1912 statute for meetings of a society or association (regardless of the relationship to official duties), and by 31 U.S.C. § 1345 for other types of meetings unless attendance was in the discharge of official duties.

The next relevant legislative action came in 1958 with two provisions of the Government Employees Training Act, Pub. L. No. 85-507, 72 Stat. 327 (July 7, 1958). Section 10 of the Act, 5 U.S.C. § 4109, authorizes payment of certain expenses in connection with authorized training. Section 19(b) of the Act, 5 U.S.C. § 4110, makes travel appropriations available for expenses of attendance at meetings, "which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities." When Title 5 of the United States Code was recodified in 1966, qualifying language was added to 5 U.S.C. § 5946 to make it clear that the requirement for specific statutory authority no longer applied to the extent payment was authorized by 5 U.S.C. § 4109 or § 4110. *See* 38 Comp. Gen. 800 (1959).

With this statutory framework as background, it is now possible to attempt to state some rules.

A government employee may attend a nongovernment-sponsored meeting at government expense (1) if it is part of an authorized training program under 5 U.S.C. § 4109 or (2) if it is related to agency functions or management under 5 U.S.C. § 4110.

For example, the Labor Department could use its Salaries and Expenses appropriation to pay the attendance fees of its Director of Personnel at a conference of the American Society of Training Directors since the meeting qualified under the broad authority of 5 U.S.C. § 4110. 38 Comp. Gen. 26 (1958). The expenses of attendance may not be paid if the employing agency refuses to authorize attendance, even if authorization would have been permissible under the statute. B-164372, June 12, 1968. (This was sort of an odd case. An employee wanted to attend a conference in Tokyo, Japan. The agency refused authorization because the employee had announced his intention to resign after the conference. The employee went anyway, and for some reason filed a claim for his expenses. GAO said no.) Where attendance is authorized, the fact that the sponsor is a profit-making organization is immaterial. B-161777, July 11, 1967.

The express inclusion of "management" in 5 U.S.C. § 4110 is significant. Before the Government Employees Training Act, GAO had strictly construed grants of statutory authority for attendance at meetings as excluding meetings concerning general problems such as management that are common to all agencies. 37 Comp. Gen. 335 (1957). This type of meeting is now expressly authorized.

If neither 5 U.S.C. § 4109 nor 5 U.S.C. § 4110 applies and the meeting is a meeting of a "society or association," then it is subject to the prohibition of 5 U.S.C. § 5946.

The continuing viability of 5 U.S.C. § 5946 requires further elaboration. GAO held in 38 Comp. Gen. 800 (1959) that the Government Employees Training Act repealed section 5946 by implication to the extent that the two statutes were incompatible. While this is true, some of the language in that decision has generated some confusion. The decision stated that the restriction in section 5946 "is inapplicable so far as agencies and personnel covered by the Government Employees Training Act are concerned," and that those agencies no longer need to obtain specific appropriation provisions to authorize attendance at meetings. Of course this statement is based on the premise that an agency is not likely to seek, nor is Congress likely to grant, specific appropriation authority for an agency to send its employees to meetings which have nothing to do with agency business. Thus, it is not accurate to say that section 5946 simply no longer applies to civilian employees of the government. It does apply, except that its scope is considerably reduced by virtue of the broad authority of the Government Employees Training Act. If attendance cannot be authorized under either of the Acts provisions, 5 U.S.C. § 5946 still applies. This relationship is

correctly stated in 55 Comp. Gen. 1332, 1335–36 (1976). For cases where expenses were disallowed because they could not be justified under these standards, see B-202028, May 14, 1981; B-195045, Feb. 8, 1980; and B-166560, May 27, 1969.

It is also possible for 31 U.S.C. § 1345 to apply to government employees, although it would be the rare case. As noted above, 31 U.S.C. § 1345 does not apply to government employees in the discharge of official duties. A number of earlier cases will be found that cite the statute in passing for this proposition. *E.g.*, 27 Comp. Gen. 627 (1948); 26 Comp. Gen. 53 (1946); 22 Comp. Gen. 315 (1942); B-117137, Sept. 25, 1953; B-87691, Aug. 2, 1949; B-80621, Oct. 8, 1948; B-77404, June 29, 1948; B-77613, June 23, 1948; B-13888, Dec. 10, 1940.[20]

Since the exception for government employees in 31 U.S.C. § 1345 is limited to the discharge of official duties, the statutory prohibition applies to government employees to the extent that a given meeting is not part of the discharge of official duties. If a meeting is not part of authorized training under 5 U.S.C. § 4109 and cannot qualify as related to agency functions under 5 U.S.C. § 4110, it would certainly not be within the exception in 31 U.S.C. § 1345 for the discharge of official duties. If the meeting is a meeting of a "society or association," it is, as noted above, subject to 5 U.S.C. § 5946. If the meeting is not a meeting of a society or association and is not within the exception for the discharge of official duties, 31 U.S.C. § 1345 would apply. An example of a situation in which this rationale might apply is B-195045, Feb. 8, 1980, in which attendance expenses at an executive board meeting of the Combined Federal Campaign were disallowed. (The case was decided on the basis of regulations and prior decisions.)

(2) Inability to attend

If an employee is scheduled to participate in a meeting or conference and is unable to attend, the government may be liable for attendance fees in certain situations. Two cases will illustrate.

[20] All of these cases also involve the pre-Government Employees Training Act version of 5 U.S.C. § 5946 and may no longer be valid to that extent. The editors have made no attempt to examine each of the cases from this perspective. Thus, while the pre-1958 cases remain valid to the limited extent that they involve 31 U.S.C. § 1345, the results in those cases may no longer apply in view of the subsequent enactment of 5 U.S.C. §§ 4109 and 4110.

In B-159059, June 28, 1966, an Interior Department employee had been accepted to attend an energy seminar. The seminar announcement provided a cutoff date for cancellation of reservations but permitted substitutions. Due to the press of other necessary work, the employee did not attend the seminar, nor did he send a substitute or request cancellation before the cutoff date. GAO found that the sponsors acceptance of the employees application, which had been duly approved (in this particular case, the applicant was also the approving official), obligated the government to pay the seminar fee subject to timely cancellation. Since the agency failed to give timely notice of cancellation, it was liable for the seminar fee.

In another 1966 case, a Defense Department employee was scheduled to attend a training seminar in New York but a severe snowstorm prevented him from leaving Washington. (By Washington standards, this could have been 2 inches.) Since the employee's nonattendance was in no way attributable to the organization conducting the seminar, GAO concluded (citing B-159059) that the seminar fee should be paid. GAO rejected a contention that the government's obligation should be excused on the grounds of impossibility (the employee's nonattendance resulted from natural forces) since the arrangement permitted substitution of personnel. B-159820, Sept. 30, 1966.

(3) Federally sponsored meetings

Federally sponsored meetings for employees (intra-agency or interagency), such as management or planning seminars, are not prohibited by 5 U.S.C. § 5946 since they are not meetings of a "society or association," nor are they prohibited by 31 U.S.C. § 1345 because they concern the discharge of official duties. The authority for this type of meeting is essentially a "necessary expense" question.

An increasingly common type of agency meeting is the "retreat type" conference. In this situation, some agency official with authority to do so determines that the participants should get away from their normal work environment and its associated interruptions such as telephones. Frequently, they need to get just far enough away to justify the payment of per diem allowances. While this type of meeting may be criticized as extravagant, it is within the agency's administrative discretion under the necessary expense rule and therefore not illegal. *See* B-193137, July 23, 1979.

Agency meetings at or near the participant's normal duty station may present special problems with respect to reimbursement for meals. In many cases, meals or snacks will be unauthorized even though there is nothing improper about conducting the meeting itself. This area is discussed in detail in this chapter, section C.5.

(4) Rental of space in District of Columbia

Originally enacted in 1877 (Act of March 2, 1877, ch. 106, 19 Stat. 370), 40 U.S.C. § 8141 now provides:

> "A contract shall not be made for the rent of a building, or part of a building, to be used for the purposes of the Federal Government in the District of Columbia until Congress enacts an appropriation for the rent. This section is deemed to be notice to all contractors or lessors of the building or a part of a building."

The statute does not prohibit the procurement of short-term conference facilities if otherwise proper. 54 Comp. Gen. 1055 (1975). In rendering this decision, which overruled several earlier cases, the Comptroller General relied heavily on the Federal Property Management Regulations, in which the General Services Administration construed the procurement of short-term conference facilities as a service contract rather than a rental contract.

However, the statute does prohibit the procurement of lodging accommodations in the District of Columbia in connection with a meeting or conference without specific statutory authority. 56 Comp. Gen. 572 (1977), *modified and aff'd*, B-159633, Sept. 10, 1974; 49 Comp. Gen. 305 (1969).[21] In 56 Comp. Gen. 572, GAO approved payment to the hotel of the difference between full per diem and the reduced per diem actually paid to the participating employees. This is because the agency could, without violating the statute, have paid full per diem to the employees if they had made the arrangements themselves on an individual basis. Thus, the difference represented a cost the agency would have properly incurred had it not procured the accommodations directly.

[21] One of the decisions listed as overruled in 54 Comp. Gen. 1055 was 49 Comp. Gen. 305. However, the overruling action was later recognized to be erroneous and 49 Comp. Gen. 305 was reinstated in 56 Comp. Gen. 572, 574.

(5) Military personnel

Attendance at meetings by military personnel is governed by 37 U.S.C. § 412:

> "Appropriations of the Department of Defense that are available for travel may not, without the approval of the Secretary concerned or his designee, be used for expenses incident to attendance of a member of an armed force under that department at a meeting of a technical, scientific, professional, or similar organization."

This statute, designed to provide a broad exception for the Defense Department from 5 U.S.C. § 5946, originated as an appropriation act rider in the mid-1940s and was enacted as permanent legislation by section 605 of the Department of Defense Appropriation Act for 1954, 67 Stat. 349 (Aug. 1, 1953).

The Government Employees Training Act, enacted in 1958 and discussed above, applies to civilian employees of the military departments but not to members of the uniformed services. 38 Comp. Gen. 312 (1958). Accordingly, the Comptroller General held in 1959 that the administrative approval specified in 37 U.S.C. § 412 was no longer required for civilian employees covered by the Government Employees Training Act. However, the requirement of 37 U.S.C. § 412 remains applicable to members of the uniformed services. 38 Comp. Gen. 800 (1959). *See also* 55 Comp. Gen. 1332, 1335 (1976). The recodification of Title 37 of the United States Code in 1962 recognized this distinction and reworded the statute to its present form so it would apply only to members of the armed forces.

The administrative approval required by the statute is a prerequisite to the availability of the appropriation, and has the effect of removing the appropriation from the prohibition of 5 U.S.C. § 5946 to the extent of such approval. 34 Comp. Gen. 573, 575 (1955). Oral approval, if satisfactorily established by the record, is sufficient to meet the requirement of the statute. B-140082, Aug. 19, 1959. However, where implementing departmental regulations establish more stringent requirements, such as advance approval in writing, the regulations will control. B-139173, June 2, 1959.

The administrative approval requirement of 37 U.S.C. § 412 does not apply to meetings sponsored by a federal department or agency. 50 Comp. Gen. 527 (1971).

b. Nongovernment Personnel

(1) 31 U.S.C. § 1345

Quoted previously, 31 U.S.C. § 1345 prohibits the payment of travel, transportation, or subsistence expenses of private parties at meetings without specific statutory authority.

The Comptroller General set the tone for GAO's approach to 31 U.S.C. § 1345 in two cases decided shortly after the statute was enacted. In 14 Comp. Gen. 638 (1935), the Comptroller held that the Federal Housing Administration (FHA) could not pay the travel and lodging expenses for attendance at meetings of private citizens who were cooperating with the FHA in a campaign to encourage the repair and modernization of real estate. GAO had no difficulty in finding that the statute barred payment:

> "There seems very little if any room for doubt as to the reasonable meaning and legal effect of [31 U.S.C. § 1345]. Simply stated, it is that no convention or other form of assemblage or gathering may be lodged, fed, conveyed, or furnished transportation at Government expense unless authority therefor is specifically granted by law."

Id. at 640 (explanatory language provided).

A few months later, relying on 14 Comp. Gen. 638, the Comptroller General held similarly that 31 U.S.C. § 1345 prohibited the American Battle Monuments Commission from providing transportation and refreshments for private individuals at monument dedication ceremonies in Europe. 14 Comp. Gen. 851 (1935). Other early decisions applying the statutory prohibition are 15 Comp. Gen. 1081 (1936); B-53554, Nov. 6, 1945; B-27441, Aug. 25, 1942; and A-66869, Jan. 31, 1936.

Some more recent cases in which GAO found expenditures prohibited by 31 U.S.C. § 1345 are summarized below:

- The Environmental Protection Agency (EPA) could not pay the transportation and lodging expenses of state officials attending a National Solid Waste Management Association Convention. B-166506, July 15, 1975, *aff'd*, 55 Comp. Gen. 750 (1976).

- The Mine Safety and Health Administration, Department of Labor, could not pay travel and subsistence expenses of miners and mine operators attending safety and health training seminars. B-193644, July 2, 1979.

- Maritime Administration could not pay transportation and subsistence expenses of nonfederal participants in a 2-week seminar for general publication maritime writers. B-168627, May 26, 1970.

- Navy could not pay for a dinner and cocktail party for nongovernment minority group leaders. B-176806-O.M., Sept. 18, 1972.

- National Highway Traffic Safety Administration could not pay travel and lodging expenses of state officials at a workshop on odometer fraud. 62 Comp. Gen. 531 (1983).

GAO has not attempted to define precisely what types of gatherings are within the scope of the statutory prohibition. The determination is made on a case-by-case basis. The statutory language is broad and could presumably be construed to cover any situation where two or more persons are gathered together in one place. However, GAO has never adopted such a rigid view. For example, in 45 Comp. Gen. 476 (1966), a certifying officer of the Department of Agriculture asked whether he could "properly certify for payment a voucher covering payment for rental of a chartered bus for the transportation of female guests from Albuquerque to Grants, New Mexico, and return, for purposes of providing social and recreational services to Job Corps enrollees." (This is what the case says. The editors are not making it up.) The Comptroller General found that this was simply not the kind of "meeting" 31 U.S.C. § 1345 was intended to prohibit. Further, there was statutory authority for providing "recreational services" for the enrollees. Therefore, the expenditure was not illegal. The decision does not specify precisely what "social and recreational services" the women were bused in to provide. *See also* 72 Comp. Gen. 229 (1993) (the Department of Defense (DOD) may pay for travel expenses from the United States to Germany for recruiters from public schools to attend job fairs for teachers at DOD Dependent schools (DODDS) because job fairs and one-on-one interviews between recruiters and DODDS teachers are not the type of "meeting" covered by section 1345).

As noted, the prohibition of 31 U.S.C. § 1345 can be overcome by specific statutory authority. An example of such authority is language in an appropriation act making the appropriation available for "expenses of

attendance at meetings" or similar language.[22] *See* 72 Comp. Gen. 146 (1993); 34 Comp. Gen. 321 (1955); 24 Comp. Gen. 86 (1944); 17 Comp. Gen. 838 (1938); 16 Comp. Gen. 839 (1937); B-117137, Sept. 25, 1953. (This is the same language used before enactment of the Government Employees Training Act to grant exceptions from 5 U.S.C. § 5946.)

In one case, less-than-specific authority was found adequate. In 35 Comp. Gen. 129 (1955), GAO considered a statute that (1) provided for a "White House Conference on Education," (2) specified that the conference be broadly representative of educators and other interested persons from all parts of the United States, and (3) authorized appropriations necessary for the "administration" of the act. The decision held this sufficient to make the ensuing appropriations available for the travel costs of the invitees. While the decision does not mention 31 U.S.C. § 1345, the distinction is readily apparent. Here, holding the conference was more than merely a legitimate means of implementing the enabling statute; it was the very purpose of the statute and hence the only means. *See also* 35 Comp. Gen. 198 (1955) (discussing other funding issues under the same legislation). A more recent case applying 35 Comp. Gen. 129 to a similar situation is B-242880, Mar. 27, 1991 (Commission on Interstate Child Support could pay lodging costs for core nonfederal invitees at a statutorily mandated National Conference on Interstate Child Support where the core invitees were essential to assist the Commission in its statutory duties).

However, general statutory authority to disseminate information to the public, or to promote or encourage cooperation with the private sector, or to provide technical assistance or education to specified segments of the private sector, is not sufficiently specific to overcome 31 U.S.C. § 1345. *See* 62 Comp. Gen. 531 (1983); B-193644, July 2, 1979; B-166506, July 15, 1975; B-168627, May 26, 1970.

A distinction must be drawn between the authority to sponsor a meeting and the authority to pay the types of expenses prohibited by 31 U.S.C. § 1345. An agency may be able to do the former but not the latter. Thus, in B-166506, July 15, 1975, GAO pointed out that EPA could hold a solid waste management convention as a legitimate means of implementing its

[22] In some cases, the authority has been made permanent. An example is 31 U.S.C. § 326(a) for the Treasury Department, construed in 37 Comp. Gen. 708 (1958). Another example is subsection (2) of 31 U.S.C. § 1345 concerning meetings of 4-H Clubs, noted in B-166506, July 15, 1975.

functions under the Solid Waste Disposal Act. What it could not do without more specific statutory authority was pay the travel and lodging expenses of the state participants. Sponsoring the meeting itself is essentially a "necessary expense" question. *See also* 62 Comp. Gen. 531 (1983); B-239856, Apr. 29, 1991. *Cf.* 45 Comp. Gen. 333 (1965); B-147552, Nov. 29, 1961.

Thus, depending on the agency's statutory authority, it may be authorized to incur such expenses as renting conference facilities, financing the participation of its own employees, bringing in guest speakers, both federal and nonfederal, and preparing and disseminating literature. The prohibition of 31 U.S.C. § 1345 comes into play only when the agency purports to pay the travel, transportation, or subsistence expenses of nonfederal attendees.

Another thing the agency may be able to do is permit the use of government facilities for the meeting. For example, in B-168627, May 26, 1970, while the Maritime Administration could not pick up the tab for the participation of nongovernment persons at a seminar, it could permit the seminar to be held at the U.S. Merchant Marine Academy. The rule, stated in that decision, is that an agency has authority to grant to a private individual or business a "revocable license" to use government property, subject to termination at any time at the will of the government, provided that such use does not injure the property in question and serves some purpose useful or beneficial to the government.

(2) Invitational travel

Another statute we should note is 5 U.S.C. § 5703, which provides:

> "An employee serving intermittently in the Government service as an expert or consultant …or serving without pay or at $1 a year, may be allowed travel or transportation expenses, under this subchapter, while away from his home or regular place of business and at the place of employment or service."

This statute originated as an appropriation act rider in 1945 and was enacted as permanent legislation the following year as section 5 of the Administrative Expenses Act of 1946, Pub. L. No. 600, ch. 744, 60 Stat. 806 (Aug. 2, 1946). To the extent it authorizes payment in the so-called "invitational travel" situation—a private party called upon by the

government to confer or advise on government business—it represents a limited exception to 31 U.S.C. § 1345.

Even before 5 U.S.C. § 5703 was enacted, GAO had recognized that a private individual "invited" by the government to confer on official business was entitled to reimbursement of travel expenses if specified in the request and justified as a necessary expense. 8 Comp. Gen. 465 (1929); 4 Comp. Gen. 281 (1924); A-41751, Apr. 15, 1932.

The enactment of 31 U.S.C. § 1345 in 1935 did not change this. Thus, the Comptroller General recognized in 15 Comp. Gen. 91, 92 (1935) that while the statute might prohibit the payment of expenses of private individuals called together as a group, it would not apply to "individuals called to Washington or elsewhere for consultation as individuals." *See also* A-81080, Oct. 27, 1936. Viewed in this light, the 1946 enactment of 5 U.S.C. § 5703 in large measure merely gave express congressional sanction to a rule that had already developed in the decisions.

Although GAO did not directly address the relationship between 5 U.S.C. § 5703 and 31 U.S.C. § 1345 until 1976 (55 Comp. Gen. 750 (1976), discussed below), the relevant principles were established in several earlier cases. In one of GAO's earliest decisions under 5 U.S.C. § 5703, the Comptroller General held that persons who are not government officers or employees may, "when requested by a proper officer to travel for the purpose of conferring upon official Government matters," be regarded as persons serving without pay and therefore entitled to travel expenses under 5 U.S.C. § 5703. 27 Comp. Gen. 183, 184 (1947). *See also* 39 Comp. Gen. 55 (1959). Thus, the rule of 8 Comp. Gen. 465 now had a statutory basis. A critical prerequisite is this: in order to qualify under 5 U.S.C. § 5703, the individual must be performing a direct service for the government. 37 Comp. Gen. 349 (1957).

Once the proposition of 27 Comp. Gen. 183 is accepted, it is but a short step to recognizing that a private individual called upon to advise on government business may be called upon to do so in the form of making a presentation at a meeting or conference. See, for example, B-111310, Sept. 4, 1952, and 33 Comp. Gen. 39 (1953), in which payment under 5 U.S.C. § 5703 was authorized. The statute could not reasonably be limited to "one-on-one" consultations. As stated in B-196088, Nov. 1, 1979:

> "It is not unusual for the Government to invite an individual with a particular expertise to attend a meeting and to share

> the benefit of his views without compensation other than by way of reimbursement for his travel and transportation expenses."

Thus, travel expenses of private individuals "invited" to participate in meetings sponsored by the National Center for Productivity and Quality of Working Life were properly paid under 5 U.S.C. § 5703. B-192734, Nov. 24, 1978. Similarly, the Internal Revenue Service could invoke 5 U.S.C. § 5703 to buy lunches for guest speakers invited to participate in a ceremony observing National Black History Month since the ceremony was an authorized part of the agency's formal program to advance equal opportunity objectives. 60 Comp. Gen. 303 (1981).

There is a limit to this rationale and a point at which 5 U.S.C. § 5703 collides head-on with 31 U.S.C. § 1345. This point was discussed in 55 Comp. Gen. 750, *supra*, and reiterated in B-193644, July 2, 1979. In 1976, 55 Comp. Gen. 750 affirmed B-166506, July 15, 1975, and held that 31 U.S.C. § 1345 prohibited the Environmental Protection Agency (EPA) from paying travel and lodging expenses of state officials at a solid waste management convention; B-193644 reached the same result for safety and training seminars for miners and mine operators. In both cases, the Comptroller General rejected the suggestion that the expenses could somehow be authorized under the "invitational travel" statute. In neither case were the attendees providing a direct service for the government, even though in both cases the government may have derived some incidental benefit in terms of enhancement of program objectives. The following passage illustrates the "collision point":

> "We thus do not believe that [5 U.S.C. § 5703] was ever intended to establish the proposition that anyone may be deemed a person serving without compensation merely because he or she is attending a meeting or convention, the subject matter of which is related to the official business of some Federal department or agency…. We believe that being called upon to confer with agency staff on official business is different from attending a meeting or convention in which a department or agency is also interested."

55 Comp. Gen. at 752–53 (explanatory information provided). Thus, 5 U.S.C. § 5703 permits an agency to invite a private individual (or more than one) to a meeting or conference at government expense, if that individual is legitimately performing a direct service for the government

such as making a presentation or advising in an area of expertise. Invitational travel also encompasses private individuals whose travel is a necessary incident to the service that provides a direct benefit to the government. B-259620, Feb. 29, 1996 (cross-cultural training for spouses of Federal Aviation Administration employees living abroad directly benefits the agency). *See also* 71 Comp. Gen. 9 (1991); 71 Comp. Gen. 6 (1991). However, 5 U.S.C. § 5703 is not a device for circumventing 31 U.S.C. § 1345. The "direct service" test is not met merely because the agency is interested in the subject matter of the conference or because the conference will enhance the agency's program objectives. B-251921, Apr. 14, 1993 (EPA cannot pay for participants who are not federal employees to attend a United Nations-sponsored conference on women's contributions to solving environmental problems because EPA does not benefit directly from their attendance). In a somewhat unique set of circumstances, however, GAO held that the invitational travel statute permits a private individual, appointed by the government, to travel to participate in a state conference at government expense if the information imparted by the conference provides a direct service to the government. *See* B-260896, Oct. 17, 1996 (DOD may pay for nongovernment school board members appointed by DOD pursuant to 20 U.S.C. § 241(h) (authorizing assistance for local education agencies in areas affected by federal agencies, since repealed) to travel to participate in state school board conferences and workshops because the knowledge and information derived from participation provides a direct service for the government).

(3) Use of grant funds

One of the principles of grant law is that, where a grant is made for an authorized grant purpose, the grant funds in the hands of the grantee are not subject generally to many of the restrictions applicable to the direct expenditure of appropriations, unless there is a special condition of the grant to the contrary. B-153417, Feb. 17, 1964. One of those restrictions, which does not apply to grant funds in the hands of a grantee, is 31 U.S.C. § 1345.

For example, the American Law Institute could use funds provided by the Environmental Protection Agency in the form of a statutorily authorized training grant to defray transportation and subsistence expenses of law students and practicing environmental lawyers at an environmental law seminar. 55 Comp. Gen. 750 (1976). For this result to apply, the grant must be made for an authorized grant purpose and there must be no provision to the contrary in the grant agreement. Once these conditions are met, the

grantee's use of the funds is not impaired by 31 U.S.C. § 1345. However, an agency may not use the grant mechanism for the sole purpose of circumventing 31 U.S.C. § 1345, that is, to do indirectly that which it could not do directly. In other words, if an agency makes a grant for an authorized purpose, and the grantee sponsors a meeting or conference as a means of implementing that purpose, the grantee's use of the funds will not be restrained by 31 U.S.C. § 1345. However, unless otherwise authorized, the agency could not make the grant for the purpose of sponsoring the conference and thereby permitting payments it could not make by direct expenditure.

Depending on the precise statutory authority involved, there may be situations in which sponsoring or helping to sponsor a conference is itself an authorized grant purpose. One example is B-83261, Feb. 10, 1949 (grant to American Cancer Society under Public Health Service Act).

The treatment of grant funds described above does not apply to procurement contracts. 62 Comp. Gen. 531 (1983). *See also* B-262110, Mar. 19, 1997.

3. Attorney's Fees

a. Introduction

Questions on the availability of appropriated funds to pay attorney's fees arise in many contexts. Attorney's fees awarded by courts are discussed in Chapter 14 (Volume III of the second edition of *Principles of Federal Appropriations Law*). This section deals with administrative payments.

Traditionally, the United States has followed what has come to be known as the "American Rule," that each party in litigation or administrative proceedings is personally responsible for his or her own attorney's fees. In other words, in the absence of statutory authority to the contrary, the losing party may not be forced to pay the winner's attorney. *E.g.*, *Buckhannon Board & Care Home*, *Inc. v. West Virginia Department Of Health & Human Resources*, 532 U.S. 598, 602 (2001); *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975).

One application of the American Rule is that a claimant who prosecutes an administrative claim against the United States is not entitled to reimbursement of legal fees unless authorized by statute. *E.g.*, 57 Comp. Gen. 554 (1978); 49 Comp. Gen. 44 (1969); 37 Comp. Gen. 485, 487 (1958);

B-189045, Jan. 26, 1979. To illustrate, a vendor who successfully filed a claim for the payment of goods sold and delivered to a Navy vessel was not entitled to reimbursement of attorney's fees. B-187877, Apr. 14, 1977. Similarly nonreimbursable were legal fees incurred incident to prosecuting a claim for damages for breach of an oral agreement. B-188607, July 19, 1977. "Fairness" and "decency," however appealing, do not compensate for the lack of statutory authority. 67 Comp. Gen. 574, 576 (1988); 57 Comp. Gen. 856, 861 (1978).

Payments to attorneys also arise in a number of situations that are, strictly speaking, not applications of the American Rule, that is, which do not involve payment of fees to a "prevailing party." The approach in these cases is to look first for statutory authority and if express statutory authority does not exist, apply the various principles discussed throughout this publication, such as the necessary expense doctrine.

For example, a private attorney sought reimbursement for out-of-pocket expenses he incurred incident to a "special proceeding" initiated by the Nuclear Regulatory Commission (NRC) to investigate charges of misconduct raised by the attorney against NRC staff members and by the staff members against the attorney. There was no statutory authority to reimburse the attorney, nor could the payment be justified as a necessary expense since it was not reasonably necessary to carrying out NRC functions. Therefore, payment was unauthorized. B-192784, Jan. 10, 1979. In another case, the Small Business Administration (SBA) could not reimburse a bank for legal fees the bank incurred in protecting its interest in an SBA-guaranteed loan since SBA neither contracted with the attorney nor did it benefit from his services. B-187950, Apr. 26, 1977.

The Justice Department has held that legal fees incurred by a Cabinet nominee in connection with Senate confirmation hearings, for services rendered before the nominating administration took office, could be paid either from Presidential Transition Act appropriations or from private sources. 5 Op. Off. Legal Counsel 126 (1981).

The remainder of this section will discuss the situations that have been most commonly addressed in decisions of the Comptroller General.

b. Hiring of Attorneys by Government Agencies

During the first century of the Republic, government agencies who needed lawyers either as counsellors or litigators simply went out and hired them. Not only was this system expensive (payments from the public treasury are not conducive to reduced fees), it resulted in inconsistencies in the

government's legal position. Congress remedied the situation in 1870 by creating the Department of Justice, headed by the Attorney General. Act of June 22, 1870, ch. 150, 16 Stat. 162.

To ensure that the objectives of the 1870 legislation would be achieved, Congress included section 17, which (a) prohibited executive agencies from employing attorneys at the expense of the United States and (b) prohibited payments to attorneys, except those employed by the Justice Department, unless the Attorney General certified that the services could not be performed by the Justice Department. The two parts of section 17 subsequently became Revised Statutes §§ 189 and 365.

As the federal government grew in size and complexity, it became apparent that the need for centralization of legal services within the Justice Department related primarily to the specialty of litigation. Thus, with congressional approval, federal agencies regularly employed attorneys to serve as legal advisers. (The term "Attorney-Adviser" is still commonly used to designate staff attorneys in many government agencies.) When Title 5 of the United States Code was recodified in 1966, the successors of R.S. §§ 189 and 365 were combined into the new 5 U.S.C. § 3106. This statute, reflecting the evolved state of the law, prohibits agencies, unless otherwise authorized by law, from employing attorneys "for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested." The agencies are required to refer such matters to the Justice Department.[23] Thus, agencies routinely employ attorneys to provide legal services other than litigation, but may not employ attorneys as litigators unless they have statutory authority to conduct their own litigation or unless that authority has been delegated to them by the Attorney General.

Normally, in view of the existence of the Justice Department and the agency's own staff attorneys, the need for a federal agency to retain private counsel should rarely occur. Indeed, GAO has found it unauthorized for an agency to retain private counsel to provide legal opinions on matters within the Justice Department's jurisdiction under statutes such as 28 U.S.C. §§ 511–514. 16 Comp. Gen. 1089 (1937). In limited situations, the Comptroller General has held that the retention of private attorneys as

[23] Many early decisions will be found dealing with R.S. §§ 189 and 365. *E.g.*, 6 Comp. Gen. 517 (1927); 5 Comp. Gen. 382 (1925). For the most part they may be disregarded as applying statutory provisions that have since been significantly amended or repealed. However, decisions under R.S. §§ 189 and 365 remain valid to the extent they concern the elements of those statutes that survived into 5 U.S.C. § 3106. *E.g.*, 32 Comp. Gen. 118 (1952).

experts or consultants under 5 U.S.C. § 3109 is authorized. For example, in B-192406, Oct. 12, 1978, GAO concluded that the then Civil Service Commission could hire a private law firm under 5 U.S.C. § 3109 to serve as "special counsel" to the Chairman to investigate alleged merit system abuses, since the matter was not covered by 5 U.S.C. § 3106 nor otherwise under the jurisdiction of the Justice Department. Similarly, the Navajo and Hopi Indian Relocation Commission could retain a private attorney under 5 U.S.C. § 3109 as an independent contractor to handle matters beyond the Justice Department's jurisdiction, where the workload was insufficient to justify hiring a full-time attorney. B-114868.18, Feb. 10, 1978.

For similar holdings, see *Boyle v. United States*, 309 F.2d 399 (Ct. Cl. 1962) (retired government patent lawyer retained on part-time basis); 61 Comp. Gen. 69 (1981) (United States Advisory Commission on Public Diplomacy could hire law firm to provide legal analysis of its authority and independence); B-210518, Jan. 18, 1984 (Environmental Protection Agency could retain private counsel to provide independent analysis of issues relating to congressional contempt citation of Administrator). *See also* B133381, July 22, 1977; B-141529, July 15, 1963.

In B-289701, Feb. 27, 2002, GAO faced an unusual situation. A presidential appointee to the Civil Rights Commission had been prevented from taking his seat on the Commission when the appointee whose position he was to assume refused to give up her seat, arguing that her term had not expired. The Justice Department filed suit on behalf of the new appointee. The Commission retained private legal counsel to defend the previous appointee and argue her case before the court. Justice, citing 28 U.S.C. § 516,[24] challenged the Commission's right to intervene in the litigation. Justice objected that neither the Commission nor its officers in their official capacity have a right to appear in litigation without the permission of the Attorney General, which had not been granted. The district court overrode those objections, and ruled in favor of the previous appointee (and the Commission). At this point, after the district court had acted but before the appeal was completed, GAO was asked whether appropriated funds were available to pay for outside counsel. GAO agreed with Justice—the Commission had no authority to use appropriated funds to retain counsel in order to intervene in the court case in opposition to Justice. In its

[24] "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party …is reserved to the officers of the Department of Justice, under the direction of the Attorney General." 28 U.S.C. § 516.

decision, the appellate court overturned the district court's order and held in favor of the new appointee. *United States v. Wilson*, 290 F.3d 347 (D.C. Cir. 2002). However, the circuit court did not address whether the Commission had authority to intervene. *Id.* at 352. The court explained: "As the United States has not raised this issue on appeal, …we do not decide whether this intervention was permissible." *Id.* The effect of this was to let stand the district court's order granting Commission intervention.

Agencies may have specific authority to retain special counsel in addition to the lawyers on the regular payroll. For example, appropriations for the Federal Communications Commission have traditionally included "special counsel fees." The Comptroller General has construed this authority as permitting contractual arrangements with former employees as retired annuitants to perform functions for which they were uniquely qualified. Since the appropriation provision constitutes independent authority, the contracts are not subject to the salary limitations of 5 U.S.C. § 3109. 53 Comp. Gen. 702 (1974); B-180708, Jan. 30, 1976. However, the authority is limited to services of the legal profession and does not embrace "counsel" in a broader sense. B-180708, July 22, 1975.

In B-290005, July 1, 2002, GAO reported that the Interior Department's Fish and Wildlife Service (FWS) had contracted with outside lawyers to obtain legal services in connection with various issues of personnel, labor law, and discrimination allegations. By law, the Solicitor of the Interior Department is solely responsible for the legal work of the Interior Department, including the FWS. 43 U.S.C. § 1455. The Solicitor receives a separate annual appropriation to fund that work. FWS had not obtained the Solicitor's approval for the legal services contracts, and the Solicitor had not exercised any supervisory control over them. GAO concluded that (1) FWS had no authority to contract for legal services; (2) FWS's use of its fiscal year 2001 resource management appropriation for this purpose constituted a violation of the purpose statute, 31 U.S.C. § 1301(a); and (3) FWS had violated the Antideficiency Act, 31 U.S.C. § 1341(a).

c. Suits Against Government Officers and Employees

At one time, government employees were considered largely immune from being sued for actions they took while performing their official duties. This is no longer true. For a variety of reasons, it is no longer uncommon for a government employee to be sued in his individual capacity for something he did (or failed to do) while performing his job. For example, the Supreme Court held in 1978 that an executive official has only a "qualified immunity" for so-called "constitutional torts" (alleged violations of constitutional rights). *Butz v. Economou*, 438 U.S. 478 (1978). In any event, regardless of

whether the employee ultimately wins or loses, he has to defend the suit and therefore will need professional legal representation.

As a general proposition, GAO considers the hiring of an attorney to be a matter between the attorney and the client, and this is no less true when the client is a government officer or employee. *E.g.*, 55 Comp. Gen. 1418, 1419 (1976); B-242891, Sept. 13, 1991. However, the decisions have long recognized another principle as well: Where an officer of the United States is sued because of some official act done in the discharge of an official duty, the expense of defending the suit should be borne by the United States. *E.g.*, 70 Comp. Gen. 647, 649 (1991); 6 Comp. Gen. 214 (1926). This section will discuss when appropriated funds may be used for attorney's fees to defend a government officer or employee.

Generally, when a present or former employee is sued for actions performed as part of his official duties, his defense is provided by the Justice Department. In order for a given case to be eligible for Justice Department representation, the Justice Department must determine that the employee's action, which gave rise to the suit, was performed within the scope of federal employment, and that providing representation is in the interest of the United States.

The role of the Justice Department derives from a number of statutory provisions: 28 U.S.C. §§ 515–519, 543, and 547. *See also* Exec. Order No. 6166, § 5 (1933). These provisions establish the Justice Department as the government's litigator,[25] which for the most part means representation by Justice Department attorneys.[26] To reinforce these provisions, 5 U.S.C. § 3106, previously noted, prohibits executive or military agencies from employing attorneys for the conduct of litigation in which the United States or one of its agencies or employees is a party or is interested. The agencies must refer such matters to the Justice Department. The Justice Department has also issued implementing regulations, found at 28 C.F.R. §§ 50.15 and 50.16.[27] This statutory and regulatory scheme is designed to encourage

[25] For a discussion of the historical evolution and current legal basis of the Attorney General's role as "chief litigator," see 6 Op. Off. Legal Counsel 47 (1982).

[26] In addition, an executive agency may call upon the Justice Department for help in performing the legal investigation of any claim pending in that agency. 28 U.S.C. § 514.

[27] For situations where the Federal Tort Claims Act is the exclusive remedy, see 28 C.F.R. pt. 15.

employees to vigorously carry out their duties by assuring them of an adequate defense at no cost if they should be sued in the course of executing their responsibilities. *Cf. Bontkowski v. Smith*, 305 F.3d 757, 760 (7th Cir. 2002) ("It would be absurd to require law enforcement officers to defend at their own expense against likely groundless spite suits by the people whom they have arrested or investigated.").

However, the Attorney General's decision to provide or not provide counsel to an individual employee sued for official actions is discretionary and not subject to judicial review. *E.g.*, *Turner v. Schultz*, 187 F. Supp. 2d 1288, 1292–97 (D. Colo. 2002); *Falkowski v. Equal Employment Opportunity Commission*, 783 F.2d 252 (D.C. Cir.), *cert. denied*, 478 U.S. 1014 (1986). *Cf. Hall v. Clinton*, 143 F. Supp. 2d 1, 4 (D.D.C. 2001) (Justice Department decision to represent a party—as opposed to withholding representation—might be reviewable). The Attorney General may take into consideration "how blameworthy or litigation-prone the employee seeking representation may be." *Falkowski*, 783 F.2d at 254.

In addition, the Comptroller General has recognized that the statutes cited above authorize the Justice Department to retain private counsel, payable from Justice Department appropriations, if determined necessary and in the interest of the United States. *E.g.*, 56 Comp. Gen. 615, 623 (1977); B-22494, Jan. 10, 1942. For example, the Justice Department generally will not provide representation if the employee is the target of a criminal investigation,[28] but may authorize private counsel at Justice Department expense if a decision to seek an indictment has not yet been made. The Justice Department may also authorize private counsel if it perceives a conflict of interest between the legal or factual positions of different government defendants in the same case. 28 C.F.R. §§ 50.15 and 50.16. *See*

[28] *E.g.*, B-251141, May 3, 1993 (although no criminal charges or disciplinary actions were taken and the matters at issue did concern the performance of agency functions, Food and Drug Administration's request to use its appropriations to reimburse private attorney fees incurred by several employees incident to a federal criminal investigation of possible insider trader activities should be referred to Justice for consideration); B-242891, Sept. 13, 1991 (Army may not use appropriated funds to reimburse private legal fees incurred by civilian officers of the U.S. Army Chemical Research, Development and Engineering Center convicted of multiple criminal environmental protection violations committed in the course of pursuing their otherwise official duties relating to the development of chemical warfare systems), *quoting United States v. Dee*, 912 F.2d 741, 744 (4th Cir. 1990), *quoting United States v. Isaacs*, 493 F.2d 1124, 1142–44 (7th Cir. 1974) ("Criminal conduct is not part of the necessary functions performed by public officials.").

2 Op. Off. Legal Counsel 66 (1978); 56 Comp. Gen. 615, 621–624 (1977);[29] B-150136, B-130441, May 19, 1978; B-130441, May 8, 1978; B-130441, Apr. 12, 1978.

Thus, an employee who learns that he is being sued should first explore the possibility of obtaining representation through the Justice Department. Procedures for requesting representation are found in 28 C.F.R. § 50.15(a). The importance of this step must be emphasized. If the employee fails to immediately seek Justice Department representation, he may find, as discussed below, that he is stuck footing the bill for his attorney's fees even in cases where the expense might otherwise have been paid by the government.

If Justice Department representation is unavailable, there are limited situations in which appropriations of the employing agency may be available to retain private counsel. Generally, before an agency can consider using its own funds, Justice Department representation must first have been sought and must be appropriate but unavailable, and representation must be in the interest of the United States. *E.g.*, B-251141, *supra*. The employee's personal interest in the outcome does not automatically preempt a legitimate government interest. The two may exist side-by-side.

One case, 53 Comp. Gen. 301 (1973), dealt with suits against federal judges and other judicial officers.[30] The suits arise in a variety of contexts, often involving collateral attacks on the judges rulings in original actions. While many of the suits are frivolous, some sort of defense, even if only a *pro forma* submission, is almost always necessary. In many cases, such as actions where no personal relief is sought against the judicial officer, or in potential conflict of interest situations, the Justice Department has determined that it cannot or will not provide representation. The Comptroller General held that judiciary appropriations are available to pay the costs of litigation, including "minimal fees" to private attorneys, if

[29] The decision in 56 Comp. Gen. 615 dealt with civil actions against employees under a prior version of section 7217 of the Internal Revenue Code (26 U.S.C. § 7217) for improper disclosure of tax returns. The prior version of section 7217 has since been repealed (and another statute has been inserted in its place). The remedy is now a suit for damages against the United States under 26 U.S.C. § 7431.

[30] Subject to the same kinds of exceptions applied to legal representation of other federal employees, the Justice Department is statutorily required to defend federal judges. *E.g.*, *Bryan v. Murphy*, 243 F. Supp. 2d 1375, 1381 (N.D. Ga. 2003) (citing 28 U.S.C. § 516).

determined to be in the best interest of the United States and necessary to carry out the purposes of the appropriation. However, the Comptroller General added that (1) the Justice Department must have declined representation, although individual requests are not required for cases falling within the Attorney General's stated policy; (2) the determination of necessity cannot be made by the individual defendant but must be made by the Administrative Office of the U.S. Courts; and (3) the Administrative Office should make full disclosure to the appropriate congressional committees. Under similar circumstances, appropriations for the public defender service are available to defend federal public defenders appointed under the Criminal Justice Act who are sued for actions taken within the scope of their duties. *Id.* at 306.

Nine years after GAO's ruling in 53 Comp. Gen. 301, a statute was added to Title 28 of the United States Code authorizing the Administrative Office of the United States Courts to pay the costs (including attorney fees) of defending a Chief Justice, justice, judge, officer, or employee of any United States court who is "sued in his official capacity, or is otherwise required to defend acts taken or omissions made in his official capacity, and the services of an attorney for the Government are not reasonably available pursuant to chapter 31 of this title." Pub. L. No. 97-164, title I, § 116(a), 96 Stat. 25, 32 (Apr. 2, 1982), *codified at* 28 U.S.C. § 463. This statute was intended to address those situations where the Justice Department declines to provide representation to a judicial officer or employee on grounds of conflict of interest or other ethical reasons. *McBryde v. United States*, 299 F.3d 1357, 1362–63, 1366 (Fed. Cir. 2002) (quoting S. Rep. No. 97-275, at 16). Generally speaking, this provision does not authorize reimbursement where the judicial officer or employee was engaged in "offensive" rather than "defensive" litigation. *Id.* at 1365–1367. Regulations issued by the Administrative Office to implement 28 U.S.C. § 463 provide that the decision to reimburse expenses associated with legal representation by private counsel "will be guided by the opinion of the Comptroller General in 53 Comp. Gen. 301." *McBryde v. United States*, 50 Fed. Cl. 261, 266 (2001), *citing The Guide to Judiciary Policies and Procedures*, vol. I, ch. XI, pt. D, § 3C (reissued April 2001).

In 55 Comp. Gen. 408 (1975), the U.S. Attorney had agreed to defend a former Small Business Administration (SBA) employee who was sued for acts performed within the scope of his employment. The U.S. Attorney later withdrew from the case even though the government's interest in defending the former employee continued. In order to protect his own interests, the employee retained the services of a private attorney. Since the Justice

Department had determined that it was in the interest of the United States to defend the employee and had undertaken to provide him with legal representation, the Comptroller General held that SBA could reimburse the employee for legal fees incurred as a result of his obtaining private counsel when representation by the United States subsequently became unavailable. *See also* B-251141, *supra* ("In limited circumstances, where Justice determines that representation of a federal employee is appropriate but is unable to provide representation, agency appropriations may be used to pay for legal work that Justice determines to be in the government's interest.").

While 53 Comp. Gen. 301 and 55 Comp. Gen. 408 are widely viewed as establishing the concept that, in appropriate circumstances, agency appropriations may be available to pay private attorney's fees to defend an employee, several later cases established some of the limits on the concept.

If the employee fails to request Justice Department representation in a timely fashion, the employee may be forced to bear the expense of any private legal fees incurred. In B-195314, June 23, 1980, an employee of the Internal Revenue Service (IRS) was sued for improper disclosure of confidential information. The employee requested Justice Department representation, but not until after she had hired a private attorney to file an answer in order to avoid a default judgment. The Justice Department agreed to provide representation, but declined to pay the private legal fees since the case was not within either of the situations permitted under the Justice Department regulations. Since the facts could not support a finding that Justice Department representation was appropriate but unavailable, IRS appropriations could not be used either. The need to take prompt action to avoid a default judgment makes no difference since the regulations expressly provide for provisional representation on the basis of telephone contact.

If the actions giving rise to the suit are not within the scope of the employee's official duties, even though related, there is no entitlement to government representation and hence no legal basis to reimburse attorney's fees. For example, in 57 Comp. Gen. 444 (1978), a Department of Agriculture employee was sued for libel by his supervisor because of allegations contained in letters the employee had written to various public officials. At the employee's insistence, Agriculture wrote to the Justice Department to request representation. However, Agriculture concluded that, while some of the employee's actions had been within the scope of his official duties, others—such as writing letters to the President and to a

Senator—were not. Before the Justice Department reached its decision, the employee retained private counsel and was successful in having the suit dismissed. Subsequently, the Justice Department determined that the employee would not have been eligible for representation since Agriculture had been unwilling to say that all of the employee's actions were within the scope of his official duties. On this basis, GAO found no entitlement to government representation and disallowed the employee's claim for reimbursement of his legal fees.

Similarly, GAO denied a claim for legal fees where an Army Reserve member on inactive duty was arrested by the Federal Bureau of Investigation (FBI), charged with larceny of government property, and the charge was later dismissed. The government property involved consisted of service weapons and ammunition. The member had been authorized to retain weapons and ammunition in his personal possession, although it is not clear from the decision how this authority justified the possession of seven guns and over 100,000 rounds of ammunition, which is what the FBI found. In any event, the member's actions did not result from the performance of required official duties but were at best permissible under existing regulations. Therefore, there was no entitlement to either government-furnished or government-financed representation. B-185612, Aug. 12, 1976.

A related situation is where an employee incurs legal fees defending against a fine. In section C.6 of this chapter on Fines and Penalties, a distinction is drawn between an action that is a necessary part of an employee's official duties and an action which, although taken in the course of performing official duties, is not a necessary part of them. By logical application of this reasoning, where the fine itself is not reimbursable, related legal fees are similarly nonreimbursable. Thus, in 57 Comp. Gen. 270 (1978), the Comptroller General held that the employing agency could not pay legal fees incurred by one of its employees defending against a reckless driving charge, where the Justice Department had declined to provide representation or to authorize retention of private counsel. *See also* B-192880, Feb. 27, 1979 (nondecision letter); 15 Op. Off. Legal Counsel 57, 63 (1991).

In 70 Comp. Gen. 647, *supra*, the Smithsonian Institution used federal funds to provide legal services to an Interior Department employee (on detail at the Smithsonian) who became the subject of federal civil and criminal investigations. After a big-game hunt in China, some hunters and the Interior Department employee (whom the hunters had paid to serve as

their game advisor) were charged with violating the Endangered Species Act. The Interior Department employee was also charged with conflicts of interest in his financial arrangements. GAO held that the Smithsonian lacked authority to use appropriated funds to pay the employee's attorney. *Id.* at 652. GAO explained:

> "Our cases do not support and were not intended to allow agencies to pursue their own litigative policies. Instead, they recognize the availability of agency appropriations, where otherwise proper and necessary, for uses consistent with the litigative policies established for the United States by the Attorney General…. To allow the use of appropriated funds [to defend a government employee against a federal criminal investigation and prosecution] would seriously undermine the litigative posture of the Attorney General [and contradict] the clearly expressed intent of the Congress to centralize control of government litigation under the Attorney General, and to restrict the availability of appropriations in order to reinforce that policy."

Id. at 650–651 (citation omitted).

Sometimes, agencies chafe under the maxim (noted above) that agency appropriations are available, where otherwise proper and necessary, for uses consistent with the litigative policies established for the United States by the Attorney General. The decision in 73 Comp. Gen. 90 (1994) offers a case in point. The United States Information Agency (USIA) was caught up in a sex discrimination class action. The Justice Department was defending the lawsuit, and required USIA to support its effort by providing a secure suite of offices, office supplies and equipment, and four to six attorneys, the same number of paralegal/document specialists, along with other support staff, all on a full-time basis. Normally, USIA's General Counsel staff included only eight attorneys. For its part, the Justice Department dedicated two full-time attorneys and one full-time paralegal to the task force. Justice refused to allow USIA to contract-out for the additional staff, insisting instead that USIA hire them under temporary appointments. *Id.* at 90–91.

USIA asked GAO to require Justice to reimburse USIA for its expenses, which USIA estimated at $4.6 million over fiscal years 1992, 1993, and 1994. Since Justice gets annual appropriations to cover litigative expenses, USIA

argued, Justice's annual appropriations had been improperly augmented. 73 Comp. Gen. at 91–92.

GAO replied, "[T]here is no legal or equitable requirement that litigation support costs be shared equally, or even proportionately, between Justice and its client agencies." *Id.* at 94. The expenses at issue represented "no more than the cost to USIA of gathering and presenting to Justice the facts and agency perspectives necessary to allow Justice to represent USIA in court, a typical example of agency support for Justice litigators." *Id.* GAO explained:

> "The limitations on the use of agency appropriations to provide litigative services originated as part of the provisions that created the Justice Department and invested it with general responsibility to act as the government's litigator…These provisions were intended to reinforce Justice's control of the conduct of litigation involving the United States, not to bar agencies from using their appropriations to assist in the defense of litigation. Our cases 'recognize the availability of agency appropriations, where otherwise proper and necessary, for uses consistent with the litigative policies established for the United States by the Attorney General.'"

Id. at 93–94, *quoting* 70 Comp. Gen. at 650–51 (citing 39 Comp. Gen. 643 at 646–47 (1960)).

Of course, every rule has its exceptions. In B-289288, July 3, 2002, a Department of Defense Dependents Schools (DODDS) employee, who worked at a DODDS school in Japan, had been arrested, charged, and eventually convicted of criminal violations of Japanese law involving the importation and possession of marijuana. Under 10 U.S.C. § 1037, local counsel was retained to defend the employee in the Japanese courts. Read together, the plain terms of section 1037 and the regulations implementing it required DOD to provide legal services to persons "employed by or accompanying [U.S.] armed forces in an area outside the United States," even when the matter is unrelated to and wholly beyond the scope of the employee's official duties. 10 U.S.C. § 1037(a). Funding is to come from "[a]ppropriations available to the military department concerned …for the pay of persons under its jurisdiction." 10 U.S.C. § 1037(c). The statute leaves no role for the Justice Department in these matters.

Questions over reimbursement of legal fees also arise in a number of nonjudicial contexts. In B-193712, May 24, 1979, GAO concluded that the Central Intelligence Agency (CIA) could reimburse a staff psychiatrist, who had been directed to prepare a psychological profile of Daniel Ellsberg as part of his official duties, for the cost of legal representation before congressional investigating committees and professional organizations. While the Justice Department regulations authorize representation at congressional proceedings on the same basis as in lawsuits (28 C.F.R. § 50.15(a)), this is not an area within Justice Department's exclusive representation authority. Therefore, while it may be desirable to first request Justice Department representation, failure to do so in this case did not preclude the use of CIA appropriations, based on an administrative determination that the psychiatrist's activities were necessary to carry out authorized CIA functions. As in the judicial context, payment is generally unauthorized where it is not in furtherance of an official agency interest. *See* U.S. General Accounting Office, *Postal Service: Board of Governors Contract for Legal Services*, GAO/GGD-87-12 (Washington, D.C.: Feb. 10, 1987) (questioning propriety of payment of legal fees of Board member incident to congressional investigation of prenomination activities).

The Justice Department will not provide representation in administrative disciplinary proceedings because of the potential conflict in the event the employee later sues the government. In one case, GAO concluded that the Nuclear Regulatory Commission (NRC) could retain private counsel to represent two NRC staff members at a disciplinary proceeding where the agency determined that the employees had been acting within the scope of their authority. B-127945, Apr. 5, 1979. *See also* B-192784, Jan. 10, 1979.

In another case, however, 58 Comp. Gen. 613 (1979), the Securities and Exchange Commission (SEC) could not reimburse the legal fees of an SEC employee at a disciplinary hearing even though the proceeding was ultimately resolved in the employee's favor. The distinction is that in the NRC case, the misconduct charge had been raised and pursued by a third party, whereas in the SEC case, while the charge was initially raised by an outside party, it was pursued based on the SEC's independent determination to investigate the allegation. The point of this distinction is that, once the agency determines to investigate the employee, its interests and those of the employee are no longer "aligned." *E.g.*, B-245648.2, July 24, 1992 (even though the administrative investigation was precipitated by a congressional subcommittee, since the IRS conducted it, IRS's interests were no longer aligned with those of its employee, and the attorney fees incurred by the employee as a result of the investigation could not be

reimbursed); B-245712.3, May 20, 1992 (Department of Agriculture employee, subject to an Inspector General investigation instigated by a third party, may not be reimbursed for the attorney fees he incurred since the agency, having decided to investigate the employee, no longer had a common interest with him). In other words, the interests of the agency and employee have diverged and it is no longer possible to justify providing representation to the employee as a necessary and appropriate expense of the agency. Also, the determination to provide legal representation must be made at the outset of the proceedings and not at the end based on the outcome. GAO reached the same result in 70 Comp. Gen. 628 (1991) (Forest Service investigative report leading to criminal trial ending in acquittal on all charges), and in B-212487, Apr. 17, 1984 (Inspector General misconduct investigation).

An agency may use its appropriated funds to provide legal representation for an employee brought before the Merit Systems Protection Board (MSPB) on a complaint by the MSPB Special Counsel, if the agency determines that the employee's conduct was in furtherance of or incident to carrying out his or her official duties, and that providing representation would be in the government's interest. 67 Comp. Gen. 37 (1987); 61 Comp. Gen. 515 (1982). Of course, this principle is not limited to cases pending before MSPB. *See*, *e.g.*, B-251141, *supra* (federal criminal investigation). If the agency makes the required determinations, the expenditure is viewed as a "necessary expense" of the agency or function. While the necessary expense theory is the legal basis, the underlying policy is expressed in the following excerpt:

> "Surely federal employees must be answerable for illegal conduct. Yet it can be in the interest of neither the government as a whole nor the taxpayers we serve to have employees afraid to function out of fear of being bankrupted by a lawsuit arising out of the good faith performance of their jobs."

67 Comp. Gen. at 37–38. Similarly, see, for example, 15 Op. Off. Legal Counsel, *supra*, at 62–63.

Appropriated funds may not be used to pay legal fees incurred by an "alleged discriminating official" in a discrimination complaint. 61 Comp. Gen. 411 (1982); B-201183, Feb. 1, 1985.

Government-financed legal counsel was also held improper at a grievance hearing where the legal liability of the employee was not an issue and the purpose of the hearing was solely to develop facts. 55 Comp. Gen. 1418.

Where reimbursement of legal fees under the above principles is authorized, it is a discretionary payment and not a legal entitlement of the employee. The agency's responsibilities and discretion are summarized in the following paragraph from 67 Comp. Gen. at 38:

> "[I]t should be understood that payment in this type of case is not a legal liability on the part of the agency, but is essentially a discretionary payment. As such, an agency is not required to pay the entire amount of the fees actually charged in any given case. The controlling concept under fee-shifting statutes is a 'reasonable' attorney's fee, and there is a vast body of judicial precedent applying this concept under statutes such as the Back Pay Act and Title VII of the Civil Rights Act. This body of precedent is available to provide guidance to agencies in evaluating the reasonableness of claims. Also, since payment is discretionary, an agency is free to formulate administrative policies with respect to treatment of claims of this type. Of course, any such policies should be applied fairly and consistently."

The preceding cases have all involved legal fees incurred for representation of the employee. A different situation occurred in 59 Comp. Gen. 489 (1980). In 1969, local police raided a Chicago apartment housing members of the Black Panther Party. The raid erupted into violence and two of the occupants were killed. Subsequently, the surviving occupants and the estates of the deceased sued state law enforcement officials and several agents of the Federal Bureau of Investigation (FBI), alleging violations of civil rights and the Illinois wrongful death statute. The Justice Department represented the federal defendants, who were being sued in their individual capacities.

As the litigation progressed, a possibility emerged that the court might grant the plaintiffs an award of attorney's fees, in part against the FBI agents. The Justice Department asked whether FBI appropriations would be available to reimburse such an award. In the past, the Comptroller General has at times declined to render decisions on questions that are premature and essentially hypothetical. Here, however, in view of the legal

strategy proposed by the Justice Department (the case also involved issues raising the potential liability of the United States), it was important to know if the fees could be reimbursed because if they could not, it might be necessary for the defendants to retain private counsel to represent their interests. The Comptroller General resolved the question by applying the necessary expense doctrine. If the FBI made an administrative determination, supported by substantial evidence, that the actions giving rise to the award constituted officially authorized conduct and were taken as a necessary part of the defendant's official duties, it could reimburse the award from its Salaries and Expenses appropriation.

d. Suits Unrelated to Federal Employees

Finally, the concept of using agency appropriations for legal fees when Justice Department representation is unavailable has arisen in a couple of contexts that are unrelated to suits against government employees. Under 25 U.S.C. § 175, the U.S. Attorneys will generally represent Indian tribes, and under 25 U.S.C. § 13, the Bureau of Indian Affairs may spend money appropriated for the benefit of Indians for general and incidental expenses relating to the administration of Indian affairs. Construing these provisions, the Comptroller General has held that the Bureau of Indian Affairs could use appropriated funds to pay legal fees incurred by Indian tribes in judicial litigation, including intervention actions and cases where the tribe is the plaintiff, when conflict of interest makes Justice Department representation unavailable. However, the Bureau must first give the Justice Department the option of providing or declining to provide representation. The Bureau may also use appropriated funds for legal fees of Indian tribes in administrative proceedings in which the Justice Department does not participate. 56 Comp. Gen. 123 (1976).

The courts have recognized that this authority carries with it substantial discretion. For example, in *Hopi Tribe v. United States*, 55 Fed. Cl. 81 (2002), suit was brought to recover legal fees and expenses incurred in litigation pursuant to the Navajo-Hopi Settlement Act of 1974. The court held that, under 25 U.S.C. §§ 13, 175, Justice and the Bureau both have broad discretion in determining whether to provide legal services or reimbursement for the costs of obtaining them elsewhere. Among other things, the court explained that because Congress appropriates lump sums to Justice and the Bureau for these purposes, the question of how best to use those sums is committed to agency discretion. *Hopi Tribe*, 55 Fed. Cl. at 97–98, quoting *Lincoln v. Vigil*, 508 U.S. 182, 192–195 (1993), *quoting both* 55 Comp. Gen. 307, 319 (1975), *and Principles of Federal*

Appropriations Law, at 6-159 (2nd Ed. 1992). *See also* discussion in Chapter 6.[31]

e. Claims by Federal Employees

(1) Discrimination proceedings

Title VII of the Civil Rights Act of 1964, made applicable to the federal government by the Equal Employment Opportunity Amendments of 1972, broadly prohibits employment discrimination based on race, color, religion, sex, or national origin. Two statutory provisions are relevant to the awarding of attorney's fees. Judicial awards, covered in Chapter 14 (Volume III of the second edition of the *Principles of Federal Appropriations Law*), are governed by 42 U.S.C. § 2000e-5(k), which authorizes courts to award reasonable attorney's fees to nonfederal prevailing parties. In addition, 42 U.S.C. § 2000e-16(b) directs the former Civil Service Commission to enforce Title VII in the federal government "through appropriate remedies …as will effectuate the policies of this section." The enforcement function was transferred to the Equal Employment Opportunity Commission (EEOC) in 1978.

The concept of administrative fee awards developed largely as the result of a series of court decisions. First, the courts held that a court can award attorney's fees to include compensation for services performed in related administrative proceedings as well as the lawsuit itself. *Parker v. Califano*, 561 F.2d 320 (D.C. Cir. 1977); *Johnson v. United States*, 554 F.2d 632 (4th Cir. 1977). Then, the District Court for the District of Columbia held that Title VII authorized the administrative awarding of attorney's fees. *Patton v. Andrus*, 459 F. Supp. 1189 (D.D.C. 1978); *Smith v. Califano*, 446 F. Supp. 530 (D.D.C. 1978). However, this view was not unanimous. The court in *Noble v. Claytor*, 448 F. Supp. 1242 (D.D.C. 1978), held that there was no authority for administrative awards and that only the court could award fees.

[31] The Office of Legal Counsel (OLC) has wrestled with a related issue: whether the Justice Department may defend tribes or tribal employees against suits for constitutional torts. OLC concluded that the 1990 amendments to the Indian Self-Determination and Education Assistance Act of 1975 cover only those torts for which the Federal Tort Claims Act waives the sovereign immunity of the United States and do not authorize or otherwise address representation of tribes or tribal employees who are sued in their individual capacities for constitutional torts. Opinion of the Office of Legal Counsel, for the Assistant Attorney General Civil Division, *Coverage Issues Under The Indian Self-Determination Act*, Apr. 22, 1998.

GAO was initially inclined toward the view expressed in the *Noble* decision. *See* B-167015, Apr. 7, 1978. However, GAO reconsidered its position and subsequently announced that it would not object to the issuance of regulations by the EEOC to include the awarding of attorney's fees at the administrative level. B-193144, Nov. 3, 1978; B-167015, Sept. 12, 1978; B-167015, May 16, 1978 (all nondecision letters).

EEOC issued interim regulations on April 9, 1980 (45 Fed. Reg. 24130), and subsequently finalized them. The regulations, found at 29 C.F.R. § 1613.271, provide for awards of reasonable attorney's fees both by EEOC and by the agencies themselves. With the issuance of these regulations, federal agencies now have the requisite authority. B-199291, June 19, 1981; B-195544, May 7, 1980 (nondecision letter).

Attorney's fees awarded under the EEOC regulations are payable from the employing agency's operating appropriations and not from the permanent judgment appropriation established by 31 U.S.C. § 1304.[32] 64 Comp. Gen. 349, 354 (1985); B-199291, *supra*. *Cf.* B-257334, June 30, 1995 (except as specifically provided by law, the permanent judgment appropriation is not available to pay administrative awards, including administrative settlements for compensatory damages under Title VII).

[32] As noted above, this chapter does not address the payment of litigative awards, which is covered in Chapter 14. Accordingly, the text here is speaking only about the payment of administrative awards.

We note in passing, however, that a recently enacted law has changed the payment process for litigative attorney fees and other litigative awards rendered against certain federal agencies (including "executive agencies" as defined in 5 U.S.C. § 105) arising from claims of discrimination or whistle-blowing retaliation against federal employees, former federal employees, or applicants for federal employment. Under the new law, known as the "Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002" (or "NoFEAR," for short), these litigative awards will now be paid initially from the permanent, indefinite Judgment Fund appropriation. Within a reasonable time thereafter, the federal agency involved must reimburse the Judgment Fund from its operating appropriations. *See* Pub. L. No. 107-174, § 1(a), 116 Stat. 566 (May 15, 2002), *to be codified at* 5 U.S.C. § 2301 note. As a result of this law, all awards against federal agencies for discrimination or whistle-blowing retaliation against federal employees, former federal employees, or applicants for federal employment (including associated attorney fee awards)—whether litigative or administrative—will ultimately be paid from agency operating appropriations, which is one of the main goals Congress intended the new law to accomplish S. Rep. No. 107-143, at 1–3, 7–8 (2002).

GAO will not review awards of, nor consider claims for, attorney's fees under Title VII. 69 Comp. Gen. 134 (1989); 61 Comp. Gen. 326 (1982); B-259632, June 12, 1995.

Title VII is not the only statute prohibiting discrimination in federal employment. Discrimination based on age or handicap is prohibited, respectively, by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*, and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 *et seq.* The EEOC has enforcement responsibility for federal employment under these statutes as well as Title VII.[33]

Initially, GAO had held that the EEOC could provide by regulation for the awarding of attorney's fees at the administrative level under the Age Discrimination in Employment Act and the Rehabilitation Act, just as in the Title VII situation. 59 Comp. Gen. 728 (1980). Subsequently, the courts held that the Age Discrimination in Employment Act did not authorize fees at the administrative level, and GAO partially overruled 59 Comp. Gen. 728 in 64 Comp. Gen. 349 (1985). However, that portion of 59 Comp. Gen. 728 dealing with the Rehabilitation Act remains valid. *See also* B-204156, Sept. 13, 1982. This treatment is consistent with the EEOC regulations, which authorize administrative fee awards under Title VII and the Rehabilitation Act, but not the Age Discrimination in Employment Act. *See* 29 C.F.R. § 1614.501(e) (*formerly codified at* § 1613.271(d)).

The situation may become more complicated where an employee alleges discrimination on more than one ground. In 69 Comp. Gen. 469 (1990), an agency settled a complaint in which the employee had alleged both age and sex discrimination. Based on the agency's assertion that the result would have been the same if the employee had pursued only the sex discrimination charge, GAO concluded that the agency was not required to "apportion" the attorney's fee claim between the two charges and that the entire fee claim could be paid.

(2) Other employee claims

Prior to October 1978, there was no authority to award attorney's fees to federal employees in connection with claims, grievances, or administrative

[33] EEOC is not responsible for the entire Rehabilitation Act. The Architectural and Transportation Barriers Compliance Board is responsible for insuring compliance with the standards prescribed in the Architectural Barriers Act of 1968. 29 U.S.C. § 792.

proceedings involving back pay, adverse personnel actions, or other personnel matters. During this time period, GAO consistently denied claims for attorney's fees based on the general rule barring the payment of legal fees in the absence of statutory authority. *E.g.*, 52 Comp. Gen. 859 (1973) (administrative grievance proceeding); B-167461, Aug. 9, 1978 (unfair labor practice proceeding); B-184200, Apr. 13, 1976 (reduction in grade); B-183038, May 9, 1975 (improper removal for disciplinary reasons).

In October 1978, the Civil Service Reform Act added two attorney's fee provisions as part of its general overhaul of the system.

First, it authorized the Merit Systems Protection Board to require the employing agency to pay reasonable attorney's fees if the employee is the prevailing party and the Board determines that the fee award is "warranted in the interest of justice." 5 U.S.C. § 7701(g). Fees awarded under this provision are payable directly to the attorney, not the party. *Jensen v. Department of Transportation*, 858 F.2d 721 (Fed. Cir. 1988).[34]

Second, it added an attorney's fee provision to the Back Pay Act, 5 U.S.C. § 5596. Now, if an employee, based on a timely appeal or an administrative determination, including grievance or unfair labor practice proceedings, is found by "appropriate authority"[35] to have suffered a loss or reduction of pay as a result of an "unjustified or unwarranted personnel action," the employee is entitled to recover reasonable attorney's fees in addition to back pay. *Id.* § 5596(b). *See generally* B-258290, June 26, 1995; B-231813, Aug. 22, 1989.

Regulations to implement the Back Pay Act are issued by the Office of Personnel Management and are found at 5 C.F.R. pt. 550, subpt. H. Under the regulations, fees may be awarded only if the "appropriate authority" determines that payment is in the interest of justice, applying standards established by the Merit Systems Protection Board under 5 U.S.C. § 7701. 5 C.F.R. § 550.807(c)(1). The standards are set forth in *Allen v. United*

[34] Of course, different statutes often dictate different results with respect to who should receive payment. *Cf.*, *e.g.*, *Heston v. Secretary of Health & Human Services*, 41 Fed. Cl. 41, 45–46 (1998) (distinguishing the result in *Jensen*, *supra.*)

[35] The term "appropriate authority" includes the head of the employing agency, a court, the Office of Personnel Management, the Merit Systems Protection Board (but not the MSPB Special Counsel, 59 Comp. Gen. 107 (1979)), the Comptroller General (*see*, *e.g.*, 63 Comp. Gen. 170 (1984) and 62 Comp. Gen. 464 (1983)), the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, plus a few others. 5 C.F.R. § 550.803.

States Postal Service, 2 M.S.P.R. 420 (1980), and discussed in *Sterner v. Department of the Army*, 711 F.2d 1563 (Fed. Cir. 1983), and in 62 Comp. Gen. 464. For "[a] review of the case law," see *Abramson v. United States*, 45 Fed. Cl. 149, 151–152 (1999).

GAO will not review decisions awarding or declining to award, nor consider claims for, fees under 5 U.S.C. § 7701. B-257593, Aug. 15, 1994 (GAO has no authority to review any MSPB decision, citing, among others, 61 Comp. Gen. 578 (1982)—disavowing authority to review fee awards under section 7701); 63 Comp. Gen. at 174; 61 Comp. Gen. 290 (1982). The Back Pay Act regulations provide for review of fee determinations only "if provided for by statute or regulation." 5 C.F.R. § 550.8067(g) (formerly at 5 C.F.R. § 550.06(g)). Thus, absent some statute or regulation to the contrary, GAO will similarly decline to review fee determinations under 5 U.S.C. § 5596 where the "appropriate authority" is someone other than the Comptroller General. 61 Comp. Gen. 290.

While GAO will not "review" such matters, it may provide its opinion on them, when requested by the agency or the accountable officer. For example, in B-253507, Jan. 11, 1994, the National Archives and Records Administration (NARA) asked GAO if it could pay attorney fees as part of an administrative settlement, even though NARA had not determined that an unjustified or unwarranted personnel action had occurred. NARA argued that because the employee could have appealed to the Merit Systems Protection Board and possibly obtained attorney fees (as discussed in the following paragraph), NARA had implied authority to award attorney fees as part of its settlement. GAO disagreed. NARA had no statutory authority to pay attorney fees under the facts and laws applicable to the case. The fact that the employee could have appealed and might have won did not authorize NARA and the employee to behave as if the employee actually had appealed and won. *Id. See also* B-258290, *supra* (advance decision, pursuant to 31 U.S.C. § 3529, disapproved payment of attorney fees and other amounts arising from a grievance hearing wherein the agency declined to find an unjustified or unwarranted personnel action); B-257893, June 1, 1995 (certifying officer granted relief from liability, pursuant to 31 U.S.C. § 3528(b)(1)(B), for the erroneous payment, which was the subject of B-253507, *supra*).

Under a provision added in 1989, if an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board (MSPB), and MSPB's decision is based on a finding of a "prohibited personnel practice" (defined in 5 U.S.C. § 2302), "the agency

involved shall be liable" to the complainant for reasonable attorney's fees. The same liability applies with respect to appeals from the Board, regardless of the basis of the decision. 5 U.S.C. § 1221(g), added by the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16, 30 (Apr. 10, 1989).

Employee claims outside the scope of the Back Pay Act or the MSPB authority remain subject to the general rule prohibiting fee awards except under specific statutory authority. Thus, administrative claims for attorney's fees were *denied* in the following situations:

- Applicant for employment with Nuclear Regulatory Commission successfully challenged adverse information in security investigation file. B-194507, Aug. 20, 1979.

- Nuclear Regulatory Commission employee detailed in violation of the Whistleblower Protection Act (WPA), *supra*, as retaliation for the disclosure of government illegality, waste, and corruption. Although WPA does provide for attorney fees in certain circumstances, employee used agency grievance procedures not subject to WPA. 72 Comp. Gen. 289 (1993).

- Employee obtained continuance in divorce proceedings. Continuance was necessitated by temporary duty assignment. B-197950, Sept. 30, 1980. *Cf.* 70 Comp. Gen. 329 (1991) (legal fees incurred to search title, prepare abstracts, conveyances and other documents required in the chain of conveying property interest from seller to buyer that are normally reimbursable under Federal Travel Regulations (FTR), ¶ 26.2c, but may not be reimbursed here as original court order was part of a divorce settlement; modification of divorce order constituted continuation of a litigated matter; litigation costs may not be reimbursed under the FTR); B-242154, Mar. 28, 1991 (FTR does not allow reimbursement of litigation costs, even though employee "sustained a loss that he would not have sustained had he not transferred in the interest of the government").

- A military member's legal fees incident to custody proceedings, and medical insurance expenses for his adopted children are not "qualifying adoption expenses" under section 638 of the National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 638, 101 Stat. 1019, 1106–1108 (Dec. 4, 1987), as amended, and may not be reimbursed (but legal fees incident to the actual petition and

order of adoption, as well as the amendment of birth certificates for the member's adopted children are reimbursable from agency funds under the Act). B-235606, Feb. 7, 1991.

- Former employee successfully prosecuted administrative patent interference action against National Aeronautics and Space Administration. B-193272, Aug. 21, 1981.

- Fees incurred incident to prosecution of claim for relocation expenses. 68 Comp. Gen. 456 (1989); B-186763, Mar. 28, 1977.

- Employee, selling residence incident to transfer of duty station, incurred legal fees in excess of customary range of charges for services rendered. B-200207, Sept. 29, 1981 (legal fees within customary range of charges are reimbursable; see cases cited). Similarly, see B-252531, Aug. 13, 1993 (attorney fees claimed were duplicative of attorney fees already paid as part of the services provided by the relocation service company).

- Administrative grievance proceeding involving neither an appeal to the Merit Systems Protection Board nor a reduction or denial of pay or allowances. B-253507 n.5, *supra;* 68 Comp. Gen. 366 (1989); 61 Comp. Gen. 411 (1982).

The same rule applies to expert witness expenses incurred by an employee. They are reimbursable only under specific statutory authority. In 67 Comp. Gen. 574 (1988), a Department of Energy employee had requested an administrative hearing incident to a security clearance. The agency, due to the sudden unavailability of its witness, was forced to reschedule the hearing. The employee's witness, a clinical psychologist, was unable to reschedule his patients to fill the now freed-up time slot, and charged the employee for the 3 hours he had set aside to testify. GAO found no authority to reimburse the employee.

f. Criminal Justice Act

The Criminal Justice Act (CJA), 18 U.S.C. § 3006A, was originally enacted in 1964 and substantially amended on several subsequent occasions. Reflecting a series of Supreme Court decisions on the right of a criminal defendant to counsel, the CJA establishes a system of government-financed counsel for indigent defendants in federal criminal cases. In general, any person charged with a felony or misdemeanor, including juvenile delinquency, and who is "financially unable to obtain adequate representation" is eligible for counsel under the CJA. Counsel is to be

provided at every stage of the proceeding, from the first appearance before a magistrate through appeal, including appropriate ancillary matters. As the Supreme Court has expanded the right to counsel to encompass every meaningful stage at which significant rights may be affected (*see*, *e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966)), the right to counsel under the CJA has similarly expanded.

The lawyers, who are court-appointed, may be private attorneys appointed on an individual basis or members of a Federal Public Defender Organization or Community Defender Organization established and funded under the Act. The attorneys are paid at rates of compensation specified in the statute. Appropriations are made to the Judiciary to carry out the Act CJA and payments are supervised by the Administrative Office of the United States Courts.

(1) Types of actions covered

Originally, GAO had held that the Criminal Justice Act (CJA) did not apply to probation revocation proceedings. 45 Comp. Gen. 780 (1966). Subsequently, following the Supreme Court's holding in *Mempa v. Rhay*, 389 U.S. 128 (1967), GAO modified the 1966 decision to recognize the applicability of the Act to probation proceedings coupled with deferred sentencing. However, GAO continued to hold the Act inapplicable to a "simple" probation revocation proceeding (one not involving deferred sentencing). 50 Comp. Gen. 128 (1970). Two months after the issuance of 50 Comp. Gen. 128, Congress passed Public Law 91-447, substantially amending the CJA. Pub. L. No. 91-447, 84 Stat. 916 (Oct. 14, 1970). One of the changes made by these amendments was to expressly cover probation proceedings. The legislative history of Public Law 91-447 indicates that it was intended to recognize *Mempa v. Rhay.* H.R. Rep. No. 91-1546, at 7 (1970). GAO has not had occasion to issue any further decisions on probation proceedings.

Another change made by the 1970 amendments was to add parole revocation proceedings, with counsel to be provided at the discretion of the court or magistrate. Subsequent legislation made appointment of counsel mandatory, and the Comptroller General held that appropriations under the CJA are available to provide counsel for indigents at parole revocation and parole termination proceedings under the Parole Commission and Reorganization Act. B-156932, June 16, 1977.

Representation may be provided, at the discretion of the court or magistrate, to an indigent prosecuting a writ of *habeas corpus* (28 U.S.C. §§ 2241, 2254, 2255). 18 U.S.C. § 3006A(a)(2). This authority does not extend to civil rights actions brought by indigent prisoners under 42 U.S.C. § 1983. 53 Comp. Gen. 638 (1974); B-139703, June 19, 1975.

In 51 Comp. Gen. 769 (1972), GAO held that the CJA applied to prosecutions brought in the name of the United States in the District of Columbia Superior Court and Court of Appeals. In 1974, Congress passed the District of Columbia Criminal Justice Act (Pub. L. No. 93-412, 88 Stat. 1089 (Sept. 3, 1974)), which established a parallel criminal justice system for the District of Columbia patterned after 18 U.S.C. § 3006A. With the enactment of this legislation, the CJA was amended to remove the District of Columbia courts from its coverage. GAO considered the D.C. statute in 61 Comp. Gen. 507 (1982) and construed it to include sentencing. The result should apply equally to the federal statute inasmuch as the language being construed is virtually identical in both laws.

(2) Miscellaneous cases

When a court appoints an attorney under the Criminal Justice Act (CJA), the government's contractual obligation, and hence the obligation of appropriations, occurs at the time of the appointment and not when the court reviews the voucher for payment, even though the exact amount of the obligation is not determinable until the voucher is approved. Where fiscal year appropriations are involved, the Administrative Office of the U.S. Courts must record the obligation based on an estimate, and the payment is chargeable to the fiscal year in which the appointment was made. 50 Comp. Gen. 589 (1971).

In B-283599, Sept. 15, 1999, the Executive Officer of the District of Columbia Courts told GAO that he anticipated fiscal year 1999 appropriations for CJA claims would be exhausted on September 10, 1999. How, he asked, should the courts respond to CJA claims received during the remainder of fiscal year 1999? Should the courts suspend approving CJA vouchers in order to avoid violating the Antideficiency Act? GAO said, "No." CJA representation is a mandatory expense. An overobligation entirely attributable to a mandatory spending program, like CJA, would be an overobligation authorized by law and, therefore, not a violation of the Antideficiency Act. *See* 31 U.S.C. §§ 1341(a)(1)(A) and (B). However, this did not mean that the vouchers could be paid immediately on approval. A legally available funding source would still be required before any

authorized overobligations could be liquidated. Fortunately, GAO noted, a bill then pending in Congress would provide funds for this purpose. B-283599, *supra*. *See also* U.S. General Accounting Office, *D.C. Courts: Planning and Budgeting Difficulties During Fiscal Year 1998*, GAO/AIMD/OGC-99-226, at 11–13 (Washington, D.C.: Sept. 16, 1999). (For a full discussion of the law governing federal obligations, see Chapter 7.)

An attorney appointed and paid under the CJA does not thereby enter into an employer-employee relationship with the United States for purposes of the dual compensation laws. 44 Comp. Gen. 605 (1965). (This decision predated the 1970 amendments to the CJA, which created the Federal Public Defender Organizations, and would presumably not apply to full-time salaried attorneys employed by such organizations.)

An attorney regularly employed by the federal government who is appointed by a court to represent an indigent defendant, in either federal or state cases, may not be excused from official duty without loss of pay or charge to annual leave. 61 Comp. Gen. 652 (1982); 44 Comp. Gen. 643 (1965).

An attorney appointed under the CJA is expected to use his or her usual secretarial resources. As a general proposition, secretarial and other overhead expenses are reflected in the statutory fee and are not separately reimbursable. However, there may be exceptional situations, and if the attorney can demonstrate to the court that extraordinary stenographic or other secretarial-type expenses are necessary, they may be reimbursed from Criminal Justice Act appropriations. 53 Comp. Gen. 638 (1974).

g. Equal Access to Justice Act

A significant diminution of the American Rule occurred in 1980 with the enactment of the Equal Access to Justice Act (EAJA), which authorizes the awarding of attorney's fees and expenses in a number of administrative and judicial situations where fee-shifting had not been previously authorized. This section describes the authority for administrative awards.

The administrative portion of the EAJA is found in 5 U.S.C. § 504. There are four key elements to the statute:

1. The administrative proceeding generating the fee request must be an "adversary adjudication," defined as an adjudication under the Administrative Procedure Act in which the position of the United States is represented by counsel or otherwise. 5 U.S.C. §§ 504(a)(1), (b)(1)(C). The definition excludes adjudications to fix or establish a

rate or to grant or renew a license, but proceedings involving the suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license are covered if they otherwise qualify.[36] (Application in the context of government procurement is discussed separately later.)

2. The party seeking fees must be a "prevailing party other than the United States." 5 U.S.C. § 504(a)(1). The meaning of "prevailing party" is to be determined by reference to case law under other fee-shifting statutes.[37] Of course before you can be a "prevailing party" you must first be a "party," and the law prescribes financial and other eligibility criteria. 5 U.S.C. § 504(b)(1)(B).

3. The law is not self-executing. The party must, within 30 days after final disposition of the adversary adjudication, submit an application to the agency showing that it is a prevailing party and meets the eligibility criteria, documenting the amount sought, and alleging that the position of the United States was not "substantially justified." 5 U.S.C. § 504(a)(2). If the United States appeals the underlying merits, action on the application must be deferred until final resolution of the appeal. *Id.*

4. If the above criteria are met, the fee award is mandatory unless the agency adjudicative officer finds that "the position of the agency was substantially justified or that special circumstances make an award unjust." 5 U.S.C. § 504(a)(1).[38] Substantial justification or lack thereof is to be determined "on the basis of the administrative record as a whole, which is made in the adversary adjudication." *Id.* The "position of the agency" includes the agency's action or failure to act which generated the adjudication as well as the agency's position in the adjudication itself. 5 U.S.C. § 504(b)(1)(E). A party who "unreasonably protracts" the proceedings risks reduction of the award. 5 U.S.C. § 504(a)(3).

[36] S. Rep. No. 96-253, at 17 (1979) (report of the Senate Judiciary Committee).

[37] S. Rep. No. 96-253, *supra*, at 7; H.R. Rep. No. 96-1418, at 11 (1980) (report of House Judiciary Committee).

[38] A position is "substantially justified" if it is "justified to a degree that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). *See also Immigration & Naturalization Service v. Jean*, 496 U.S. 154, 157 n.6 (1990); *Dantran, Inc. v. Department of Labor*, 246 F.3d 36, 40–41 (1st Cir. 2001).

The award includes "fees and other expenses." "Fees" means a reasonable attorney's fee, generally capped at $125 per hour unless the agency determines by regulation that cost-of-living increases or other special factors justify a higher rate.[39] "Other expenses" include such items as expert witness expenses and the necessary cost of studies, analyses, engineering reports, *etc.* 5 U.S.C. § 504(b)(1)(A).

The statute requires agencies to establish, by regulation, uniform procedures for administering the statute, in consultation with the Administrative Conference of the United States (ACUS). 5 U.S.C. § 504(c)(1). In 1986, ACUS has published a set of nonbinding model rules., found at 51 Fed. Reg. 16659 (May 6, 1986) (formerly codified in 1 C.F.R. pt. 315). Among other things, the supplementary information statement for those rules, found at 51 Fed. Reg. 16659 (May 6, 1986), advised agencies that the statutory requirement to consult with ACUS will be met by simply notifying ACUS of the publication of proposed regulations, or by sending ACUS a pre-publication draft for review and comment. *Id.* There's only one problem: ACUS was terminated in 1995 when its annual appropriation stipulated that funds for it were "available [only] for the purposes of [its] prompt and orderly termination." Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, title IV, 109 Stat. 468, 480 (Nov. 19, 1995), *codified at* 5 U.S.C. § 591 (note preceding section). Although ACUS is now history, someone forgot to fix the statute. *Compare* 5 U.S.C. § 504(c)(1) (requiring agencies to consult ACUS) and 5 U.S.C. § 593–595 (establishing ACUS).

Payment of administrative EAJA awards is addressed in 5 U.S.C. § 504(d):

> "Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise."[40]

[39] *Pierce v. Underwood*, *supra*, identified a number of factors that may *not* be used as "special factors" to justify exceeding the cap: novelty and difficulty of issues; undesirability of the case; work and ability of counsel (except for counsel with "distinctive knowledge or specialized skill" relevant to the case); results obtained; customary fees and awards in other cases; contingent nature of the fee. 487 U.S. at 571–74. *See also*, *e.g.*, *Hyatt v. Barnhart*, 315 F.3d 239, 249 (4th Cir. 2002).

[40] This provision was added in 1985. The payment provision in the original EAJA was complex and confusing. The amendment was designed to preclude payment under 31 U.S.C. § 1304, the permanent judgment appropriation.

As with judicial awards under 28 U.S.C. § 2412(d), 5 U.S.C. § 504 awards are payable from agency operating appropriations with no need for specific, line-item, or "earmarked" appropriations.[41]

The obligation of the agency's appropriations occurs when the agency issues its decision on the fee application. 62 Comp. Gen. 692, 699 (1983). This determines the fiscal year to be charged. Sometimes, the logic of this rule eludes an agency that is otherwise striving to be prudent and responsible in the management of its legal responsibilities and fiscal obligations. In B-255772, Aug. 22, 1995, the Justice Department and the National Endowment for the Arts (NEA) sought GAO's guidance regarding whether the NEA could pay an EAJA attorney fee settlement using unobligated NEA appropriations from previous fiscal years. For several years, NEA had realized that a then pending case would eventually require NEA to pay EAJA attorney fees from its appropriations pursuant to 28 U.S.C. § 2412(d)(4). In anticipation of this, NEA began setting aside a portion of its annual appropriations across several fiscal years so that, when the time to pay finally arrived, NEA would have funds adequate to meet its obligations without adversely affecting other NEA operations. However, when the settlement was finally completed, questions arose about whether the funds NEA set aside could legally be used for this purpose. Of course, they could not. As a general principle, "[a] court or administrative award creates a new right in the successful claimant, giving rise to new government liability." B-255772, *quoting* 63 Comp. Gen. 308, 310 (1984). NEA had no obligation to pay the claims until the settlement agreement was final. In the absence of appropriate statutory authority, the funds NEA had set aside in previous fiscal years had expired, and were not legally available to liquidate the obligation of a later fiscal year—the year in which the settlement agreement became final. *Id. See also* B-257061, July 19, 1995 (except as otherwise provided by law, (a) FAA must use appropriations available at time of award to pay attorney fees from a Title VII discrimination complaint, and (b) had FAA set aside appropriations in a prior fiscal year, when the complaint was filed, they would not have been available for this purpose).

Section 504 permits fee awards to intervenors who otherwise meet the statutory criteria. 62 Comp. Gen. at 693. As noted in that decision, the

[41] Authorities for this proposition are cited in Chapter 14 (Volume III of the second edition of *Principles of Federal Appropriations Law*) in our discussion of the judicial portion of EAJA, which has an identical payment provision.

Administrative Conference expressed the same position in the preamble to an earlier version of the model rules, although commenting further that intervenors would rarely be in a position to actually receive awards. *Id.* at 693–94. A specific appropriation act restriction on compensating intervenors will override the more general authority of 5 U.S.C. § 504. 62 Comp. Gen. 692; *Electrical District No. 1 v. Federal Energy Regulatory Commission*, 813 F.2d 1246 (D.C. Cir. 1987); *Business & Professional People for the Public Interest v. Nuclear Regulatory Commission*, 793 F.2d 1366 (D.C. Cir. 1986) (court agreed with result in 62 Comp. Gen. 692, implicitly accepting premise that EAJA itself could apply to intervenors).

We previously reviewed statutory authorities for awarding attorney's fees in a variety of matters involving federal employees. Initially, the law in this area, especially with respect to EAJA, appeared unsettled. The Court of Appeals for the Federal Circuit has held that 5 U.S.C. § 504 does not authorize the Merit Systems Protection Board (MSPB) to award attorney's fees in cases involving employee selection or tenure. *Gavette v. Office of Personnel Management*, 808 F.2d 1456 (Fed. Cir. 1986); *Olsen v. Department of Commerce, Census Bureau*, 735 F.2d 558 (Fed. Cir. 1984). This is was because the definition of "adversary adjudication" in section 504 refers to 5 U.S.C. § 554 (part of the Administrative Procedure Act), which expressly excludes "the selection or tenure of an employee." This was consistent with an earlier decision of the District of Columbia Circuit. *Hoska v. Department of the Army*, 694 F.2d 270 (D.C. Cir. 1982). However, the court in *Miller v. United States*, 753 F.2d 270 (3rd Cir. 1985), reached a contrary result.

A review of the case law since *Gavette* suggests that it and its progeny may have quietly assumed the prevailing position in the circuits.[42] Despite the passage of nearly two decades, the conflict does not appear to have been expressly addressed by the Supreme Court, and at least one commentator has concluded, "The Federal Circuit's decision in *Gavette* resolve[d] the conflicts among the lower courts." Nancy A. Streeff, Note, *Gavette v. Office of Personnel Management: The Right To Attorney Fees Under The Equal Access To Justice Act*, 36 Am. U. L. Rev. 1013, 1025 (1987).

[42] The First Circuit handed *Gavette* down later in time, and took advantage of the opportunity to comment on *Miller*. 808 F.2d at 1462–63. The Third Circuit has yet to reply, either with its analysis of *Gavette*, or with a renewal or a repudiation of its support for *Miller*.

Prior to *Gavette*, the MSPB had taken the position that the existence of other fee-shifting statutes made EAJA inapplicable. *Social Security Administration v. Goodman*, 28 M.S.P.R. 120, 126 (1985). However, in view of the implication of *Gavette* that EAJA might apply in cases not involving employee selection or tenure, the MSPB reopened the *Goodman* appeal, found that fees could be awarded in that case under 5 U.S.C. § 7701, and declined to comment further on the applicability of EAJA. *Social Security Administration v. Goodman*, 33 M.S.P.R. 325, 326–27 n.1 (1987). *See also*, *e.g.*, *NLRB v. Boyce*, 51 M.S.P.R. 295, 300 n.4 (1991).

GAO held in 68 Comp. Gen. 366 (1989) that EAJA did not authorize a fee award to an employee who prevailed in an agency grievance proceeding that did not meet the standard of an "adversary adjudication." *See also* 72 Comp. Gen. 289 (1993) (attorney fee provision of the Whistleblower Protection Act does not apply where employee uses informal agency grievance procedure). (This being the case, it was irrelevant whether or not the grievance involved selection or tenure.)

Where a MSPB decision is appealed to the courts, including a decision involving selection or tenure, the majority view is that EAJA permits the court to award fees for the judicial proceedings, the relevant standard now being a "civil action" under 28 U.S.C. § 2412(d) rather than an "adversary adjudication" under 5 U.S.C. § 504. *See Maritime Management*, *Inc. v. United States*, 242 F.3d 1326, 1336 (11th Cir. 2001) (fees disallowed for bid protest proceedings before GAO, but allowed in associated civil action). *See also Brewer v. American Battle Monuments Commission*, 814 F.2d 1564 (Fed. Cir. 1987); *Gavette*, 808 F.2d at 1462–65; *Miller*, 753 F.2d at 274–75; *Olsen*, 735 F.2d at 561. Here, however, the *Hoska* case is in disagreement.

To the extent EAJA is inapplicable either to the MSPB or to a court reviewing a MSPB action, all is not necessarily lost to the fee applicant because EAJA is not exclusive in these situations. The MSPB and the courts both may award fees under the Back Pay Act in appropriate cases, and the MSPB additionally has 5 U.S.C. § 7701. Thus, for example, *Hoska*, while finding EAJA inapplicable, awarded fees under the Back Pay Act.

h. Contract Matters

(1) Bid protests

Prior to 1984, attorney's fees incurred by a bidder for a government contract in pursuing a bid protest with GAO were not compensable. 57 Comp. Gen. 125, 127 (1977); B-197174, Aug. 25, 1980; B-192910, Apr. 11, 1979. The question arose again upon enactment of the Equal Access to

Justice Act (EAJA) in 1980. However, since a bid protest at GAO is not an adversary adjudication governed by the Administrative Procedure Act, EAJA was equally unavailing. *Maritime Management, Inc. v. United States*, 242 F.3d 1326, 1336 (11th Cir. 2001) (fees disallowed for bid protest proceedings before GAO). *See also* 63 Comp. Gen. 541 (1984); 62 Comp. Gen. 86 (1982); B-251668, May 13, 1993; B-211105.2, Jan. 19, 1984.

Under the Competition in Contracting Act of 1984, as amended, 31 U.S.C. § 3554(c)(1), GAO may recommend that a protester be reimbursed the costs of filing and pursuing a protest, including reasonable attorney's fees, where it finds that a solicitation or the award of a contract does not comply with statute or regulation. This is to relieve parties with valid claims of the burden of vindicating the public interests that Congress seeks to promote. 68 Comp. Gen. 506, 508 (1989). The costs and fees are payable from the contracting agency's procurement appropriations. 31 U.S.C. § 3554(c)(2) (contracting agency "shall …pay the costs promptly").

GAO's approach under 31 U.S.C. § 3554(c) is to recommend that the contracting agency pay the protest costs and allow the protester and agency to negotiate the appropriate amount. If the parties cannot agree, GAO will determine the amount. 4 C.F.R. §§ 21.8(d), (e), and (f) (formerly at 4 C.F.R. §§ 21.6(d) and (e)). A protester seeking to recover the costs of pursuing its protest must submit sufficient evidence to support its monetary claim; the amount claimed may be recovered to the extent that the claim is adequately documented and is shown to be reasonable. B-240327.3, Dec. 30, 1994. *See, e.g.*, B-291657, Feb. 11, 2003.

GAO's bid protest authority is not exclusive. A protester may also seek resolution with the contracting agency, file a bid protest at the Court of Federal Claims after having its protest denied at GAO, or go directly to the Court of Federal Claims in lieu of filing a protest at GAO. 31 U.S.C. § 3556. Once a case is in court, 31 U.S.C. § 3554(c) is out of the picture, and the court may consider a fee application under the judicial portion of EAJA. *E.g.*, *Essex Electro Engineers, Inc. v. United States*, 757 F.2d 247 (Fed. Cir. 1985); *Laboratory Supply Corp. of America v. United States*, 5 Cl. Ct. 28 (1984).

Bid protest disputes often give rise to significant operational delays. Sometimes, rather than litigate the bid protest and then correct the flaws in its procurement, an agency will try to "buy off" a bid protester with a monetary settlement. This practice is known as "Fedmail." Typically, the payment is for bid protest preparation expenses, including legal fees. In

U.S. General Accounting Office, *ADP Bid Protests: Better Disclosure and Accountability of Settlements Needed*, GAO/GGD-90-13 (Washington, D.C.: Mar. 30, 1990), at 31, GAO indicated that it would question the propriety of Fedmail payments, if and when it came across them. 71 Comp. Gen. 340, 342 (1992). In 71 Comp. Gen. 340, a Fedmail arrangement went sour when the disbursing officers of the Defense Supply Service-Washington refused to make payment under the agreement. This was inopportune, to say the least, as the parties had already secured dismissal of the protest from the General Services Administration Board of Contract Appeals (GSBCA)[43] pursuant to their Fedmail agreement. The GSBCA did not know about the Fedmail agreement when it ordered the dismissal. Once it learned of it, GSBCA declined to modify its dismissal order. Consequently, the agency asked GAO to issue an advance decision authorizing the payment. However, as it had threatened in GAO/GGD-90-13, GAO objected to the payment as improper and without legal authority:

> "We do not believe that in making appropriations available to an agency for the procurement of goods and services, Congress intended those funds to be available to allow the agency to obtain the withdrawal of a meritorious protest without taking appropriate corrective action. In addition, …[w]e are not aware of any statute that would permit the Army to pay attorney fees in the circumstances of this case."

71 Comp. Gen. at 342.

(2) Contract disputes

Under the original (1980) version of the Equal Access to Justice Act (EAJA), the Court of Appeals for the Federal Circuit held that (1) a court, reviewing a decision of an agency board of contract appeals, could, under the judicial portion of EAJA, make a fee award covering services before both the board and the court, but that (2) boards of contract appeals were not authorized to independently make EAJA fee awards. *Fidelity Construction Co. v. United States*, 700 F.2d 1379 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983).

[43] At that time, GSBCA was authorized to hear bid protests involving automatic data processing procurements under the so-called Brooks Act, formerly codified at 40 U.S.C. § 759. The Brooks Act has since been repealed, Pub. L. No. 104-106, § 5101, 110 Stat. 186, 680 (1996).

The 1985 EAJA amendments legislatively overturned *Fidelity* to the extent it held 5 U.S.C. § 504 inapplicable to boards of contract appeals. *E.g.*, *Ardestani v. Immigration & Naturalization Service*, 502 U.S. 129, 138 (1991); *Dantran, Inc. v. Department of Labor*, 246 F.3d 36, 45 (1st Cir. 2001); *Texas Instruments, Inc. v. United States*, 991 F.2d 760, 767 (Fed. Cir. 1993). Specifically, the law amended the definition of "adversary adjudication" to expressly include appeals to boards of contract appeals under the Contract Disputes Act. The 1985 amendments also added language to 28 U.S.C. § 2412(d) to make it clear that fee awards are authorized when a contractor appeals a contracting officers decision directly to a court instead of to a board of contract appeals, as authorized by the Contract Disputes Act. (As noted in the preceding paragraph, appeals to court from board decisions were already covered.) The fees recovered under this authority are limited to services provided after the contracting officers decision and do not include services provided in order to argue the matter before the contracting officer. *See Levernier Construction, Inc. v. United States*, 947 F.2d 497, 500–503 (Fed. Cir. 1991).

i. Public Participation in Administrative Proceedings: Funding of Intervenors

A number of regulatory agencies conduct administrative proceedings and take actions that have a direct public impact. A prime example is licensing. An important concern has been that the agency may not receive a balanced presentation of viewpoints. The reason is that the industries being regulated usually have adequate resources to ensure representation of their interests, while lack of resources may preclude participation by various nonindustry "public interest" representatives.

The Comptroller General has considered questions of intervenor funding. An "intervenor" in this context means someone who is not a direct party to the proceedings. Stated briefly, the rule is that an agency may use its appropriations to fund intervenor participation, including attorney's fees, if—

1. intervenor participation is authorized, either expressly by statute or by necessary implication derived from a regulatory or licensing function;

2. the agency determines that the participation is reasonably necessary to a full and fair determination of the issues before it; and

3. the intervenor could not otherwise afford to participate.

This is essentially an application of the "necessary expense" doctrine discussed previously in this chapter. Thus, intervenor funding does not require express statutory authority, but it must relate to accomplishing the objectives of the appropriation sought to be charged, and of course must not be otherwise prohibited. The agency must have authority to encourage or accept intervenor participation in connection with an authorized function for which its appropriations are available. In this sense, it may be said that intervenor funding must have a statutory foundation.

Historically the concept of intervenor funding emerged in the early 1970s. In 1970, the Federal Trade Commission (FTC) held that an indigent respondent in an FTC hearing was entitled to government-furnished counsel. *American Chinchilla Corp.*, 1970 Trade Reg. Rep. ¶ 19059. Following the *Chinchilla* case, the FTC asked whether it could pay certain related expenses for the indigent respondent, such as transcript costs and attorney's expenses. It also asked whether it could pay the same expenses when incurred by an indigent intervenor rather than the respondent.

In the first of the intervenor cases, B-139703, July 24, 1972, GAO answered "yes" to both questions. Noting that FTC had statutory authority to grant intervention "upon good cause shown," the Comptroller General responded to the intervenor question as follows:

> "Thus, if the Commission determines it necessary to allow a person to intervene in order to properly dispose of a matter before it, the Commission has the authority to do so. As in the case of an indigent respondent, and for the same reasons, appropriated funds of the Commission would be available to assure proper case preparation."

A few years later, the Nuclear Regulatory Commission asked whether it was authorized to provide financial assistance to participants in its adjudicatory and rulemaking proceedings. Finding that NRC had statutory authority to admit intervenors, the Comptroller General applied the "necessary expense" rationale of B-139703, and answered "yes." B-92288, Feb. 19, 1976.

In this decision, GAO explained why the "American rule" as set forth in *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975),[44] does not apply to bar the payment of attorney's fees. The distinction is that the American rule limits the power of a court or an agency to require an unwilling defendant to pay the attorney's fees of a prevailing plaintiff or intervenor. In cases like B-139703 and B-92288, an administrative body, exercising its rulemaking function, is attempting to encourage public participation in its proceedings. It does this by willingly assuming representation costs for intervenors who would otherwise be financially unable to participate, in order to obtain their input for a balanced rulemaking effort. Only by obtaining a balanced view can the agency perform its function of protecting the public interest.

Next, in a letter to the Chairman of the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce, GAO advised that the rationale of B-92288, *supra*, applied equally to nine agencies under the Subcommittees jurisdiction. The nine were: Federal Communications Commission, Federal Trade Commission, Federal Power Commission, Interstate Commerce Commission, Consumer Product Safety Commission, Securities and Exchange Commission, Food and Drug Administration, Environmental Protection Agency, and National Highway Traffic Safety Administration. B-180224, May 10, 1976.

GAO pointed out in the same letter that there were several possible ways of providing assistance to qualifying participants:

1. Provision of funds directly to participants.

2. Modification of agency procedural rules so as to ease the financial burdens of public participation.

3. Provision of technical assistance by agency staff. (However, this cannot include assigning staff members to participants to help them with their advocacy positions.)

4. Provision of legal assistance by agency staff, but again not as advocates.

[44] The Supreme Court reiterated the "American Rule" recently in *Buckhannon Board & Care Home, Inc. v. West Virginia Department of Health & Human Resources*, 532 U.S. 598, 602 (2001).

5. Creation of an independent public counsel. (However, the public counsel cannot be beyond the agency's jurisdiction and control.)

6. Creation of a consumer assistance office, as long as it remains under the agency's jurisdiction and control and does not act as an advocate.

In subsequent decisions and opinions, GAO examined aspects of the programs of several specific agencies. In each case, GAO consistently applied the rationale of the earlier decisions. The cases are:

- Environmental Protection Agency: 59 Comp. Gen. 424 (1980); B-180224, Apr. 5, 1977;
- Federal Communications Commission: B-139703, Sept. 22, 1976;
- Food and Drug Administration: 56 Comp. Gen. 111 (1976);
- Nuclear Regulatory Commission: 59 Comp. Gen. 228 (1980); and
- Economic Regulatory Administration (a component of the Department of Energy): B-192213-O.M., Aug. 29, 1978; U.S. General Accounting Office, *Department of Energy's Procedures in Funding Intervenors in Proceedings before the Economic Regulatory Administration*, EMD-78-111 (Washington, D.C.: Oct. 2, 1978).

While the decisions have consistently upheld the legality of intervenor funding under the necessary expense theory, GAO has nevertheless emphasized the desirability of an agency's seeking specific statutory authority to embark on a public participation program. *E.g.*, B-180224, *supra;* B-92288, *supra.* Congress has acted in several instances, authorizing intervenor funding in some cases and prohibiting it in others.

For example, the Environmental Protection Agency has intervenor funding authority under the Toxic Substances Control Act, 15 U.S.C. § 2605(c), and the Consumer Product Safety Commission has such authority under the Consumer Product Safety Act, 15 U.S.C. § 2056(c). Similarly, from 1975 until recently, the Federal Trade Commission was given specific authority to fund intervenor participation in 1975 by the Magnuson-Moss Warranty–Federal Trade Commission Improvement Act, formerly, 15 U.S.C.

§ 57a(h).[45] Under this legislation, payments for legal services could not exceed the costs actually incurred, even though the participant used "house counsel" whose rate of pay was lower than prevailing rates. 57 Comp. Gen. 610 (1978).

Restrictions in appropriation acts have prohibited intervenor funding programs for several agencies. For example, a provision in the Nuclear Regulatory Commissions (NRC) 1981 appropriation prohibited the use of funds for the expenses of intervenors. The Comptroller General construed this restriction as prohibiting the NRC from adopting a "cost reduction program" of providing transcripts and other documents free to intervenors. B-200585, Dec. 3, 1980. However, NRC could reduce the number of copies of documents required to be filed. *Id.* Also, NRC could decide to provide free transcripts to all parties, intervenors included, without violating the restriction. B-200585, May 11, 1981. Other cases construing the NRC restriction, or successor versions, are *Business & Professional People for the Public Interest v. Nuclear Regulatory Commission*, 793 F.2d 1366 (D.C. Cir. 1986); 67 Comp. Gen. 553 (1988); and 62 Comp. Gen. 692 (1983).

Appropriation act restrictions have also prohibited intervenor funding by the Economic Regulatory Administration and the Federal Energy Regulatory Commission (FERC). A case involving the FERC prohibition is *Electrical District No. 1 v. Federal Energy Regulatory Commission*, 813 F.2d 1246 (D.C. Cir. 1987). In addition, the conference committee on the 1980 appropriation for the National Highway Traffic Safety Administration and the former Civil Aeronautics Board directed that no funds be allocated by these agencies for intervenor funding programs.[46]

A restriction contained solely in legislative history and not carried into the statutory language itself is not legally binding on the agency. The history of the NRC prohibition will illustrate this. For fiscal year 1980, the prohibition was expressed in committee reports but not in the appropriation act itself. Accordingly, GAO told NRC that, while it would be well advised to postpone its program, the restriction was not legally binding. 59 Comp. Gen. 228 (1980). For fiscal year 1981, the prohibition was written into NRC's appropriation act. Similarly, the restriction noted above for the

[45] Authority repealed by Pub. L. No. 103-312, § 3, 108 Stat. 1691 (Aug. 26, 1994).

[46] H.R. Rep. No. 96-610, at 9, 14 (1979) (on H.R. 4440, 1980 appropriations bill for Department of Transportation and related agencies).

transportation agencies later "graduated" to a general provision in the statute.[47]

One court has disagreed with the GAO decisions. *Greene County Planning Board v. Federal Power Commission (Greene County IV)*, 559 F.2d 1227 (2nd Cir.), *cert. denied*, 434 U.S. 1086 (1976).[48] There, after several years of litigation, the plaintiff Board had finally prevailed in its attempt to compel relocation of a proposed high kilovolt power line through a scenic portion of the county. The only question remaining was the ability of the Federal Power Commission (FPC) to reimburse the plaintiff's attorney's fees. (Though not "indigent," the counsel fees had drained a disproportionate amount of the county's resources.) The FPC had denied reimbursement on the grounds that the Board was protecting its own, not the public, interest and because it thought it lacked authority to reimburse the fees. After first concluding that the issue should be remanded to the FPC so that it could determine the propriety of reimbursement in accordance with the Comptroller General's decisions, the Second Circuit Court of Appeals granted a rehearing *en banc*. On rehearing, the majority opinion held that the FPC lacked authority to reimburse the attorney's fees. *Greene County IV*, 559 F.2d at 1238.

Subsequently, both GAO and the Justice Departments Office of Legal Counsel took the position that *Greene County IV* applied only to the former FPC, and not to other federal agencies or even to the agencies that succeeded to the FPC's responsibilities. 59 Comp. Gen. 228; 2 Op. Off. Legal Counsel 60 (1978). In addition, the U.S. District Court for the District of Columbia has likewise determined that *Greene County IV* does not extend generally to all agencies. *Chamber of Commerce v. United States Department of Agriculture*, 459 F. Supp. 216 (D.D.C. 1978), upholding the authority of the Department of Agriculture to fund a consumer study on the impact of certain proposed rules.

Thus, to determine whether a given agency has intervenor funding authority, it is necessary first to examine the legislation, including appropriation acts, applicable to that agency, as well as pertinent judicial

[47] *E.g.*, Department of Transportation and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-164, § 306, 103 Stat. 1069, 1092 (Nov. 21, 1989).

[48] The *Greene County* litigation produced several published decisions: 455 F.2d 412 (2nd Cir. 1972), 490 F.2d 256 (2nd Cir. 1973), 528 F.2d 38 (2nd Cir. 1975), and the decision cited in the text, known as "*Greene County IV*."

decisions. In the absence of statutory direction one way or the other, and if there are no judicial decisions on point, it is then appropriate to apply the necessary expense rationale of the GAO decisions.

The later decisions somewhat refined the standards expressed in the earlier cases. For example, in order to constitute a "necessary expense," the participation does not have to be absolutely indispensable in the sense that the issues could not be decided without it. It is sufficient for the agency to determine that a particular expenditure for participation can reasonably be expected to contribute substantially to a full and fair determination of the issues. 56 Comp. Gen. 111. This is consistent with the application of the necessary expense doctrine in other contexts as discussed throughout this chapter. Assuming the requisite statutory basis for intervention exists, the determination of necessity must be made by the administering agency itself, not by GAO. *Id. See also* B-92288, *supra*.

The standard of the participant's financial status was discussed in 59 Comp. Gen. 424 (1980). While the participant need not be literally indigent, the authority to fund intervenor participation extends only to individuals and organizations which could not afford to participate without the assistance. In making this determination, the agency should consider the income and expense statements, as well as the net assets, of an applicant. An applicant does not qualify for assistance merely because it cannot afford to participate in all activities it desires. The applicant is expected to choose those activities it considers most significant and to allocate its resources accordingly.

Some of the earlier cases held that advance funding was prohibited by 31 U.S.C. § 3324. 56 Comp. Gen. 111; B-139703, Sept. 22, 1976. However, in view of the Federal Grant and Cooperative Agreement Act of 1977, an agency with statutory authority to extend financial assistance in the form of grants may be able to utilize advance funding in its public participation program. A 1980 decision, 59 Comp. Gen. 424, applied this concept to the program of the Environmental Protection Agency.

The decisions have all dealt with participation in the agency's own proceedings. There would generally be no authority to fund intervenor participation in someone else's proceedings, for example, participation by a state agency in a state utility ratemaking proceeding. B-178278, Apr. 27, 1973 (nondecision letter).

Finally, the GAO decisions in no way imply that an agency is compelled to fund intervenor participation. They hold merely that, if the various standards are met, an agency has the authority to do so if it wishes. *See* B-92288, *supra*.

A summary and discussion of intervenor funding through early 1981 may be found in U.S. General Accounting Office, *Review of Programs for Reimbursement for Public Participation in Federal Rulemaking Proceedings*, PAD-81-30 (Washington, D.C.: Mar. 4, 1981). *See also* Rollee H. Efros, "Payment of Intervenors Expenses in Agency Regulatory Proceedings," *Cases in Accountability: The Work of the GAO* (Washington, D.C.: Westview Press,1979), pp. 171–181.

4. Compensation Restrictions

> "If an officer is not satisfied with what the law gives him for his services, he may resign."

Embry v. United States, 100 U.S. 680, 685 (1879), quoted in *Lincoln v. United States*, 418 F. Supp. 1094, 1095 (N.D. Cal. 1976).

As a general proposition, restrictions on the compensation of federal employees are regarded as matters of personnel law that are now under the jurisdiction of the Office of Personnel Management.[49] However, compensation restrictions may also be viewed as limits on the "purpose availability" of appropriations. We specifically treat three compensation-related topics in this chapter—the restrictions on dual compensation, the restrictions on employing aliens, and the statutes concerning forfeiture of retirement annuities and retired pay—as illustrations of the different ways in which Congress may exercise its constitutional role of controlling the public purse by prescribing the purposes for which appropriated funds may be used. The provision on aliens is a restriction appearing in annual appropriation acts. The dual compensation and forfeiture statutes are

[49] The 104th Congress enacted two laws, the Legislative Branch Appropriations Act of 1996, Pub. L. No. 104-53, § 211, 109 Stat. 514, 535 (Nov. 19, 1995), and the General Accounting Office Act of 1996, Pub. L. No. 104-316, 110 Stat. 3826 (Oct. 19, 1996), that transferred GAO's authority over the settlement of claims and related advance decisions, waivers, and other functions (including judgment fund payments and transportation carriers appeals) to the Executive Branch. Federal employees' claims for compensation and leave, and settlement of deceased employees' accounts were assigned to Office of Personnel Management (OPM), Office of General Counsel, Claims Adjudication Unit. In April 2000, this function was transferred to OPM's Office of Merit Systems Oversight and Effectiveness.

permanent provisions found in the United States Code; while not phrased in terms of appropriation restrictions, the effect is the same.

a. Dual Compensation

Section 5536 of title 5 of the United States Code prohibits a civilian employee or member of the uniformed services whose pay is fixed by statute or regulation from receiving additional pay from public money for any other service or duty, unless authorized by law.[50] This is a purpose restriction on how an agency may spend its appropriation. For instance, GAO found that paying the actual cost of personal cell phone use for government business is permitted but not at a flat rate because an established fee per day is equivalent to an allowance in addition to salary, and, therefore, is prohibited by 5 U.S.C. § 5536. B-287524, Oct. 22, 2001. GAO has also held in several cases that the provision of free food while on duty violates the prohibition against dual compensation. *See*, *e.g.*, 42 Comp. Gen. 149, 151 (1962); B-272985, Dec. 30, 1996.

b. Employment of Aliens

For many years, with minor variations from year to year, various appropriation acts have included provisions restricting the federal employment of aliens. The typical prohibition, with exceptions to be noted below, bars the use of appropriated funds to pay compensation to any officer or employee of the United States whose post of duty is in the continental United States unless that person is a U.S. citizen. In more recent years, the prohibition has appeared as a general provision in the Treasury, Postal Service, and General Government appropriation acts, applicable to funds contained "in this or any other act."[51] A recurring general provision in the Defense Department appropriation act exempts Defense Department personnel from the alien restriction.[52]

The prohibition applies to all appropriated funds unless expressly provided otherwise. Therefore, it applies to the special deposit accounts established by statute for the Senate and House restaurants since these accounts

[50] We note in passing that there are other laws limiting the salaries paid to federal employees. *E.g.*, 18 U.S.C. § 209 (salary of government employees payable only by United States). However, this discussion is limited to laws that constitute purpose restrictions on an agency's use of appropriations to pay salaries.

[51] For example, the 2003 provision is found in Pub. L. No. 108-7, div. J, title VI, § 605, 117 Stat. 11, 464 (Feb. 20, 2003) (codified at 5 U.S.C. § 3101 note).

[52] The 2003 provision is Pub. L. No. 107-248, title VIII, § 8002, 116 Stat. 1519, 1536 (Oct. 23, 2002) (codified at 10 U.S.C. § 1584 note).

amount to permanent indefinite appropriations. 50 Comp. Gen. 323 (1970). It also applies to working capital funds. B-161976, Aug. 10, 1967.[53]

There are a number of statutory exceptions to the restriction on compensating aliens. As noted, one significant exemption is for Defense Department personnel. *See* B-188507, Dec. 16, 1977; B-110831, Aug. 4, 1952. Others are 42 U.S.C. § 2473(c)(10) (National Aeronautics and Space Administration, permanent legislation); 2 U.S.C. § 169 (Library of Congress, found in annual appropriation acts); 22 U.S.C. § 1474(1) (permanent authority for specific, activities within the United States Information Agency); and 22 U.S.C. § 2672 (permanent authority for specific activities within the State Department). Since appropriation act exceptions may appear, disappear, or vary from time to time, it is important to scrutinize the relevant appropriation act for any given year. Absent an applicable exception, the general prohibition will apply. For an illustration of the complexities that may arise when the provisions vary from year to year, see 57 Comp. Gen. 172 (1977). GAO has supported enactment of the general restriction as permanent legislation. B-130733, Mar. 6, 1957.

In addition to the agencywide exemptions noted above, the alien restriction itself contains a number of exceptions. Several of these are summarized below.

Declaration of intention exception. The prohibition does not apply to a person in the federal service on the date of enactment of the appropriation act containing the prohibition who is actually residing in the United States, is eligible for citizenship, and has filed a declaration of intention to become a citizen. The employee must have filed the declaration prior to the date of enactment. Subsequent filing will not cure the disqualification. 17 Comp. Gen. 1104 (1938). A declaration timely filed but which had become void by operation of law due to lapse of time has also been held insufficient. B-138854, Apr. 1, 1959.

Specific country exceptions. The statute typically exempts nationals of certain specified countries. The countries specified in any given

[53] The cited decision refers to the Naval Industrial Fund established under 10 U.S.C. § 2208. The decision makes no mention of the statutory exemption for the Defense Department, which was in effect in 1967. For purposes of this discussion, whether B-161976 could have been disposed of more simply based on the Department's exemption is irrelevant. The decision is cited here merely for the proposition noted in the text.

appropriation act change from time to time according to the political climate. Dual citizenship will not negate the exception as long as one of the countries is within the exception, even where the individual has entered the United States from the nonexempt country. B-194929, June 20, 1979.

Allied country exception. The prohibition does not apply to nationals of "countries allied with the United States in the current defense effort." GAO will not decide whether a country meets this test. The determination is the responsibility of the employing agency, perhaps with the assistance of the State Department. GAO will not question a determination based on reasonable grounds. 35 Comp. Gen. 216 (1955); B-151064, Mar. 25, 1963; B-146142, June 22, 1961; B-139667, June 22, 1959. The reason for GAO's position is that "it is not the responsibility nor the proper province of the accounting officers to initially determine political facts." B-107288, Feb. 14, 1952; B-107579, Feb. 14, 1952.

Given the facts and circumstances at the time, GAO ventured an assertion in the more obvious cases. For instance, GAO has said that Britain meets the test. 73 Comp. Gen. 319 (1994). We have also opined that Canada and Japan meet the test. B-188852, July 19, 1977; B-133877, Oct. 16, 1957; B-113780, Mar. 4, 1953. Even in these cases, the determination, strictly speaking, is up to the employing agency.

Allegiance exception. The prohibition does not apply to a person who "owes allegiance to the United States." This means "absolute and permanent allegiance" as distinguished from "qualified and temporary allegiance." 17 Comp. Gen. 1047 (1938); B-119760, Apr. 27, 1954. The exemption was apparently prompted by a concern for noncitizen inhabitants of U.S. territorial possessions; for example, "Filipinos in the service of the United States on March 28, 1938." 17 Comp. Gen. at 1048.

The allegiance exception includes a clause to the effect that a signed affidavit will be regarded as *prima facie* evidence of allegiance. This clause has been construed to apply to noncitizen nationals, that is, noncitizen inhabitants of U.S. territorial possessions and not to resident aliens. *Yuen v. Internal Revenue Service*, 497 F. Supp. 1023 (S.D.N.Y. 1980), *aff'd*, 649 F.2d 163 (2nd Cir. 1981). The district court opinion includes an exhaustive review of legislative history.

Emergency exception. The prohibition does not apply to "temporary employment in the field service …as a result of emergencies." The term

"emergency" in this context means "flood, fire, or other catastrophe." B-146142, June 22, 1961. *See also* 73 Comp. Gen. 319 (1994).

An alien appointed in contravention of the statutory prohibition may not retain compensation already paid. 35 Comp. Gen. 216 (1955); 18 Comp. Gen. 815 (1939). (The statute expressly gives the United States the right to recover.) If there is no statutory bar—for example, if the employment would have qualified under the "allied country" exception but the agency failed to make the required determination—the alien may be paid as a "*de facto* employee." Earlier decisions distinguished between appointments "void *ab initio*" and those that are merely "voidable." *E.g.*, 37 Comp. Gen. 483 (1958); 35 Comp. Gen. 216 (1955); B-188852, July 19, 1977; B-178882, Aug. 29, 1973. The distinction proved confusing and GAO has moved away from it. The current rule is stated in 58 Comp. Gen. 734 (1979).

As a final note, the Supreme Court in 1976 invalidated a Civil Service Commission regulation requiring citizenship as a prerequisite to federal employment. *Hampton v. Mow Sun Wong*, 426 U.S. 88 (1976). The Court did not, however, invalidate the appropriation act restrictions. *See* B-188507, Dec. 16, 1977. The *Yuen* litigation cited earlier specifically upheld the restriction against a charge of violation of the Equal Protection clause.

c. Forfeiture of Annuities and Retired Pay

(1) General principles

Under 5 U.S.C. § 8312 (the so-called "Hiss Act"), a civilian employee of the United States or a member of the uniformed services who is convicted of certain criminal offenses relating to the national security will forfeit his or her retirement annuity or retired pay. Further, the annuity or retired pay may not be paid to the convicted employees survivors or beneficiaries. The offenses that will result in forfeiture are specified in the statute. Examples are: gathering or delivering defense information to aid a foreign government; gathering, transmitting, or losing defense information; disclosure of classified information; espionage; sabotage; treason; rebellion or insurrection; seditious conspiracy; advocating the overthrow of the government; enlistment to serve in an armed force against the United States; and certain violations of the Atomic Energy Act. In addition, perjury by falsely denying the commission of one of the specified offenses is itself an offense for purposes of forfeiture.

An employee for purposes of 5 U.S.C. § 8312 includes a Member of Congress and an individual employed by the government of the District of

Columbia. 5 U.S.C. § 8311(1). The specific types of retirement annuities and retired pay subject to forfeiture are enumerated in 5 U.S.C. §§ 8311(2) and (3).

Since 5 U.S.C. § 8312 imposes a forfeiture, it is penal in nature. Therefore, it must be strictly construed. GAO will not construe the statute as applicable to situations that are not expressly covered by its terms. 35 Comp. Gen. 302 (1955).

In the absence of an authoritative judicial decision to the contrary, the effective date of a conviction for stoppage of retired pay should be determined in a manner which will result in the least expenditure of public funds. Thus, the date a guilty verdict is returned should be considered the date of conviction rather than a later date when the judgment is ordered executed, and retired pay should be stopped the following day. 39 Comp. Gen. 741 (1960). Using the cited decision to illustrate: the jury returned a guilty verdict on December 2, 1959; judgment was entered on January 29, 1960; the date of conviction is December 2, 1959, and retired pay should be stopped effective December 3.

In the absence of an authoritative judicial decision to the contrary, a plea of "*nolo contendere*" should be regarded as a conviction for purposes of 5 U.S.C. § 8312. 41 Comp. Gen. 62 (1961).

(2) The Alger Hiss case

The event that, more than any other single incident, gave rise to the original enactment of 5 U.S.C. § 8312, was the case of Alger Hiss. A former State Department employee, Hiss was convicted in 1950 of perjury stemming from testimony before a grand jury investigating alleged espionage violations. When Hiss was released from prison after serving his sentence, considerable public and congressional attention was directed at the fact that he was still entitled to receive his government pension. Given the political climate of the times, the result was the enactment of 5 U.S.C. § 8312 in 1954 (Pub. L. No. 769, ch. 1214, 68 Stat. 1142 (Sept. 1, 1954)).

Hiss applied for his pension in 1967 and the then Civil Service Commission denied the application based on 5 U.S.C. § 8312. He subsequently sued for restoration of his forfeited pension. In *Hiss v. Hampton*, 338 F. Supp. 1141 (D.D.C. 1972), the court, finding that the statute had been aimed more at punishing Alger Hiss than regulating the federal service, held 5 U.S.C. § 8312 to be an *ex post facto* law and therefore unconstitutional as it had

been applied to Hiss for conduct which occurred prior to the date of its enactment. Therefore, the court ordered the Civil Service Commission to pay Hiss his annuity retroactively with interest.

The *Hiss* case gave rise to two GAO decisions—52 Comp. Gen. 175 (1972), *aff'd*, B-115505, Dec. 21, 1972—holding that the interest payable to Hiss, as with the annuity itself, must be paid from the Civil Service Retirement Fund rather than the permanent judgment appropriation, 31 U.S.C. § 1304. The court case and decisions are summarized in B-115505, May 15, 1973.

(3) Types of offenses covered

Under the original version of 5 U.S.C. § 8312, forfeiture was not strictly limited to national security offenses. An employee could lose his or her retirement annuity or retired pay simply by committing a felony "in the exercise of his authority, influence, power, or privileges as an officer or employee of the Government." There were numerous examples of forfeitures for such infractions as falsifying a travel voucher or using a government-owned vehicle for personal purposes.[54]

Recognizing that in many cases the punishment was too severe for the offense, especially in cases where the offense occurred after many years of government service, Congress amended the statute in 1961 (Pub. L. No. 87-299, 75 Stat. 640 (Sept. 26, 1961)) to limit it to offenses relating to national security and to "retroactively remove therefrom those provisions of the statute which prohibited payment of annuities and retired pay to persons who commit offenses, acts or omissions which do not involve the security of the United States." 41 Comp. Gen. 399, 400 (1961). Thus, numerous offenses which would have caused forfeiture before 1961 no longer do. *See*, *e.g.*, B-155823, Sept. 15, 1965 (conspiracy to embezzle government funds); B-155558, Nov. 25, 1964 (false statement). Of course, to the extent that the pre-1961 decisions establish principles apart from the specific offenses involved, such as the general principles noted above, they remain valid.

The original 1954 enactment of 5 U.S.C. § 8312 did not expressly cover offenses under the Uniform Code of Military Justice (UCMJ), and this omission generated many GAO decisions prior to the 1961 amendment. *E.g.*, 40 Comp. Gen. 601 (1961); 38 Comp. Gen. 310 (1958); 35 Comp. Gen. 302 (1955). The UCMJ decisions came to an abrupt halt with the

[54] *See*, *e.g.*, 41 Comp. Gen. 114 (1961); 40 Comp. Gen. 364 (1960); 40 Comp. Gen. 176 (1960).

enactment of the 1961 amendment. The current version of 5 U.S.C. § 8312 expressly covers UCMJ offenses, again limited to national security violations. Now, a conviction under the UCMJ will produce a forfeiture if the offense involves certain UCMJ articles specified in the statute, or if it involves any other article of the UCMJ where the charges and specifications describe a violation of certain of the United States Code offenses, and if the "executed sentence" includes death, dishonorable discharge, or dismissal from the service.

(4) Related statutory provisions

When a forfeiture is invoked under 5 U.S.C. § 8312, the individual is entitled to a refund of his contribution toward the annuity less any amounts already paid out or refunded. 5 U.S.C. § 8316.

Forfeiture may not be invoked where an individual is convicted of an offense "as a result of proper compliance with orders issued, in a confidential relationship, by an agency or other authority" of the United States government or the District of Columbia government. 5 U.S.C. § 8320.

If a payment of annuity or retired pay is made in violation of 5 U.S.C. § 8312 "in due course and without fraud, collusion, or gross negligence," the relevant accountable officer will not be held responsible. 5 U.S.C. § 8321.

In addition to 5 U.S.C. § 8312, retirement annuities or retired pay may be forfeited for willful absence from the United States to avoid prosecution for a section 8312 offense (5 U.S.C. § 8313); refusal to testify in national security matters (5 U.S.C. § 8314);[55] or knowingly falsifying certain national security-related aspects of a federal or District of Columbia employment application (5 U.S.C. § 8315).

[55] Construed by the Justice Department as applicable to proceedings involving the individual's own loyalty or knowledge of activities or plans that pose a serious threat to national security. 1 Op. Off. Legal Counsel 252 (1977).

5. Entertainment—Recreation—Morale and Welfare

a. Introduction

The concept to be explored in this section is the rule that appropriated funds may not be used for entertainment except when specifically authorized by statute and also authorized or approved by proper administrative officers. *E.g.*, 69 Comp. Gen. 242 (1990); 43 Comp. Gen. 305 (1963). The basis for the rule is that entertainment is essentially a personal expense even where it occurs in some business-related context. Except where specifically appropriated for, entertainment cannot normally be said to be necessary to carry out the purposes of an appropriation.

The reader will readily note the sharp distinction between government practice and corporate practice in this regard. "Entertainment" as a business-related expense is an established practice in the corporate sector. No one questions that it can be equally business-related for a government agency. The difference—and the policy underlying the rule for the government—is summarized in the following passage from B-223678, June 5, 1989:

> "The theory is not so much that these items can never be business-related, because sometimes they clearly are. Rather, what the decisions are really saying is that, because public confidence in the integrity of those who spend the taxpayers' money is essential, certain items which may appear frivolous or wasteful—however legitimate they may in fact be in a specific context—should, if they are to be charged to public funds, be authorized specifically by the Congress."

Another way of expressing this idea is found in the following passage from B-288266, Jan. 27, 2003:

> "[R]eference to 'common business practice' is not in itself an adequate justification for spending public money on food or, for that matter, other objects. An expenditure of public funds must be anchored in existing law, not the practices and conventions of the private sector."

(1) Application of the rule

As a general proposition, the rule applies to all federal departments and agencies operating with appropriated funds. For example, in 1977 it was held applicable to the Alaska Railroad. B-124195-O.M., Aug. 8, 1977.

The question in B-170938, Oct. 30, 1972, was whether the entertainment prohibition applied to the revolving fund of the National Credit Union Administration. The fund is derived from fees collected from federal credit unions and not from direct appropriations from the Treasury. Nevertheless, the authority to retain and use the collections constitutes a continuing appropriation since, but for that authority, the fees would have to be deposited in the Treasury and Congress would have to make annual appropriations for the agency's expenses. Therefore, the revolving fund could not be used for entertainment.

There are three situations in which the rule has not been applied. The first is certain government corporations. For example, the Corporation for Public Broadcasting, since it was established as a private nonprofit corporation and is not an agency or establishment of the U.S. government (notwithstanding that it receives appropriations), could use its funds to hold a reception in the Cannon House Office Building. B-131935, July 16, 1975.

The rule has also been held not to apply to government corporations that are classed as government agencies but which have statutory authority to determine the character and necessity of their expenditures. B-127949, May 18, 1956 (Saint Lawrence Seaway Development Corporation); B-35062, July 28, 1943. There are limits, however. *See*, *e.g.*, B-45702, Nov. 22, 1944, disallowing the cost of a "luncheon meeting" of government employees.

The second exception is donated funds where the recipient agency has statutory authority to accept and retain the gift. The availability of donated funds for entertainment is discussed further, with case citations, in Chapter 6.

The third exception, infrequently applied, is for certain commissions with statutory authority to procure supplies, services, or property, and to make contracts, without regard to the laws and procedures applicable to federal agencies, and to exercise those powers that are necessary to enable the commission to carry out the purposes for which it was established efficiently and in the public interest. B-138969, Apr. 16, 1959 (Lincoln

Sesquicentennial Commission); B-138925, Apr. 15, 1959 (Civil War Centennial Commission); B-129102, Oct. 2, 1956 (Woodrow Wilson Foundation).

(2) What is entertainment?

The Comptroller General has not attempted a precise definition of the term "entertainment." In one decision, GAO noted that one court had defined the term as "a source or means of amusement, a diverting performance, especially a public performance, as a concert, drama, or the like." Another court said that entertainment "denotes that which serves for amusement and amusement is defined as a pleasurable occupation of the senses, or that which furnishes it, as dancing, sports, or music." 58 Comp. Gen. 202, 205 (1979),[56] *overruled on other grounds*, 60 Comp. Gen. 303 (1981).

For purposes of this discussion, the term entertainment, as used in decisions of the Comptroller General and Comptroller of the Treasury, is an "umbrella" term that includes: food and drink, either as formal meals or as snacks or refreshments; receptions, banquets, and the like; music, live or recorded; live artistic performances; and recreational facilities. Our treatment includes one other category that, even though not entertainment as such, is closely related to the entertainment cases: facilities for the welfare or morale of employees.

Earlier decisions from time to time had occasion to address the components of entertainment. Can it include liquor? Responding to an inquiry from the Navy, a Comptroller of the Treasury, obviously not a teetotaler, said: "Entertainments …without wines, liquors or cigars, would be like the play of Hamlet with the melancholy Dane entirely left out of the lines." 14 Comp. Dec. 344, 346 (1907).[57]

In a 1941 decision (B-20085, Sept. 10, 1941), the Coordinator of Inter-American Affairs asked whether authorized entertainment could include

[56] Citing, respectively, *People v. Klaw*, 106 N.Y.S. 341, 351 (Ct. Gen. Sess. 1907), and *Young v. Board of Trustees of Broadwater County High School*, 90 Mont. 576, 4 P.2d 725, 726 (1931).

[57] The Comptroller of the Treasury's comments should not be confused with the rule that alcoholic beverages are not reimbursable as subsistence expenses. B-164366, Mar. 31, 1981; B-164366, Aug. 16, 1968; B-157312, May 23, 1966. The exclusion applies even against a claim that consumption of alcohol is required by religious beliefs. B-202124, July 17, 1981.

such items as cocktail parties, banquets and dinners, theater attendance, and sightseeing parties. The Comptroller General, recognizing that an appropriation for entertainment conferred considerable discretion, replied, in effect, "all of the above."

That's entertainment.

b. Food for Government Employees

It may be stated as a general rule that appropriated funds are not available to pay subsistence or to provide free food to government employees at their official duty stations ("at headquarters") unless specifically authorized by statute. In addition to the obvious reason that food is a personal expense and government salaries are presumed adequate to enable employees to eat regularly,[58] furnishing free food might violate 5 U.S.C. § 5536, which prohibits an employee from receiving compensation in addition to the pay and allowances fixed by law. *See*, *e.g.*, 68 Comp. Gen. 46, 48 (1988); 42 Comp. Gen. 149, 151 (1962); B-272985, Dec. 30, 1996; *see also* the dual compensation discussion in this chapter, section C.4.a.

The "free food" rule applies to snacks and refreshments as well as meals. For example, in 47 Comp. Gen. 657 (1968), the Comptroller General held that Internal Revenue Service appropriations were not available to serve coffee to either employees or private individuals at meetings. Similarly prohibited was the purchase of coffeemakers and cups. Although serving coffee or refreshments at meetings may be desirable, it generally is not considered a "necessary expense" in the context of appropriations availability. *See also* B-233807, Aug. 27, 1990; B-159633, May 20, 1974.

The question of food for government employees arises in many contexts and there are certain well-defined exceptions. For example, the government may pay for the meals of civilian and military personnel in travel status because there is specific statutory authority to do so.[59] The rule and exception are illustrated by 65 Comp. Gen. 16 (1985), in which the question was whether the National Oceanic and Atmospheric Administration could provide in-flight meals, at government expense, to persons on extended flights on government aircraft engaged in weather research. The answer was yes for government personnel in travel status, no

[58] "Feeding oneself is a personal expense which a Government employee is expected to bear from his or her salary." 65 Comp. Gen. 738, 739 (1986); B-288536, Nov. 19, 2001.

[59] 5 U.S.C. § 5702 (civilian employees); 37 U.S.C. § 404 (military personnel).

for anyone else, including government employees not in official travel status. *See also* B-256938, Sept. 21, 1995 (because the aircraft and its airbase were determined to be a U.S. Customs aircraft pilot's permanent duty station, the pilot could be reimbursed only for meals purchased incident to duties performed away from the aircraft outside the limits of his official duty station).

While feeding employees may not be regarded as a "necessary expense" as a general proposition, it may qualify when the agency is carrying out some particular statutory function where the necessary relationship can be established. Thus, in B-201186, Mar. 4, 1982, it was a permissible implementation of a statutory accident prevention program for the Marine Corps to set up rest stations on highways leading to a Marine base to serve coffee and doughnuts to Marines returning from certain holiday weekends. Another example is 65 Comp. Gen. 738 (1986) (refreshments at awards ceremonies), discussed later in this section. A related example is B-235163.11, Feb. 13, 1996, in which GAO determined that appropriated funds could be used to pay for the dinner of a nonfederal award recipient and her spouse at a National Science Foundation awards ceremony because of the statutory nature of the award. Exceptions of this type illustrate the relativity of the necessary expense doctrine pointed out earlier in our general discussion.

We turn now to a discussion of the rule and its exceptions in several other contexts.

(1) Working at official duty station under unusual conditions

The well-settled rule is that, except in extreme emergencies that are explained below, the government may not furnish free food (the decisions sometimes get technical and use terms like "per diem" or "subsistence") to employees at their official duty station, even when they are working under unusual circumstances.[60]

An early illustration is 16 Comp. Gen. 158 (1936), in which the expense of meals was denied to an Internal Revenue investigator who was required to maintain a 24-hour surveillance. The reason payment was denied is that the investigator would presumably have eaten (and incurred the expense of)

[60] The cases under this heading obviously do not involve entertainment as most of us understand the term. The rule, however, fits under the same conceptual umbrella.

three meals a day even if he had not been required to work the 24-hour shift. A similar example is B-272985, Dec. 30, 1996, in which the expense of meals was denied to a Central Intelligence Agency (CIA) security detail while providing 24-hour security to the Director or Deputy Director of the CIA.

Payment was also denied in 42 Comp. Gen. 149 (1962), where a postal official had bought carry-out restaurant food for postal employees conducting an internal election who were required to remain on duty beyond regular working hours.[61]

Similarly, the general rule was applied to deny reimbursement for food in the following situations:

- Federal mediators required to conduct mediation sessions after regular hours. B-169235, Apr. 6, 1970; B-141142, Dec. 15, 1959.

- District of Columbia police officers involved in clean-up work after a fire in a municipal building. B-118638.104, Feb. 5, 1979.

- Geological Survey inspectors at offshore oil rigs who had little alternative than to buy lunch from private caterers at excessive prices. B-194798, Jan. 23, 1980. *See also* B-202104, July 2, 1981 (Secret Service agents on 24-hour-a-day assignment required to buy meals at high cost hotels).

- Law enforcement personnel retained at staging area for security purposes prior to being dispatched to execute search warrants. B-234813, Nov. 9, 1989.

- Air Force enlisted personnel assigned to a security detail at an off-base social event. B-232112, Mar. 8, 1990.

An exception was permitted in 53 Comp. Gen. 71 (1973). In that case, the unauthorized occupation of a building in which the Bureau of Indian Affairs was located necessitated the assembling of a cadre of General Services Administration special police, who unexpectedly spent the whole

[61] This and several other cases cited in the text also involve the "voluntary creditor" rule, discussed in Chapter 12 (Volume III of the second edition of *Principles of Federal Appropriations Law*).

night there in alert status until relieved the following morning. Agency officials purchased and brought in sandwiches and coffee for the cadre. GAO concluded that it would not question the agency's determination that the expenditure was incidental to the protection of government property during an extreme emergency involving danger to human life and the destruction of federal property, and approved reimbursement. The decision emphasized, however, that it was an exception and that the rule still stands.

A similar exception was permitted in B-189003, July 5, 1977, where agents of the Federal Bureau of Investigation (FBI) had been forced to remain at their duty stations within the office during a severe blizzard in Buffalo, New York. The area was in a state of emergency and was later declared a national disaster area. GAO agreed with the agency's determination that the situation presented a danger to human life of Buffalo citizens and that it was imperative for FBI employees to maintain the essential functions of the office during the emergency.

The rationale of 53 Comp. Gen. 71 and B-189003 was applied in B-232487, Jan. 26, 1989, for government employees required to work continually for a 24-hour period to evacuate and secure an area threatened by the derailment of a train carrying toxic liquids.

The exception, however, is limited. The requirement to remain on duty for a 24-hour period, standing alone, is not enough. In B-185159, Dec. 10, 1975, for example, the cost of meals was denied to Treasury Department agents required to work over 24 hours investigating a bombing of federal offices. The Comptroller General pointed out that dangerous conditions alone are not enough. Under the exception established in 53 Comp. Gen. 71, it is necessary to find that the situation involves imminent danger to human life or the destruction of federal property. Also, in that case, the agents were only investigating a dangerous situation that had already occurred and there was no suggestion that any further bombings were imminent. A similar case is B-217261, Apr. 1, 1985, involving a Customs Service official required to remain in a motel room for several days on a surveillance assignment. *See also* 16 Comp. Gen. 158 (1936); B-202104, July 2, 1981.

Short of the emergency situation described in B-189003, July 5, 1977, inclement weather is not enough to support an exception. There are numerous cases in which employees have spent the night in motels rather than returning home in a snowstorm, in order to be able to get to work the following day. Reimbursement for meals has consistently been denied.

68 Comp. Gen. 46 (1988); 64 Comp. Gen. 70 (1984); B-226403, May 19, 1987; B-200779, Aug. 12, 1981; B-188985, Aug. 23, 1977. It makes no difference that the employee was directed by his or her supervisor to rent the room (B-226403 and B-188985),[62] or that the federal government in Washington was shut down (68 Comp. Gen. 46).[63]

Naturally, statutory authority will overcome the prohibition. Thus, where the Veterans Administration (VA) had statutory authority to accept uncompensated services and to contract for related "necessary services," the VA could, upon an administrative determination of necessity, contract with local restaurants for meals to be furnished without charge to uncompensated volunteer workers at VA outpatient clinics when their scheduled assignment extended over a meal period. B-145430, May 9, 1961. Similarly, in B-241708, Sept. 27, 1991, the Comptroller General determined that because the Bureau of Indian Affairs (BIA) hired emergency firefighters under special statutory authority, 43 U.S.C. § 1469, BIA's practice of furnishing hot meals and snack lunches for emergency firefighters was legally permissible. There is also authority to make subsistence payments to law enforcement officials and members of their immediate families when threats to their lives force them to occupy temporary accommodations. 5 U.S.C. § 5706a.[64]

(2) Government Employees Training Act

The Government Employees Training Act (Training Act) authorizes agencies to "pay …for all or a part of the necessary expenses of training," 5 U.S.C. § 4109, and to pay "for expenses of attendance at meetings which

[62] A supervisor has no authority to do so. As noted in B-226403, such an erroneous exercise of authority does not bind the government.

[63] While the storm in 68 Comp. Gen. 46 was certainly more than flurries, it nevertheless remains the case that the government in Washington will be disrupted by storms that do not approach the severity of the Buffalo blizzard in B-189003. There is also a practical distinction. To feed and lodge a potentially large number of employees every time it snows in Washington is simply not realistic.

[64] Federal employees may not accept donations of food, except where the recipient agency has statutory authority to accept and retain the donation. One example of such authority is found in the Legislative Branch Appropriations Act for fiscal year 2002. The Act permits the U.S. Capitol Police to "accept contributions of meals and refreshments" during a period of emergency, as determined by the Capitol Police Board. Pub. L. No. 107-68, § 121, 115 Stat. 560, 576 (Nov. 12, 2001), codified at 2 U.S.C. § 1971. The use of donations and contributions is discussed further in Chapter 6.

are concerned with the functions or activities for which the appropriation is made," 5 U.S.C. § 4110, regardless of whether the event is held within the employees' official duty station. The Comptroller General has interpreted and applied the Training Act to accommodate the day-to-day realities of governmental operations within the limits imposed by the statutes and has determined that the Training Act permits agencies to pay for the costs of meals and refreshments at meetings and training events under specific circumstances, which are outlined below. B-288266, Jan. 27, 2003; B-233807, Aug. 27, 1990.

(a) Attendance at meetings and conferences

In section C.2 of this chapter, we discuss when appropriated funds may be used to finance the attendance of government employees at meetings and conferences. This section addresses when the government may pay for meals at meetings and conferences when attendance is authorized under the principles and statutes set forth in section C.2. As the reader will discover from the discussion that follows, there are many authorities available to planners of meetings and conferences for this purpose, and planners should become familiar with them. For day-to-day routine business meetings, our case law has consistently held that the Training Act does not provide authority to use appropriations to supply food items. As our case law demonstrates, agencies appear to struggle with this rule. In this regard, our case law is not static nor inflexible. As recent history demonstrates, GAO is willing to reexamine its case law and to revise, to the extent permitted by law, rules that agency officials believe frustrate efficient, effective, and responsible government. B-288266, Jan. 27, 2003. Any revision, of course, must be founded on sound legal reasoning, and must include appropriate controls to prevent abuses and ensure public confidence in the integrity of those who spend the taxpayers money.

For meetings sponsored by nongovernment organizations, the attendee will commonly be charged a fee, usually but not necessarily called a registration fee. If a single fee is charged covering both attendance and meals and no separate charge is made for meals, the government may pay the full fee, assuming of course that funds are otherwise available for the cost of attendance. 38 Comp. Gen. 134 (1958); B-249351, May 11, 1993; B-233807, Aug. 27, 1990; B-66978, Aug. 25, 1947. The same is true for an evening social event where the cost is a mandatory nonseparable element of the registration fee. 66 Comp. Gen. 350 (1987).

If a separate charge is made for meals, the government may pay for the meals if there is a showing that (1) the meals are incidental to the meeting; (2) attendance of the employee at the meals is necessary to full participation in the business of the conference; and (3) the employee is not free to take the meals elsewhere without being absent from essential formal discussions, lectures, or speeches concerning the purpose of the conference. B-233807, Aug. 27, 1990; B-160579, Apr. 26, 1978; B-166560, Feb. 3, 1970. Absent such a showing, the government may not pay for the meals. B-154912, Aug. 26, 1964; B-152924, Dec. 18, 1963; B-95413, June 7, 1950; B-88258, Sept. 19, 1949. As an examination of the cited cases will reveal, these rules apply regardless of whether the conference takes place within the employees duty station area or someplace else.

Where the government is authorized to pay for meals under the above principles, the employee normally cannot be reimbursed for purchasing alternate meals. *See* B-193504, Aug. 9, 1979; B-186820, Feb. 23, 1978. Personal taste is irrelevant. Thus, an employee who, for example, loathes broccoli will either have to eat it anyway, pay for a substitute meal from his or her own pocket, or go without. For an employee on travel or temporary duty status, which is where this rule usually manifests itself, per diem is reduced by the value of the meals provided. *E.g.*, 60 Comp. Gen. 181, 183–84 (1981). The rule will not apply, however, where the employee is unable to eat the meal provided (and cannot arrange for an acceptable substitute) because of *bona fide* medical or religious reasons. B-231703, Oct. 31, 1989 (per diem not required to be reduced where employee, an Orthodox Jew who could not obtain kosher meals at conference, purchased substitute meals elsewhere).

The above rules will not apply to day-to-day routine agency-sponsored meetings. GAO has described "day-to-day" business meetings as meetings that involve discussions of the internal procedures or operations of the agency. *See* 68 Comp. Gen. 604, 605 (1989). Meetings or conferences that are not routine involve topical matters of general interest that might appeal to governmental and nongovernmental participants. *Id.* Attendance at routine agency-sponsored meetings will generally be subject to the prohibition on furnishing free food to employees at their official duty stations. Thus the cost of meals could not be provided at a conference of field examiners of the National Credit Union Administration. B-180806, Aug. 21, 1974. Use of appropriated funds was prohibited for coffee breaks at a management seminar, B-159633, May 20, 1974; meals served during "working sessions" at Department of Labor business meetings, B-168774, Jan. 23, 1970; and meals at monthly luncheon meetings for officials of law

enforcement agencies, B-198882, Mar. 25, 1981. Appropriated funds also could not be used for meals at quarterly managers meetings of the U.S. Army Corps of Engineers, 72 Comp. Gen. 178 (1993), and meals and refreshments served to government employees attending Federal Communication Commission radio spectrum auctions. B-260692, Jan. 2, 1996. *See also* 47 Comp. Gen. 657 (1968); B-45702, Nov. 22, 1944.

In B-137999, Dec. 16, 1958, the commissioners of the Outdoor Recreation Resources Review Commission had statutory authority to be reimbursed for actual subsistence expenses. This was held to include the cost of lunches during meetings at a Washington hotel. However, the cost of lunches for staff members of the Commission could not be paid.

Merely calling the cost of meals a "registration fee" will not avoid the prohibition. In a 1975 case, the cost of meals was disallowed for Army employees at an Army-sponsored "Operations and Maintenance Seminar." The charge had been termed a registration fee but covered only luncheons, dinner, and coffee breaks. B-182527, Feb. 12, 1975. *See also* B-195045, Feb. 8, 1980.

In B-187150, Oct. 14, 1976, grant funds provided to the government of the District of Columbia under the Social Security Act for personnel training and administrative expenses could not be used to pay for a luncheon at a 4-hour conference of officials of the D.C. Department of Human Resources. The conference could not be reasonably characterized as training and did not qualify as an allowable administrative cost under the program regulations.

While 5 U.S.C. § 4110 does not apply to a routine business meeting, in B-281063, Dec. 1, 1999, the Nuclear Regulatory Commission (NRC) could pay an all-inclusive facility rental fee for a meeting to discuss internal matters, even though the fee resulted in food being served to NRC employees at their official duty stations. Because the fee would have remained the same for NRC whether or not it accepted and its employees ate the food, the harm that the general rule is meant to prevent (*i.e.*, expenditure of federal funds on personal items) was not present.

In January 2000, the General Services Administration (GSA) published an amendment to the Federal Travel Regulations to address "conference planning." 41 C.F.R. pts. 301-11 and 4301-74, 65 Fed. Reg. 1326 (Jan. 10, 2000). The amendment defined "conference" as "[a] meeting, retreat, seminar, symposium or event that involves attendee travel." The

amendment included a provision permitting agencies to pay for light refreshments for agency employees at conferences. 41 C.F.R. § 301-74.11. In agency guidance explaining the regulation, GSA advised agencies that they could use appropriated funds to pay for refreshments for nontravelers at some conferences. In particular, GSA advised that if the majority of the attendees were in travel status, the agency could fund refreshments for all attendees.

In a 2003 decision, GAO explained that GSA's statutory basis for the light refreshment provision is 5 U.S.C. § 5702, which addresses the subsistence expenses of federal employees "when traveling on official business away from the employees designated post of duty"; therefore, while Congress has authorized GSA to prescribe regulations necessary for the administration of travel and subsistence expenses, GSA's authority does not extend to employees who are not in travel status. B-288266, Jan. 27, 2003.[65] Accordingly, GAO held that the light refreshment provision of the travel regulation applies only to federal employees who are in travel status. *Id.*[66] The decision also clarified that although section 4110 generally applies only to meetings sponsored by nongovernmental organizations, the Comptroller General extended section 4110 to a government-sponsored meeting, regardless of whether an employee is in travel status or not, as long as the meeting satisfies the same conditions as required for nongovernment-sponsored meetings and the government-sponsored meeting is not an internal day-to-day business meeting.

In response to this decision, GSA agreed that its authority extended only to employees in travel status and in its guidance would refer agencies to GAO decisions holding that section 4110 of the Training Act authorizes agencies to provide light refreshments to nontravelers at a government-sponsored meeting as long as the meeting meets the requirements of section 4110 and is not a "day-to-day" or "routine" business meeting. Letter from Raymond J. McNamara, General Counsel, GSA, to Anthony H. Gamboa, General Counsel, GAO, undated, received by GAO June 9, 2003.

[65] A brief mention should be made of the status of snacks and refreshments as subsistence. Over the years, applying GSA regulations, GAO objected to agencies reimbursing travelers for the actual expenses of various snacks or light refreshments consumed while in travel status. *See*, *e.g.*, B-167820, Oct. 7, 1969. GSA now interprets subsistence to include the light refreshments identified in its conference planning travel regulation. GAO endorses this interpretation. B-288266, Jan. 27, 2003.

[66] When light refreshments are furnished at nominal or no cost by the government, no deduction of per diem is required. 41 C.F.R. § 301-74.21.

In 1980, the President's Committee on Employment of the Handicapped held its annual meeting in the Washington Hilton Hotel. The affair was to last 3 days and included a luncheon and two banquets. There was no registration fee for the meeting but there were charges for the meals. GAO's Equal Employment Opportunity Office planned to send three employees to the meeting and asked whether the agency could pick up the tab for the meals. The three employees were to make a presentation at the meeting and it seemed clear that attendance was authorized under 5 U.S.C. § 4110. Also, if a registration fee were involved, the prior decisions noted above would presumably have answered the question. The Comptroller General reviewed the precedents such as B-160579, Apr. 26, 1978, and B-166560, Feb. 3, 1970, and took the logical step of applying them to the situation at hand. Thus, GAO could pay for the meals if administrative determinations were made that (1) the meals were incidental to the meeting; (2) attendance at the meals was necessary for full participation at the meeting; and (3) the employees would miss essential formal discussions, lectures, or speeches concerning the purpose of the meeting if they took their meals elsewhere. B-198471, May 1, 1980.[67]

This decision, so it seems, became perceived as the loophole through which the lunch wagon could be driven. So apparently compelling is the quest for free food that it became necessary to issue several additional decisions to clarify B-198471 and to explain precisely what the rationale of that decision does and does not authorize.

In 64 Comp. Gen. 406 (1985), the Comptroller General held that the cost of meals could not be reimbursed for employees attending monthly meetings of the Federal Executive Association within their duty station area. The meetings were essentially luncheon meetings at which representatives of various government agencies could discuss matters of mutual interest. The decision stated:

> "What distinguishes [B-198471] …is that the President's annual meeting was a 3-day affair with meals clearly incidental to the overall meeting, while in [the cases in which reimbursement has been denied] the only meetings which took place were the ones which took place during a

[67] This is a relatively rare instance of the Comptroller Generals issuing a formal decision to a GAO requester. Although it does not happen often, it will be done when the situation warrants it.

> luncheon meal…. In order to meet the three-part test [of B-198471], a meal must be part of a formal meeting or conference that includes not only functions such as speeches or business carried out during a seating at a meal but also includes substantial functions that take place separate from the meal. [W]e are unwilling to conclude that a meeting which lasts no longer than the meal during which it is conducted qualifies for reimbursement."

Id. at 408 (explanatory information provided).

A similar case the following year, 65 Comp. Gen. 508 (1986), reiterated that the above-quoted test of 64 Comp. Gen. 406 must precede the application of the three-part test of B-198471. The three-part test, and hence the authority to reimburse, relates to a meal that is incident to a meeting, not a meeting that is incident to a meal. 65 Comp. Gen. at 510; 64 Comp. Gen. at 408. *See also* B-249249, Dec. 17, 1992.

Two 1989 decisions, 68 Comp. Gen. 604 and 68 Comp. Gen. 606, defined the rules further, holding that 5 U.S.C. § 4110 and B-198471 do not apply to purely internal business meetings or conferences sponsored by government agencies. *See also* 72 Comp. Gen. 178 (1993); B-247563, Dec. 11, 1996; B-270199, Aug. 6, 1996; and B-260692, Jan. 2, 1996. Noting that this result is consistent with the legislative history of 5 U.S.C. § 4110 as summarized in prior decisions,[68] both decisions stated:

> "We think …that there is a clear distinction between the payment of meals incidental to formal conferences or meetings, typically externally organized or sponsored, involving topical matters of general interest to governmental and nongovernmental participants, and internal business or informational meetings primarily involving the day-to-day operations of government. With respect to the latter, 5 U.S.C. § 4110 has little bearing …."

68 Comp. Gen. at 605 and 608. One of the decisions went a step further and commented that the claim in 65 Comp. Gen. 508 "should have been summarily rejected based on the application of the general rule." 68 Comp.

[68] *E.g.*, 46 Comp. Gen. 135, 136–37 (1966); B-140912, Nov. 24, 1959.

Gen. at 609. Naturally, if the meeting or conference does not have the necessary connection with official agency business, the cost of meals may not be paid regardless of who sponsors the meeting or where it is held. Thus, a registration fee consisting primarily of the cost of a luncheon was disallowed for three Community Services Administration employees attending a Federal Executive Board meeting at which Combined Federal Campaign (CFC) awards were to be presented. B-195045, Feb. 8, 1980.[69] Similarly, an employee of the Department of Housing and Urban Development could not be reimbursed for meals incident to meetings of a local business association. B-166560, May 27, 1969.

In a 1981 case, the Internal Revenue Service bought tickets for several of its agents to attend the Fourth Annual Awards and Scholarship Dinner of the National Association of Black Accountants. The purposes of attending the banquet were to establish contacts for recruitment purposes and to demonstrate the commitment of the IRS to its equal employment opportunity program. However, attendance could not be authorized under either 5 U.S.C. § 4109 or 5 U.S.C. § 4110, and the expenditure was therefore prohibited by 5 U.S.C. § 5946. B-202028, May 14, 1981.

However, in B-249249, Dec. 17, 1992, the Comptroller General held that the Federal Bureau of Investigation (FBI) could reimburse an FBI agent for the cost of a retirement banquet. The agent represented the FBI at the banquet honoring a local police chief and presented him with a plaque and commendation letter from the FBI Director. "The agent's attendance at the function was in furtherance of the agency's functions or activities for which its appropriations were made and the meal was incidental to the retirement ceremony." The Department of Justice, Office of Legal Counsel, applying this decision, stated that "[w]e believe that the Comptroller General's holding was correct and would be applicable to an employee of a United States Attorney's Office attending the same kind of event under like circumstances." 17 Op. Off. Legal Counsel 70 (1993). The Office of Legal Counsel cautioned, however, that the application of the ruling should be carefully limited to where the nature of the ceremonial event "provides

[69] A later decision, 67 Comp. Gen. 254 (1988), held that agencies may spend appropriated funds, within reason, to support efforts to solicit contributions to the CFC from their employees. While 67 Comp. Gen. 254 did not involve meals, it nevertheless raises the question of whether this aspect of B-195045 (insufficient relationship for purposes of 5 U.S.C. § 4110) would still be followed. Either way, the disallowance in B-195045 was correct because the meeting was within the "duty station area" and the fee was little more than a disguised charge for the lunch.

good reason to believe that the official or employee's attendance advances the offices authorized functions." *Id.*

Before we depart the topic of meals at meeting and conferences, two cases involving a different twist—payment for meals not eaten—deserve mention. In B-208729, May 24, 1983, the Army Missile Command sponsored a luncheon to commemorate Dr. Martin Luther King, Jr., that was open to both government employees and members of the local community. Attendees were to be charged a fee for the lunch. In order to secure the necessary services, the Army contracted with a caterer (in this case the local Officers Club), guaranteeing a minimum revenue based on the anticipated number of guests. Bad weather on the day of the luncheon resulted in reduced attendance. Under the circumstances, GAO approved payment of the guaranteed minimum as a program expense.

GAO similarly approved payment of a guaranteed minimum balance in B-230382, Dec. 22, 1989, this time involving the Army's "World-Wide Audio Visual Conference." As in B-208729, attendees were charged for the meal but attendance was less than expected. This case had two additional complications. First, the official who made the arrangements lacked the authority to do so. Payment could therefore be authorized only on a *quantum meruit* basis. Second, the arrangements also included a buffet, open bar, and several coffee breaks. Payment for these items could not be authorized, even under the *quantum meruit* concept, since they would not have been authorized had proper procurement procedures been followed.

(b) Training

Under the Government Employees Training Act (Training Act), an agency may pay, or reimburse an employee for, necessary expenses incident to an authorized training program. 5 U.S.C. § 4109. This applies whether the training is held through a nongovernment facility or by the federal government itself. 5 U.S.C. § 4105; B-258442, Apr. 19, 1995; B-244473, Jan. 13, 1992. The event, however, must comply with the Training Act's definition of "training" in 5 U.S.C. § 4101(4). 72 Comp. Gen. 178 (1993). As with meetings, an agency may pay for the costs of meals and refreshments when they are included as an incidental and nonseparable portion of a training registration or attendance fee. 66 Comp. Gen. 350, 1987; B-288266, Jan. 27, 2003. If the cost of the food is not included in a registration or attendance fee, the Comptroller General has held that the government can provide meals or refreshments under this authority if the agency determines that providing meals or refreshments is necessary to achieve

the objectives of the training program. 48 Comp. Gen. 185 (1968); 39 Comp. Gen. 119 (1959); B-247966, June 16, 1993; B244473, Jan. 13, 1992; B-193955, Sept. 14, 1979. The government may also furnish meals to nongovernment speakers as an expense of conducting the training. 48 Comp. Gen. 185.

In 50 Comp. Gen. 610 (1971), the Training Act was held to authorize the procurement of catering services for a Department of Agriculture training conference where government facilities were deemed inadequate in view of the nature of the program.

The fact that an agency characterizes its meeting as "training" is not controlling. In other words, for purposes of authorizing the government to feed participants, something does not become training simply because it is called training. In B-168774, Sept. 2, 1970, headquarters employees of the then Department of Health, Education, and Welfare met with consultants in a nearby hotel at what the agency termed a "research training conference." However, the conference consisted of little more than "working sessions" and included no employee training as defined in the Training Act. Therefore, the cost of meals could not be paid. *See also* 72 Comp. Gen. 178 (1993); 68 Comp. Gen. 606 (1989); B-247563, Dec. 11, 1996; B-208527, Sept. 20, 1983; B-187150, Oct. 14, 1976; B-140912, Nov. 24, 1959.

In 65 Comp. Gen. 143 (1985), GAO held that a Social Security Administration employee who had been invited as a guest speaker at the opening day luncheon of a legitimate agency training conference in the vicinity of her duty station could be reimbursed for the cost of the meal. The decision unfortunately confuses 5 U.S.C. §§ 4109 and 4110 by analyzing the case under section 4110 yet concluding that reimbursement is authorized "as a necessary training expense," which is the standard under section 4109.

(3) Award ceremonies

General operating appropriations may be used to provide refreshments at award ceremonies under the Government Employees' Incentive Awards Act, 5 U.S.C. §§ 4501–4506. 65 Comp. Gen. 738 (1986); B-271551, Mar. 4, 1997. This Act authorizes an agency to use its operating appropriations to cover the "necessary expense for the honorary recognition of" the employee or employees receiving the awards. 5 U.S.C. § 4503. The Act also directs the Office of Personnel Management to prescribe regulations and instructions to govern agency awards programs. 5 U.S.C. § 4506.

In 65 Comp. Gen. 738, the Social Security Administration asked whether it could use operating appropriations, apart from its limited entertainment appropriation, to provide refreshments at its annual awards ceremony. GAO observed that the Incentive Awards Act (5 U.S.C. § 4503) authorizes agencies to "pay a cash award to, and incur necessary expense for the honorary recognition of" employees. The decision reasoned that the concept of a necessary expense is, within limits, a relative one based on the relationship of the expenditure to the particular appropriation or program involved. Thus, while the necessary relationship does not exist with respect to an agency's day-to-day operations, the agency would be within its legitimate discretion to determine that refreshments would materially enhance the effectiveness of a ceremonial function, specifically in this case an awards ceremony which is a valid component of the agency's statutorily authorized awards program.

The decision essentially followed B-167835, Nov. 18, 1969, which had concluded that the Incentive Awards Act authorized the National Aeronautics and Space Administration to fund part of the cost of a banquet at which the President was to present the Medal of Freedom to the Apollo 11 astronauts. What made the fuller treatment in 65 Comp. Gen. 738 necessary was that a 1974 decision, B-114827, Oct. 2, 1974, had found the cost of refreshments at an awards ceremony under the Incentive Awards Act payable only from specific entertainment appropriations. The 1986 case partially modified B-114827 to the extent it had held that an entertainment appropriation was the only available funding source. Finally, 65 Comp. Gen. 738 distinguished 43 Comp. Gen. 305 (1963), which had disallowed the cost of refreshments at an awards ceremony for persons who were not federal employees (and therefore not authorized under the Incentive Awards Act nor governed by the "necessary expense" language of that statute).

GAO has emphasized that the purpose of awards ceremonies is to foster public recognition of employees' meritorious performance and allow other employees to honor and congratulate their colleagues. 65 Comp. Gen. at 740. In B-247563, Dec. 11, 1996, the Comptroller General determined that the Department of Veterans Affairs Medical Center's use of appropriated funds for a breakfast at which the Medical Center Director presented awards was improper because there was no public recognition of the award recipients. The record indicated that (1) only those employees specifically recognized and the Medical Center Director participated in the event and (2) the employees' contributions were not otherwise publicized within the Medical Center community.

In this same decision, however, the Comptroller General did not find unauthorized the Medical Center's use of its appropriation to purchase light refreshments for an annual picnic and Valentine's Day Dance, at which the agency presented performance award certificates and years of service awards. The Comptroller General found that the Medical Center publicly recognized employees' accomplishments at both events but cautioned that where an agency combines awards receptions with social events, "the expenditures should be subject to greater scrutiny than expenditures made in connection with more traditional awards ceremonies." B-247563, *supra*.

Recent Comptroller General decisions have permitted appropriated funds to be used to provide meals as well as refreshments at awards ceremonies. For example, in B-270327, Mar. 12, 1997, the Defense Reutilization and Marketing Service (DRMS) was permitted to pay luncheon expenses not to exceed $20 per employee at worldwide DRMS award ceremonies. The Comptroller General explained that Office of Personnel Management (OPM) regulations purposely leave it up to the agencies to design their award programs, and that "we must respect and defer to OPM's regulatory decisions and the implicit delegation of authority to agencies to make implementing decisions *vis-à-vis* their incentive awards programs so long as such decisions are consistent with the essential requirements of the Act." *Id.* The Comptroller General found that the $20 per person maximum did not offend any OPM regulatory guidance or express provisions of the Government Employees' Incentive Awards Act. *Id. See also* B-288536, Nov. 19, 2001 (Bureau of Indian Affairs was permitted to pay for the cost of a buffet luncheon at an incentive awards ceremony).

The Government Employees' Incentive Awards Act does not apply to members of the armed forces. However, the uniformed services have similar authority, including the identical "necessary expense" language, in 10 U.S.C. § 1124. Therefore, 65 Comp. Gen. 738 applies equally to award ceremonies conducted under the authority of 10 U.S.C. § 1124. 65 Comp. Gen. at 739 n.2.

(4) Cafeterias and lunch facilities

The government has no general responsibility to provide luncheon facilities for its employees. 10 Comp. Gen. 140 (1930).[70] However, plans for the construction of a new government building may include provision for a lunch room or cafeteria, in which event the appropriation for construction of the building will be available for the lunch facility. 9 Comp. Gen. 217 (1929).

An agency may subsidize the operation of an employees' cafeteria if the expenditure is administratively determined to be necessary to the efficiency of operations and a significant factor in the hiring and retaining of employees and in promoting employee morale. B-216943, Mar. 21, 1985; B-169141, Nov. 17, 1970; B169141, Mar. 23, 1970. *See also* B-204214, Jan. 8, 1982 (temporarily providing paper napkins in new government cafeteria); U.S. General Accounting Office, *Benefits GSA Provides by Operating Cafeterias in Washington, D.C., Federal Buildings*, LCD-78-316 (Washington, D.C.: May 5, 1978).

The purchase of equipment for use in other than an established cafeteria may also be authorized in certain circumstances. In B-173149, Aug. 10, 1971, GAO approved the purchase of a set of stainless steel cooking utensils for use by air traffic controllers to prepare food at a flight service station. There were no other readily accessible eating facilities and the employees were required to remain at their post of duty for a full 8-hour shift. Similar cases are:

- B-180272, July 23, 1974: purchase of a sink and refrigerator to provide lunch facilities for the Occupational Safety and Health Review Commission where there was no government cafeteria on the premises.

- B-210433, Apr. 15, 1983: purchase of microwave oven by Navy facility to replace nonworking stove. Facility was in operation 7 days a week, some employees had to remain at their duty stations for 24-hour shifts, and there were no readily accessible eating facilities in the area during nights and weekends.

[70] By way of contrast, it has long been conceded that drinking water is a necessity. *See* 22 Comp. Dec. 31 (1915); 21 Comp. Dec. 739 (1915). However, an agency may not use appropriated funds for bottled drinking water for the use of employees where the public water supply of the locality is safe for drinking purposes. 17 Comp. Gen. 698 (1938).

- B-276601, June 26, 1997: purchase of a refrigerator for personal food items of Central Intelligence Agency (CIA) employees. CIA headquarters facility was relatively distant from private eating establishments, the CIA did not permit delivery service to enter the facility due to security concerns, and the cafeteria served only breakfast and lunch.

c. Entertainment for Government Employees Other Than Food

(1) Miscellaneous cases

There have been relatively few cases in this area, probably because there are few situations in which entertainment for government employees could conceivably be authorized.

An early decision held that 10 U.S.C. § 4302, which authorizes training for Army enlisted personnel "to increase their military efficiency and to enable them to return to civilian life better equipped for industrial, commercial, and business occupations," did not include sending faculty members and students of the Army Music School to grand opera and symphony concerts. 4 Comp. Gen. 169 (1924). Another decision found it improper to hire a boat and crew to send federal employees stationed in the Middle East on a recreational trip to the Red Sea. B-126374, Feb. 14, 1956.

A 1970 decision deserves brief mention although its application will be extremely limited. Legislation in 1966 established the Wolf Trap Farm Park in Fairfax County, Virginia, as a park for the performing arts and directed the Interior Department to operate and maintain it. A certifying officer of the National Park Service asked whether he could certify a voucher for symphony, ballet, and theater tickets for Wolf Traps Artistic Director. The Comptroller General held that such payments could be made if an appropriate Park Service official determined that attendance was necessary for the performance of the Artistic Directors official duties. The justification was that the Artistic Director attended these functions not as personal entertainment but so that he could review the performances to determine which cultural and theatrical events were appropriate for booking at Wolf Trap. B-168149, Feb. 3, 1970. As noted, this case would seem to have little precedent value except for the Artistic Director at Wolf Trap.

(2) Cultural awareness programs

One area that has generated several decisions, and a change in GAO's position, has been equal employment opportunity special emphasis or

cultural awareness programs. There are many areas in which the law undergoes refinement from time to time but remains essentially unchanged. There are other areas in which the law has changed to reflect changes in American society. This is one of those latter areas.

The issue first arose in 58 Comp. Gen. 202 (1979). In that case, the Bureau of Mines, Interior Department, in conjunction with the Equal Employment Opportunity Commission, sponsored a program of live entertainment for National Hispanic Heritage Week. The program consisted of such items as a lecture and demonstration of South American folk music, a concert, a slide presentation, and an exhibit of Hispanic art and ceramics. The decision concluded that, while the Bureau's Spanish-Speaking Program was a legitimate component of the agency's overall Equal Employment Opportunity (EEO) program, appropriated funds could not be used to procure entertainment. This holding was followed in two more cases, B-194433, July 18, 1979, and B-199387, Aug. 22, 1980.

In 1981, however, GAO reconsidered its position. The Internal Revenue Service asked whether it could certify a voucher covering payments for a performance by an African dance troupe and lunches for guest speakers at a ceremony observing National Black History Month. The Comptroller General held the expenditure proper in 60 Comp. Gen. 303 (1981). The decision stated:

> "[W]e now take the view that we will consider a live artistic performance as an authorized part of an agency's EEO effort if, as in this case, it is part of a formal program determined by the agency to be intended to advance EEO objectives, and consists of a number of different types of presentations designed to promote EEO training objectives of making the audience aware of the culture or ethnic history being celebrated."

Id. at 306. Further, the lunches for the guest speakers could be paid under 5 U.S.C. § 5703 if they were in fact away from their homes or regular places of business. The prior inconsistent decisions—58 Comp. Gen. 202, B-194433, and B-199387—were overruled.

It should be emphasized that the prior decisions were overruled only to the extent inconsistent with the new holding. Two specific elements of 58 Comp. Gen. 202 were not involved in the 1981 decision and remain valid. First, use of appropriated funds to serve meals or refreshments remains

improper except under specific statutory authority. 58 Comp. Gen. at 206.[71] Second, 58 Comp. Gen. 202 found the purchase of commercial insurance on art objects improper. *Id.* at 207. This portion also remains valid. The Comptroller General also determined that transportation costs of an employee participating in a cultural program are not authorized unless the employee is participating in the program as a performer or making some other type of direct contribution to the EEO event. B-243862, July 28, 1992.

The decision at 60 Comp. Gen. 303 was expanded in B-199387, Mar. 23, 1982, to include small "samples" of ethnic foods prepared and served during a formal ethnic awareness program as part of the agency's equal employment opportunity program. In the particular program being considered, the attendees were to pay for their own lunches, with the ethnic food samples of minimal proportion provided as a separate event. Thus, the samples could be distinguished from meals or refreshments, which remain unauthorized. (The decision did not specify how many "samples" an individual might consume in order to develop a fuller appreciation.)

In 1999, the Comptroller General clarified that 60 Comp. Gen. 303 does not require that a program or event have specific advance written approval in a formal agency issuance to be considered a formal Equal Employment Opportunity program for which funds are available. "What is required is that the agency through an authorized official determines that the planned performance advances EEO objectives." B-278805, July 21, 1999.

Although 60 Comp. Gen. 303 was not cast in precisely these terms, it is another example of the "theory of relativity" in purpose availability to which we have alluded in various places in this chapter. Equality in all aspects of federal employment is now a legal mandate. An agency is certainly within its discretion to determine that fostering racial and ethnic awareness is a valid—perhaps indispensable—means of advancing this objective. This being the case, it is not at all far-fetched to conclude that certain expenditures that might be wholly inappropriate in other contexts could reasonably relate to this purpose. Thus, hiring an African dance troupe could not be justified to further an objective of, for example, conducting a financial audit or constructing a building or procuring a tank,

[71] Compare B-208729, May 24, 1983, in which an Army unit sponsored a catered luncheon to commemorate Dr. Martin Luther King, Jr., but—properly—charged attendees for the meal.

but the relationship changes when the objective is promoting cultural awareness.

Once the concept of the preceding paragraph is understood, it should be apparent why, in 64 Comp. Gen. 802 (1985), GAO distinguished the cultural awareness cases and concluded that the Army could not use appropriated funds to provide free meals for handicapped employees attending a luncheon in honor of National Employ the Handicapped Week. This is not to say that an agency's EEO program should not embrace the handicapped—on the contrary, it can, should, and is required to—but merely that "[u]nlike ethnic and cultural minorities, handicapped persons do not possess a common cultural heritage" within the intended scope of the cultural awareness cases. *Id.* at 804 (quoting from the request for decision).

d. Entertainment of Nongovernment Personnel

Just as the entertainment of government personnel is generally unauthorized, the entertainment of nongovernment personnel is equally impermissible. The basic rule is the same regardless of who is being fed or entertained: Appropriated funds are not available for entertainment, including free food, except under specific statutory authority.

Two of the most frequently cited decisions for this proposition are 5 Comp. Gen. 455 (1925) and 26 Comp. Gen. 281 (1946). In 5 Comp. Gen. 455, expenditures by two Army officers for entertaining officials of foreign governments while making arrangements for an around-the-world flight were disallowed. In 26 Comp. Gen. 281, appropriations were held unavailable for dinners and luncheons for "distinguished guests" given by a commissioner of the Philippine War Damage Commission. Other early decisions on point are: 5 Comp. Gen. 1018 (1926); B-85555, June 6, 1949; and A-10221, Oct. 8, 1925. A limited exception was recognized in B-22307, Dec. 23, 1941, to permit entertainment of officials of foreign governments incident to the gathering of intelligence for national security.

As with the cases dealing with government employees, a large proportion of the decisions tend to involve food. In 43 Comp. Gen. 305 (1963), funds were not available to furnish food or refreshments at "recognition ceremonies" for volunteers at Veterans Administration field stations. The ceremonies had been designed as an inducement to the volunteers to continue rendering service. Naturally, the situation would be permissible under specific statutory authority. B-152331, Nov. 19, 1975. Other examples are 26 Comp. Gen. 281, cited above; B-236763, Jan. 10, 1990, disallowing costs for refreshments for college students at recruiting functions, unless the costs were included in a lump-sum bill with other room facility charges;

and B-138081, Jan. 13, 1959, disallowing the cost of a breakfast meeting with Canadian officials called at the initiative of the Chairman of the Securities and Exchange Commission.

Several more recent decisions illustrate the continued application of the rule and some of the exceptions permitted by statute. In 68 Comp. Gen. 226 (1989), the Department of Housing and Urban Development (HUD) used its research and technology appropriations for entertainment expenses incident to a trade show it sponsored in the Soviet Union. Since HUD had no authority to sponsor the show, the related expenditures were improper. The decision further pointed out that, even if the trade show itself had been authorized, the research and technology appropriations still would not have been available for entertainment, although HUD could then have used its "official reception and representation" funds. *See also* 65 Comp. Gen. 16 (1985) (free in-flight meals during weather research flight unauthorized for nongovernment personnel).

In 57 Comp. Gen. 806 (1978), the Comptroller General held that appropriations available to the judiciary for jury expenses could not be used to buy coffee and refreshments for jurors during recesses in trial proceedings. The situation was analogized to the cases prohibiting the purchase of food from appropriated funds for employees working under unusual conditions. The decision noted that statutory authority existed to pay actual subsistence expenses for jurors under sequestration, not an issue in the case at hand. The relevant appropriation language was subsequently amended to provide for refreshments, and the authority was made permanent in 1989.[72]

In a 1979 decision, appropriations of the Equal Employment Opportunity Commission were found not available to host a reception for Hispanic leaders in conjunction with a planning conference. B-193661, Jan. 19, 1979. The case fell squarely within the general rule. So did B-205292, June 2, 1982, involving a Fourth of July fireworks display by a Navy station, justified as a community relations measure. While good community relations may be desirable for all government agencies, fireworks are not necessary to the operation and maintenance of the Navy.

[72] Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 988, 1012 (Nov. 21, 1989).

The propriety of using appropriated funds to furnish luncheons to public school officials in conjunction with Marine Corps recruiting programs was considered in B-162642, Aug. 9, 1976. A statute authorized reimbursement of necessary expenses incurred by recruiters, and applicable regulations permitted the reimbursement to include small amounts spent for occasional lunches, snacks, or nonalcoholic beverages. GAO, however, did not consider a planned luncheon involving a formal presentation with a guest speaker as within the intended scope of the statute or regulations. Since the statute and regulations were broadly worded, payment in that case was authorized. The decision cautioned, however, against incurring similar expenses in the future unless the regulations were first revised to provide adequate guidelines and limitations.

The National Park Service has authority to provide for "interpretive demonstrations" at Park Service sites. 16 U.S.C. § 1a-2(g). GAO reviewed this authority and its legislative history in 68 Comp. Gen. 544 (1989), concluding that it could properly include some level of entertainment, as long as it was sufficiently related to the significance of the particular site. Thus, there was no objection to the 1988 Railroaders Festival at the Golden Spike National Historic Site, which included musical entertainment by a band specializing in railroad and nineteenth century western American music. (Golden Spike is the site of the completion of the first U.S. transcontinental railroad in 1869.) Similarly within this authority was the decoration of a historic ranch house at the Grant-Kohrs Ranch National Historic Site to "interpret" how the ranch celebrated Christmas during the frontier era. B-226781, Jan. 11, 1988. However, an "open house" with refreshments and a visit by Santa Claus had "too indirect and conjectural a bearing" on the Park Services mission and was therefore unauthorized. *Id.*

GAO considered whether the National Science Foundation (NSF) could use appropriated funds to pay for dinner-related expenses for a nonfederal award recipient and her spouse pursuant to a statutorily established award called the Alan T. Waterman Award in B-235163.11, Feb. 13, 1996. GAO concluded that NSF could use appropriated funds for the dinner-related expenses because the dinner at which the awards were presented was the necessary vehicle to accomplish the statutory objectives of the Waterman Award.

No discussion of entertainment would be complete without B-182357, Dec. 9, 1975. The Foreign Assistance Act of 1961, as amended, 22 U.S.C. §§ 2151 *et seq.* (1970), authorized funds for an informational program to give foreign military trainees a greater exposure to American culture. To

implement the program, the Department of Defense set up a program whereby officers would serve as escorts for foreign military trainees to impart to them an active appreciation of American values and ideals. The case involved a voucher submitted by a civilian employee of the Navy for expenses incurred as escort officer for a group of twelve senior foreign naval officers being trained in the United States. The voucher included visits to a variety of restaurants, night clubs, and bars. One of the items was a visit to the Boston Playboy Club. The claimant justified the visit as "symbolic of the United States" and "one of the most enjoyable experiences" the trainees had during their stay in America. Apparently to get more symbolism, the party returned for a second visit. In reviewing the case, the Comptroller General noted that, under the statutory program, the funds could have been given directly to the trainees to be spent as they desired, and the agency would therefore have considerable discretion in spending the money for the trainees. In addition, the regulations provided "no guidance whatsoever" on the limits of the program. Somewhat reluctantly, the Comptroller General was forced to conclude that "the lack of adequate guidance to the escort officer leaves us no alternative but to allow him credit for the expenses incurred."

e. Recreational and Welfare Facilities for Government Personnel

(1) The rules: older cases and modern trends

The basic rule for recreational facilities—which, as we shall see, has become more flexible—was established in early decisions: Appropriations are not available unless the expenditure is authorized by express statutory provision or by necessary implication. Thus, in 18 Comp. Gen. 147 (1938), appropriations for a river and harbor project on Midway Island were held not available to provide recreational facilities such as athletic facilities and motion pictures for the working force. Similarly, in 27 Comp. Gen. 679 (1948), the Comptroller General advised that Navy appropriations were not available to hire full-time or part-time employees to develop and supervise recreational programs for civilian employees of the Navy. The reason in both cases was that the expenditure would have at best only an indirect bearing on the purposes for which the appropriations were made.

Other early decisions applying the general rule are B-49169, May 5, 1945 (rental of motion picture by Bonneville Power Administration); B-37344, Oct. 14, 1943 (footballs and basketballs for employees in Forest Service camps); and A-55035, May 19, 1934 (billiard tables for Tennessee Valley Authority employees). In B-49169, the Comptroller General pointed out that the Administrators authority to make such expenditures as he "may find necessary" does not mean anything he may approve, regardless of its

nature, but the expenditures must bear a direct relationship to the purposes to be accomplished under the particular legislation.

It follows that, as a general proposition, appropriated funds may not be used to underwrite travel to or participation in sports or recreational events since this is not the performance of public business. 42 Comp. Gen. 233 (1962). For example, in 73 Comp. Gen. 169 (1994), appropriated funds were not available to the Department of Energy to pay the registration fees of employees participating in competitive fitness promotion, team activities, and sporting events. GAO concluded that these activities were not an essential part of a statutorily authorized physical fitness program and therefore were "generally personal, rather than official," with costs to be "borne by the participating employees, not by the taxpayers." *Id.* at 170. *See also* B-247563.3, Apr. 5, 1996 (Department of Veterans Affairs appropriations not available for registration fees for athletic contest "virtually indistinguishable" from contest in 73 Comp. Gen. 169). Similarly, in B-262008, Oct. 23, 1996, GAO found that the Army Corps of Engineers could not use appropriated funds to pay an entrance fee for Corps employees in a "Corporate Cup Run" sponsored by the American Lung Association. The fact that the employees were to participate as an agency-sponsored team, rather than as individuals, did not change the result. GAO cited the "absence of any justification to show that participation of employees in the run—a competitive athletic event—in any way supports the mission of the Corps."

Of course, the particular circumstances may warrant an exception. Thus, appropriations for "student athletic and related activities" at the Federal Law Enforcement Training Center may be used to provide limited off-site busing to shopping centers, recreational facilities, and places of worship in the nearest town several miles away. The students—government employees in travel status—must live at the Center for several weeks, most do not have cars, and there is no public transportation to the nearest town. B-214638, Aug. 13, 1984.

One area in which recreational and welfare expenditures have been permitted with some regularity is where employees are located at a remote site, where such facilities would not otherwise be available. Expenditures were permitted in the following cases:

- Purchase of ping pong paddles and balls by the Corps of Engineers to equip a recreation room on a seagoing dredge. B-61076, Feb. 25, 1947.

- Transportation of musical instruments, billiard and ping pong tables, and baseball equipment, obtained from surplus military stock, to isolated Weather Bureau installations in the Arctic. B-144237, Nov. 7, 1960.

- Purchase of playground equipment for children of employees living in a government-owned housing facility in connection with the operation of a dam on the Rio Grande River in an isolated area. 41 Comp. Gen. 264 (1961). The agency in that case had statutory authority to provide recreational facilities for employees and the question was whether that authority extended to employees families as well. It did.

- Use of an appropriation of the Federal Aviation Administration (FAA) for construction of "quarters and related accommodations" to provide tennis courts and playground facilities in an isolated sector of the Panama Canal Zone. B-173009, July 20, 1971.

- Purchase of a television set and antenna for use by the crew on a ship owned by the Environmental Protection Agency. The ship was used to gather and evaluate water samples from the Great Lakes, and cruises lasted for up to 15 days. The alternative would have been to extend the length of the cruises to permit more frequent docking. 54 Comp. Gen. 1075 (1975).

- Provision of television services for National Weather Service employees on a remote island in the Bering Sea. The agency was authorized to furnish recreational facilities by the Fur Seal Act of 1966, but the statute also required that the employees be charged a reasonable fee. B-186798, Sept. 16, 1976.

- Use of government vehicles to transport FAA employees on temporary duty at a remote duty location permissible under applicable Federal Travel Regulations, subject to "reasonable limitations and safeguards." B-254296, Nov. 23, 1993. The employees were on temporary duty assignments at a remote Alaskan station.

In recent decades, the role of certain "employee welfare" activities in employee morale and productivity has been increasingly recognized. *See* 71 Comp. Gen. 527, 529 (1992) (GAO has "accepted the retention of employees and promotion of employee morale, generally, as a justification for paying some expenses that, in many circumstances, would be viewed as personal in nature . . ."). In some instances, the recognition has been

accompanied by statutory authority. For example, the Defense Department has specific authority to use appropriated funds for welfare and recreation. This authority originated in general provisions contained in annual appropriation acts, was made permanent in 1983,[73] and is now codified at 10 U.S.C. § 2241. *See also* 10 U.S.C. § 2494 (Department of Defense funds available for morale, welfare, and recreation programs under certain circumstances "may be treated as nonappropriated funds and expended in accordance with laws applicable to the expenditure of nonappropriated funds.").[74] On the other hand, there are limits to congressional support for recreational funding. Congress has found it necessary to enact a specific statutory prohibition on the use of Defense appropriated funds to "equip, operate, or maintain" a golf course that is neither outside the United States nor at a "remote and isolated location" within the United States. 10 U.S.C. § 2246. (Note that this statute does not restrict the use of nonappropriated funds for golf courses.) GAO interpreted section 2246 in B-277905, Mar. 17, 1998, involving installation of irrigation pipelines for a golf course at Fort Sam Houston, Texas. GAO concluded that the explicit statutory prohibition of 10 U.S.C. § 2246 was not overcome by other statutes encouraging agency cooperation with state and local water conservation efforts, finding that "a statute that is clear and unambiguous on its face should be construed to mean what it says."

The civilian agencies generally do not have statutory authority comparable to that of the Department of Defense, and decisions must be made, for the most part, under 31 U.S.C. § 1301(a) and the necessary expense doctrine. Even here, however, the rather strict rule of the early decisions has undergone some liberalization, even in nonremote locations. While the general rule expressed in 18 Comp. Gen. 147 and 27 Comp. Gen. 679 remains as a bar to indiscriminate expenditures, it may now be said that an agency has reasonable discretion to spend its money for employee welfare purposes if the expenditure can be said to enhance employee morale and to be a significant factor in hiring and retention. The test remains one of necessity, but it is evaluated in terms of the agency's legitimate interest in the welfare, morale, and productivity of its employees. Determinations must be made on a case-by-case basis.

[73] Department of Defense Appropriation Act, 1984, Pub. L. No. 98-212, § 735, 97 Stat. 1421, 1444 (Dec. 8, 1983).

[74] *See* Chapter 14, section C, "Nonappropriated Fund Instrumentalities" (Volume III of the third edition of *Principles of Federal Appropriations Law*).

A good illustration of this evolution is the treatment of programmed "incentive music" (sometimes called "Muzak"[75] or, by its detractors, "elevator music"). When GAO first visited the issue, it concluded that an agency could not, within its legitimate range of discretion, find this to be a necessary expense. B-86148, Nov. 8, 1950. The issue arose again 20 years later when the Bureau of the Public Debt, Treasury Department, asked if it could use its Salaries and Expenses appropriation to provide programmed incentive music for its employees. The system had been installed by a previous tenant and the speakers were located in central work areas rather than in private offices. The Bureau pointed out that private concerns had found that such music enhanced employee morale by "creating a pleasantly stimulating and efficient atmosphere during the workday" and helped to minimize employee boredom. GAO had rejected similar arguments in the 1950 decision. This time, GAO concurred, accepting the Bureau's justification that the expenditure would improve employee morale and increase productivity. 51 Comp. Gen. 797 (1972), *overruling* B-86148. In terms of the legal principle involved, whether GAO agreed with the justification or not was irrelevant; all that matters is that the determination is now viewed as a proper exercise of agency discretion.

Another example of a permissible expenditure in this area is the subsidization of employee cafeterias, previously discussed. Still another is parking facilities, discussed later in the section on personal expenses. Two items covered in the section on health and medical care—physical fitness activities and smoking cessation programs—further illustrate evolving trends in the area of employee welfare and morale. A final example is our next topic, child care.

(2) Child care[76]

Like the cultural awareness programs previously discussed, child care is another example of evolution in the law to accommodate a changing society. Prior to 1985, there was no express statutory authority for using

[75] The name is derived from the MUZAK Company, one of the providers.

[76] The statutes and cases discussed in this section concern the use of appropriated funds for federal child care facilities. They do not concern child care expenses incurred by federal employees as travel costs. *See*, *e.g.*, B-246829, May 18, 1982 ("Our decisions have clearly held that fees for child care are not reimbursable expenses in connection with an employees travel or relocation since neither the governing statutes nor the [Federal Travel Regulations] authorize such an entitlement.").

appropriated funds to support child care services in federal buildings for federal employees.

Times have changed and the federal government, as an employer, is not immune from the changes. The number of single-parent families in America has increased dramatically, as has the number of two-parent families in which both parents work, out of either economic necessity, personal choice, or some combination of factors. The inevitable result is a heightened awareness of the need for child care.[77]

GAO's first written discussion of the authority to spend appropriated funds to provide child care services for government employees, B-39772-O.M., July 30, 1976, was not a decision to another agency but an internal memorandum from the General Counsel analyzing GAO's own authority. GAO was considering establishing a day care center in its own building, to be funded and operated by employees. GAO's administrative officials wanted to know what kinds of support the agency could or could not provide without statutory authority, which, at the time, did not exist.

The General Counsel analyzed the questions from the perspective of purpose availability, and concluded that the Comptroller General could allocate space in the GAO building for a day care center, could use GAO's appropriations to renovate the space and buy equipment, and could assume part or all of the rent payable to the General Services Administration for the space.

However, before any of these things could be done, the Comptroller General, as the agency head, would first have to determine that the expenditure would materially contribute to recruiting or retaining staff or maintaining employee morale and hence efficiency and productivity. Because of the lack of statutory authority, the memorandum cautioned that GAO should disclose any substantial capital expenditures for renovation in its budget presentation and to the Appropriations Committees if it chose to take such action. *See also* B-205342, Dec. 8, 1981 (nondecision letter), reiterating the general conclusion of the 1976 memorandum. As it turned

[77] Some GAO reports on child care in the federal sector are: U.S. General Accounting Office, *Child Care: Employer Assistance for Private Sector and Federal Employees*, GAO/GGD-86-38 (Washington, D.C.: Feb. 11, 1986); *Military Child Care Programs: Progress Made, More Needed*, GAO/FPCD-82-30 (Washington, D.C.: June 1, 1982); and *Child Care: Availability for Civilian Dependents at Selected DOD Installations*, GAO/HRD-88-115 (Washington, D.C.: Sept. 15, 1988).

out, GAO did not establish a day care center until after the enactment of 40 U.S.C. § 590 (formerly 40 U.S.C. § 490b), discussed below.

Prior to the enactment of more general legislation in 1985, some agencies had authority to provide day care facilities under agency-specific legislation. For example, legislation authorized the then Department of Health, Education, and Welfare to donate space for day care centers.[78] In 57 Comp. Gen. 357 (1978), the Comptroller General held that the use of the term "donate" gave the agency discretion to provide the space without charge, or to lease space in other buildings for that purpose if suitable space was not available in buildings the agency already occupied. Also, as we have seen, the Defense Department has specific authority to use operation and maintenance appropriations for welfare expenditures.

In 1985, Congress enacted former 40 U.S.C. § 490b, now recodified at 40 U.S.C. § 590, which authorizes, but does not require, federal agencies to provide space and services for child care centers. The term "services" is defined as including "lighting, heating, cooling, electricity, office furniture, office machines and equipment, classroom furnishings and equipment, kitchen appliances, playground equipment, telephone service (including installation of lines and equipment . . .), and security systems …." *Id.* § 590(c)(1).[79] The space and services may be provided with or without charge.

The Comptroller General's first construction of this statute came in response to an arbitration panel award that included a union day care proposal for the children of civilian employees. *Council 214, American Federation of Government Employees, AFL-CIO*, 15 F.L.R.A. 151 (1984), *aff'd sub nom. Department of Air Force v. Federal Labor Relations Authority*, 775 F.2d 727 (6th Cir. 1985). The Federal Labor Relations Authority directed the Air Force to incorporate the award in its collective bargaining agreement,[80] and the Air Force in turn asked GAO whether, under former 40 U.S.C. § 490b, it had authority to use its appropriations to

[78] Education Amendments of 1976, Pub. L. No. 94-482, § 524, 90 Stat. 2081, 2240 (Oct. 12, 1976), *codified at* 20 U.S.C. § 2564.

[79] The definition was patterned generally after the statute authorizing agencies to provide space to federal credit unions, 12 U.S.C. § 1770, discussed in 66 Comp. Gen. 356 (1987).

[80] The fact that day care is involved cannot be determined from either opinion, both of which discuss procedural issues.

implement the award. The resulting decision, 67 Comp. Gen. 443 (1988), reached the following conclusions:

- The Air Force can, either with or without charge, allot space in government buildings under its control for child care facilities for civilian employees, and can provide the services outlined in the statute.
- The Air Force can use its appropriations to renovate, modify, or expand the space allotted to make it suitable for use as a child care facility.
- The Air Force can expand existing child care facilities for military personnel to accommodate the children of civilian employees.

The decision also concluded that any reimbursements received from a child care center (which, as noted, are optional) must be deposited in the Treasury as miscellaneous receipts.

In 70 Comp. Gen. 210 (1991), GAO concluded that former 40 U.S.C. § 490b did not preclude the General Services Administration from leasing space or constructing buildings for child care facilities if there is insufficient space available in existing federal buildings. The authority in section 490b to use existing space was not exclusive. (The 1988 decision to the Air Force, 67 Comp. Gen. 443, had expressed a contrary view and was overruled to that extent.) In 73 Comp. Gen. 336 (1994), GAO approved the use of appropriated funds by the Forest Service to pay a consultant for services rendered to a Forest Service-supported child care center on Forest Service premises. Citing former section 490b and a recurring appropriation act provision that permitted payment of expenses (predecessor to 40 U.S.C. § 590(d)(2), discussed below), GAO concluded that Forest Service funds were available to pay "start-up/support costs" for the day care facility, including consultant services.

In 1998, Congress made permanent a recurring appropriation act provision authorizing reimbursement of "travel, transportation, and subsistence expenses incurred for training classes, conferences, or other meetings" in connection with the provision of child care services. Pub. L. No. 105-277, div. A, § 101(h) (title VI, § 603), 112 Stat. 2681-480, 2681-513 (Oct. 21, 1998). This statute is now codified at 40 U.S.C. § 590(d)(2).

Similarly, in 2001, Congress made permanent another recurring provision that made appropriated funds available "to improve the affordability of child care for lower income Federal employees." Pub. L. No. 107-67, § 630,

115 Stat. 514, 552–53 (Nov. 12, 2001). This statute is now codified at 40 U.S.C. § 590(g). Office of Personnel Management regulations governing agency use of appropriated funds for child care costs for lower income employees are at 5 C.F.R. pt. 792, subpt. B, 68 Fed. Reg. 14127, 14129 (Mar. 24, 2003) (Interim Rule).

In late 1989, Congress enacted new child care legislation for the armed forces, including the authority to use fees collected from parents. Military Child Care Act of 1989, title XV of the National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, 103 Stat. 1352, 1589 (Nov. 29, 1989), *formerly codified at* 10 U.S.C. § 103 note. This provision was revised and recodified by Pub. L. No. 104-106, § 568, 110 Stat. 186, 329–336 (Feb. 10, 1996), which added new legislation governing Department of Defense child care programs. 10 U.S.C. § 1791 *et seq*.[81] Section 1791 expresses the policy of Congress that:

> "[T]he amount of appropriated funds available during a fiscal year for operating expenses for military child development centers and programs shall be not less than the amount of child care fee receipts that are estimated to be received by the Department of Defense during that fiscal year."[82]

In 71 Comp. Gen. 527 (1992), GAO addressed the analogous issue of the use of appropriated funds to provide "eldercare" facilities for adult relatives of federal employees, as well as related counseling services. In response to a request for a decision from the Internal Revenue Service (IRS), GAO concluded that eldercare was not a necessary expense for which IRS's appropriations were available. GAO pointed out that Congress had provided specific authority for child care in former 40 U.S.C. § 490b and, since eldercare was not a "typical benefit offered the American workforce," similar benefits were available to federal workers only pursuant to specific legislation. It was "for the Congress to decide whether agency appropriations [could] be used to support eldercare centers." IRS's appropriations, therefore, were not available for costs associated with

[81] Implementation of the DOD program is discussed in U.S. General Accounting Office, *Child Care: How Do Military and Civilian Center Costs Compare?* GAO/HEHS-00-7 (Washington, D.C.: Oct. 14, 1999).

[82] *See also Child Development Programs*, DOD Instruction 6060.2 (Jan. 19, 1993); *School-Age Care Program*, DOD Instruction 6060.3 (Dec. 19, 1996).

eldercare facilities. IRS's appropriated funds were available, however, "to implement a resource and referral service on eldercare issues" under the authority of 5 U.S.C. § 7901, which authorizes "preventive programs related to health." *Id.* at 530.

f. Reception and Representation Funds

Implicit in all of our discussion of entertainment is the point that otherwise improper expenditures may be authorized under specific statutory authority. Congress has long recognized that many agencies have a legitimate need for items that otherwise would be prohibited as entertainment, and has responded by making limited amounts available for official entertainment to those agencies that can justify the need. Entertainment appropriations originated from the need to permit officials of agencies whose activities involve substantial contact with foreign officials to reciprocate for courtesies extended to them by foreign officials. For example, the State Department would find it difficult to accomplish its mission if it could not spend any money entertaining foreign officials. In fact, some of the early entertainment appropriations were limited to entertaining non-U.S. citizens, and some could only be spent overseas. An example of the latter type is discussed in B-46169, Dec. 21, 1944. Restrictions of this nature have become increasingly uncommon.

Entertainment appropriations may take various forms. Some agencies have their own well-established structures that may include permanent legislation. For example, the State Department has permanent authorization to pay for official entertainment. 22 U.S.C. § 4085. *See also* 22 U.S.C. § 2671, which authorizes expenditures for "unforeseen emergencies" that may include official entertainment in certain contexts. The authority of 22 U.S.C. § 4085 is implemented by means of annual appropriations under the heading "Representation Allowances."[83] State Department representation allowances have been found available for rental of formal evening wear by embassy officials accompanying the Ambassador to the United Kingdom in presenting his credentials to the Queen, 68 Comp. Gen. 638 (1989); hiring extra waiters and busboys to serve at official functions at foreign posts, 64 Comp. Gen. 138 (1984); meals for certain embassy officials at Rotary Club meetings in Tanzania, if approved by the local Chief of Mission, B-232165, June 14, 1989; and reimbursement of Ambassador and Deputy Chief of Mission for cost of renting formal morning dress required by protocol for official occasions, B-256936,

[83] *E.g.*, Pub. L. No. 101-162, 103 Stat. 988, 1007 (Nov. 21, 1989) (fiscal year 1990); Pub. L. No. 108-7, div. B, title IV, 117 Stat. 11, 87 (Feb. 20, 2003) (fiscal year 2003).

June 22, 1995. A fact sheet reviewing expenditures at selected overseas posts is U.S. General Accounting Office, *Representational Funds: State Department Expenditures at Selected Posts*, GAO/NSIAD-87-73FS (Washington, D.C.: Feb. 3, 1987).

The Defense Department also has its own structure. Under 10 U.S.C. § 127, the Secretary of Defense, or of a military department, within the limitations of appropriations made for that purpose, may use funds to "provide for any emergency or extraordinary expense which cannot be anticipated or classified." *See Official Representation Funds*, DOD Directive 7250.13 (Sept. 10, 2002). When so provided in an appropriation, the official may spend the funds "for any purpose he determines to be proper." 10 U.S.C. § 127(a). *See* 72 Comp. Gen. 279 (1993) (certifying officer processing voucher under 10 U.S.C. § 127 is responsible only for errors made in his own processing of the voucher, and not for the Defense Attache's prior certification as to the propriety of the payment). Annual Operation and Maintenance appropriations include amounts for "emergencies and extraordinary expenses."[84] Although the title is not particularly revealing, it has long been understood that official representation expenses are charged to this account. *See* U.S. General Accounting Office, *Internal Controls: Defenses Use of Emergency and Extraordinary Funds*, GAO/AFMD-86-44 (Washington, D.C.: June 4, 1986); *DOD Use of Official Representation Funds to Entertain Foreign Dignitaries*, GAO/ID-83-7 (Washington, D.C.: Dec. 29, 1982); 69 Comp. Gen. 242 (1990) (reception for newly assigned commander at U.S. Army School of the Americas).

With these two major exceptions, most agencies follow a similar pattern and receive their entertainment funds, if they receive them at all, simply as part of their annual appropriations. The appropriation may specify that it will be available for "entertainment." *See*, *e.g.*, B-20085, Sept. 10, 1941. Far more commonly, however, the term used in the appropriation is "official reception and representation (R&R)." This has come to be the technical "appropriations language" for entertainment.

While we cannot guarantee that one does not exist somewhere, we have not found a congressional definition of the term "official R&R." Absent a definition, we found it instructive to review agency justifications to see

[84] *E.g.*, Department of Defense Appropriations Act 2003, Pub. L. No. 107-248, 116 Stat. 1519, 1521 (Army), 1522 (Navy, Air Force, Defense-Wide), 1535 (Inspector General) (Oct. 23, 2002).

what sort of authority Congress thought it was conferring. The term seems to have originated—or at least became more widespread—in the early 1960s. We identified the first appearance of the term for a number of agencies, and selected two, the Departments of Agriculture and Interior, as illustrative. Both agencies first received "official R&R" funds in their appropriations for fiscal year 1963.[85]

The Agriculture Department explained that the Secretary frequently finds it necessary to provide a luncheon or similar courtesy to various individuals and small groups in the conduct of official business, to promote effective working relationships with farm, trade, industry, and other groups that are directly related to accomplishing the Agriculture Departments work. Such official courtesies benefit the government, and the Secretary and Under Secretary of Agriculture should not be required to bear these expenses from their own personal funds as was then the case. In conclusion, the justification observed that "[i]t is unseemly that the hospitality should always be left to the visitor." [86] Similarly, the Interior Department explained that its request for "not to exceed $2,000 for official reception and representation expenses" was intended to provide authority to use appropriated funds for expenses incurred by the Interior Secretary "in fulfilling the courtesy and social responsibilities directly associated with his official duties," in situations much like those the Agriculture Department had noted. Such official expenses, the justification asserted, "rightly should be borne by the Government rather than be financed from personal funds."[87]

One point that is clear from these excerpts is that an R&R appropriation, whatever its origins may have been, is not limited to the entertainment of foreign nationals, unless of course the appropriation language so provides. The experience of the former Department of Health, Education, and Welfare (HEW) provides further evidence that, absent some indication to

[85] Department of Agriculture and Related Agencies Appropriation Act, 1963, Pub. L. No. 87-879, 76 Stat. 1203, 1212 (Oct. 24, 1962); Department of the Interior and Related Agencies Appropriation Act, 1963, Pub. L. No. 87-578, 76 Stat. 335, 345 (Aug. 9, 1962).

[86] *Department of Agriculture Appropriations for 1963: Hearings before the Subcomm. on Department of Agriculture and Related Agencies Appropriations of the House Comm. on Appropriations*, 87th Cong., 2d Sess. pt. 4, at 2090–91 (1962).

[87] *Interior Department and Related Agencies Appropriations for 1963: Hearings on H.R. 10802 before a Subcomm. of the Senate Comm. on Appropriations*, 87th Cong., 2d Sess. 550 (1962).

the contrary, Congress does not intend that an "official R&R" appropriation be limited to entertaining foreign nationals. The Secretary of HEW first received an entertainment appropriation in HEW's fiscal year 1960 appropriation act, but it was limited to certain foreign visitors.[88] The language was changed to "official reception and representation" in HEW's fiscal year 1964 appropriation.[89] The conference report on the 1964 appropriation explained that the change was intended to expand the scope of the appropriation to include U.S. citizens as well as foreign visitors.[90]

It is clear that R&R appropriations have traditionally been sought, justified, and granted in the context of an agency's need to interact with various nongovernment individuals or organizations. Precisely who these individuals or organizations might be will vary with the agency. Of course, the fact that the thrust of the appropriation is the entertainment of nongovernment persons does not mean that government persons are precluded. For example, it has long been recognized that persons from other agencies (and by necessary implication members of the host agency as well) may be included incident to an authorized entertainment function for nongovernment persons. *E.g.*, B-84184, Mar. 17, 1949.

An agency has wide discretion in the use of its R&R appropriation. 61 Comp. Gen. 260, 266 (1982); B-212634, Oct. 12, 1983. As a general proposition, "official agency events, typically characterized by a mixed ceremonial, social and/or business purpose, and hosted in a formal sense by high level agency officials" and relating to a function of the agency will not be questioned. B-223678, June 5, 1989. Accordingly, R&R funds have been found available for the following:

- Holiday party for government officials and their spouses or guests, held by Secretary of the Interior at the Custis-Lee Mansion. 61 Comp. Gen. 260 (1982), *aff'd upon reconsideration*, B-206173(2), Aug. 3, 1982.

- Party for various government officials and their families or guests held on July 4 by Secretary of Interior to celebrate Independence Day. B-212634, Oct. 12, 1983.

[88] Pub. L. No. 86-158, § 209, 73 Stat. 339, 355 (Aug. 14, 1959).

[89] Pub. L. No. 88-136, § 905, 77 Stat. 224, 246 (Oct. 11, 1963).

[90] H.R. Conf. Rep. No. 88-774, at 11 (1963).

- Luncheon incident to "graduation ceremony" for Latin American students being trained by the Bureau of Labor Statistics. B-84184, Mar. 17, 1949.

- Entertainment of British war workers visiting various American cities as guests of the British Ministry of Information. B-46169, Aug. 18, 1945.[91]

- Cost of food and entertainment provided by General Services Administration at grand opening of a government cafeteria "to the extent that the grand opening otherwise qualifies as an official reception." B-250450, May 3, 1993.

- Cost of meals at "representational" interagency briefings for executive branch employees personally hosted by Director of the Trade and Development Program of the United States Agency for International Development. 72 Comp. Gen. 310 (1993).

In a case previously noted in our coverage of award ceremonies, the Veterans Administration could not use its general appropriations to provide refreshments at an awards ceremony for volunteers, but it could use its R&R appropriation. 43 Comp. Gen. 305 (1963). An agency may also use its R&R funds, although it is not required to, for refreshments at award ceremonies under the Government Employees' Incentive Awards Act, 5 U.S.C. §§ 4501–4506. 65 Comp. Gen. 738, 741 n.5 (1986).

A case relied on in B-223678 was B-122515, Feb. 23, 1955, in which the Comptroller General held that a "representation allowance" similar to the State Department appropriation discussed above could be used to purchase printed invitation cards and envelopes in connection with an official function at an overseas mission. In 42 Comp. Gen. 19 (1962) and in B-131611, May 24, 1957, however, a similar appropriation to the Foreign Agricultural Service was not available for printed invitations because an executive order provided that the Foreign Agricultural Service was to be governed by State Department regulations, and the applicable State Department regulations prohibited the use of representation allowances for printing cards.

[91] The decision modified the result of an earlier decision, B-46169, Dec. 21, 1944, based on a change in the relevant appropriation language. The 1944 decision contains a fuller statement of the facts.

Notwithstanding the discretion it confers, an R&R appropriation is not intended to permit government officials to feed themselves and one another incident to the normal day-to-day performance of their jobs. Thus, GAO has held that R&R funds may not be used to provide food or refreshments at intra-government work sessions or routine business meetings, even if held outside of normal working hours. B-223678, June 5, 1989. *See also* B-250884, Mar. 18, 1993 (the cost of meals provided to government employees during interagency working meetings improperly charged to R&R funds).

A final but significant limitation on the use of representation funds stems from the appropriation language itself—R&R appropriations are made for the expenses of official reception and representation activities. There must be some connection with official agency business. Thus, it would be improper to use representation funds for a social function hosted and attended by private parties, such as a breakfast for Cabinet wives. 61 Comp. Gen. 260 (1982), *aff'd upon reconsideration* B-206173(2), Aug. 3, 1982. Similarly, R&R funds may not be used for entertainment incident to an activity which is itself unauthorized. 68 Comp. Gen. 226 (1989) (entertainment incident to trade show in Soviet Union which agency had no authority to sponsor). The impropriety of the underlying activity necessarily "taints" the entertainment expenditures.

6. Fines and Penalties

As a general proposition, no authority exists for the federal government to use appropriated funds to pay fines or penalties incurred as a result of its activities or those of its employees.

In the most common situation, a fine is assessed against an individual employee for some action he or she took in the course of performing official duties. The cases frequently involve traffic violations. The rule is that appropriated funds are not available to pay the fine or reimburse the employee. The theory is that, while an employee may have certain discretion as to precisely how to perform a given task, the range of permissible discretion does not include violating the law. If the employee chooses to violate the law, he is acting beyond the scope of his authority and must bear any resulting liability as his personal responsibility.

The earliest case stating the rule appears to be B-58378, July 31, 1946. Holding that a government employee ticketed for parking a government vehicle in a "no parking" zone could not be reimbursed, the Comptroller General stated:

> "[T]here is not known to this office any authority to use appropriated moneys for payment of the amount of a fine imposed by a court on a Government employee for an offense committed by him while in the performance of, but not as a part of, his official duty. Such fine is imposed on the employee personally and payment thereof is his personal responsibility."

The rule applies to forfeitures of collateral as well as fines. B-102829, May 8, 1951.

The first published decision stating the rule, and the case most often cited, is 31 Comp. Gen. 246 (1952). A government employee double-parked a government vehicle to make a delivery. While the employee was inside the building, the inner vehicle drove away, leaving the government vehicle unattended in the middle of the street, whereupon it was ticketed. Citing B-58378 and B-102829, the Comptroller General held that the employee could not be reimbursed from appropriated funds for the amount of the fine.[92]

GAO has applied the rule even in a case where the employee could establish that the speedometer on the government vehicle was inaccurate. B-173660, Nov. 18, 1971. While at first glance this might seem like a harsh and unfair result, it in fact was not, at least in that particular case. In that case, the employee was ticketed for driving at 85 m.p.h. The speedometer at the time read a mere 73 m.p.h. Conceding the established inaccuracy of the speedometer, the employee nevertheless, by observing other vehicles on the road and applying common sense, should have suspected that he was driving at an excessive rate of speed.

Further, in a case involving a possessory interest tax, a tax on the rental interest in government owned property, B-251228, July 20, 1993, the Forest Service was not permitted to pay penalties and interest assessed against an employee for a delay in payment of the tax due while the employee occupied government-owned quarters. The penalties and interest were

[92] For other cases involving motor vehicle violations, see 57 Comp. Gen. 270 (1978); B-250880, Nov. 3, 1992; B-238612, Apr. 16, 1990; B-147420, Apr. 18, 1968; B-168096-O.M., Aug. 31, 1976; B-147420, July 27, 1977 (nondecision letter); B-173783.188, Mar. 24, 1976 (nondecision letter).

considered to be personal liabilities of the employee and not the federal government.

The very statement of the rule as quoted above from B-58378 suggests that there may be situations in which reimbursement is permissible. The exception occurred in 44 Comp. Gen. 312 (1964). In connection with the case of *Sam Giancana v. J. Edgar Hoover*, 322 F.2d 789 (7th Cir. 1963), an agent of the Federal Bureau of Investigation (FBI) was ordered by the court to answer certain questions. Based on Justice Department regulations and specific instructions from the Attorney General, the FBI agent refused to testify and was fined for contempt of court. The contempt order was upheld in *Sam Giancana v. Marlin W. Johnson*, 335 F.2d 372 (7th Cir. 1964). Finding that the employee had incurred the fine by reason of his compliance with Department regulations and instructions and that he was without fault or negligence, GAO held that the FBI could reimburse the agent from its Salaries and Expenses appropriation under the "necessary expense" doctrine.[93]

Subsequently, some people thought that 31 Comp. Gen. 246 and 44 Comp. Gen. 312 appeared inconsistent, and GAO has discussed the two lines of reasoning in several later decisions. The distinction is this: in 31 Comp. Gen. 246, the offense was committed while performing official duties but it was not a necessary part of those duties. The employee could have made the delivery without parking illegally. The fine in 44 Comp. Gen. 312 was "necessarily incurred" in the sense that the employee was following his agency's regulations and the instructions of his agency head. Thus, the actions that gave rise to the contempt fine could be viewed as a necessary part of the employee's official duties, although certainly not in the sense that it would have been physically impossible for the employee to have done anything else.

Applying these concepts, the Comptroller General held in B-205438, Nov. 12, 1981, that the Federal Mediation and Conciliation Service could reimburse a former employee for a contempt fine levied against him for refusal to testify, pursuant to agency regulations and instructions, on matters discussed at a mediation session at which he was present while employed by the agency.

[93] B-239556, Oct. 12, 1990 and B-242786, Jan. 31, 1991, substantially supported the rule stated in *Giancana* and explained the rationale behind it drawing a distinction between criminal and civil contempt and the punitive nature of the awards.

Reimbursement was denied, however, in B-186680, Oct. 4, 1976. There, a Justice Department attorney was fined for contempt for missing a court-imposed deadline. The attorney had been working under a number of tight deadlines and argued that it was impossible to meet them all. However, he had not been acting in compliance with regulations or instructions, had exercised his own judgment in missing the deadline in question, and the record did not support a determination that he was without fault or negligence in the matter. Therefore, the case was governed by 31 Comp. Gen. 246 rather than 44 Comp. Gen. 312.

Reading all of these cases together, it seems fair to state that the mere fact of compliance with instructions will not by itself be sufficient to authorize reimbursement. There must be some legitimate government interest to protect. Thus, it would not be sufficient to instruct an employee to refuse to testify where the purpose is to avoid embarrassment or to avoid the disclosure of government wrongdoing. Similarly, it would follow that the prohibition against reimbursement of traffic fines could not be circumvented merely because some supervisor instructed a subordinate to park illegally.

The two lines of cases were discussed in the specific context of traffic violations in B-107081, Jan. 22, 1980, a response to a Member of Congress. Summarizing the rules discussed above, the Comptroller General pointed out that they applied equally to law enforcement personnel. However, the Comptroller General alluded to one situation in which reimbursement might be authorized—a parking fine incurred by a law enforcement official as a necessary part of an official investigation. An example might be parking an unmarked undercover vehicle during a surveillance where there was no other feasible alternative. Compare 38 Comp. Gen. 258 (1958) concerning the reimbursement of parking meter fees.

Another situation in which a fine was held reimbursable is illustrated in 57 Comp. Gen. 476 (1978). Forest Service employees had loaded logs on a truck to transport them from Virginia to West Virginia. In Virginia, the driver was fined for improper loading (overweight on rear axle). The employees had loaded the logs in a forest and there was no way for them to have checked the weight. The fine did not result from any negligent or intentional act on the part of the driver. Under these circumstances, the Comptroller General found that the fine was not for any personal wrongdoing by the employee but was, in effect, a citation against the United States. Therefore, Forest Service appropriations were available to reimburse the fine. This situation is distinguishable from the case of an

overweight fine levied against a commercial carrier, which is not reimbursable. 35 Comp. Gen. 317 (1955).

Similar reasoning applies with respect to penalties in the form of liquidated damages assessed against a government employee who fails to either use or cancel airline reservations in accordance with the carrier's applicable tariff. If the charges are unavoidable in the conduct of official travel or are incurred for reasons beyond the traveler's control and acceptable to the agency concerned, they may be reimbursed from the agency's travel appropriations. However, if the charges are not unavoidable in the performance of official business nor incurred for reasons beyond the employee's control and acceptable to the agency, they are personal to the employee and may not be reimbursed. 41 Comp. Gen. 806 (1962).

In 70 Comp. Gen. 153 (1990), GAO recognized that the government may reimburse an employee for the payment of a fine or penalty where the government has agreed to do so by contract. In this case, the Selective Service System had leased vehicles under a contract with a commercial vendor in the District of Columbia. The government had agreed to "hold [the] lessor harmless" for any fine or penalty imposed on the vehicles. One of the vehicles received a ticket for failure to have a current safety inspection sticker. Although the lessor was arguably responsible for the ticket, the government employee had paid the ticket and was seeking reimbursement. GAO therein stated that:

> "[T]he government's immunity from state or municipal fines is inapplicable when the legal incidence of the fine is not imposed directly on the government but, instead, is imposed on the lessor, and the fine is merely a measure of damages for the government's failure to comply with the terms of its agreement and against which the government has agreed to indemnify the lessor."

The case was returned to the Selective Service System to make a determination as to whether, under D.C. law, the lessor was liable for the ticket. For further discussion of the concept of "legal incidence" and the government's immunity, see section C.7.c in this chapter.

The cases discussed so far have all involved fines levied against individual employees. Questions may also arise over the liability of a federal agency for a fine or civil penalty. The question is essentially one of sovereign immunity. In order for a federal agency to be liable for a fine or penalty,

there must be an express statutory waiver of sovereign immunity. *E.g.*, *United States Department of Energy v. Ohio*, 503 U.S. 607 (1992).

For example, the Clean Air Act provides for the administrative imposition of civil penalties for violation of state or local air quality standards. The statute directs the federal government to comply with these standards and makes government agencies liable for the civil penalties to the same extent as nongovernmental entities. In view of this express waiver of sovereign immunity, the Comptroller General held that agency operating appropriations are available, under the "necessary expense" theory, to pay administratively imposed civil penalties under the Clean Air Act. B-191747, June 6, 1978. If the penalty is imposed by court action, it may be paid from the permanent judgment appropriation, 31 U.S.C. § 1304. However, if there is no legitimate dispute over the basis for liability or the amount of the penalty, an agency may not avoid use of its own appropriations by the simple device of refusing to pay and forcing the state or local authority to sue. 58 Comp. Gen. 667 (1979).

Absent the requisite statutory waiver of sovereign immunity, the agency's appropriations would not be available to pay a fine or penalty. For example, in 65 Comp. Gen. 61 (1985), appropriated funds were not available to pay a "fee," which was clearly in the nature of a penalty, imposed by a city of Boston ordinance for equipment malfunctions resulting in the transmission of false fire alarms. *See also* B-227388, Sept. 3, 1987 (no authority to pay false alarm fines imposed by municipality).

What about a penalty assessed by one federal agency against another? In B-161457, May 9, 1978, the Comptroller General held that, absent a statute specifically so providing, an agency's appropriations are not available to pay penalties assessed by the Internal Revenue Service for late filing or underpayment of employment taxes. The reason is that this would constitute a use of the funds for a purpose other than that for which they were appropriated. Also, in B-260532, May 9, 1995, the Comptroller General held that there was no authority for the Government Printing Office to directly charge other federal agencies interest for payments that the Government Printing Office considered to be "late."

7. Firefighting and Other Municipal Services

a. Firefighting Services: Availability of Appropriations

A frequent subject of inquiry has been the authority of the federal government to voluntarily contract, or to pay involuntary assessments, for firefighting services rendered by local governments to federal property and buildings. The general rule is: If the political subdivision rendering the service is required by law to extinguish fires within its boundaries, then the United States cannot make additional payments in any form to underwrite that legal responsibility. The earliest published decision containing a detailed discussion of the rule and its rationale is 24 Comp. Gen. 599 (1945).

The rule proceeds from the premise that firefighting is a governmental rather than a proprietary or business function. Where a local firefighting organization (city or county fire department, fire protection district, *etc.*) is required by local law to cover a particular territorial area and to respond to fires without direct charge to the property owners, this duty extends to federal as well as nonfederal property within that territorial area. A charge to appropriated funds under these circumstances would amount to a tax or a payment in lieu of taxes and would, absent specific statutory authority, violate the government's constitutional immunity from taxation. B-243004, Sept. 5, 1991. It follows that the government may not contract for firefighting services that it would be legally entitled to receive in any event,[94] nor may it reimburse a political subdivision for the additional costs incurred in fighting a federal fire.[95] *See* 53 Comp. Gen. 410 (1973) and cases cited therein. In addition to the taxation problem, use of appropriated funds for this purpose would violate the purpose statute at 31 U.S.C. § 1301(a). 32 Comp. Gen. 91 (1952).

Limited reimbursement authority now exists by virtue of the Federal Fire Prevention and Control Act of 1974, codified at 15 U.S.C. § 2210, discussed later in this section. The present discussion concerns the availability of appropriations apart from that limited authority.

[94] In addition to the cases cited in the text, see B-131932, Mar. 13, 1958; B-125617, Apr. 11, 1956; B-126228, Jan. 6, 1956; B-105602, Dec. 17, 1951; B-40387-O.M., June 24, 1966.

[95] In addition to the cases cited in the text, see B-167709, Sept. 9, 1969; B-153911, Dec. 6, 1968; B-147731, Jan. 22, 1962.

In applying the rule, it is irrelevant that a city cannot regulate building and fire codes for structures on a military establishment within the city limits. 24 Comp. Gen. 599 (1945). Also, the rule applies equally when the fire protection is provided by a volunteer fire department performing the mandatory governmental function for a political subdivision. The fact that the firefighters are unpaid does not affect the local government unit's legal duty to render the service. 26 Comp. Gen. 382 (1946); B-47142, Apr. 3, 1970.

In 53 Comp. Gen. 410 (1973), GAO denied a claim by the St. Louis Community Fire Protection District (CFPD) and several surrounding fire districts and departments for equipment losses and supplemental payroll expenses incurred in fighting a massive fire at the St. Louis Federal Records Center. The St. Louis CFPD could not be reimbursed because the Records Center was within its territorial responsibility. The surrounding fire districts were also under a duty to respond to the alarm because they had entered into mutual aid agreements with the St. Louis CFPD that had the effect of extending their own areas of responsibility.

In some rural areas, firefighting services may be unavailable or very limited. In such areas, the government may have to provide its own fire protection. The Comptroller General had stated, in 32 Comp. Gen. 91 (1952), that an agency could not enter into "mutual aid agreements" to extend that service to the general community beyond the boundaries of government property, even where the local inhabitants were predominantly government employees and where the additional protection could be accomplished without additional expense. Later, Congress enacted legislation specifically authorizing reciprocal agreements for mutual aid. 42 U.S.C. §§ 1856–1856d. This statutory authority is limited to mutual aid agreements and does not authorize an agency to enter into an agreement to reimburse a political subdivision for services unilaterally provided to the government. 35 Comp. Gen. 311, 313 (1955); B-243004, Sept. 5, 1991; B-126228, Jan. 6, 1956; B-40387-O.M., June 24, 1966. An agency participating in a mutual aid agreement under this authority may contribute, on a basis comparable to other participants, to a common fund to be used for training and equipment incident to responding to fires and related emergencies such as hazardous waste accidents. B-222821, Apr. 6, 1987.

If the government may not contract for or reimburse fire protection services which a local entity is legally required to provide, it follows that the government may not pay a "service charge" for fire protection provided by a municipality with respect to federal property within the city limits, at least where the assessment for fire protection is normally included in the

city's property tax. In 49 Comp. Gen. 284 (1969), the city of New London, Connecticut, sought to charge the government on a direct cost-related basis for fire protection afforded the United States Coast Guard Academy. Fire protection was included in the city's real estate tax and the service charge was to apply only to tax-exempt property. In view of the city's duty to provide fire protection to the Academy, the Comptroller General found the proposed charge to be an unconstitutional tax on the government. *See also* B-160936, Mar. 13, 1967. However, a flat-fee service charge levied by a utility district for extinguishing a fire in a postal vehicle was held permissible where the utility district was under no legal obligation to provide the service. B-123294, May 2, 1955.

In B-168024, Dec. 13, 1973, a city was required to provide fire protection to all property within its boundaries, but was given the option under state law of financing the fire protection by service charges rather than from general tax revenues. In these circumstances, it was held that the United States could pay a valid service charge, although the charge in that particular case was held to be a tax and therefore invalid because it was based on the value of the property rather than the *quantum* of services provided. The decision contains a useful discussion of the distinction between a service charge and a tax.[96]

Similarly, in B-243004, Sept. 5, 1991, a service charge was imposed on the Bureau of Reclamation for fire protection on federal property where the city was not required to provide such services. If the charge for firefighting services bears a reasonable relationship to the *quantum* of services provided and is charged proportionately against all who use the services, it need not be considered a tax but a fee for services that the United States may pay. In this case, however, the method used to compute the charge was found not to bear any particular relationship to the services rendered, and hence, was not payable.

Because the rule is predicated on the existence of state laws requiring political subdivisions to provide firefighting services, it would not apply in instances where there is no entitlement to service. Thus, reimbursement was allowed in 3 Comp. Gen. 979 (1924) where a fire unit had no legal duty to respond to an emergency call outside its district. It was further noted that there was no violation of the prohibition on accepting voluntary

[96] For more on the distinction between a tax and a service charge, see "Other Municipal Services" later in this section, and section C.15 of this chapter.

services now found in 31 U.S.C. § 1342 (part of the Antideficiency Act). Similarly, a contractual agreement for fire protection with the nearest fire district may be proper where the federal property in question is not served by any fire district. 35 Comp. Gen. 311 (1955). Under the same theory, the Comptroller General held that the Bureau of Indian Affairs could make a financial contribution to the "Community Fire Truck," a volunteer firefighting organization which otherwise would have been under no obligation to respond to fires at an Indian school outside the limits of the city served by the organization. 34 Comp. Gen. 195 (1954). *See also* B-163089, Feb. 8, 1968; B-123294, May 2, 1955. However, there is no authority to pay for fire services rendered without a preexisting legal obligation if such services were necessary to protect adjoining state or privately owned property as to which such a legal duty existed. 30 Comp. Gen. 376 (1951).

A variation occurred in B-116333-O.M., Oct. 15, 1953, in which it was held permissible to reimburse a private firefighting enterprise for repair and maintenance service to hydrants and fire alarm boxes on a government-owned and -operated housing facility, irrespective of the duty of the municipality.

In the analysis of legal duty to provide protection, it is irrelevant that the government may have engaged in an activity causing the fire. 32 Comp. Gen. 401 (1953); B-167709, Sept. 9, 1969; B-147731, Dec. 28, 1961; B-6400, Aug. 28, 1940.[97] Similarly, there is no estoppel created by the fact that the United States operated its own fire protection at a given installation for a period of time. If the legal duty to provide protection exists, the United States is entitled to claim protection at any time its own service becomes obsolete, undesirable, or uneconomical. B-129013, Sept. 20, 1956; B-126228, Jan. 6, 1956.

An exception to the general rule may exist in the case of a "federal enclave." This term usually describes large tracts of land held under exclusive federal jurisdiction. In 45 Comp. Gen. 1 (1965), the Comptroller General held that, despite locally available protection, a federal enclave could provide its own

[97]A claim for expenses (as opposed to damages) incurred by a state in suppressing a fire starting on federal property and allegedly caused by the negligence of a federal employee is not a claim for injury or loss of property under the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.*, and is therefore not cognizable under that Act. *Oregon v. United States*, 308 F.2d 568 (9th Cir. 1962), *cert. denied*, 372 U.S. 941 (1963); *California v. United States*, 307 F.2d 941 (9th Cir. 1962), *cert. denied*, 372 U.S. 941 (1963); B-163089, Oct. 19, 1970.

fire protection on a contract basis. Further, adjacent land under federal control but not part of the federal enclave could be protected under the same contractual arrangement. However, an additional factor in 45 Comp. Gen. 1 was that legitimate doubt existed as to whether the fire district was under a legal obligation under state law to provide services to the federal property involved, and the district had petitioned the state government to redraw its boundaries to exclude the federal property. The effect of this factor is unclear, and since that time, no case has been decided in which a federal enclave was involved. Note that the threatened exclusion of the federal property was based on a legitimate doubt as to whether protection was required by state law. If protection is required, exclusion would be improper. *See* B-129013, Sept. 20, 1956. *Cf.* B-192641, May 2, 1979 (nondecision letter) (questioning a redistricting to exclude federal property that was not a federal enclave).

A 1981 decision addressed the authority of the Bureau of Land Management to contract with rural fire districts in Oregon and Washington for fire protection and firefighting services for federally owned timberlands in those states. The Comptroller General reviewed the principles and precedents established over the years and concluded that, since the fire districts were legally required to protect the federal tracts, the Bureau could not enter into the desired contracts without specific statutory authority. However, Bureau installations with a federally maintained firefighting capacity could enter into mutual aid agreements under 42 U.S.C. § 1856, discussed above. 60 Comp. Gen. 637 (1981).

b. Federal Fire Prevention and Control Act of 1974

In light of the huge losses suffered by local fire districts in the 1973 St. Louis Records Center fire, the need for some legislative action became apparent. The result was section 11 of the Federal Fire Prevention and Control Act of 1974, Pub. L. No. 93-498, 88 Stat. 1535, 1543 (Oct. 29, 1974), codified at 15 U.S.C. § 2210. This provision allows a fire service fighting a fire on federal property to file a claim for the direct expenses and direct losses incurred. The claim is filed with the United States Fire Administration, Federal Emergency Management Agency (FEMA).[98] The amount allowable is the amount by which the additional firefighting costs, over and above the claimant's normal operating costs, exceed the total of any payments made by the United States to the claimant or its parent

[98] FEMA was transferred to the Department of Homeland Security by Pub. L. No. 107-296, § 503, 166 Stat. 2135, 2213 (Nov. 25, 2002).

jurisdiction for the support of fire services on the property in question, including taxes and payments in lieu of taxes.

FEMA, upon determining the amount allowable, must forward it to the Treasury Department for payment. The Comptroller General has determined that section 11 constitutes a permanent indefinite appropriation for the payment of these claims. B-160998, Apr. 13, 1978. Disputes under section 11 may be adjudicated in the United States Claims Court. FEMA has issued implementing regulations at 44 C.F.R. pt. 151.[99]

Notwithstanding this authority, the decisions discussed previously in this section remain significant for several reasons. First, they define the extent to which an agency may use its own appropriations apart from section 11. Second, they define the extent to which an agency may contract for fire protection services. Finally, section 11 provides that payment shall be subject to reimbursement by the federal agency under whose jurisdiction the fire occurred, "from any appropriations which may be available or which may be made available for the purpose." Although no decision has been rendered on this point, it would seem that the existing body of decisions provides a starting point in determining the extent to which an agency's operating appropriations "may be available" to make this reimbursement.

c. Other Municipal Services

The principles involved in the firefighting cases are relevant to other municipal services as well.

The closest analogy is police protection. Like fire protection, police protection is a mandatory governmental function. Thus a municipality may not levy direct charges against the United States for ordinary police protective services provided within its area of jurisdiction. 49 Comp. Gen. 284, 286–87 (1969); B-187733, Oct. 27, 1977. However, the United States may pay on a *quantum meruit* basis for police services over and above the ordinary level, where the city is not required to provide such extraordinary services and where the same charge would be imposed on nonfederal users in like circumstances. Examples are: extra police for special events such as football games at the Coast Guard Academy

[99] Section 2465 of Title 10 of the United States Code prohibits DOD contracts for firefighting or security guard functions, although this provision has been suspended during Operation Enduring Freedom by Pub. L. No. 107-56, title X, § 1010, 115 Stat. 272, 395 (Oct. 26, 2001).

(49 Comp. Gen. at 287) and special police details at Bicentennial ceremonies (B-187733, Oct. 27, 1977).

The same principles have been applied to emergency ambulance services required to be furnished by a municipality. 49 Comp. Gen. at 286. However, contracts with state or local governments or private entities for ambulance services have been held permissible where there was no requirement for the political subdivision involved to provide ambulance services without direct charge. 51 Comp. Gen. 444 (1972), *modifying* B-172945, June 22, 1971; B-198032, June 3, 1981. Another example is the maintenance of public highways. *See* B-199205, Apr. 27, 1981.

A charge for services rendered by a state or local government to the United States is to be distinguished from a tax; the former may be paid while the latter may not. *E.g.*, 20 Comp. Gen. 748 (1941). While this distinction does not apply to mandatory governmental functions such as police and fire protection, it has frequently been cited in connection with such things as water and sewer services. As a general proposition, a charge for water and/or sewer services is a permissible service charge rather than a tax if it is based on the *quantum* of direct services actually furnished. A federal agency may generally pay service charges such as those for municipal sewer service, so long as the charges represent the fair and reasonable value received by the United States for the services. GAO has also held that, in the context of utility services, where rates are established by a legislative body, such rates are controlling unless they are manifestly unjust, unreasonable, or discriminatory. 73 Comp. Gen. 1 (1993). (In that 1993 case, GAO questioned discounts built into the city's fee structure that were not afforded to the federal agency, and held that the sewer charge may be paid only to the extent that the city makes and documents a nondiscriminatory assessment for the reasonable value of sewer services rendered.) *See* 31 Comp. Gen. 405 (1952) (assessment for water/sewer services levied on citywide basis rather than quantum of service rendered held a tax); 29 Comp. Gen. 120 (1949) (sewer service charge held payable on *quantum meruit* basis); 20 Comp. Gen. 206 (1940) (water charge held to be a tax where it was levied as a flat charge rather than on the basis of actual water consumption). *See also* 49 Comp. Gen. 284 (1969); B-243004, Sept. 5, 1991; B-168024, Dec. 13, 1973; B-105117, Mar. 16, 1953.

Also, in 70 Comp. Gen. 687 (1991), GAO held that the Forest Service may pay county landfill user fees as a reasonable service charge, analogous to other utility services provided the government, since the charge was based on levels of service provided and appeared nondiscriminatory.

A reasonable charge based on the *quantum* of direct services actually furnished need not be considered a tax even though the services in question are provided to the taxpayers of the political subdivision without a direct charge, provided of course that the political subdivision is not required by law to furnish the service without direct charge. Such a charge may be paid if it is applied equally to all tax-exempt property, but not if it applies only to federal tax-exempt property. 50 Comp. Gen. 343 (1970).

A sewer service charge which is otherwise proper may be paid in advance if required by local law, notwithstanding 31 U.S.C. § 3324. 73 Comp. Gen. 1 (1993). The government's liability would also include late payment penalties to the extent required by local law. 39 Comp. Gen. 285 (1959).

GAO has applied the same principles to charges for 9-1-1 emergency services. In a series of cases, GAO examined 9-1-1 charges in several states and found that they amounted to a tax and therefore could not be assessed against the United States or its agencies. 66 Comp. Gen. 385 (1987) (Florida); 65 Comp. Gen. 879 (1986) (Maryland); 64 Comp. Gen. 655 (1985) (Texas); B-300737, June 27, 2003 (Alabama); B-230691, May 12, 1988 (Tennessee); B-239608, Dec. 14, 1990 (nondecision letter) (Rhode Island). One decision stated:

> "In our view, telephone access to police, fire and other municipal services, is intrinsically connected to the services themselves. The fact that 9-1-1 service is more technologically sophisticated than normal telephone access does not change its essential character."

66 Comp. Gen. at 386. In each case, the charges were included in telephone bills, with the telephone company acting as collection agent for the relevant governmental authority. As noted in 66 Comp. Gen. 385, 387, a 9-1-1 fee might be properly payable if a telephone company installed and operated the system itself and, as with directory assistance for example, offered the service as a component of its regular communications services. However, in none of the situations examined was this the case.

Several characteristics of the systems support the conclusion of nonliability: the service is provided by a local government or quasi-governmental unit; public funding of the service requires legal authority such as an ordinance or referendum; and the charge is not related to actual levels of service but is based on a flat rate per telephone line. 65 Comp. Gen. at 881. It is irrelevant that the 9-1-1 charge is called a "service charge"

(B-230691) or a "service fee" (64 Comp. Gen. 655), or that state law provides that the charge shall not be construed as a tax (B-230691), or that the local government has threatened to cut off access (66 Comp. Gen. 385). The same analysis produced the same result in B-227388, Sept. 3, 1987, in which a municipality tried to charge a federal agency a registration fee for 9-1-1 services.

The distinction between "vendor taxes" and "vendee taxes" discussed later in this chapter, that is, the applicability or nonapplicability to the government depending on the "legal incidence" of the tax, applies as well to 9-1-1 charges. When the legal incidence of a tax falls directly on the federal government as the "vendee," the tax is not payable unless expressly authorized by Congress. 64 Comp. Gen. 655, 656–57 (1985). On the other hand, if the legal incidence of the tax falls directly on a business enterprise (the "vendor"), which is supplying the federal government as a customer with goods or services, immunity does not apply. 61 Comp. Gen. 257 (1982). Thus, in B-238410, Sept. 7, 1990, GAO considered the Arizona 9-1-1 statute, found that it was a vendor tax and, distinguishing the prior 9-1-1 decisions, concluded that it could be assessed against the federal government.

A final group of cases involves the installation of traffic signals. At one point, GAO took the position, subsequently modified, that appropriated funds could not be used to pay for or contribute to the installation of traffic signals on public roads or highways, regardless of the resulting benefit to the government. Traffic control, so the reasoning went, is a municipal service financed by tax revenues the same as police or firefighting services, for which payment by a federal agency is not permissible. 51 Comp. Gen. 135 (1971); 36 Comp. Gen. 286 (1956).

A different situation was presented in 55 Comp. Gen. 1437 (1976). There, a state highway bisected an Army installation and the Army wanted to install a traffic light to regulate traffic at the intersection of the state highway and a road on the Army facility. Local authorities had agreed to repair and maintain the light if the Army would purchase and install it. Since the light would be located on federal property and would be for the primary benefit of the federal facility, even though it would regulate traffic on the state highway as well, GAO distinguished the prior cases and concluded that the Army could use its appropriations for the proposed expenditure.

In 1982, GAO modified the prior decisions and held that traffic signals at or near a federal facility, where the federal facility is the primary beneficiary

and benefit to the general public is incidental, should be governed by the same tests applicable to other municipal services. If the state or local government is legally required to provide the service to all residents free of charge, the federal agency may not pay. If, however, the service is not legally required and the charge does not discriminate against the United States—that is, any other resident would be subject to a similar charge—then the appropriations of the benefiting agency may be used. 61 Comp. Gen. 501 (1982).

Does the primary benefit shift where the federal agency is leasing the property from a private owner? GAO said no in 65 Comp. Gen. 847 (1986), but the lease in that case was to continue for at least another 6 years. *Compare* 71 Comp. Gen. 4 (1991). The answer would presumably be different if the agency was about to vacate, but the decision does not purport to address precisely where the line should be drawn.

8. Gifts and Awards

a. Gifts

An agency frequently wants to use gifts to attract attention to the agency or to specific programs. For example, gifts can be used as recruiting tools, to commemorate an event, or to inform the public or agency employees about the agency. Appropriated funds may not be used for personal gifts, unless, of course, there is specific statutory authority. 68 Comp. Gen. 226 (1989). To state the rule in this manner is to make it appear rather obvious. If, for example, a General Counsel decided it would be a nice gesture and improve employee morale to give each lawyer in the agency a Thanksgiving turkey, few would argue that the expense should be borne by the agency's appropriations. Appropriated funds could not be used because the appropriation was not made for this purpose (assuming, of course, that the agency has not received an appropriation for Thanksgiving turkeys) and because giving turkeys to lawyers is not reasonably necessary to carry out the mission at least of any agency that now exists. Most cases, however, are not quite this obvious or simple.

The cases generally involve the application of the necessary expense doctrine, and, as with any necessary expense analysis, the result turns on whether the item will directly further the agency's mission. Occasionally, an item that would typically be viewed as a personal gift may, in other circumstances, help advance an agency's mission. In making the analysis, it makes no difference whether the "gift items" are given to federal employees

or to others. The connection is either there or, far more commonly, it is not. In each of the cases in which funds have been found unavailable, there was a certain logic to the agency's justification, and the amount of the expenditure in many cases was small. The problem is that, in most cases, were the justification put forward by the agency deemed sufficient, there would be no stopping point. If a free ashtray might generate positive feelings about an agency or program or enhance motivation, so would a new car or an infusion of cash into the bank account. The rule prohibiting the use of appropriated funds for personal gifts reflects the clear potential for abuse. Because a necessary expense analysis is, of course, case specific, it is impossible to draw a rational line identifying those gift items that are acceptable and those that are not. That certainly is evident from the discussion that follows. It is important that anyone confronting a "gift" issue scrutinize the case law carefully to appreciate distinctions that may not be apparent at first read.

In 53 Comp. Gen. 770 (1974), a certifying officer for the Small Business Administration (SBA) asked GAO to rule on the propriety of an expenditure for decorative ashtrays that were distributed to federal employee participants of a conference sponsored by that agency. By passing out ashtrays, the agency intended that they would generate conversation concerning the conference and thereby further SBA's objectives by serving as a reminder of the purposes of the conference. The decision held that the justification given by the agency was not sufficient because the recipients of the ashtrays were federal officials who were already charged by law to cooperate with the objectives of SBA. Thus, there was no necessity that ashtrays be given away. The ashtrays were properly designated as personal gifts.

Contrast the SBA decision, however, with a 1993 Veterans Affairs decision. In B-247563.2, May 12, 1993, GAO approved the distribution by the Department of Veterans Affairs (VA) of imprinted book matches and imprinted jar grip openers at the Oklahoma State Fair for recruiting purposes and to provide veterans with a number to call to obtain information. VA's appropriation explicitly authorized it to create exhibits and other material to accomplish its mission. This case stated the general rule regarding the use of appropriated funds to purchase gifts:

> "Under the 'necessary expense rule,' an agency may not purchase items in the nature of gifts or souvenirs unless there is a direct link between the items and the purpose of the appropriation charged. Stated differently, in order to

> justify purchasing novelty items or personal gifts with appropriated funds, an agency must demonstrate that the items will directly further its mission."

Applying this rule to the VA's matches and jar openers, GAO concluded that it was "entirely appropriate for the [VA] to attempt to attract the attention of those attending the event," and that the means chosen were "appropriate for the objective to be accomplished."

In this section, we provide a short discussion of decisions in which we concluded that the item at issue was a gift. We follow that with a discussion of decisions in which we found that items ordinarily considered to be gifts were connected to carrying out the agency's mission. The discussion, of course, does not identify all of our gift decisions and, while we provide our holdings, the discussion does not substitute for a full analysis of these decisions. We encourage the reader to use the discussion as a tool for honing his or her research.

In 54 Comp. Gen. 976 (1975), specially made key chains, which were distributed to educators who attended seminars sponsored by the Forest Service, were determined to be personal gifts despite the Department of Agricultures claim that their distribution would generate future responses from participants. That decision stated:

> "The appropriation …proposed to be charged with payment for the items in question is available for '…expenses necessary for forest protection and utilization….' Since the appropriation is not specifically available for giving key chains to individuals, in order to qualify as a legitimate expenditure it must be demonstrated that the acquisition and distribution of such items constituted a necessary expense of the Forest Service."

The decision concluded that the key chains were not necessary to implement the appropriation and were, therefore, improper expenditures.

This line of reasoning was also used in 57 Comp. Gen. 385 (1978). There it was held that novelty plastic garbage cans containing candy in the shape of solid waste, which were distributed by the Environmental Protection Agency to attendees at an exposition, were personal gifts. The agency's argument that the candy was used to attract people to its exhibit on the

Resource Conservation and Recovery Act and therefore to promote solid waste management was not sufficient to justify the expenditure.

In B-195247, Aug. 29, 1979, the Comptroller General held that an expenditure of appropriated funds for the cost of jackets and sweaters as holiday gifts to corpsmen at a Job Corps Center with the intent of increasing morale and enhancing program support was unauthorized. It was determined that these were not a necessary and proper use of appropriated funds and therefore were personal gifts.

The following cases are additional illustrations of expenditures that were found to be in the nature of personal gifts and therefore improper:

- T-shirts stamped with Combined Federal Campaign logo to be given to employees contributing a certain amount. 70 Comp. Gen. 248 (1991).

- Winter caps purchased by National Oceanographic and Atmospheric Administration to be given to volunteer participants in weather observation program to create "*esprit de corps*" and enhance motivation. B-201488, Feb. 25, 1981.

- Photographs taken at the dedication of the Klondike Gold Rush Visitor Center to be sent by the National Park Service as "mementos" to persons attending the ceremony. B-195896, Oct. 22, 1979.

- "Sun Day" buttons procured by the General Services Administration (GSA) and given out to members of the public to show GSA's support of certain energy policies. B-192423, Aug. 21, 1978.

- Agricultural products developed in Department of Agriculture research programs (gift boxes of convenience foods, leather products, paperweights of flowers imbedded in plastic) to be given to foreign visitors and other official dignitaries. B-151668, June 30, 1970.

- Cuff links and bracelets to be given to foreign visitors by the Commerce Department to promote tourism to the United States. B-151668, Dec. 5, 1963; B-151668, June 28, 1963 (same case).

- Baseball caps purchased by the Department of Energy to be given to nonemployees for personnel recruitment purposes. B-260260, Dec. 28, 1995.

- Pens, scissors, and shoe laces purchased by the then Veterans Administration (VA) to be given to potential employees for recruiting purposes, which were nothing more than "favorable reminders of VA" and did not facilitate VA's acquisition of information necessary to its recruiting efforts. B-247563.3, Apr. 5, 1996.

- Gift certificates to local restaurants and silk plants distributed by the then Veterans Administration in celebration of women's Equality Week, where there was no evidence of how these items advanced the agency's celebration. *Id.*

In these cases, while we gave considerable weight to the agency's administrative determination of necessity, it was not controlling. *See*, *e.g.*, B-151668, Dec. 5, 1963.

What follows is a discussion of some expenditures that resemble personal gifts, but which we approved because they were found necessary to carry out the purposes of the agency's appropriation. For example, in B-193769, Jan. 24, 1979, it was held that the purchase and distribution of pieces of lava rocks to visitors of the Capulin Mountain National Monument was a necessary and proper use of the Interior Department's appropriated funds. The appropriation in question was for "expenses necessary for the management, operation, and maintenance of areas and facilities administered by the National Park Service …." The distribution of the rocks furthered the objectives of the appropriation because it was effective in preserving the Monument by discouraging visitors from removing lava rock elsewhere in the Monument. Thus, the rocks were not considered to be personal gifts.

Similarly, GAO concluded in B-230062, Dec. 22, 1988, that the Army could use its appropriations to give away framed recruiting posters as "prizes" in drawings at national conventions of student organizations. The students had to fill out cards to enter the drawings, and the cards would provide leads for potential recruits. Also, the Army is authorized to advertise its recruitment program, and posters are a legitimate form of advertising.

Another case in which GAO found adequate justification is 68 Comp. Gen. 583 (1989), concluding that the U.S. Mint may give complimentary specimens of commemorative coins and medals to customers whose orders have been mishandled. Since customers who do not receive what they paid for may be disinclined to place further orders, the goodwill gesture of

giving complimentary copies to these customers would directly contribute to the success of the Mint's commemorative sales program.

In another case involving buttons, 72 Comp. Gen. 73 (1992), GAO responded to a request from the Comptroller of the Environmental Protection Agency for an opinion on the availability of appropriated funds to acquire buttons and magnets inscribed with messages related to indoor air quality, concluding that appropriated funds were available for such items. GAO discussed and distinguished cases such as 53 Comp. Gen. 770 (SBA decorative ashtrays) and 54 Comp. Gen. 976 (key chains for participants at Forest Service seminars), above, noting that the buttons and magnets, "unlike a container of candy, a key chain, or an ice scraper," had "no real use other than to convey a message." 72 Comp. Gen. at 74. Also key was the "direct link between the items and an authorized agency function," which involved conveying a message to increase public awareness of indoor air quality. *Id.*

In yet another "button" case, B-257488, Nov. 6, 1995, GAO concluded that the Food and Drug Administration could use appropriated funds to purchase "No Red Tape" buttons for employees to wear at work. GAO noted that the buttons had "no intrinsic value" to the recipients and served solely to assist the achievement of agency objectives. The agency had demonstrated "the requisite nexus between its appropriation's purpose and the 'No Red Tape' buttons. The message [was] clearly informational and directed at the promotion of an internal agency management objective."

In B-280440, Feb. 26, 1999, GAO approved a plan by the Immigration and Naturalization Service to purchase medals to be worn by uniformed employees of the Border Patrol to commemorate the Border Patrol's 75th anniversary. Citing the FDA "No Red Tape" button case, B-257488, above, GAO noted first that the medals would not be gifts, but rather part of a Border Patrol agent's uniform. Additionally, GAO observed that, "The medals convey as well as serve an institutional purpose—*i.e.*, reminding the public and agency staff of the Border Patrol's …history and mission and promoting the stability and longevity of the agency."

In a case involving GAO's own appropriations, GAO cited several of the above cases in support of GAO's distribution of GAO-logo coffee mugs to new employees and highlighter pens and post-it notes to potential recruits. B-287241, Aug. 21, 2001 (nondecision letter). The mugs, pens, and note pads had all been imprinted with a new GAO logo, "Accountability, Integrity and Reliability," and had already been supplied to current GAO

staff as part of a larger campaign to instill GAO's priorities. Some items were provided to new employees as part of an orientation package to educate them in GAO's priorities. The pens and pads, along with other materials about GAO, were provided to potential recruits to inform them of GAO's priorities. *Id.*

b. Contests

(1) Entry fees

The Comptroller General has held that payment of an entry fee to enter agency publications in a contest sponsored by a private organization is improper and cannot be justified as a necessary expense, at least where the prize is a monetary award to be given to the editors of the winning publications. B-164467, June 14, 1968.

However, payment of a contest entry fee may be permissible where the prize is awarded to the agency and not to the individuals and where there is sufficient justification that the expense will further the objects of the appropriation. B-172556, Dec. 29, 1971. The Comptroller General pointed out in that decision that whether appropriated funds may be used to enter a contest will depend on the nature of the contest, the nature of the prizes and to whom they are awarded, and the sufficiency of the administrative justification.

Thus, the Bureau of Mines could use its appropriations to enter an educational film it produced in an industrial film festival where entry was made in the Bureau's name, awards would be made to the Bureau and not to any individuals, and there was adequate justification that entry would further the Bureau's function of promoting mine safety. B-164467, Aug. 9, 1971.

In recent years, the issue of the use of appropriated funds to pay contest entry fees has come up in the context of athletic contests. See section C.5.e of this chapter, "Recreational and Welfare Facilities for Government Personnel." In each case, funds were found not to be available for the entry fee in question. *See*, *e.g.*, 73 Comp. Gen. 169 (1994) (Department of Energy employees participating in competitive fitness promotion, team activities, and sporting events); B-247563.3, Apr. 5, 1996 (Department of Veterans Affairs payment of "sponsor fee" at a local "Corporate Challenge" in which employees participated); B-262008, Oct. 23, 1996 (Army Corps of Engineers employees participating in a "Corporate Cup Run" sponsored by the American Lung Association).

(2) Government-sponsored contests

In an early case, the Navy wanted to use its appropriation for naval aviation to sponsor a competition for the design of amphibious landing gear for Navy aircraft. Cash prizes would be awarded for the two most successful designs. The Comptroller General ruled, however, that the proposed expenditure was unauthorized because the prizes were not related to the reasonable value of the services of the successful contestants and because the appropriation contemplated that the design and development work would be performed by Navy personnel. 5 Comp. Gen. 640 (1926). *See also* B-247563.3, Apr. 5, 1996 (Department of Veterans Affairs purchase of restaurant gift certificates and a silk plant "for distribution as prizes during women's Equality Week" not permissible).

While 5 Comp. Gen. 640 may be said to express a general rule, later decisions have permitted agencies to, in effect, sponsor contests and competitions where artistic design was involved. Thus, in A-13559, Apr. 5, 1926, the Arlington Memorial Bridge Commission wanted to invite several firms to submit designs for a portion of the Arlington Memorial Bridge. Each design accepted by the Commission would be purchased for $2,000, estimated to approximate the reasonable cost of preparing a design. Since the $2,000 was reasonably related to the cost of producing a design, GAO viewed the proposal as amounting to a direct purchase of the satisfactory designs and distinguished 5 Comp. Gen. 640 on that basis. A significant factor was that the bridge was intended not merely as a functional device to cross the river but "as a memorial in which artistic features are a major, if not the primary, consideration."

This decision was followed in 9 Comp. Gen. 63 (1929), holding that the Marine Corps could offer a set sum of $1,000 for an acceptable original design for a service medal. The Comptroller General stated:

> "Competition in the purchase of supplies or articles for Government use in its most common form is for the purpose of securing specified supplies or articles at the lowest possible price. Where, however, the purpose is the selection of the most suitable and artistic design …, the primary value of the subject being in its design, the ordinary procedure may be reversed and the amount to be expended fixed in advance at a sum considered to be the reasonable value of the services solicited and the bidders requested to submit the best design which they can furnish for that sum."

Id. at 65.

The concept of A-13559 was followed and applied in several later decisions. *See* 19 Comp. Gen. 287, 288 (1939) (design of advertising literature for savings bonds); 18 Comp. Gen. 862 (1939) (plaster models for Thomas Jefferson Memorial); 14 Comp. Gen. 852 (1935) (bronze tablets and memorials for Boulder Dam); A-37686, Aug. 1, 1931 (monument at Harrodsburg, Kentucky, as first permanent settlement west of the Allegheny Mountains); A-35929, Apr. 3, 1931 (ornamental sculptured granite columns for the Arlington Memorial Bridge).

Thus, a prize competition *per se* is generally unauthorized in accordance with 5 Comp. Gen. 640. However, the procedure in A-13559 and its progeny is permissible where artistic features are the major consideration, and the amount awarded is related to the reasonable cost of producing the design.

Apart from the artistic design line of cases, an agency may be authorized to sponsor a contest under the necessary expense theory, if the expenditure bears a reasonable relationship to carrying out some authorized activity. For example, in B-158831, June 8, 1966, prizes were awarded to enrollees at a Job Corps Conservation Center in a contest to suggest a name for the Center newspaper. GAO held the expenditure permissible because the enabling legislation authorized the providing of "recreational services" for the enrollees, and the contest was viewed as a permissible exercise of administrative discretion in implementing the statutory objective.

In another case, the National Park Service sponsored a cross-country ski race in a national park and awarded trophies to the winners. The cost of the trophies could not be charged to appropriations for management, operation, and maintenance of the national park system. However, the Park Service also received appropriations for recreational programs in national parks, and the trophies could properly have been charged to that account. B-214833, Aug. 22, 1984. *See also* B-230062, Dec. 22, 1988.

GAO concluded in 70 Comp. Gen. 720 (1991) that the National Oceanic and Atmospheric Administration (NOAA) could pay cash prizes to certain fortunate fisherman returning "fish tags" to the government. The National Marine Fisheries Service issued such "fish tags," displaying questions about the circumstances under which the fish in question was caught, a return address, and the word "reward." When returned by fishermen, the fish tags provided information on the history and migration rates of the tagged fish. The fishermen were paid a reward of $5.00 for the return of each fish tag.

GAO concluded that the agency was "statutorily required to conduct research supporting fishery management" and therefore was required to "obtain information from the public." Since the fish tag awards facilitated acquisition of the needed information, the cost of the awards was reasonably necessary to the agency's accomplishment of an authorized purpose. *Id.* at 722. In this decision, GAO also considered an NOAA proposal to expand its reward program to include the alternative of participating in an annual drawing for a limited number of large cash prizes. This alternative was also approved. *Id.* at 723.

In B-286536, Nov. 17, 2000, GAO considered a proposal by the General Services Administration's Public Buildings Service (PBS) to use appropriated funds to pay for prizes in a drawing held in connection with customer satisfaction surveys. In order to develop customer satisfaction information, PBS distributed such customer surveys to employees of tenant-agencies in buildings it managed. PBS proposed the use of the Federal Buildings Fund to provide prizes to survey recipients whose names PBS chose in a drawing. Citing 70 Comp. Gen. 720 and B-230062, above, GAO observed that it had concluded in several instances that "agencies may use appropriated funds to provide prizes to individuals to further the collection of information necessary to the accomplishment of the agency's statutory mandate." This case differed in that PBS proposed to make awards to federal employees, rather than to the general public as in the cited cases. This was not determinative, however, since the federal employees would not be receiving prizes for what they already were required to do, and therefore they were "akin to the general public." There was "a direct connection between the purpose of the Fund and the use of prizes to increase the response rate to customer satisfaction surveys." Therefore, GAO had no objection to PBS's use of the Federal Buildings Fund for this purpose.

c. Awards

A number of early decisions established the proposition that, absent specific statutory authority, appropriations could not be used to purchase such items as medals, trophies, or insignia for the purpose of making awards. The rationale follows that of the gift cases. The prohibition was applied in 5 Comp. Gen. 344 (1925) (medals for winners of athletic events) and 15 Comp. Gen. 278 (1935) (annual trophies for Naval Reserve bases for efficiency). In 10 Comp. Gen. 453 (1931), the Comptroller General held that a general appropriation could be used to design and procure medals of honor for air mail flyers where the awarding of the medals had been authorized in virtually concurrent legislation. The general appropriation was viewed as available to carry out the specifically expressed intent of

Congress and the express authorization obviated any need for a more specific appropriation.

The rule was restated in 45 Comp. Gen. 199 (1965) and viewed as prohibiting the purchase of a plaque to present to a state to recognize 50 years of achievement in forestry. While the voucher in that case was paid because the plaque had already been presented, the decision stated that payment was for that instance only and that congressional authority should be sought if similar awards were considered desirable in the future. A more recent case applying the prohibition is B-223447, Oct. 10, 1986.

As with the gift cases, an occasional exception will be found based on an adequate justification under the necessary expense doctrine. One example, prompted perhaps by wartime considerations, is B-31094, Jan. 11, 1943, approving the purchase of medals or other inexpensive insignia (but not cash payments) to be awarded to civil defense volunteers for heroism or distinguished service.

Similarly, the Comptroller General held in 17 Comp. Gen. 674 (1938) that an appropriation, one of whose purposes was "accident prevention," was available to purchase medals and insignia (but not to make monetary awards) to recognize mail truck drivers with safe driving records. There was sufficient discretion under the appropriation to determine the forms "accident prevention" should take. However, the discretion in recognizing safe job performance does not extend to distributing "awards" of merchandise selected from a catalogue. B-223608, Dec. 19, 1988.[100] The same decision disapproved the distribution of ice scrapers imprinted with a safety message, based on the lack of adequate justification.

The prohibition does not apply to a government corporation with the authority to determine the character and necessity of its expenditures. 64 Comp. Gen. 124 (1984). (The expenditure in the case cited was to be made from donated funds.)

Several statutes now authorize the making of awards in various contexts. Perhaps the most important is the Government Employees' Incentive

[100] Merchandise in that case was distributed to more than 80 percent of the workforce at one project.

Awards Act, enacted in 1954 [101]and now found at 5 U.S.C. §§ 4501–4506. The Act authorizes an agency to pay a cash award to an employee who by his or her "suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paper work" or performs a special act or service in the public interest related to his or her official employment. 5 U.S.C. § 4503. The agency may also incur "necessary expenses" in connection with an incentive award. *Id.* Awards and related expenses under the Act are paid from appropriations available to the activity or activities benefited. The Office of Personnel Management is authorized to prescribe implementing regulations. 5 U.S.C. § 4506. OPM's regulations are found in 5 C.F.R. pt. 451. *See also Awards*, Department of Defense Civilian Personnel Manual, DOD 1400.25-M, subchapter 451 (Dec. 1996). A provision added in 1990, 5 U.S.C. § 4505a, authorizes cash awards for employees with fully successful performance ratings.[102]

The Incentive Awards Act applies to civilian agencies, civilian employees of the various armed services, the District of Columbia government, and specified legislative branch agencies. 5 U.S.C. § 4501. Within the judicial branch, it applies to the United States Sentencing Commission. *Id.*[103] While it does not apply to members of the armed forces, the Defense Department has very similar authority for military personnel in 10 U.S.C. § 1124.

GAO has issued a number of decisions interpreting the Government Employees' Incentive Awards Act. Thus, where an award is based on a suggestion resulting in monetary savings, the savings must be to government rather than nongovernment funds. 36 Comp. Gen. 822 (1957). Applying this principle, GAO found that a suggestion for changes in

[101] 68 Stat. 1112. This was an expansion of similar but more limited authority enacted in 1946 (60 Stat. 809). GAO reviewed the Acts effectiveness in U.S. General Accounting Office, *Federal Workforce: Federal Suggestion Programs Could Be Enhanced*, GAO/GGD-89-71 (Washington, D.C.: Aug. 1989).

[102] Section 207 of the Federal Employees Pay Comparability Act of 1990 (FEPCA), contained in section 529 of the fiscal year 1991 Treasury, Postal Service, and General Government Appropriation Act, Pub. L. No. 101-509, 104 Stat. 1389, 1457 (Nov. 5, 1990). The authority is effective only to the extent funds are provided in appropriation acts. FEPCA § 301, 104 Stat. 1461.

[103] The Sentencing Commission had not been covered prior to a 1988 amendment to the statute. *See* 66 Comp. Gen. 650 (1987). The Administrative Office of the United States Courts is no longer covered by the statute. Pub. L. No. 101-474, § 5(f), 104 Stat. 1100 (Oct. 30, 1990).

procedures that would decrease administrative expenses of state employment security offices would effect a savings to an appropriation for unemployment service administration grants to the states. Therefore, the appropriation was available to make an award to the employee who made the suggestion. 38 Comp. Gen. 815 (1959). An agency may make an award to an employee on detail from another agency. 33 Comp. Gen. 577 (1954). An agency may also make an award to one of its employees for service to a Federal Executive Board. B-240316, Mar. 15, 1991. *See also* 70 Comp. Gen. 16 (1990).

An interesting situation occurred in B-192334, Sept. 28, 1978. There, an employee made a suggestion that resulted in monetary savings to his own agency, but the savings would be offset by increased costs to other agencies. The decision concluded that, if the agency wanted to make an award on the basis of tangible benefits, it must measure tangible benefits to the government, that is, it must deduct the increased costs to other agencies from its own savings. However, the agency could view the suggestion as a contribution to efficiency or improved operations and make a monetary award based on intangible benefits.

As noted, the Act authorizes an agency to incur"necessary expenses" incident to its awards program. Thus, an agency may pay travel and miscellaneous expenses to bring recipients to Washington D.C. to participate in award ceremonies. 70 Comp. Gen. 440 (1991). These expenses are not chargeable against the statutory award ceiling. 32 Comp. Gen. 134 (1952). The agency may also pay travel expenses for the recipients spouse. 69 Comp. Gen. 38 (1989), *overruling* 54 Comp. Gen. 1054 (1975); B-235163.11, Feb. 13, 1996. Travel and miscellaneous expenses may also be paid to a surviving spouse to receive an award on behalf of a deceased recipient. B-111642, May 31, 1957. Where a recipient has a disability and cannot travel unattended, the travel and miscellaneous expenses of an attendant, whether or not a family member, may be paid. 55 Comp. Gen. 800 (1976).

The Act does not authorize "necessary expenses" incident to the receipt of an award from a nonfederal organization. 40 Comp. Gen. 706 (1961). *See*, *e.g.*, B-258216, July 27, 1995 (agency's payment for airline tickets for mother and brother of a deceased employee to attend nongovernmental awards ceremony honoring deceased employee not authorized). However, in limited situations where an award from a nonfederal organization is closely related to the recipients official duties, it may be possible to pay certain related expenses on other grounds. *See* 55 Comp. Gen. 1332 (1976).

As previously discussed in our section on entertainment, the Comptroller General has held that the "necessary expense" language of the Government Employees' Incentive Awards Act may include refreshments at an agency's awards ceremony. 65 Comp. Gen. 738 (1986). *See also* B-167835, Nov. 18, 1969. A 1990 decision applied the rationale of 65 Comp. Gen. 738 and held that an agency could pay a fee, which included a luncheon, for attendance at a Federal Executive Board regional award ceremony by agency employees who had been selected for awards and their supervisors. 70 Comp. Gen. 16 (1990). *See also* B-288536, Nov. 19, 2001 (buffet-style luncheon provided Bureau of Indian Affairs (BIA) employees attending awards ceremony); B-270199, Aug. 6, 1996 (cake at a Pension Benefit Guaranty Corporation awards ceremony); B-235163.11, Feb. 13, 1996 (National Science Foundation annual awards dinner).

In B-247563.4, Dec. 11, 1996, however, the Comptroller General ruled that the Government Employees' Incentive Awards Act does not authorize refreshments "in connection with an event or function designed to achieve other objectives simply because the agency distributes awards as part of the event or function." The purpose of authorized refreshments is to "facilitate public recognition of awards recipients" and this purpose would not be served where, as in this case, the awards recipients and the donor were the only participants in the event.

GAO explored the range of agency discretion in providing refreshments in connection with awards ceremonies in B-270327, Mar. 12, 1997. This case arose when the Defense Reutilization and Marketing Service (DRMS), in recognition of excellent agency performance, designated a worldwide "celebration day," on which it hosted luncheons for all DRMS employees and provided each employee a specially designed "Bucks Bunny" and "Reut Rabbit" T-shirt, as well as 4 hours of administrative leave. DRMS guidance authorized each DRMS location to spend up to $20 per person for accommodations and "incidental refreshments" in connection with the awards ceremonies. GAO considered the DRMS awards program in light of OPM's regulations implementing the Incentive Awards Act at 5 C.F.R. pt. 451, which, the decision concluded, "purposely leave it up to the agencies to design their award programs and make their own award decisions." GAO concluded that it was required to "respect and defer" to OPM's regulatory decisions and implicit delegation of authority to agencies to make implementing decisions so long as such decisions were consistent with essential requirements of the Act. Although GAO observed that the coverage of the "celebration day" was "broader than [it had] typically encountered in … prior decisions," it concluded that "unless arbitrary and

capricious, differences in degree do not invalidate the decisions made." The submitted vouchers were approved. *See also* B-288536, *supra* (BIA buffet).

Awards under the Act may take forms other than cash. Thus, in 55 Comp. Gen. 346 (1975), the Comptroller General held that the Army Criminal Investigation Command could award marble paperweights and walnut plaques to Command employees, including those who had died in the line of duty, if the awards conformed to the Act and applicable regulations. In situations not covered by the statute (*e.g.*, presentations to nongovernment persons to recognize cooperation and enhance community relations), however, such awards would be personal gifts and therefore improper. Similarly authorized as "honorary" awards are desk medallions (B-184306, Aug. 27, 1980); telephones of nominal value (67 Comp. Gen. 349 (1988)); $50 jackets bearing agency insignia (B-243025, May 2, 1991); coffee mugs and pens (B-257488, Nov. 6, 1995); tickets to local sporting events or amusement parks (B-256399, June 27, 1994); and meals or gift certificates for meals (B-271511, Mar. 4, 1997). Administrative leave can also be awarded if and to the extent authorized in Office of Personnel Managements (OPM) implementing regulations. 5 U.S.C. § 4502(e)(2).[104] *See also* B-208766, Dec. 7, 1982. Whether the award is monetary or nonmonetary, the act or service prompting it must be related to official employment. 70 Comp. Gen. 248 (1991) (the Government Employees' Incentive Awards Act does not authorize giving T-shirts to Combined Federal Campaign contributors). *See also* 71 Comp. Gen. 145 (1992) (contractor in 70 Comp. Gen. 248 not entitled to payment for shirts provided to government).

The Act does not authorize cash awards based merely on length of service or upon retirement. However, honorary noncash awards are permissible. For example, the Department of Agriculture wanted to present to retiring members of its Office of Inspector General engraved plastic holders containing their credentials. GAO found this authorized by the Act. 46 Comp. Gen. 662 (1967). The use of incentive awards for good sick leave records is inappropriate. 67 Comp. Gen. 349 (1988), *cited in National Association of Government Employees Local R1-109*, 53 F.L.R.A. 271, Aug. 15, 1997.

The making of an award—and therefore the refusal to make an award—under the Government Employees' Incentive Awards Act is discretionary.

[104] Added by FEPCA, *supra*, § 201, 104 Stat. at 1455.

Rosano v. United States, 9 Cl. Ct. 137, 144–45 (1985), *aff'd*, 800 F.2d 1126 (Fed. Cir. 1986), *cert. denied*, 480 U.S. 907 (1987). As such, it is reviewable only for abuse of discretion. *E.g.*, *Shaller v. United States*, 202 Ct. Cl. 571, *cert. denied*, 414 U.S. 1092 (1973). A labor relations arbitrator may order an agency to prepare and submit an award recommendation, but cannot order the agency to actually make the award. 56 Comp. Gen. 57 (1976).

In B-202039, Apr. 3, 1981, *aff'd upon reconsideration*, B-202039, May 7, 1982, two employees filed a claim where their agency had given them a cash award several years after implementing their suggestion. They claimed interest on the award, lost imputed investment earnings, an inflation adjustment, and compensation for higher income taxes paid as a result of the delay. The claim was denied. In the May 1982 decision, GAO pointed out that an agency's own regulations can have the effect of limiting the discretion it would otherwise have under the statute. *See also Griffin v. United States*, 215 Ct. Cl. 710 (1978). Thus, agency regulations can commit the agency to making an award if it adopts a suggestion. However, this does not create an entitlement to interest.

Finally, the Government Employees' Incentive Awards Act is limited to government employees. Since no similar authority exists for persons other than government employees, an award may not be made to a nongovernment employee who submits a suggestion resulting in savings to the government. B-160419, July 28, 1967. The limitation to government employees is also noted in two internal GAO memoranda. B-224071-O.M., Aug. 3, 1987 (GAO appropriations not available for cash awards to contract security guards); B-176600-O.M., Aug. 18, 1978 (appropriations of agencies funding the Joint Financial Management Improvement Program not available to make cash awards to other than federal employees).

In addition to the Government Employees' Incentive Awards Act, several other statutes authorize various types of awards. Some examples are:

- 5 U.S.C. § 5384: authorizes lump-sum cash performance awards to members of the Senior Executive Service. Some representative decisions are 68 Comp. Gen. 337 (1989), 64 Comp. Gen. 114 (1984), and 62 Comp. Gen. 675 (1983).

- 10 U.S.C. § 1125 and 14 U.S.C. § 503: authorize the Defense Department and the Coast Guard, respectively, to award trophies and badges for certain accomplishments. *See* 71 Comp. Gen. 346 (1992) (Air Force purchase of belt buckles as awards for participants in "Peacekeeper

Challenge" competition permissible under 10 U.S.C. § 1125). The Coast Guard statute includes cash prizes. The statutes have been narrowly construed as limited essentially to proficiency in arms and related skills. 68 Comp. Gen. 343 (1989) (Coast Guard); 27 Comp. Gen. 637 (1948) (discussing predecessor of 10 U.S.C. § 1125).

- 5 U.S.C. §§ 4511–4513: Inspector General of an agency may make cash awards to employees whose disclosure of fraud, waste, or mismanagement results in cost savings for the agency. For an agency without an Inspector General, the agency head is to designate an official to make the awards. The President may make the awards where the cost savings accrue to the government as a whole. GAO reviews under this legislation indicate that the authority has been used sparingly, but that actual or projected cost savings appear reasonable in those cases where awards have been made.[105]

9. Guard Services: Anti-Pinkerton Act

a. Evolution of the Law Prior to 57 Comp. Gen. 524

On July 6, 1892, in Homestead, Pennsylvania, a riot occurred between striking employees of the Carnegie, Phipps & Company steel mill and approximately 200 Pinkerton guards. The company had brought in the Pinkerton force ostensibly to protect company property. As the Pinkertons were being transported down the Monongahela River, the strikers sighted them and began firing on them. The strikers were heavily armed, and even had a cannon on the riverbank. The violence escalated to the point where the strikers spread oil on the water and ignited it. Several of the Pinkerton men were killed and several of the strikers were indicted for murder. The riot received national attention.

The then-common practice of employing armed Pinkerton guards as strikebreakers in labor disputes became an emotionally charged issue. The Homestead riot, together with other similar although less dramatic incidents, made it clear that the use of these guards provoked violence. Although Congress was reluctant to legislate against their use in the private

[105] U.S. General Accounting Office, *Federal Workforce: Low Activity in Awards Program for Cost Savings Disclosures*, GAO/GGD-88-22 (Washington, D.C.: Dec. 18, 1987); *Executive Agencies Employee Cash Awards Program for Disclosure of Fraud, Waste, or Mismanagement*, GAO/GGD-84-74 (Washington, D.C.: May 8, 1984).

sector, some congressional action became inevitable. The result was the law that came to be known as the Anti-Pinkerton Act. Originally enacted as part of the Sundry Civil Appropriation Act of August 5, 1892, 27 Stat. 368, it was made permanent the following year by the Act of March 3, 1893, ch. 208, 27 Stat. 591. Now found at 5 U.S.C. § 3108, the Act provides:

> "An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government of the United States or the Government of the District of Columbia."

As we will see, the statute has little impact today. Nevertheless, it remains on the books and could become relevant, albeit only in unusual circumstances. Therefore, it may be useful to briefly record the administrative interpretations of the law.

Although the Anti-Pinkerton Act was never the subject of any judicial decisions until the late 1970s, it was the subject of numerous decisions of the Comptroller General and the Comptroller of the Treasury. Several principles evolved through the decisions.

1. The Act applies to contracts with "detective agencies" as firms or corporations as well as to contracts with or appointments of individual employees of such agencies. 8 Comp. Gen. 89 (1928); A-12194, Feb. 23, 1926.

2. The Act prohibits the employment of a detective agency or its employees, regardless of the character of the services to be performed. The fact that such services are not to be of a "detective" nature is immaterial. Thus, detectives or detective agencies within the scope of the Act may not be employed in *any* capacity. 51 Comp. Gen. 494 (1972); 26 Comp. Gen. 303 (1946).

3. The statutory prohibition applies only to direct employment. It does not extend to subcontracts entered into with independent contractors of the United States. 26 Comp. Gen. 303. The legislative history of the original 1892 statute made it clear that Congress did not intend to reach subcontracts. However, the Act does apply to a contract under the Small Business Administration (SBA) set-aside program since the contract is a prime contract *vis-à-vis* SBA even though it may be a subcontract *vis-à-vis* the actual employing agency. 55 Comp. Gen. 1472 (1976).

4. Although the Comptroller General never defined "detective agency" for purposes of the Anti-Pinkerton Act, the decisions drew a distinction between detective agencies and protective agencies and held that the Act did not forbid contracts with the latter. 38 Comp. Gen. 881 (1959); 26 Comp. Gen. 303 (1946); B-32894, Mar. 29, 1943. Thus, the government could employ a protective agency, but could not employ a detective agency to do protective work. An important test became whether the organization was empowered to do general investigative work.

5. In determining whether a given firm is within the statutory prohibition, GAO considers the nature of the functions it may perform as well as the functions it in fact performs. Two factors are relevant here—the firm's authority under its corporate charter and its powers under licensing arrangements in the states in which it does business. If a firm is chartered as a detective agency and licensed as a detective agency, then the fact that it does not actually engage in detective work will not permit it to escape the statutory prohibition. Since virtually every corporation inserts in its charter an "omnibus" clause ("engage in any lawful act or activity for which corporations may be organized in this state" or similar language), an omnibus clause alone will not make a company a detective agency. Rather, specific charter authorization is needed. 41 Comp. Gen. 819 (1962); B-146293, July 14, 1961.

6. The government may employ a wholly owned subsidiary of a detective agency if the subsidiary itself is not a detective agency, even if the subsidiary was organized primarily or solely to avoid the Anti-Pinkerton Act. As long as there is *prima facie* separation of corporate affairs, the Act does not compel the government to "pierce the corporate veil." 44 Comp. Gen. 564 (1965); 41 Comp. Gen. 819 (1962); B-167723, Sept. 12, 1969.

7. A telephone listing alone is not sufficient evidence that a given firm is a "detective agency" for purposes of 5 U.S.C. § 3108, although the fact of such a listing should prompt further inquiry by the procuring agency. 55 Comp. Gen. 1472 (1976); B-181684, Mar. 17, 1975; B-176307(1), Mar. 21, 1973; B-177137, Feb. 12, 1973.

8. Corrections to charters and licenses may be made prior to contract award to avoid Anti-Pinkerton Act violations. Post-award corrections, while perhaps relevant to future procurements, do not, absent compelling circumstances, retroactively expunge ineligibility existing at

the time of the award. 56 Comp. Gen. 225 (1977); B-172587, June 21, 1971; B-161770, Nov. 21, 1967; B-160538, Nov. 15, 1967; B-156424, July 22, 1965.

These principles were discussed and applied in many decisions over the years. For example, a contract for guard services was found to violate the Act where the contractor was expressly chartered and licensed as a detective agency. 55 Comp. Gen. 1472, *aff'd upon reconsideration*, 56 Comp. Gen. 225. Similarly, a contract with a sole proprietorship was invalid where the owner was also the president of a corporation chartered and licensed as a detective agency. B-186347, B-185495, Oct. 14, 1976, *aff'd upon reconsideration*, B-186347, B-185495, Mar. 7, 1977.

By the 1970s, the Anti-Pinkerton Act had become a hindrance to the government's guard service contracting activities. The federal government is a major consumer of guard services, and it was the rare solicitation that did not generate a squabble over who was or was not subject to the Act. Many companies, including Pinkerton itself, were forced to form subsidiaries in order to compete for government business.

b. 57 Comp. Gen. 524 and the Present State of the Law

The first reported judicial decision dealing with the Anti-Pinkerton Act was *United States ex rel. Weinberger v. Equifax*, 557 F.2d 456 (5th Cir. 1977), *cert. denied*, 434 U.S. 1035 (1978). The issue in that case was whether the Act applied to a credit reporting company. The Comptroller General, in B-139965, Jan. 10, 1975, had already held that it did not. The court reached the same result, although on different reasoning. Relying heavily on the Act's legislative history, the court held:

> "In light of the purpose of the Act and its legislative history, we conclude that an organization is not 'similar' to the (quondam) Pinkerton Detective Agency unless it offers quasi-military armed forces for hire."

557 F.2d at 463.

In a June 1978 circular letter to department and agency heads, published at 57 Comp. Gen. 524 (1978), the Comptroller General announced that GAO would follow the *Equifax* interpretation in the future. Therefore, the statutory prohibition will now be applied only if an organization can be said to offer quasi-military armed forces for hire. The Comptroller General declined, as did the Fifth Circuit, to attempt a definition of a quasi-military armed force but noted that, whatever it might mean, "it seems clear that a

company which provides guard or protective services does not thereby become a 'quasi-military armed force,' even if the individual guards are armed." 57 Comp. Gen. at 525. It follows that whether that company also provides investigative or detective services is no longer relevant. The first decision applying this new standard was 57 Comp. Gen. 480 (1978).

Prior to the *Equifax* decision, GAO had gone on record as favoring repeal of the Anti-Pinkerton Act. *See*, *e.g.*, 56 Comp. Gen. 225, 230 (1977). In light of the *Equifax* case and 57 Comp. Gen. 524, the case for repeal is considerably lessened. The statute is no longer a major impediment to legitimate guard service contracting, and certainly most would agree that the government should not deal with an organization that offers quasi-military armed forces for hire.

With the issuance of 57 Comp. Gen. 524 and 57 Comp. Gen. 480, GAO reviewed the prior decisions under the Anti-Pinkerton Act and designated them as either overruled or modified. If the result in the earlier case would have remained the same under the new standard, the decision was only "modified." If the new standard would have produced a different result, the earlier decision was "overruled." This is important because 57 Comp. Gen. 524 did not simply throw out all of the old rules. What it did is eliminate the "protective versus investigative" distinction and adopt the *Equifax* standard as the definition of a proscribed entity. Thus, an organization will no longer violate the Act by providing general investigative services; it will violate the Act only if it "offers quasi-military armed forces for hire." 57 Comp. Gen. at 525. If a given organization were found to offer quasi-military armed forces for hire—an event that is viewed as unlikely although not impossible—the rules in the earlier decisions would still be applicable even though the decisions themselves have been technically overruled or modified. Thus, the pre-1978 principles set forth previously in this discussion remain applicable, but the focal point is now whether the organization in question offers quasi-military armed forces for hire, not merely whether it provides general detective or investigative services. For purposes of guard service contracting, the burden of proof rests with the party alleging the violation. *E.g.*, B-216534, Jan. 22, 1985.

10. Insurance

a. The Self-Insurance Rule

One frequently hears that the government is a self-insurer. This is not completely true. There are many situations in which the government buys

or pays for insurance. Among the more well-known examples are the Federal Employees' Health Benefits Program and Federal Employees' Group Life Insurance. As another example, the federal government is required by statute to pay half of the costs incurred by "qualified employees" for professional liability insurance. *See* Pub. L. No. 106-58, title VI, § 642(a), 113 Stat. 430, 477 (Sept. 29, 1999), and discussion later in this chapter in section C.13.j; B-300866, May 30, 2003. Also, the government frequently pays for insurance indirectly through contracts, grants, and leases. *E.g.*, B-72120, Jan. 14, 1948 (lease). A comprehensive treatment may be found in a report of the Comptroller General. U.S. General Accounting Office, *Survey of the Application of the Government's Policy on Self-Insurance*, B-168106 (Washington, D.C.: June 14, 1972). Another useful report, although more limited in scope, is U.S. General Accounting Office, *Extending the Government's Policy of Self-Insurance in Certain Instances Could Result in Great Savings*, PSAD-75-105 (Washington, D.C.: Aug. 26, 1975).

However, the government is essentially a self-insurer in certain important areas, primarily loss or damage to government property and the liability of government employees insofar as the government is legally responsible or would ultimately bear the loss. The rule to be discussed in this section may be stated thus: In the absence of express statutory authority to the contrary, appropriated funds are not available for the purchase of insurance to cover loss or damage to government property or the liability of government employees.

The rationale for the rule is aptly summarized in the following two passages from early decisions:

> "The basic principle of fire, tornado, or other similar insurance is the lessening of the burden of individual losses by wider distribution thereof, and it is difficult to conceive of a person, corporation, or legal entity better prepared to carry insurance or sustain a loss than the United States Government."

19 Comp. Gen. 798, 800 (1940).

> "The magnitude of [the government's] resources obviously makes it more advantageous for the Government to carry its own risks than to shift them to private insurers at rates sufficient to cover all losses, to pay their operating

> expenses, including agency or broker's commissions, and to leave such insurers a profit."

19 Comp. Gen. 211, 214 (1939).

The rule and its evolution are also summarized in B-158766, Feb. 3, 1977.

The "self-insurance rule" dates back to the nineteenth century and has been stated and applied in numerous decisions of the Comptroller General and the Comptroller of the Treasury. In one early decision, 13 Comp. Dec. 779 (1907), the question was whether an appropriation for the education of natives in Alaska could be used to buy insurance to cover desks en route to Alaska which had been purchased from that appropriation. The Comptroller of the Treasury held that the insurance could not be considered a necessary expense incident to accomplishing the purpose of the appropriation unless it somehow operated either to preserve and maintain the property for use or to preserve the appropriation that was used to buy it. It did not do the first because insurance does not provide any added means to actually protect the property (life insurance does not keep you alive) but merely transfers the risk of loss. Neither could it "preserve the appropriation" because any recoveries would have to be deposited into the general fund (miscellaneous receipts) of the Treasury. Therefore the appropriation was not available to purchase the insurance.

The following year, the Comptroller held that appropriations for the construction and maintenance of target ranges for the National Guard (then called "organized militias") could not be used to insure buildings acquired for use in target practice. 14 Comp. Dec. 836 (1908). The decision closely followed the reasoning of 13 Comp. Dec. 779—the insurance would not actually protect the property from loss nor would it preserve the appropriation because any proceeds could not be retained by the agency but would have to be paid into the Treasury. Thus, the object of the appropriation "can be as readily accomplished without insurance as with it." 14 Comp. Dec. at 840.

Citing these and several other decisions, the Comptroller held similarly in 23 Comp. Dec. 269 (1916) that an appropriation for the construction and operation of a railroad in Alaska was not available to pay premiums for insurance on buildings constructed as part of the project.

A slightly different situation was presented in 24 Comp. Dec. 569 (1918). The Lincoln Farm Association had donated to the United States a memorial

hall enclosing the log cabin in which Abraham Lincoln was born, together with a $50,000 endowment fund to preserve and maintain the property. The question was whether the fund could be used to buy fire insurance on the property. The Comptroller noted that the funds were not appropriated funds in the strict sense, but were nevertheless "government funds" in that legal title was in the United States. Therefore, the self-insurance rule applied. Recalling the reasoning of the earlier decisions, the Comptroller apparently could not resist commenting "[i]t should be remembered that fire insurance does not tend to protect or preserve a building from fire." *Id.* at 570.

The Comptroller General continued to apply the rule. In a 1927 case, a contracting officer attempted to agree to indemnify a contractor against loss or damage by casualty on buildings under construction. Since the appropriation would not have been available to insure the buildings directly, the contracting officer could not agree to do so by contract. The stipulation to indemnify was held to exceed the contracting officer's authority and therefore imposed no legal liability against the appropriation. 7 Comp. Gen. 105 (1927). Boiler inspection insurance was found improper in 11 Comp. Gen. 59 (1931).

A more recent decision applying the self-insurance rule is 55 Comp. Gen. 1196 (1976). There, the National Aeronautics and Space Administration (NASA) loaned certain property associated with the Apollo Moon Mission to the Air Force for exhibition. As a condition of the loan, NASA required the Air Force to purchase commercial insurance against loss or damage to its property. The Comptroller General found that the self-insurance rule applied to the loan of property from one federal agency to another, and that commercial coverage should not have been procured. Since the insurance had already been purchased and had apparently been procured and issued in good faith, the voucher could be paid. However, the decision cautioned against similar purchases in the future. *See also* B-237654, Feb. 21, 1991.

As noted at the outset, the self-insurance rule applies to tort liability as well as property damage. This was established in a 1940 decision to the Federal Housing Administration, 19 Comp. Gen. 798. In holding that insurance could not be procured against possible tort liability, the Comptroller General noted that the self-insurance rule "relates to the risk and not to the nature of the risk." *Id.* at 800. Since the 1946 enactment of the Federal Tort Claims Act, now codified at 28 U.S.C. §§ 2671 *et seq.*, the issue has become largely moot. However, questions still arise concerning the operation of

motor vehicles, and these are discussed later in this section. Conceptually related is 65 Comp. Gen. 790 (1986), holding that an agency may not use its appropriations to insure against loss or damage to employee-owned hand tools. If the agency wishes to afford a measure of protection to employees who use their own tools, it may consider loss or damage claims under the Military Personnel and Civilian Employees' Claims Act of 1964, 31 U.S.C. § 3721. (This provision was amended in 1994 to permit agencies to pay for losses sustained by government personnel forced to evacuate a foreign country. Pub. L. No. 103-236, § 172, 108 Stat. 382 (Apr. 30, 1994).)

Another type of insurance which may not be paid for from appropriated funds is flight insurance. If a federal employee traveling by air on official business wishes to buy flight insurance, it is considered a personal expense and not reimbursable. 47 Comp. Gen. 319 (1967); 40 Comp. Gen. 11 (1960). Similarly nonreimbursable is trip cancellation insurance. 58 Comp. Gen. 710 (1979).

Insurance on household goods placed in storage incident to a permanent change of duty station may not be reimbursed to the employee unless the insurance is required by the storage company as a condition of accepting the goods for storage or is otherwise required by law. 28 Comp. Gen. 679 (1949).

Many of the decisions in this area include a statement to the effect that the government's practice of self-insurance "is one of policy and not of positive law." *E.g.*, 21 Comp. Gen. 928, 931 (1942). While the statement is true, as it has been carried from decision to decision the word "positive" has occasionally been omitted and this has caused some confusion. All the statement means is that the rule is not mandated by statute, but has evolved administratively from the policy considerations summarized above. *See also* 71 Comp. Gen. 4 (1991) (policy against using appropriated funds to make permanent improvements to private property).

b. Exceptions to the Rule

(1) Departments and agencies generally

Exceptions to the self-insurance rule may of course be authorized by statute. The absence of an express prohibition on insurance is not enough to authorize it; rather, specific statutory authority is required. 19 Comp. Gen. 798, 800 (1940); 14 Comp. Dec. 836, 839 (1908). Although legislation in this area has been minimal, Congress has occasionally authorized the procurement of insurance in some instances and prohibited it in others. By this pattern, congressional recognition of the rule may be inferred.

Also, the existence of statutory authority to buy insurance does not necessarily mean it has to be exercised. In one case, the Comptroller General recommended against the purchase of insurance although recognizing that it was statutorily authorized in that instance. 19 Comp. Gen. 211 (1939).

Moreover, because the rule is not mandated by statute but rather has evolved administratively from policy considerations, there are nonstatutory exceptions in the limited number of cases where the underlying policy considerations do not apply. The standards for exception were summarized in B-151876, Apr. 24, 1964, as follows:

1. where the economy sought by self-insurance would be defeated;

2. where sound business practice indicates that a savings can be effected; or

3. where services or benefits not otherwise available can be obtained by purchasing insurance.

See also B-290162, Oct. 22, 2002; B-244473.2, May 13, 1993.

Two World War II cases provide early illustrations of this approach. In B-35379, July 17, 1943, the procurement of airplane hull insurance by the Civil Aeronautics Administration was approved. It was determined that the Administration did not have in its employ, and was unable at the time to recruit, the number of qualified personnel that would be required to appraise damage and arrange for and supervise immediate repairs in connection with the War Training Service and that commercial insurance coverage could provide such services. Also, in B-59941, Oct. 8, 1946, the purchase of pressure vessel insurance including essential inspection services from commercial sources was permissible because of the necessity and economy brought on by wartime conditions.

In 37 Comp. Gen. 511 (1958), GAO considered a provision in a shipbuilding contract, which required the contractor to procure builder's risk insurance, including war risk insurance that was obtainable mainly from the government. Under the contract, title vested in the United States to the extent work was completed, but the risk of loss remained in the shipbuilder until the completed vessel was delivered to and accepted by the government. The government would end up paying part of the premiums because their cost was included in the bid price. GAO approved the

arrangement, finding that it did not improperly transfer the contractors risk to the government.

A more recent example is provided in B-290162, Oct. 22, 2002. The Architect of the Capitol asked whether appropriated funds could be used for the purchase of "wrap-up" insurance for the construction of the Capitol Visitor Center. Wrap-up insurance would cover both the government's risk and the risks of contractors, designers, and consultants in constructing the Visitor Center. GAO held that wrap-up insurance could be purchased if it were shown that purchasing wrap-up insurance (1) is reasonably necessary or incident to the construction of the Visitor Center and (2) would otherwise satisfy the standards for exception (discussed above), that is, the use of wrap-up insurance would result in a savings or that a benefit, not otherwise obtainable, would be gained through the use of wrap-up insurance.

Exceptions may be based on the funding arrangement of a particular agency or program. For example, the rule prohibiting the purchase of insurance did not apply to the Panama Canal Commission because the Commission operated on a self-sustaining basis, deriving its operating funds from outside sources. The vast resources available to the government, upon which the self-insurance rule is founded, were not intended to be available to the Commission. B-217769, July 6, 1987 (holding that the Commission could purchase "full scope" catastrophic insurance coverage if administratively determined to be necessary). Similarly, GAO held in B-287209, June 3, 2002, that the rule prohibiting the purchase of insurance to cover loss of property or tort claims does not apply to the District of Columbia, since the United States resources are not available to cover such loss sustained by the District. The fact that an agency's initial appropriation was placed in an interest-earning trust fund was found not sufficient to warrant an exception where the government's resources were nevertheless available to it. B-236022, Jan. 29, 1991 (John C. Stennis Center for Public Service Training and Development).

The Comptroller General has held that the self-insurance rule does not apply to privately owned property temporarily entrusted to the government. 17 Comp. Gen. 55 (1937) (historical items loaned to the government for exhibition purposes); 8 Comp. Gen. 19 (1928) (corporate books and records produced by subpoena for a federal grand jury); B-126535-O.M., Feb. 1, 1956 (airplane models loaned by manufacturer). Compare 25 Comp. Dec. 358 (1918), disallowing a claim for insurance premiums by West Publishing Company for law books loaned to a federal

employee, where correspondence from the claimant made it clear that it was loaning the books to the employee personally and not to the government.

However, insurance may be purchased on loaned private property only where the owner requires insurance coverage as part of the transaction. If the owner does not require insurance, private insurance is not a necessary expense and the government should self-insure. 63 Comp. Gen. 110 (1983) (works of art temporarily loaned by the Corcoran Gallery to the President's Commission on Executive Exchange); 42 Comp. Gen. 392 (1963) (school classrooms used for civil service examinations).

Foreign art treasures are frequently loaned to the United States for exhibition purposes. While insurance may be purchased by virtue of 17 Comp. Gen. 55, its extremely high cost has been a disincentive. To remedy this situation, in 1975 Congress passed the Arts and Artifacts Indemnity Act, 20 U.S.C. §§ 971–977. This statute authorizes the Federal Council on the Arts and Humanities to enter into agreements to indemnify against loss or damage to works of art and other materials while on exhibition under specified circumstances and within specified limits. Claims under the Act require specific appropriations for payment, but the agreements are backed by the full faith and credit of the United States. The Act constitutes authority to incur obligations in advance of appropriations and the agreements would therefore not violate the Antideficiency Act. *See* B-115398.01, Apr. 19, 1977 (nondecision letter).

Since nonappropriated fund activities are by definition not financed from public funds, they are not governed by the self-insurance rule. Whether the rule should or should not be followed would generally be within the discretion of the activity or its parent agency. Thus, it is within the discretion of the Department of Defense to establish the rule by regulation for its nonappropriated fund activities. B-137896, Dec. 4, 1958.

Finally, it is important to keep in mind that the self-insurance rule is aimed at insurance whose purpose is to protect the United States from risk of financial loss. Applying the rule from this perspective, GAO found that it would not preclude the Federal Bureau of Investigation (FBI) from purchasing insurance in connection with certain of its undercover operations. The objective in these instances was not to protect the government against risk of loss, but to maintain the security of the operation itself, for example, by creating the appearance of normality for FBI-run undercover proprietary corporations. Thus, the FBI could treat the

expenditure purely as a "necessary expense" question. B-204486, Jan. 19, 1982. For additional exceptions, see 59 Comp. Gen. 369 (1980) and B-197583, Jan. 19, 1981.

(2) Government corporations

In an early case, the Comptroller of the Treasury indicated that the self-insurance rule would not apply to a wholly owned government corporation and suggested that it would generally take an act of Congress to apply the prohibition to a corporations funds. 23 Comp. Dec. 297 (1916).

The Comptroller General followed this approach in 21 Comp. Gen. 928 (1942), noting that the rule "has not been observed strictly in cases involving insurance of property of government corporations." *Id.* at 931. The decision held that, while the funds of the Virgin Islands Company were subject to various statutory restrictions on the use of public funds, they could be used to insure the Company's property.

The Federal Housing Administration is treated as a corporation for many purposes although it is not chartered as one. *See* 53 Comp. Gen. 337 (1973). In 16 Comp. Gen. 453 (1936), the Comptroller General held that the Administration could purchase hazard insurance on acquired property based on a determination of necessity, but in 19 Comp. Gen. 798 (1940), declined to extend that ruling to cover insurance against possible tort liability. *See also* 55 Comp. Gen. 1321 (1976) (former Federal Home Loan Bank Board, although technically not a corporation, could nevertheless insure its new office building since the Board's authority to cover losses by assessments against member banks made the rationale of self-insurance rule inapplicable).

c. Specific Areas of Concern

(1) Property owned by government contractors

The cases previously discussed in which insurance was prohibited involved property to which the government held legal title. Questions also arise concerning property to which the government holds less than legal title, and property owned by government contractors.

A contractor will normally procure a variety of insurance as a matter of sound business practice. This may include hazard insurance on its property, liability insurance, and workers' compensation insurance. The premiums are part of the contractors' overhead and will be reflected in its bid price. When this is done, the government is paying at least a part of the insurance

cost indirectly. Since the risks covered are not the risks of the government, there is no objection to this "indirect payment" nor, if administratively determined to be necessary, to the inclusion of an insurance stipulation in the contract. 39 Comp. Gen. 793 (1960); 18 Comp. Gen. 285, 298 (1938).

Similarly differentiating between the government's risk and the contractor's risk, the Comptroller General has applied the self-insurance rule where the government holds "equitable title" under a lease-purchase agreement. 35 Comp. Gen. 393 (1956); 35 Comp. Gen. 391 (1956). In both decisions, the Comptroller General held that, although the government could reimburse the lessor for the cost of insuring against its own (the lessors) risk, it could not require the lessor to carry insurance for the benefit of the government.

(2) Use of motor vehicles

As noted previously, the self-insurance rule applies to tort liability as well as property damage. 19 Comp. Gen. 798 (1940). At present, the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.*, provides the exclusive remedy for claims against the United States resulting from the negligent operation of motor vehicles by government employees within the scope of their employment. Thus, insurance questions have become largely moot. Nevertheless, the self-insurance rule has been involved in several situations involving the operation of motor vehicles.

A 1966 decision, 45 Comp. Gen. 542, involved Internal Revenue Service (IRS) employees classified as "high mileage drivers." They were assigned government-owned cars for official use and, when warranted, could drive the cars home at the close of the workday so that they could proceed directly to an assignment from home the next morning. The Treasury Department asked whether IRS appropriations were available to reimburse the employees for having their commercial liability insurance extended to cover the government vehicles. Applying the self-insurance rule, and noting further that the travel would most likely be considered within the scope of employment for purposes of the Federal Tort Claims Act, the Comptroller General concluded that the funds could not be so used. GAO similarly denied the claims of six Navy members for reimbursement of extra collision insurance they purchased on rented trucks. They were authorized to rent trucks to perform their official duties and were even directed to obtain extra collision insurance. Nonetheless, GAO denied reimbursement because the insurance had been purchased in violation of the Joint Federal Travel Regulation, vol. I, para. U3415C2a, which prohibits the purchase of optional

extra collision insurance. B-256669, Aug. 31, 1994. *See also* B-261141, Nov. 9, 1995. Collision damage waiver coverage on commercial rental vehicles is discussed in the section entitled "Damage to Commercial Rental Vehicles" in Chapter 12 (Volume III of the second edition of *Principles of Federal Appropriations Law*).

In B-127343, Dec. 15, 1976, the Comptroller General concluded that the Federal Tort Claims Act applied to Senate employees operating Senate-owned vehicles within the scope of their employment. Therefore, the purchase of commercial insurance would be neither necessary nor desirable.

In 1972, the Veterans Administration (VA) asked whether it could use its appropriations to provide liability insurance coverage for disabled veteran patients being given VA-conducted driver training. Since the trainees were not government employees, they would not be covered by the Federal Tort Claims Act. Since the risk was not that of the government, the self-insurance rule was not applicable. Therefore, VA could procure the liability insurance upon administrative determinations that (1) the driver training was a necessary part of a given patient's medical rehabilitation and (2) that the insurance coverage was necessary to its success. B-175086, May 16, 1972.

The Federal Tort Claims Act does not apply to claims arising in foreign countries and the rules are a bit different for driving overseas. Originally, notwithstanding the nonavailability of the Federal Tort Claims Act, the Comptroller General had prohibited the purchase of insurance for government-owned vehicles operated in foreign countries. 39 Comp. Gen. 145 (1959). Instances of specific statutory authority for the State Department and the Foreign Agricultural Service were viewed as precluding insurance in other situations without similar legislative sanction.

However, GAO reviewed and revised its position in 1976. In 55 Comp. Gen. 1343 (1976), the Comptroller General held that the General Services Administration (GSA) could provide by regulation for the purchase of liability insurance on government-owned vehicles operated regularly or intermittently in foreign countries, where required by local law or necessitated by legal procedures that could pose extreme difficulties in case of an accident (such as arrest of the driver and/or impoundment of the vehicle). The decision also concluded that GSA could amend its regulations to permit reimbursement of federal employees for the cost of "trip

insurance" on both government-owned and privately owned vehicles in foreign countries where liability insurance is a legal or practical necessity. The decision was extended in 55 Comp. Gen. 1397 (1976) to cover the cost of required insurance on vehicles leased commercially in foreign countries on a long-term basis.

Some confusion may result from the statement in 55 Comp. Gen. 1343, 1347, that "39 Comp. Gen. 145 (1959), 19 Comp. Gen. 798 (1940), and similar decisions" are overruled "to the extent that they are inconsistent with this decision." Since 39 Comp. Gen. 145 prohibited insurance on government-owned vehicles *in foreign countries*, it is properly viewed as overruled by 55 Comp. Gen. 1343. However, 19 Comp. Gen. 798 and "similar decisions" remain valid insofar as they assert the general applicability of the self-insurance rule to tort liability and to motor vehicle usage in the United States. They should be viewed as modified to the extent that they no longer preclude purchase of insurance in the foreign country situations dealt with in 55 Comp. Gen. 1343 and 55 Comp. Gen. 1397.

(3) Losses in shipment

Early decisions had applied the self-insurance rule to the risk of damage or loss of valuable government property while in shipment. Thus, marine insurance could not be purchased for shipment of a box of silverware. 4 Comp. Gen. 690 (1925). Nor could it be purchased to cover shipment of $5,000 in silver dollars from San Francisco to Samoa. 22 Comp. Dec. 674 (1916), *aff'd upon reconsideration*, 23 Comp. Dec. 297 (1916).

In 1937, Congress enacted the Government Losses in Shipment Act, 40 U.S.C. §§ 721–729. The Act provides a fund for the payment of claims resulting from the loss or damage in shipment of government-owned "valuables" as defined in the Act. The Act also prohibits the purchase of insurance except as specifically authorized by the Secretary of the Treasury. The Secretary may give such an authorization when he finds the risk of loss in shipment cannot adequately be guarded against by the facilities of the United States or adequate replacement cannot be provided for. *See* S. Rep. No. 75-738, at 5 (1937). If a given risk is beyond the scope of the Act, for example, if the items in question are not within the definition of "valuables" or if the particular movement does not qualify as "shipment," then the self-insurance rule and its exceptions would still apply. *See*, *e.g.*, 17 Comp. Gen. 419 (1937); B-244473.2, May 13, 1993.

(4) Bonding of government personnel

Prior to 1972, the federal government frequently required the surety bonding of officers and employees who handled money or other valuables. In 1972, Congress enacted legislation, now found at 31 U.S.C. § 9302, to expressly prohibit the government from requiring or obtaining surety bonds for its civilian employees or military personnel in connection with the performance of their official duties. The reasons for this legislation parallel the policy considerations behind the self-insurance rule. Indeed, the objective of the legislation was to substitute the principle of self-insurance for the practice of obtaining surety bonds on federal employees where the risk insured against is a loss of government funds or property in which the United States is the insured.[106] 56 Comp. Gen. 788, 790 (1977). Although 31 U.S.C. § 9302 does not define "officer" or "employee," the definitions in Title 5 of the United States Code are available for guidance. B-236022, Jan. 29, 1991.

Under the former system, the surety bonds were for the protection of the government, not the bonded employee. If a loss occurred and the government collected on the bond, the surety could attempt to recover against the individual employee. Thus, the elimination of bonding in no way affects the personal liability of federal employees, and 31 U.S.C. § 9302 specifies this. This principle has been noted several times in connection with the liability of accountable officers and the cases are cited in Chapter 9.

In 56 Comp. Gen. 788 (1977), the Comptroller General held that, by virtue of 31 U.S.C. § 9302, the United States became a self-insurer of restitution, reparation, and support moneys collected by probation officers under court order. The decision noted that the same result applied to litigation funds paid into the registry of the court (funds paid into the registry by a litigant pending distribution by the court to the successful party).

However, if an agency requires an employee to serve as a notary public and state law requires bonding of notaries, the employee's expense in obtaining the surety bond may be reimbursed notwithstanding 31 U.S.C. § 9302. The bond in such a situation is neither required by nor obtained by the federal

[106] GAO had recommended the legislation. *See* U.S. General Accounting Office, *Review of Bonding Program for Employees of the Federal Government*, B-8201 (Washington, D.C.: Mar. 29, 1962); B-8201, B-59149, Jan. 18, 1972 (bill comments).

government. It is required by the state and obtained by the employee. Also, the risk involved is not one in which the United States is the insured. B-185909, June 16, 1976.

Similarly, if a federal court designates a state court employee to perform certain functions in connection with the arrest and detention of federal offenders, 31 U.S.C. § 9302 does not preclude the Administrative Office of the United States Courts from requiring that the state employee be bonded since the statute applies only to federal employees. 52 Comp. Gen. 549 (1973).

11. Lobbying and Related Matters

a. Introduction

Lobbying—attempting to influence legislators—is nothing new. The term itself derives from the practice of advocates of a particular measure lying in wait in the corridors or "lobby" of the Capitol Building, there to collar passing members of Congress.

Generally speaking, there are two types of lobbying. "Direct lobbying," as the term implies, means direct contact with the legislators, either in person or by various means of written or oral communication. "Indirect" or "grassroots" lobbying is different. There, the lobbyist contacts third parties, either members of special interest groups or the general public, and urges them to contact their legislators to support or oppose something. Of course, the term "lobbying" can also refer to attempts to influence decision makers other than legislators.

There is nothing inherently evil about lobbying. A House select committee investigating lobbying in 1950 put it this way:

> "Every democratic society worthy of the name must have some lawful means by which individuals and groups can lay their needs before government. One of the central purposes of government is that people should be able to reach it; the central purpose of what we call 'lobbying' is that they should be able to reach it with maximum impact and

possibility of success. This is, fundamentally, what lobbying is about."[107]

Nevertheless, because of the obvious potential for abuse, there are legal restrictions on lobbying. This section will explore some of them. Because the focus of this publication is on the use of appropriated funds, coverage is limited for the most part to lobbying by government officials and does not include lobbying by private organizations. Restrictions on lobbying by government officials derive from two sources: penal statutes and provisions in appropriation acts.

b. Penal Statutes

Originally enacted in 1919, 18 U.S.C. § 1913 provided for criminal sanctions. In late 2002, however, the statute was amended to omit the criminal sanctions and significantly expand the scope of the lobbying restriction.[108] The statute, commonly referred to as the Anti-Lobbying Act, now provides:

> "No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy, or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy, or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to any such Member or official, at his request, or to Congress or such official, through the proper official channels, requests for any legislation, law, ratification, policy, or appropriations which they deem necessary for the efficient conduct of the public

[107] General Interim Report of the House Select Committee on Lobbying Activities, H.R. Rep. No. 81-3138, at 1 (1950).

[108] 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, div. A, title II, § 205(b), 116 Stat. 1758, 1778 (Nov. 2, 2002).

> business, or from making any communication whose prohibition by this section might, in the opinion of the Attorney General, violate the Constitution or interfere with the conduct of foreign policy, counter-intelligence, intelligence, or national security activities."

The statute is now punishable by civil penalties ranging between $10,000 and $100,000 per expenditure. Section 1913 actually incorporates the civil penalties contained in another lobbying statute, 31 U.S.C. § 1352. Section 1352(a) prohibits recipients of federal contracts, grants, or loans from using such funds to lobby in connection with the awarding of such contracts, grants, or loans. A thorough discussion of 31 U.S.C. § 1352, also known as the Byrd Amendment, is found in the subsequent section on lobbying with grant funds in this chapter, section C.11.d.

Prior to the 2002 amendment, 18 U.S.C. § 1913 only prohibited the use of appropriated funds for lobbying aimed at the most basic legislative activities of Congress. The amended statute expands the prohibition to a broader scope of legislative activities conducted at all levels of government, not just the federal level.

To date there has been no case law interpreting the expanded and decriminalized 18 U.S.C. § 1913. The following discussion of the statute, while based upon section 1913 before it was amended in 2002, nevertheless provides a solid foundation for interpreting the statute as the basic framework of the lobbying restriction was not altered.

The context in which the original section 1913 was enacted is reflected in the following passage from the floor debate on the 1919 legislation:

> "The bill also contains a provision which …will prohibit a practice that has been indulged in so often, without regard to what administration is in power—the practice of a bureau chief or the head of a department writing letters throughout the country, sending telegrams throughout the country, for this organization, for this man, for that company to write his Congressman, to wire his Congressman, in behalf of this or that legislation. [Applause.] The gentleman from Kentucky …during the closing days of the last Congress was greatly worried because he had on his desk thousands upon thousands of telegrams that had been started right here in Washington by some official wiring out for people to wire

> Congressman Sherley …Now, it was never the intention of Congress to appropriate money for this purpose, and [§ 1913] will absolutely put a stop to that sort of thing. [Applause.]" [109]

Since 18 U.S.C. § 1913 was a criminal statute, its enforcement was the responsibility of the Justice Department and the courts. Although the statute no longer contains criminal sanctions, the Justice Department continues to have enforcement responsibilities. The enforcement mechanism for 18 U.S.C. § 1913 is derived from 31 U.S.C. § 1352(c), which provides that violations are to be handled in accordance with the administrative process for adjudicating civil liability for false claims. Under this process, provided for under the Program Fraud Civil Remedies Act of 1986, 31 U.S.C. § 3801–3812, no alleged violation is subject to adjudication unless approved by the Justice Department. 31 U.S.C. § 3803(b)(2). The Justice Department is also responsible for the judicial enforcement of any civil penalty imposed. 31 U.S.C. § 3806.

Where GAO has determined that appropriated funds were used, it would refer those matters to the Justice Department in appropriate cases. *E.g.*, B-192658, Sept. 1, 1978; B-164497(5), Mar. 10, 1977. Generally, GAO would refer matters to the Justice Department if asked to do so by a Member of Congress or where available information provided reasonable cause to suspect that a violation may have occurred. B-145883, Apr. 27, 1962.

In addition, since a violation of section 1913 is by definition an improper use of appropriated funds, such a violation could form the basis of a GAO exception or disallowance.[110] As a practical matter, however, this option is often not viable. GAO's real "enforcement" tool is to report any unlawful activities to Congress in furtherance of Congress's oversight of executive branch activities.[111]

[109] 58 Cong. Rec. 403 (1919) (remarks of Representative Good), quoted in *National Treasury Employees Union v. Campbell*, 654 F.2d 784, 791 (D.C. Cir. 1981).

[110] In the past, GAO noted that it could take no action unless the Justice Department or the courts first determined that there had been a violation. B-164497(5), Mar. 10, 1977.

[111] *See* U.S. General Accounting Office, H.R. 3078, *The Federal Agency Anti-Lobbying Act*, GAO/T-OGC-96-18 (Washington, D.C.: May 15, 1996).

The Justice Department has construed section 1913 as applying to large-scale "grassroots" lobbying campaigns of telegrams, letters, and other forms of communication designed to generate citizen contacts with Congress on behalf of an administration position with respect to pending legislation, but not to direct communications between executive branch officials and Congress. More recently, the Justice Department emphasized that section 1913 does not apply to (1) public speeches, appearances, or writings, so that officials are free to publicly advance administration positions, even to the point of calling on the public to encourage Members of Congress to support such positions, or (2) the lobbying activities of the President, his aides and assistants within the Executive Office of the President, the Vice President, cabinet members, and other Senate-confirmed officials appointed by the President. *See* Memorandum for the Attorney General and the Deputy Attorney General from Walter Dellinger, Assistant Attorney General, Department of Justice, Office of Legal Counsel, Apr. 14, 1995; 13 Op. Off. Legal Counsel 300 (1989).

In evaluating particular fact situations to determine possible violations of section 1913, GAO has applied the Justice Department's interpretation of that statute. Thus, GAO found that referral to the Justice Department was not warranted in the following situations:

- Various judicial branch activities including direct contacts with legislators by federal judges, legislative liaison activities by the Judicial Conference of the United States, and some grassroots lobbying that did not involve the use of federal funds. 63 Comp. Gen. 624 (1984).

- Providing to a private lobbying group a copy of congressional testimony by the Secretary of State supporting the administration's Central American policies. 66 Comp. Gen. 707 (1987). The answer would have been different if the State Department had used appropriated funds to develop material for the lobbying group rather than simply providing existing and readily available material. *Id.* at 712. *See also* "Providing assistance to private lobbying groups" later in this chapter, section C.11.c, and B-229069.2, Aug. 1, 1988.

- Contacts with congressional staff members and a briefing for the House Foreign Affairs Committee by State Department officials designed to generate opposition for a legislative measure perceived as inconsistent with administration nuclear nonproliferation policy. B-217896, July 25, 1985.

- Speeches and written materials by the Chairman of the Federal Trade Commission expressing opposition to the Postal Service's "monopoly" status for letter class mail. None of the materials exhorted members of the public to contact their legislators. B-229257, June 10, 1988.[112]

- Written materials prepared and disseminated by the Small Business Administration (SBA), none of which included grassroots lobbying, designed to support an administration proposal to transfer SBA to the Commerce Department. B-223098, B-223098.2, Oct. 10, 1986.

- Transmission of information by the Consumer Product Safety Commission to a private company advising of scheduled congressional hearings on legislation relevant to a problem the company was facing. B-229275-O.M., Nov. 17, 1987. The memorandum stated:

  > "We believe it is within the statutory authority of a regulatory agency to advise a regulated company that a remedy it seeks can only be obtained through legislation and that such legislative remedy may be initiated by a particular Congressional Committee."

- Congressional briefings by Department of Energy officials designed to influence views on nuclear weapons testing legislation. A planned media campaign to further that objective would have been more questionable, but it was not carried out. U.S. General Accounting Office, *Nuclear Test Lobbying: DOE Regulations for Contractors Need Reevaluation*, GAO/RCED-88-25BR (Washington, D.C.: Oct. 9, 1987).

- Memorandum written by Commissioner of Commodity Futures Trading Commission, urging individuals and organizations to "make [their] position known to the co-sponsors of this [b]ill," constituted grassroots lobbying. However, no referral was made since the Commissioner was a presidential appointee confirmed by the Senate and the amount spent on the memorandum was not substantial. B-270875, July 5, 1996.

- Letter sent by Deputy Secretary of Energy to thousands of individuals and organizations addressing the administration's energy policies and

[112] Although not noted in the decision, under the Department of Justice's interpretation of section 1913 noted above, the lobbying activities of the Chairman would not have been restricted in any case. *See*, *e.g.*, B-270875, July 5, 1996.

legislative proposals was not grassroots lobbying as recipients were encouraged to contact the Deputy Secretary, not their elected representatives. Moreover, the Deputy Secretary's activities were not restricted by section 1913 since he was a Senate-confirmed presidential appointee. B-270875, July 5, 1996.

- Environmental Protection Agency distribution of fact sheets to various organizations setting forth the adverse effects of pending legislation on the environment, was not grassroots lobbying as none of the material contained direct appeals for people to contact Members of Congress. B-270875, July 5, 1996.

Numerous additional examples may be found in our discussion of "pending legislation" appropriation restrictions later in this chapter, in section C.11.c.

GAO found the following situations sufficiently questionable to warrant referral to Justice:[113]

- An article written by a Commerce Department official and published in *Business America*, a Commerce Department publication, explicitly urging readers to contact their elected representatives in Congress to support certain amendments to the Export Administration Act. B-212235(1), Nov. 17, 1983. Under the Justice Department's more recent interpretations of section 1913, this case would not have warranted referral since officials are free to publicly advance administration positions.

- Campaign by Air Force and Defense Department to use contractors' lobbyists and subcontractor network to lobby Congress in support of C-5B aircraft procurement. U.S. General Accounting Office, *Improper Lobbying Activities by the Department of Defense on the Proposed Procurement of the C-5B Aircraft*, GAO/AFMD-82-123 (Washington, D.C.: Sept. 29, 1982).

[113] A few early cases will be found in which GAO held expenditures illegal under 18 U.S.C. § 1913. *E.g.*, B-139134-O.M., June 17, 1959 (Air Force paid registration fee for members to enter state rifle association shooting match; portion of fee set aside for fund to fight adverse gun legislation held to be an improper payment); B-76695, June 8, 1948.

As of early 1995, the Justice Department reported that there had been no prosecutions under section 1913.[114] *See* Memorandum for the Attorney General and the Deputy Attorney General from Walter Dellinger, Assistant Attorney General, Department of Justice, Office of Legal Counsel, Apr. 14, 1995. To our knowledge, Justice initiated no prosecutions between 1995 and 2002 when section 1913 was amended.

As noted earlier, there has been no judicial activity under the amended version of 18 U.S.C. § 1913. The only judicial activity addressing the pre-amendment version was the issue of whether the statute created a private right of action. The answer was no. *National Treasury Employees Union v. Campbell*, 482 F. Supp. 1122 (D.D.C. 1980), *aff'd*, 654 F.2d 784 (D.C. Cir. 1981), *overruling National Association for Community Development v. Hodgson*, 356 F. Supp. 1399 (D.D.C. 1973); *Grassley v. Legal Services Corp.*, 535 F. Supp. 818 (S.D. Iowa 1982); *American Trucking Assn's, Inc. v. Department of Transportation*, 492 F. Supp. 566 (D.D.C. 1980).

One other statute with penal sanctions deserves brief mention— the Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (Dec. 19, 1995), codified largely at 2 U.S.C. § 1601–1612. This statute does not apply to the legislative activities of government agencies, but rather to organizations that lobby certain federal officials in the legislative and executive branches. These organizations are required to register with the Secretary of the Senate and the Clerk of the House of Representatives and to semiannually report expenditures and certain other information related to their lobbying efforts. 2 U.S.C. § 1603(a) and § 1604.[115] This statute repealed the 1946 Federal Regulation of Lobbying Act, which GAO criticized for resulting in comparatively few lobbyists registering with Congress. *See* U.S. General Accounting Office, *Federal Lobbying: Comments on the Adequacy of Federal Lobbying Laws*, GAO/T-GGD-93-49 (Washington, D.C.: Sept. 30, 1993).

[114] A conclusion by the Justice Department that section 1913 was violated would not have automatically resulted in a prosecution. The Attorney General has what is known as "prosecutorial discretion," wherein a great many factors influence the decision whether to prosecute.

[115] *See* U.S. General Accounting Office, *Federal Lobbying: Differences in Lobbying Definitions and Their Impact*, GAO/GGD-99-38 (Washington, D.C.: Apr. 15, 1999).

c. Appropriation Act Restrictions

(1) Origin and general considerations

In 1949, a House Resolution created a Select Committee on Lobbying Activities to review the operation of the Federal Regulation of Lobbying Act and to investigate all lobbying activities both by the private sector and by federal agencies. The Committee held extensive hearings and issued several reports. In its final report, the Committee had this to say about lobbying by government agencies:

> "The existing law in this field, unlike the law governing lobbying by private interests, is not directed toward obtaining information of such activities, but is prohibitory in concept and character. It forbids the use of appropriated funds for certain types of lobbying activities and is specifically a part of the Criminal Code. Enacted in 1919, it is not a recent or in any sense a novel piece of legislation. Its validity has never been challenged and we consider it sound law….
>
> "It is our conclusion that the long-established criminal statute referred to above should be retained intact and that Congress, through the proper exercise of its powers to appropriate funds and to investigate conditions and practices of the executive branch, as well as through its financial watch dog, the General Accounting Office, can and should remain vigilant against any improper use of appropriated funds and any invasion of the legislative prerogatives and responsibilities of the Congress."[116]

When the Select Committee referred to the "proper exercise" of the congressional power to appropriate funds, it of course had in mind the use of that power to restrict the use of funds for activities considered undesirable. While the use of appropriation act restrictions to control lobbying had some earlier precedent, the practice began in earnest shortly after the issuance of the Select Committee's final report with some fiscal year 1952 appropriations, and has continued ever since.

[116] House Select Committee on Lobbying Activities, *Report and Recommendations on Federal Lobbying Act*, H.R. Rep. No. 81-3239, at 36 (1951).

The most common form of appropriation act restriction prohibits the use of funds for "publicity or propaganda." There are several variations of the provision, with varying degrees of specificity. As of 2003, in addition to two governmentwide publicity or propaganda restrictions, approximately half of the regular annual appropriation acts include some version. The simplest version of the statute, and the most general, is this:

> "No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress."[117]

It prohibits expenditures for all unauthorized publicity or propaganda. Unfortunately, as with most of the publicity and propaganda statutes over the years, there is no definition of either term. Thus, the statutes have been applied through administrative interpretation.

In construing and applying a publicity or propaganda provision, it is necessary to achieve a delicate balance between competing interests. On the one hand, every agency has a legitimate interest in communicating with the public and with the Congress regarding its functions, policies, and activities. The Select Committee recognized this, quoting in its Interim Report from the report of the Hoover Commission:

> "Apart from his responsibility as spokesman, the department head has another obligation in a democracy: to keep the public informed about the activities of his agency. How far to go and what media to use in this effort present touchy issues of personal and administrative integrity. But of the basic obligation there can be little doubt."[118]

In addition, the courts have indicated that it is not illegal for government agencies to spend money to advocate their positions, even on controversial issues. *See Joyner v. Whiting*, 477 F.2d 456, 461 (4th Cir. 1973); *Donaggio v. Arlington County, Virginia*, 880 F. Supp. 446, 454–56 (E.D.

[117] *E.g.*, Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 2003, Pub. L. No. 108-7, div. B, § 601, 117 Stat. 11, 99 (Feb. 20, 2003).

[118] H.R. Rep. No. 81-3138, at 53 (1950).

Va. 1995); *Arrington v. Taylor*, 380 F. Supp. 1348, 1364 (M.D. N.C. 1974).[119]

Yet on the other hand, the statute has to mean something. As the court said in *National Association for Community Development v. Hodgson*, 356 F. Supp. 1399 (D.D.C. 1973) in reference to 18 U.S.C. § 1913, "[o]bviously, Congress intended to remedy some problem or further some cause, otherwise they would not have bothered enacting the statute." *Id.* at 1403. As long as the law exists, there has to be a point beyond which government action violates it. Testifying before the Select Committee on March 30, 1950, former Assistant Comptroller General Frank Weitzel made the following remarks:

> "[I]f you set up an organization in the executive branch for the benefit of the three blind mice they would come up here with a budget program and prospectus which would convince any Member of Congress that that was one of the most important organizations in the executive branch….
>
> "And no doubt by that time there would also be some private organizations with branches which would parallel your Federal agency, which would be devoted to the propagation and dissemination of information about the three blind mice…."[120]

In evaluating whether a given action violates a publicity or propaganda provision, GAO will rely heavily on the agency's administrative justification. In other words, the agency gets the benefit of any legitimate doubt. GAO will not accept the agency's justification where it is clear that the action falls into one of a very few specific categories. Before discussing what those categories are, two threshold issues must be noted.

First, it must be determined whether the agency in question is subject to a publicity or propaganda restriction. The existence and precise terms of the

[119] Further useful discussion may be found in cases dealing with different but conceptually related issues such as *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), citing *United States v. Frame*, 885 F.2d 1119 (3rd Cir. 1989).

[120] *The Role of Lobbying in Representative Self-Government: Hearings before the House Select Committee on Lobbying Activities*, 81st Cong., pt. 1, at 158 (1950).

restriction can change over time. Therefore, it is always necessary to check the relevant appropriation acts for the year in which the questioned obligation or expenditure was made in order to determine what, if any, agency-specific or governmentwide restrictions exist.

Second, a violation must be predicated on the use of public funds (either direct appropriations or funds which, although not direct appropriations, are treated as appropriated funds). If appropriated funds are not involved, there is no violation no matter how blatant the conduct may be. 56 Comp. Gen. 889 (1977) (involving a newsletter concerning the Clinch River Breeder Reactor Project containing material that would have been illegal had it been financed in any way with appropriated funds).

(2) Self-aggrandizement

As noted above, the broadest form of the publicity and propaganda restriction prohibits the use of appropriated funds "for publicity or propaganda purposes not authorized by the Congress." A fiscal year 2003 governmentwide variation limits the restriction to activities "within the United States."[121]

The Comptroller General first had occasion to construe this provision in 31 Comp. Gen. 311 (1952). The National Labor Relations Board asked whether the activities of its Division of Information amounted to a violation. Reviewing the statute's scant legislative history, the Comptroller General concluded that it was intended "to prevent publicity of a nature tending to emphasize the importance of the agency or activity in question." *Id.* at 313. Therefore, the prohibition would not apply to the "dissemination to the general public, or to particular inquirers, of information reasonably necessary to the proper administration of the laws" for which an agency is responsible. *Id.* at 314. Based on this interpretation, GAO concluded that the activities of the Board's Division of Information were not improper. The only thing GAO found that might be questionable, the decision noted, were certain press releases reporting speeches of members of the Board.

Thus, 31 Comp. Gen. 311 established the important proposition that the statute does not prohibit an agency's legitimate informational activities. *See also* B-284226.2, Aug. 17, 2000; B-223098, B-223098.2, Oct. 10, 1986;

[121] *E.g.*, Treasury and General Government Appropriations Act, 2003, Pub. L. No. 108-7, div. J, § 626, 117 Stat. 11, 470 (Feb. 20, 2003).

B-177704, Feb. 7, 1973; U.S. General Accounting Office, *Military Activities: Display of Equipment at the Former Philadelphia Naval Base in July 2000*, GAO-01-77R (Washington, D.C.: Oct. 18, 2000); *U.S. Attorneys: Laws, Rules, and Policies Governing Political Activities*, GAO/GGD-00-171 (Washington, D.C.: July 24, 2000). It is geared at activities whose obvious purpose is "self-aggrandizement" or "puffery."

GAO's approach to this statute is basically the same as its approach to the other appropriation act lobbying restrictions to be discussed in detail later. The statute does not provide adequate guidelines to distinguish the legitimate from the proscribed. Thus, without further clarification from Congress or the courts, GAO is reluctant to find a violation where the agency can provide a reasonable justification for its activities.

In a 1973 case, B-178528, July 27, 1973, the Republican National Committee financed a mass mailing of copies of editorials from British newspapers in praise of the President. The editorials were transmitted with a letter prepared by a member of the White House staff, on State Department letterhead stationery, and signed by the Ambassador to Great Britain. GAO again noted the extreme difficulty in distinguishing between disseminating information to explain or defend administration policies, which is permissible, and similar activities designed for purely political or partisan purposes. (*See also* B-194776, June 4, 1979.) In addition, a legitimate function of a foreign legation is to communicate information on press reaction in the host country to policies of the United States. Thus, GAO was unable to conclude that there was any violation of the publicity and propaganda law. In any event, the use of appropriated funds was limited to the cost of one piece of paper and the time it took the Ambassador to think about it and sign his name.

Other cases in which GAO found no violation are B-284226.2, *supra* (Housing and Urban Development report "Losing Ground" and accompanying letter providing information to agency constituents about the impact of program reductions being proposed in Congress); B-212069, Oct. 6, 1983 (press release by Director of Office of Personnel Management excoriating certain Members of Congress who wanted to delay a civil service measure the administration supported); and B-161686, June 30, 1967 (State Department publications on Vietnam War). In none of these cases were the documents designed to glorify the issuing agency or official.

Similarly, GAO concluded that the Census Bureau did not violate this restriction when its employees participated in a symposium. The

symposium was to attract thousands of African-Americans, a population the Bureau characterized as "hard-to-count" and therefore targeted in its outreach activities. The Bureau's participation in the symposium was limited to responding to questions about the census and giving away promotional items and was therefore legitimate informational activity, not puffery or self-aggrandizement. *See* U.S. General Accounting Office, *Census Bureau Participation in Los Angeles Symposium*, *August 2000*, GAO-01-124R (Washington, D.C.: Oct. 24, 2000).

GAO did find a violation in B-136762, Aug. 18, 1958. The Deputy Assistant Secretary of Defense for Military Assistance Programs attended a meeting of the Aircraft Industries Association and made a speech "clearly designed to enlist the aid of the Aircraft Industries Association in publicizing and selling the Mutual Security program to the American public through the various media available to the Association." Reviewing the text of the speech, GAO found that it went far beyond any legitimate purpose of informing the public and that it therefore violated the publicity and propaganda restriction. However, the officer had been authorized to attend the meeting as related to the performance of official duty and would have been entitled to per diem for the full day even if he had not made the speech. Therefore, since the government incurred no additional expense by virtue of the speech, GAO declined to seek recovery either from the officer himself or from the accountable officers who had made the payment.

Some agencies have authority to disseminate material that is promotional rather than purely informational. For example, the Commerce Department is charged with promoting commerce. In so doing, it entered into a contract with the Advertising Council to undertake a national multimedia campaign to enhance public understanding of the American economic system. Finding that this was a reasonable means of implementing its function and that the campaign did not "aggrandize" the Commerce Department, GAO found nothing illegal. B-184648, Dec. 3, 1975.

If an agency does not have promotional authority, the scope of its permissible activities is correspondingly more restricted. For example, GAO found the publicity and propaganda law violated when a presidential advisory committee, whose sole function was to advise the President and which had no promotional role, set up and implemented a public affairs program that included the hiring of a "publicity expert." B-222758, June 25, 1986.

See section C.11.f of this chapter for further discussion of agency promotional authorities and the employment of publicity experts.

(3) Covert propaganda

Another type of activity that GAO has construed as prohibited by the "publicity or propaganda not authorized by Congress" statute is "covert propaganda," defined as "materials such as editorials or other articles prepared by an agency or its contractors at the behest of the agency and circulated as the ostensible position of parties outside the agency." B-229257, June 10, 1988. A critical element of the violation is concealment of the agency's role in sponsoring the material. *Id.*

In a 1986 case, the Small Business Administration (SBA) prepared "suggested editorials" and distributed them to newspapers. The editorials urged support of an administration proposal to merge SBA with the Department of Commerce. The editorials were clearly "propaganda." This, however, was not enough to violate the law. The problem was that they were misleading as to their origin. The plan presumably was for a newspaper to print the editorial as its own without identifying it as an SBA document. This, the Comptroller General concluded, went beyond the range of acceptable public information activities and therefore violated the publicity and propaganda law. B-223098, B-223098.2, Oct. 10, 1986.

A similar holding is 66 Comp. Gen. 707 (1987), involving newspaper articles and editorials in support of Central American policy. The materials were prepared by paid consultants at government request, and published as the work of nongovernmental parties. The decision also found that media visits by Nicaraguan opposition leaders, arranged by government officials but with that fact concealed, constituted another form of "covert propaganda." *See also* B-129874, Sept. 11, 1978 ("canned editorials" and sample letters to the editor in support of Consumer Protection Agency legislation, had they been prepared, would have violated the law).

In B-229257, *supra*, the Federal Trade Commission (FTC) prepared a variety of materials critical of the Postal Services "monopoly" on letter class mail, for distribution at a National Press Club breakfast that the Postmaster General was to attend. While the material was unquestionably propaganda, it did not violate the law because it identified the FTC as the source.

(4) Pending legislation: overview

The version of the appropriations act restriction that the Comptroller General has had the most frequent occasion to apply is the version prohibiting publicity and propaganda designed to influence pending legislation.

For over 30 years, from the early 1950s to fiscal year 1984, the following provision was enacted every year:

> "No part of any appropriation contained in this or any other Act …shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."[122]

As long as this version was in effect, it applied, by virtue of the "this or any other act" language, to all government agencies regardless of which appropriation act provided their funds. For fiscal year 1984, the "this or any other act" provision fell victim to a point of order and was dropped. *See* 64 Comp. Gen. 281 (1985). For some time after that, no governmentwide provision existed. However, another change in course occurred and since fiscal year 1997,[123] the following governmentwide "pending legislation" provision has been in place:

> "No part of any funds appropriated in this or any other Act shall be used by an agency of the executive branch, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television or film presentation

[122] *E.g.*, Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, § 607(a), 93 Stat. 559, 575 (Sept. 29, 1979).

[123] In fiscal year 1996 GAO investigated whether or not the activities of five agencies violated any anti-lobbying provisions and concluded that there were no violations, in part, because only one of the five agencies was covered by a restriction on influencing pending legislation. B-270875, July 5, 1996. A governmentwide restriction reappeared the next fiscal year.

designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself."[124]

Although the governmentwide provision currently in place is more detailed than the prior governmentwide restriction, we have concluded that the language currently used has the same legal effect. *See* B-270875, *supra*.

During the time when there was no governmentwide restriction, restrictions aimed at curtailing the influencing of pending legislation appeared in individual appropriation acts in various forms. Many of these continue to appear in individual appropriation acts along with the governmentwide restriction.[125] A sampling of fiscal year 2003 appropriation acts provisions provided below reveals a variety of versions, many of which do not include the terms publicity and propaganda:

- "None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress."[126]

- " …[No] part of this appropriation shall be used for publicity or propaganda purposes or implementation of any policy including boycott designed to support or defeat legislation pending before Congress or any State legislature."[127]

- "None of the funds in this Act shall …be used …to pay for any personal service, advertisement, telegraph …or other device, intended or designed to influence in any manner a Member of Congress or of a State legislature to favor or oppose by vote or otherwise, any legislation or

[124] *E.g.*, Treasury, Postal Service, and General Government Appropriations Act, 1997, Pub. L. No. 104-208, title VI, § 631, 110 Stat. 3009, 3009-362 (Sept. 30, 1996).

[125] While it is understandable that individual agency situations may require unique language, in some instances the restrictions included in the individual appropriation acts are mere repetition. For example, in 2003 a restriction identical to the governmentwide restriction was also contained in the Veterans Affairs appropriations act. *See* Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations, 2003, Pub. L. No. 108-7, div. K, title IV, § 414, 117 Stat. 11, 524 (Feb. 20, 2003).

[126] Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248, § 8012, 116 Stat. 1519, 1539 (Oct. 23, 2002).

[127] District of Columbia Appropriations Act, 2003, Pub. L. No. 108-7, div. C, title III, § 107(a), 117 Stat. 11, 122 (Feb. 20, 2003).

appropriation by Congress or a State legislature after the introduction of any bill or resolution in Congress proposing such legislation or appropriation, or after the introduction of any bill or resolution in a State legislature proposing such legislation or appropriation."[128]

- "No part of any appropriation contained in this Act shall be used, other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, radio, television, or video presentation designed to support or defeat legislation pending before the Congress or any State legislature, except in presentation to the Congress or any State legislature itself."[129]

If a given policy or activity is affected by pending or proposed legislation, any discussion of that policy or activity by officials will necessarily refer to such legislation, either explicitly or by implication, and will presumably be either in support of or in opposition to it. Thus, an interpretation of a pending legislation statute that strictly prohibited expenditures of public funds for dissemination of views on pending legislation would preclude virtually any comment by officials on agency or administration policy or activities. Absent a compelling indication of congressional intent, GAO has been unwilling to adopt this approach. *See*, *e.g.*, B-270875, *supra;* U.S. General Accounting Office, *Department Of Education: Compliance with the Federal Advisory Committee Act and Lobbying Restrictions*, GAO/GGD/OGC-00-18 (Washington, D.C.: Dec. 30, 1999).

The Comptroller General has construed the "pending legislation" provisions as applying primarily to indirect or "grassroots" lobbying and not to direct contact with Members of Congress. In other words, the statute prohibits appeals to members of the public suggesting that they in turn contact their elected representatives to indicate support of or opposition to pending legislation, thereby expressly or implicitly urging the legislators to vote in a particular manner. GAO and the Justice Department have interpreted the traditional prohibition ("publicity or propaganda purposes designed to

[128] Department of Transportation and Related Agencies Appropriations, 2003, Pub. L. No. 108-7, div. I, title III, § 322, 117 Stat. 11, 411–412 (Feb. 20, 2003).

[129] Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2003, Pub. L. No. 108-7, div. G, title V, § 503(a), 117 Stat. 11, 343 (Feb. 20, 2003).

support or defeat pending legislation") to require an overt appeal to the public. B-270875, July 5, 1996.

GAO concluded in a 1984 study that further statutory restraints on executive branch lobbying did not appear necessary. GAO did recommend, however, that the restriction on "grassroots" lobbying be enacted into permanent law. *See* U.S. General Accounting Office, *No Strong Indication That Restrictions on Executive Branch Lobbying Should Be Expanded*, GAO/GGD-84-46 (Washington, D.C.: Mar. 20, 1984). *See also* U.S. General Accounting Office, *H.R. 3078*, *The Federal Agency Anti-Lobbying Act*, GAO/T-OGC-96-18 (Washington, D.C.: May 15, 1996); B-206391, B-217896, Oct. 30, 1985; B-206391, July 2, 1982. (Each of these documents comments on proposed legislation that was not enacted.)

Before proceeding to the specific cases, certain threshold concerns should be noted. As noted earlier in the discussion of the simple publicity and propaganda restriction, the discussion that follows interprets the pending legislation provisions in existence at that time. The particular agencies involved may or may not still be subject to the same restriction. Or a different version of the restriction may apply that could produce different results. As we have noted, governmentwide restrictions have gone in and out of congressional favor. Therefore, it is critical to check the current appropriations acts to determine what restrictions are applicable.

The appropriation act restrictions, unless specified to the contrary, require pending legislation. Of course, this would include appropriation acts and proposed presidential budgets. B-178648, Sept. 21, 1973.

Finally, unless a particular provision specifically includes lobbying at the state level, the legislation must be pending before the U.S. Congress, not a state legislature. *E.g.*, B-193545, Mar. 13, 1979; B-193545, Jan. 25, 1979. *See also* U.S. General Accounting Office, *Highway Safety: NHTSA's Activities*

Concerning State Motorcycle Helmet Laws, GAO/RCED-97-185R (Washington, D.C.: June 25, 1997).[130]

(5) Cases involving "grassroots" lobbying violations

A bill was introduced in the 86th Congress to prohibit the Post Office Department from transporting first class mail by aircraft on a space-available basis. The Post Office Department opposed the bill and embarked on a campaign to defeat it. Among the tactics used were letters to postal patrons and "canned" editorials asking the public to contact Members of Congress to urge opposition to the bill. GAO found that this activity violated the anti-lobbying statute. B-116331, May 29, 1961.

Another violation resulted from the use of a kit entitled "Battle of the Budget 1973." The White House at the time was opposed to 15 bills then pending in Congress that it felt would exceed the administration's 1974 budget. White House staff writers assembled a package of materials that were distributed to executive branch officials in an effort to defeat the bills. The kit included statements that people should be urged to write their representatives in Congress to support the administration's opposition to the 15 bills. This, the Comptroller General held, violated the publicity and propaganda statute. B-178448, Apr. 30, 1973.

Administration budget battles with Congress produced another violation in B-178648, Sept. 21, 1973. This case involved prerecorded news releases provided to radio stations by executive branch agencies. GAO reviewed over 1,000 of these releases and while most were proper, GAO found several that violated the law. Examples of the violations are as follows:

- "If the President's position of resisting higher taxes resulting from big spending is to be upheld, the people need to be heard. The voice of America can reach Capitol Hill and can be a positive persuader."

[130] The report concluded that the National Highway Traffic Safety Administration (NHTSA) did not violate any anti-lobbying restrictions since the activities were directed at state governments, not Congress. Within a year after this report, however, Congress passed permanent legislation prohibiting the NHTSA from engaging in activity "specifically designed to urge a State or local Legislator to favor or oppose the adoption of any specific legislative proposal pending before any State or local legislative body." *See* 49 U.S.C. § 30105(a). *See also* Department of Transportation and Related Agencies Appropriations, 2003, Pub. L. No. 108-7, § 322, *supra*.

- "If we are going to have economic stability and fiscal responsibility, we must all support the President's budget program—and let Congress know we support it."

The next two examples illustrate important points:

- "If we don't slow down Federal spending …we face a 15-percent increase in income taxes and more inflation. I don't think any American wants this. But, in the final analysis the responsibility rests with the voters and the taxpayers. They must let the Congress know how they feel on this critical issue."

Here, the listener is urged merely to make his or her "views" known to Congress. This is nevertheless a violation if the context makes it clear, as in the example, what those "views" are supposed to be.

- "All those unneeded new bills headed for the Presidents desk from Congress—all the unworthy Federal programs and projects—are guns pointed at the heads of American taxpayers…. Right now, Congress is getting all kinds of letters from special interest groups. Those groups are pleading their own selfish causes. I think Congress should hear from all Americans on what the President is trying to do whatever their views may be. And I say that regardless of whether those who contact their Congressmen happen to be in agreement with me."

The purported disclaimer in the last sentence does not cure the obvious violation.

But see B-239856, Apr. 29, 1991, discussed further below, where the official's disclaimer statement factored into our finding that the statements made did not constitute prohibited lobbying. Despite the fact that the official's statement on its face was an exhortation for her audience to contact Members of Congress, we concluded that her comment was a good faith response to an audience members question and was more of a "civics lesson." Furthermore, audience members recalled that the official made explicit "disclaimers" to the effect that she could not advise audience members to take particular actions in support of her agency.

A clear violation occurred in B-128938, July 12, 1976. The Environmental Protection Agency, as part of an authorized public information program, contracted with a nonprofit organization to publish a newsletter in California entitled "Water Quality Awareness." One of the articles discussed

a pending bill that environmentalists opposed. The article went on to name the California representatives on the House committee that was considering the bill and exhorted readers to "[c]ontact your representatives and make sure they are aware of your feelings concerning this important legislation." As with some of the violations in B-178648, the context of the article left no doubt what those "feelings" were supposed to be. The fact that EPA did not publish the article directly did not matter since an agency has a duty to insure that its appropriations are not used to violate a statutory prohibition. *See also* B-202975(1), Nov. 3, 1981; U.S. General Accounting Office, *Alleged Lobbying Activities: Office for Substance Abuse Prevention*, GAO/HRD-93-100 (Washington, D.C.: May 4, 1993) (grantee violated statutory restriction by using grant funds to encourage grassroots lobbying).[131]

In B-285298, May 22, 2000, the White House engaged in extensive outreach efforts to business, labor, environmental, and other groups in order to achieve enactment of legislation establishing permanent normal trade relations for China. After reviewing hundreds of documents we identified one e-mail communication that constituted grassroots lobbying. The e-mail, sent by an Agriculture employee serving on the interagency working group established by the White House, went to two major farmers' organizations. The e-mail forwarded an attached message from a Commerce employee (also serving on the working group) reporting that a certain Member of the House of Representatives had not heard from any of the farmers in his district on the issue of trade with China. The forwarding e-mail stated: "We need to work on this ASAP. [The Member] needs to hear from the farmers in his district." The fact that the House Member was already planning on supporting the legislation did not impact our conclusion that the e-mail on its face directly appealed to large farm organizations to contact a Member of Congress to support the legislation.

Two other cases in which violations were found are B-212235(1), Nov. 17, 1983, and U.S. General Accounting Office, *Improper Lobbying Activities by the Department of Defense on the Proposed Procurement of the C-5B Aircraft*, GAO/AFMD-82-123 (Washington, D.C.: Sept. 29, 1982), both of which are summarized in our previous discussion of 18 U.S.C. § 1913.

[131] For a detailed discussion of the prohibition against the use of grant funds for lobbying activities, see section C.11.d of this chapter.

It is not necessary for a statement to explicitly refer to the particular piece of pending legislation. Thus, a lobbying campaign using appropriated funds urging the public to write to Members of Congress to support a strong merchant marine at a time when cargo preference legislation is pending violates the law. B-192746-O.M., Mar. 7, 1979. The fact that an article did not refer to specific pending legislation was, however, a factor in our determination that the agency did not engage in prohibited grass roots lobbying. GAO/HRD-93-100.

(6) Pending legislation: cases in which no violation was found

As indicated above, GAO has consistently taken the position that the pending legislation statute does not prohibit direct communication, solicited or unsolicited, between agency officials and Members of Congress. This is true even where the contact is an obvious attempt to influence legislation. Thus, GAO concluded that the pending legislation statute was not violated in the following cases:

- Contacts with Members of Congress by federal judges and legislative liaison activities by the Judicial Conference of the United States. 63 Comp. Gen. 624 (1984).

- Visits to Members of Congress by National War College students as part of a seminar on the legislative process. B-209584, Jan. 11, 1983.

- Director of the Office of Management and Budget's letter to all Members of the House of Representatives urging opposition to a disapproval resolution on a Presidential Reorganization Plan. B-192658, Sept. 1, 1978.

See also B-200250, Nov. 18, 1980 (agency sent position paper to Members of Congress opposing particular piece of pending legislation); B-164497(5), Mar. 10, 1977 (entertainment in form of dinners for Members of Congress); B-114823, Dec. 23, 1974 (personal visits to Capitol Hill by agency officials during floor debate on authorizing legislation, at request of congressional proponents of the legislation); B-164786, Nov. 4, 1969 (cruises with Members of Congress on presidential yacht, paid for from entertainment appropriation); B-145883, Oct. 10, 1967 (unsolicited letter to Members of Congress from agency head urging support for continuation of agency programs); B-93353, Sept. 28, 1962 (telegram sent by agency head to all Members of Congress).

A government contractor lobbying with its own corporate (*i.e.*, nonfederal) funds would generally not violate the appropriation act restriction. However, applicable contract cost principles may restrict or prohibit reimbursement. *See*, *e.g.*, Federal Acquisition Regulation, 48 C.F.R. § 31.205-22; B-218952, Aug. 21, 1985; U.S. General Accounting Office, *Nuclear Test Lobbying: DOE Regulations for Contractors Need*

Reevaluation, GAO/RCED-88-25BR (Washington, D.C.: Oct. 9, 1987). In addition, there may be legislation applicable to contractor lobbying.[132]

Also as indicated above, an agency will not violate the pending legislation statute by disseminating material to the public that is essentially expository in nature. Even if the material is promotional, there is no violation, at least of the pending legislation statute, as long as it is not a clear appeal to members of the public to contact their elected representatives.[133] Again, several cases will illustrate.

For example, the Department of Transportation (Transportation) set up displays on U.S. Capitol grounds of passenger cars equipped with passive restraint systems (airbags). Transportation employees at the displays distributed brochures, explained the devices, and answered questions from Members of Congress and the public. All this was done while legislation was pending to prohibit mandatory enforcement of the airbag standard. Considering the timing and location of the displays, one would have to be pretty stupid not to see this as an obvious lobbying ploy, that did not make it illegal since there was no evidence that Transportation urged members of the public to contact their elected representatives. Thus, since it was not illegal for Transportation to advocate the use of airbags or to communicate with Congress directly, there was no violation. B-139052, Apr. 29, 1980. The apparent intent alone is not enough; it must be translated into action.

[132] One of the previously cited pending legislation statutes—the Labor-Health & Human Services provision—has an additional sentence, not included in our quotation, barring the use of appropriated funds to pay the salary or expenses of any grant or contract recipient, or agent of such recipient, related to any activity designed to influence pending legislation. In addition, 31 U.S.C. § 1352, enacted in October 1989 and summarized later in our discussion of lobbying with grant funds, includes governmentwide restrictions on certain lobbying activities by contractors.

[133] The fact patterns of some of the examples that follow may have yielded violations of another restriction on legislative lobbying, had the provision applied. The next section will discuss this restriction, typically included in the Department of Interior appropriations act, which prohibits activity that falls short of an overt appeal to the public to contact Members of Congress.

The Office for Substance Abuse Prevention (OSAP) published "Prevention Pipeline" as part of its statutory duties to act as a clearinghouse for drug and alcohol abuse material and to educate the public. OSAP included in the publication items submitted to it with the following disclaimer: "Publication of information and products does not imply endorsement by OSAP or the Federal Government." One item that was submitted to and published by OSAP informed readers of an "activist's guide" for communities developed by an organization that lobbied for legislation requiring warning labels on alcoholic beverages. While the item went on to describe the guide as helping people with writing to U.S. Senators to urge support of legislation, it did not make any reference to the specific legislation that was pending before Congress at the time, nor did it expressly endorse the idea of writing to Members of Congress in support of legislation. U.S. General Accounting Office, *Alleged Lobbying Activities: Office for Substance Abuse Prevention*, GAO/HRD-93-100 (Washington, D.C.: May 4, 1993).

Similarly, the statute was not violated by the following actions:

- Speech by Secretary of the Air Force urging defense contractors to direct their advertising toward convincing the public of the need for a strong defense rather than promoting particular weapon systems manufactured by their companies. Speech did not refer to legislation nor urge anyone to contact Congress. B-216239, Jan. 22, 1985.

- Bumper stickers purchased by the Department of Transportation and affixed to government vehicles urging compliance with 55 mph speed limit. B-212252, July 15, 1983.

- Various trips by the District of Columbia Police Chief during which he made speeches supporting the administration's law enforcement policy. B-118638, Aug. 2, 1974.

- Statements by cabinet members, distributed to news media, which discussed pending legislation but were limited to an exposition of the administration's views. B-178648, Dec. 27, 1973.

- Mailings by the National Credit Union Administration to federally chartered credit unions consisting of reprints from the Congressional Record giving only one side of a controversial legislative issue. B-139458, Jan. 26, 1972.

- Statements by Deputy Assistant Secretary for the Mining Safety and Health Administration (MSHA) before mining industry executives concerning agency's opposition to legislative proposal to merge MSHA with OSHA did not include urging anyone to contact Members of Congress. U.S. General Accounting Office, *MSHA Lobbying*, GAO/HEHS-96-9R (Washington, D.C.: Oct. 19, 1995).

- Remarks made by Secretary of Education in meetings with members of education organizations and presidents of education associations included factual presentation of budget proposals relating to education but not requests for lobbying assistance. U.S. General Accounting Office, *Department Of Education: Compliance With the Federal Advisory Committee Act and Lobbying Restrictions*, GAO/GGD/OGC-00-18 (Washington, D.C.: Dec. 23, 1999).

- Housing and Urban Development report and the letter transmitting report to agency constituencies criticized proposed budget cuts as having "devastating impact on families and communities nationwide" but did not contain any express appeals that members of the public contact their congressional representatives. B-284226.2, Aug. 17, 2000.

See also B-270875, July 5, 1996 (Labor Department publications entitled "America's Job Fax," supporting President's employment legislation); B-147578, Nov. 8, 1962 (White House Regional Conferences); B-150038, Nov. 2, 1962 (Department of Agriculture press release); B-148206, Mar. 20, 1962 (radio and television announcements by Commerce Department supporting foreign trade legislation).

(7) Pending legislation: Providing assistance to private lobbying groups

Another type of "lobbying" activity GAO has found improper is the use of appropriated funds to provide assistance to private lobbying groups. This is largely an outgrowth of the concept that an agency should not be able to do indirectly that which it cannot do directly.

In 1977, the Office of the Special Assistant to the President for Consumer Affairs and the Office of Consumer Affairs within the then Department of Health, Education and Welfare (HEW) mounted an active campaign to obtain passage of legislation to establish a Consumer Protection Agency. As part of the campaign, the Special Assistant had instructed the Office of Consumer Affairs to informally clear its efforts with certain "public interest lobby members." In addition, two of the consumer lobby groups asked HEW

to provide material illustrating situations where a Consumer Protection Agency could have had an impact had it been in existence. Before implementing the campaign, however, the Office of Consumer Affairs sought advice from the HEW General Counsel, who advised against certain elements of the plan, including the two items mentioned.

Since, pursuant to the HEW General Counsel's advice, the more egregious elements of the plan were not carried out, the Comptroller General concluded that no laws were violated. However, the Comptroller General pointed out that the publicity and propaganda statute would prohibit the use of appropriated funds to develop propaganda material to be given to private lobbying organizations to be used in their efforts to lobby Congress. An important distinction must be made. There would be nothing wrong with servicing requests for information from outside groups, lobbyists included, by providing such items as stock education materials or position papers from agency files, since this material would presumably be available in any event under the Freedom of Information Act. The improper use of appropriated funds arises when an agency assigns personnel or otherwise provides administrative support to prepare material not otherwise in existence to be given to a private lobbying organization. B-129874, Sept. 11, 1978. *See also* 66 Comp. Gen. 707, 712 (1987), drawing the same distinction in the context of 18 U.S.C. § 1913.

In another example, the Maritime Administration ("MarAd") had become intimately involved with the National Maritime Council, a trade association of ship operators and builders. MarAd staff performed the administrative functions of the Council at MarAd headquarters and regional offices. In 1977, at a time when cargo preference legislation was pending in Congress, the Council, with MarAd's active assistance, undertook an extensive advertising campaign in national magazines and on television advocating a strong U.S. merchant marine. Some of the advertisements encouraged members of the public to contact their elected representatives to urge them to support a strong merchant fleet. Reviewing the situation, GAO concluded that MarAd had violated the publicity and propaganda statute by expending appropriated funds to provide administrative support to the Council in the form of staff time, supplies, and facilities, when it knew the Council was attempting to influence legislation pending before Congress. *See* B-192746O.M., Mar. 7, 1979; U.S. General Accounting Office, *The Maritime Administration And The National Maritime Council—Was Their Relationship Appropriate?* CED-79-91 (Washington, D.C.: May 18, 1979).

In B-133332, Mar. 28, 1977, the Smithsonian Institution had prepared an exhibit entitled "The Tallgrass Prairie: An American Landscape" and displayed it at a premiere showing for the benefit of the Tallgrass Prairie Foundation, a nonprofit organization. While appropriated funds were used to prepare the exhibit, none were used for the premiere showing itself since, under the Smithsonian's traveling exhibit program, administrative costs are paid by the host organization. The problem arose because the Tallgrass Prairie Foundation shared a large part of its membership with a lobbying organization known as "Save the Tallgrass Prairie, Inc." (There is no cause that does not have its lobbyists.) In addition, a leading member of both organizations had actually created the exhibit under contract with the Smithsonian. However, the exhibit itself was noncontroversial and the Foundation had an independent legal existence. Thus, since no lobbying took place at the premiere showing, and since any lobbying by "Save the Tallgrass" or by the exhibits creator could not be imputed to the Foundation or to the Smithsonian, GAO concluded that the Smithsonian had not used its appropriations for any improper indirect lobbying.[134]

(8) Promotion of legislative proposals: Prohibited activity short of grass roots lobbying

Since 1977, the following restriction has been included in every Interior Department appropriations act:

> "No part of any appropriation contained in this Act shall be available for any activity or the publication or distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which congressional action is not complete."[135]

[134] *See also* U.S. General Accounting Office, *Department Of Education: Compliance With the Federal Advisory Committee Act and Lobbying Restrictions*, GAO/GGD/OGC-00-18 (Washington, D.C.: Dec. 23, 1999), for a discussion of another instance in which GAO found no evidence that an agency was involved in providing improper assistance to lobbying groups.

[135] Department of Interior and Related Agencies Appropriations, 2003, Pub. L. No. 108-7, div. F, title III, § 302, 117 Stat. 11, 270 (Feb. 20, 2003). Originally the provision concluded with the phrase "in accordance with the Act of June 25, 1948 (18 U.S.C. § 1913)." While this language was eventually eliminated, GAO concluded that its deletion had no effect on the interpretation of the restriction. B-262234, Dec. 21, 1995.

The Committee report accompanying what ultimately became the Interior restriction explained the Committee's concern over "certain public information activities being promoted by [some agencies] that tend to promote pending legislative proposals to set aside certain areas in Alaska for national parks, wildlife refuges, national forest and other withdrawals." The Committee referred to the colorful brochures printed and actively distributed by these agencies, extolling the benefits of such proposals, which as a result tended to promote certain legislative goals of these agencies. The Committee considered these activities to be, at a minimum, violations of the intent of 18 U.S.C. § 1913. At the same time the Committee cautioned that the language "should not be construed as an impediment on the agencies ability to respond to public information inquiries."[136]

The Interior restriction has been interpreted to prohibit both grassroots lobbying activity, proscribed by both 18 U.S.C. § 1913 and the pending legislation restriction, and activity that falls short of such activity. In describing the prohibited activity as that which "in any way *tends to promote* public support or opposition (emphasis added)" to legislation, the restriction is designed to cover particularly egregious examples of lobbying even though the material or activity stops short of explicitly soliciting a member of the public to contact his or her member of Congress in support or opposition of pending legislation. *See* 59 Comp. Gen. 115 (1979); B-284226.2, Aug. 17, 2000.

We have found a number of instances where agencies covered by the Interior provision avoided grassroots lobbying but went beyond appropriate information dissemination and violated the Interior restriction:

- A mass mailing by the National Endowment for the Arts (NEA) of an information package supporting the Livable Cities Program implicitly advocated support of the appropriation for that NEA program. Although the literature did not directly exhort readers to lobby Congress, its tenor was clearly designed to promote public support for the program and the mailing was timed to reach the public just before House reconsideration of a prior refusal to fund the program. 59 Comp. Gen. 115 (1979).

- Remarks made by a Fish and Wildlife Service employee at a press conference called to generate opposition to a pending amendment to

[136] S. Rep. No. 95-276, at 4–5 (1977).

the Clean Water Act and timed to coincide with the congressional committee's active consideration, tended to promote public opposition to the legislative proposal. While the official did not urge members of the public to contact their Members of Congress, he stated, "we cannot afford to roll back protection" for wetlands, which he believed the legislation would do. B-262234, Dec. 21, 1995.

- Forest Service officials waged an aggressive campaign to promote public support for a budget proposal seeking to change the way certain Forest Service payments to states are calculated. Briefing packages, used by officials in talking to local public officials likely to be concerned about funding, were highly supportive of the proposal, emphasizing the benefits of re-forming Forest Service payments to states. Based on the response of some local officials, who indicated they would contact their congressional representatives, the briefing efforts were clearly

- successful at promoting support for the payment proposal. B-281637, May 14, 1999.[137]

In analyzing whether a violation has occurred, a variety of factors must be considered, including the timing, setting, audience, content, and the reasonably anticipated effect of the questioned activity. *See* U.S. General Accounting Office, *H.R. 3078, The Federal Agency Anti-Lobbying Act*, GAO/T-OGC-96-18 (May 15, 1996).[138]

Intent can also be an important factor to consider when presented with a particularly close case. As we have noted, "there is a very thin line between the provision of legitimate information in response to public inquiries and the provision of information in response to the same requests which tends to promote public support or opposition to pending legislative proposals." 59 Comp. Gen. 115 (1979). Navigating this thin line may be difficult for agencies, which cannot always prevent or even anticipate public response.

In B-239856, Apr. 29, 1991, GAO relied on the demonstrated intent of the National Endowment for the Arts (NEA) officials engaging in the questioned activities, in concluding that the agency had not violated the

[137] *See also* U.S. General Accounting Office, *Alleged Unauthorized Use of Appropriated Moneys by Interior Employees*, CED-80-128 (Washington, D.C.: Aug. 13, 1980).

[138] This testimony concerned proposed governmentwide legislation modeled on the Interior restriction. The proposed legislation did not pass.

Interior restriction. One aspect of this decision involved an NEA official's remarks at an arts conference. In response to a question from the audience concerning what the audience could do to support NEA, the official responded that they could contact their congressional representatives. GAO's investigation concluded that there was no intent to promote. The official's response was incidental to her presentation and not part of any plan to generate action on the part of her audience. The official's answer was viewed as more of a civics lesson, informational in nature, rather than an exhortation to contact Congress.

(9) Dissemination of political or misleading information

Generally speaking, funds appropriated to carry out a particular program would not be available for political purposes, that is, for a propaganda effort designed to aid a political party or candidate. *See* B-147578, Nov. 8, 1962. If for no other reason, such an expenditure would be improper as a use of funds for other than their intended purpose in violation of 31 U.S.C. § 1301(a). However, the publicity and propaganda statute does not provide adequate guidelines to distinguish between legitimate and purely political activities and is therefore applicable to "political" activities only to the extent that the activities would otherwise constitute a violation. *See* B-130961, Oct. 26, 1972.

In more general terms, it is always difficult to find that conduct is so purely political as to constitute a purpose violation. As stated in B-144323, Nov. 4, 1960:

> "[The question is] whether in any particular case a speech or a release by a cabinet officer can be said to be so completely devoid of any connection with official functions or so political in nature that it is not in furtherance of the purpose for which Government funds were appropriated, thereby making the use of such funds …unauthorized. This is extremely difficult to determine in most cases as the lines separating the nonpolitical from the political cannot be precisely drawn.
>
> "…As a practical matter, even if we were to conclude that the use of appropriated funds for any given speech or its release was unauthorized, the amount involved would be small, and difficult to ascertain; and the results of any corrective action might well be more technical than real."

Apart from considerations of whether any particular law has been violated, GAO has taken the position that the government should not disseminate misleading information. On occasion, the Comptroller General has characterized publications as propaganda and attacked them from an audit perspective.

In 1976, the former Energy Research and Development Administration (ERDA) published a pamphlet entitled "Shedding Light On Facts About Nuclear Energy." Ostensibly created as part of an employee motivational program, ERDA printed copies of the pamphlet far in excess of any legitimate program needs, and inundated the state of California with them in the months preceding a nuclear safeguards initiative vote in that state. The pamphlet had a strong pro-nuclear bias and urged the reader to "Let your voice be heard." On the legal side, the pamphlet did not violate any anti-lobbying statute because applicable restrictions did not extend to lobbying at the state level. B-130961-O.M., Sept. 10, 1976. However, GAO's review of the pamphlet found it to be oversimplified and misleading. GAO characterized it as propaganda not suitable for distribution to anyone, employees or otherwise, and recommended that ERDA cease further distribution and recover and destroy any undistributed copies. *See* U.S. General Accounting Office, *Evaluation Of the Publication and Distribution Of "Shedding Light On Facts About Nuclear Energy,"* EMD-76-12 (Washington, D.C.: Sept. 30, 1976).

In a later report, GAO reviewed a number of publications related to the Clinch River Breeder Reactor Project, a cooperative government/industry demonstration project, and found several of them to be oversimplified and distorted propaganda, and as such questionable for distribution to the public. However, the publications were produced by the private sector components of the Project and paid for with utility industry contributions and not with federal funds. While GAO was thus powerless to recommend termination of the offending publications, it nevertheless recommended that the Department of Energy work with the private sector components in an effort to eliminate this kind of material, or at the very least insure that such publications include a prominently displayed disclaimer statement making it clear that the material was not government approved. U.S. General Accounting Office, *Problems With Publications Related To The Clinch River Breeder Reactor Project*, EMD-77-74 (Washington, D.C.: Jan. 6, 1978).

d. Lobbying with Grant Funds

The use of grant funds by a federal grantee for lobbying presents somewhat more complicated issues. On the one hand, there is the principle, noted in

various contexts throughout this publication, that an agency should not be able to do indirectly what it cannot do directly. Thus, if an agency cannot make a direct expenditure of appropriated funds for certain types of lobbying, it should not be able to circumvent this restriction by the simple device of passing the funds through to a grantee. Yet on the other hand, there is the seemingly countervailing rule that where a grant is made for an authorized grant purpose, grant funds in the hands of the grantee largely lose their identity as federal funds and are no longer subject to many of the restrictions on the direct expenditure of appropriations. *See* B-289801, Dec. 30, 2002 (holding that when the Department of Education makes grant awards during the period of availability of the funds to be used, Education's grant awards are in compliance with the *bona fide* needs rule even when appropriations available for only one fiscal year are used to fund multiyear grants).

In some instances, Congress has dealt with the problem by legislation. For example, legislation, commonly known as the Byrd Amendment and codified at 31 U.S.C. § 1352, imposes limited governmentwide restrictions. Subsection 1352(a)(1) provides:

> "None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any Federal action described in paragraph (2) of this subsection."

The actions identified in paragraph (2) are the awarding of any federal contract; the making of any federal grant or loan; the entering into of any cooperative agreement; and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement. The law includes detailed disclosure requirements and civil penalties. Subsection (d)(1)(C) stresses that section 1352 should not be construed as permitting any expenditure prohibited by any other provision of law. Thus, section 1352 supplements other anti-lobbying statutes; it does not supersede them.

Subsection (b)(6) of 31 U.S.C. § 1352 directs the Office of Management and Budget (OMB) to issue guidance for agency implementation. OMB published interim final guidance entitled "Governmentwide Guidance for

New Restrictions on Lobbying" on December 20, 1989 (54 Fed. Reg. 52306), supplemented on June 15, 1990 (55 Fed. Reg. 24540), and amended on January 15, 1992 (57 Fed. Reg. 1772) and January 19, 1996 (61 Fed. Reg. 1412). An interim final rule for grants was issued jointly by OMB and 29 grantor agencies as a common rule on February 26, 1990 (55 Fed. Reg. 6736). For contracts, see subpart 3.8 of the Federal Acquisition Regulations.

GAO has addressed the application of the Byrd Amendment to federal contractors in the context of bid protests but has not had occasion to apply it to federal grant recipients. *See* 71 Comp. Gen. 281 (1992) (communication between bidder's "regularly employed" employee and government engineer was not an attempt to influence procuring agency in connection with a federal contract and therefore did not violate the Byrd Amendment); 71 Comp. Gen. 81 (1991) (Byrd Amendment does not require disclosure of reasonable compensation to regularly employed employees); 69 Comp. Gen. 604 (1990) (contractor lobbying activity was not directed at award of current contract and therefore was not required to be disclosed under the Byrd Amendment); B-246304.8 and B-246304.9, May 4, 1993 (bidder's lobbying to have legislation changed, regardless of how funded, did not violate the Byrd Amendment).

More recently, the Lobbying Disclosure Act of 1995,[139] as amended, 2 U.S.C. §§ 1601 *et seq.*, provides that organizations described in section 501(c)(4) of the Internal Revenue Code[140] which engage in lobbying activities are not eligible to receive federal grants. 2 U.S.C. § 1611. The Act, at 2 U.S.C. § 1602(7), defines "lobbying activities" to mean:

> "[L]obbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others."

The Act, at 2 U.S.C. § 1602(8), further defines "lobbying contact" to mean communications with covered federal officials. As such, the Act does not

[139] Pub. L. No. 104-65, 109 Stat. 691 (Dec. 19, 1995).

[140] Certain civic leagues, social welfare organizations, and local associations of employees. 26 U.S.C. § 501(c)(4).

prevent "grassroots" lobbying activities by federal grants recipients as that term is discussed earlier in this chapter in section C.11.c.[141]

Another example is the legislation governing the Legal Services Corporation. Under the Legal Services Corporation Act, recipients of funds, both contractors and grantees, may not use the funds directly or indirectly to attempt to influence the passage or defeat of legislation. The prohibition covers legislation at the state and local level as well as federal legislation. The statute permits three exceptions: (1) recipients may testify before and otherwise communicate with legislative bodies upon request, (2) they may initiate contact with legislative bodies to express the views of the Corporation on legislation directly affecting the Corporation, and (3) they may engage in certain otherwise prohibited lobbying activities when necessary to the proper representation of an eligible client. 42 U.S.C. § 2996f(a)(5).[142] For a general discussion of these provisions, see B-129874-O.M., Oct. 30, 1978. *See also* B-202569, Apr. 27, 1981; *Regional Management Corp. v. Legal Services Corp.*, 186 F.3d 457 (4th Cir. 1999) (generally discussing 42 U.S.C. § 2996f(a)(5) as part of finding that there is no private right of action to challenge the Legal Services Corporation's decision that its grantee did not violate anti-lobbying provision).

Three 1981 cases illustrate the application of the Legal Services Corporation statute. In one case, the Board of Aldermen for the City of Nashua, New Hampshire, was considering a resolution to authorize a "food stamp workfare" demonstration project. An attorney employed by the New Hampshire Legal Assistance group, a Legal Services Corporation grantee, wrote to members of the Board urging them to reject the resolution. Since the letter was not related to the representation of any specific client or group of clients but rather had been self-initiated by the attorney, the use of federal funds to prepare and distribute the letter was illegal. B-201928, Mar. 5, 1981.

[141] *See also* U.S. General Accounting Office, *Federal Lobbying: Differences in Lobbying Definitions and Their Impact*, GAO/GGD-99-38 (Washington, D.C.: Apr. 15, 1999) for further discussion of the Act.

[142] Similar provisions, found in 42 U.S.C. § 2996e(c), apply to the Corporation itself. An illustrative case is B-231210, June 7, 1988, *aff'd* upon reconsideration, B-231210, June 4, 1990, holding that the Corporation is not authorized to retain a private law firm to lobby Congress on its behalf.

In the second case, 60 Comp. Gen. 423 (1981), the Corporation and its grantees conducted a lobbying campaign to drum up support for the Corporation's reauthorization and appropriation legislation. The Corporation argued that the actions were permissible under the exception authorizing contact with legislative bodies on legislation directly affecting the Corporation. While recognizing that the statute permitted direct self-initiated contact in these circumstances, GAO reviewed the legislative history and concluded that the exception did not permit grassroots lobbying either by the Corporation itself or by its grantees.

In the third case, the Managing Attorney of a Legal Services Corporation (LSC) grantee made a mass mailing of a form letter to local attorneys. The letter solicited their support for continuation of the LSC program and urged them to contact a local Congressman opposed to reauthorization of the LSC to try to persuade him to change his vote. This too constituted impermissible grassroots lobbying. B-202787, Dec. 29, 1981.[143]

GAO also found the statute was violated when a grantee used LSC grant funds to oppose the confirmation of Judge Robert Bork to the United States Supreme Court. The finding was based largely on LSC regulations that broadly define "legislation" to include action on appointments. B-230743, June 29, 1990.

Another provision in the LSC enabling legislation prohibits both the Corporation and its grantees from contributing or making available "corporate funds or program personnel or equipment for use in advocating or opposing any ballot measures, initiatives, or referendums." 42 U.S.C. § 2996e(d)(4). The Corporation and one of its grantees violated this one by providing funds and personnel for a campaign to defeat a ballot measure in California. 62 Comp. Gen. 654 (1983).

In addition to the LSC's enabling legislation, appropriation acts providing funds for the Corporation also include restrictions. Beginning in 1978, the Corporation's appropriations contained a restriction that prohibited the use of Corporation funds for publicity or propaganda designed to support or defeat legislation pending before Congress or any state legislature. While serving largely to reemphasize the prohibitions contained in the Corporation's enabling legislation, the restriction made it clear that the

[143] Government lobbying has a tendency to adjust to changes in the political climate. A 1988 case, B-231210, June 7, 1988, found the LSC lobbying to reduce its appropriations.

exception for the proper representation of eligible clients did not extend to grass roots lobbying. *See* 60 Comp. Gen. 423 (1981); B-163762, Nov. 24, 1980.

Since 1996 the LSC's appropriations have gone beyond restricting grantee use of federal funds for lobbying activities to a broader prohibition of the Corporation's providing funds to any grantee "that attempts to influence the passage or defeat of any legislation, constitutional amendment,

referendum, initiative, or any similar procedure of the Congress or a State or local legislative body."[144]

In 2001, the Supreme Court struck down a restriction contained in the Corporation's 1996 appropriation on the use of the Corporation's funds for lobbying purposes. *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). The Court found that provisions, which sought to restrict efforts toward welfare reform, were unconstitutional. See also *Legal Aid Society of Hawaii v. Legal Services Corp.*, 145 F.3d 1017 (9th Cir.), *cert. denied*, 525 U.S. 1015 (1998) for additional background on appropriation act restrictions.

Still another example of legislation expressly applicable to grantees is discussed in B-202787(1), (May 1, 1981). The appropriation act providing funds for the Community Services Administration (CSA) contained a provision which prohibited the use of funds "to pay the salary or expenses of any grant or contract recipient …to engage in any activity designed to influence legislation or appropriations pending before the Congress." GAO found this provision violated when a local community action agency used grant funds for a mass mailing of a letter to members of the public urging them to write to their Congressmen to oppose abolition of the agency. In addition, CSA had issued a regulation purporting to exempt CSA grantees from the appropriation act restriction. Finding that CSA had exceeded its authority, the Comptroller General recommended that CSA rescind its

[144] Ascertaining applicable lobbying restrictions often requires a certain level of patience. The Corporation's 2003 appropriation refers back to the restriction contained in its 1996 appropriation by prohibiting the use of funds "for any purpose prohibited or limited by, or contrary to any of the provisions of, sections 501, 502, 503, 504, 505, and 506 of Public Law 105-119 . . ." Pub. L. No. 108-7,117 Stat. 11, 96, 97 (Feb. 20, 2003); Pub. L. No. 105-119, 111 Stat. 2440, 2510 (Nov. 26, 1997). Public Law 105-119 contains the Corporation's 1998 appropriation, which itself refers back to the Corporation's 1996 appropriation, contained in the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(4), 110 Stat. 1321, 1321-53 (Apr. 26, 1996).

ruling. The Justice Department also found the CSA regulations invalid, construing the statute as constituting "an unqualified prohibition against lobbying by federal grantees" and not merely a restriction on grassroots lobbying. 5 Op. Off. Legal Counsel 180 (1981).

The provision discussed in the preceding paragraph was also violated when a university, using grant funds received from the Department of Education, encouraged students to write to Members of Congress to urge their opposition to proposed cuts in student financial aid programs. U.S. General Accounting Office, *Improper Use of Federal Student Aid Funds for Lobbying Activities*, GAO/HRD-82-108 (Washington, D.C.: Aug. 13, 1982).

An almost identical, subsequent provision was violated when a grantee of the Office of Substance Abuse Prevention used grant funds to host a conference used as a forum for grassroots lobbying. Another grantee did not violate the provision, however, because its lobbying efforts related to a state legislature matter. U.S. General Accounting Office, *Alleged Lobbying Activities: Office for Substance Abuse Prevention*, GAO/HRD-93-100 (Washington, D.C.: May 4, 1993). The fiscal year 2003 Labor, Health and Human Services, and Education, and Related Agencies appropriation act contains a version of this restriction, which has been expanded to prohibit such lobbying activities at the state level. Pub. L. No. 108-7, § 503(b), 117 Stat. 11, 343 (Feb. 20, 2003).

The question of lobbying with grant funds becomes more difficult when the situation is not covered by statute and applicable appropriation act restrictions do not expressly cover grantees. Until late in 1981, the question of whether appropriation act restrictions, silent as to grantees, applied to grantee expenditures had not been definitively addressed in a decision of the Comptroller General. An early case held that telegrams to Members of Congress by state agencies funded by Labor Department grants constituted an improper use of federal funds where they were clearly designed to influence pending legislation. B-76695, June 8, 1948. This case pre-dated appropriation act restrictions and was decided under 18 U.S.C. § 1913.[145] The concept of applying the prohibition to grantee expenditures would arguably be the same under the appropriation act restrictions. In a 1977

[145] While 18 U.S.C. § 1913 has been regarded as applicable only to officers and employees of the federal government and not to contractors or grant recipients, this interpretation has not been challenged since the statute was amended in 2002 by Pub. L. No. 107-273, § 205(b), 116 Stat. 1758, 1778 (Nov. 2, 2002). *See* B-214455, Oct. 24, 1984 (citing a May 24, 1983, letter to GAO from the Justice Department's Criminal Division).

letter, GAO noted the principle that funds in the hands of a grantee largely lose their identity as federal funds and said that the applicability of the publicity and propaganda statute was therefore "questionable." B-158371, Nov. 11, 1977 (nondecision letter). A 1978 letter to a Member of the Senate said that the issue should be addressed on a case-by-case basis. B-129874, Aug. 15, 1978.

In B-128938, July 12, 1976, GAO said that an agency has a responsibility to insure that its appropriations are not used to violate the anti-lobbying statute. While the case involved expenditures by a contractor, the principle would seemingly apply as well to a grantee.

Finally, in B-202975(1), Nov. 3, 1981, the Comptroller General resolved the uncertainty, applied the concept of B-128938, and concluded that:

> "Federal agencies and departments are responsible for insuring that Federal funds made available to grantees are not used contrary to [the publicity and propaganda] restriction."

The case involved the Los Angeles Downtown People Mover Authority, a grantee of the Urban Mass Transportation Administration (UMTA), Department of Transportation. Fearing that its funding was in jeopardy, the Authority prepared and distributed a newsletter urging readers to write to their elected representatives in Congress to support continued funding for the People Mover project. The Comptroller General found that this newsletter, to the extent it involved UMTA grant funds, violated the anti-lobbying statute.

Similarly, in 1996, GAO determined that the state of Nevada improperly used grant funds in violation of a broad provision found in the annual Energy and Water Development appropriation acts prohibiting the use of federal funds to influence legislation and other lobbying activities.[146] *See* U.S. General Accounting Office, *Nuclear Waste: Nevada's Use of Nuclear Waste Grant Funds*, GAO/RCED-96-72 (Washington, D.C.: Mar. 20, 1996).

[146] "[N]one of the funds herein appropriated may be used directly or indirectly to influence legislative action on any matter pending before Congress or a State legislature or for any lobbying activity as provided in section 1913 of title 18, United States Code." Energy and Water Development Appropriations Act, 1995, Pub. L. No. 103-316, 108 Stat. 1707, 1716 (Aug. 26, 1994).

GAO concluded that the production of a videotape advancing the state's opposition to a nuclear waste repository at Yucca Mountain was an indirect attempt to influence a matter pending before Congress.

In our preceding discussion of lobbying by government agencies, we noted that appropriation act restrictions may be limited to lobbying the United States Congress or may also apply to lobbying at the state and local level where expressly provided. The same principle applies with respect to lobbying with grant funds. B-214455, Oct. 24, 1984; B-206466, Sept. 13, 1982.

e. Informational Activities

As we have noted previously, a government agency has a legitimate interest in informing the public about its programs and activities. Just how far it can go depends on the nature of its statutory authority. Certainly there is no need for statutory authority for an agency to issue a press release describing a recent speech by the agency head, or for the agency head or some other official to participate in a radio, television, or magazine interview. Activities of this type are limited only by applicable restrictions on the use of public funds such as the anti-lobbying statutes previously discussed.

A 1983 decision illustrates another form of information dissemination that is permissible without the need for specific statutory support. Military chaplains are required to hold religious services for the commands to which they are assigned. 10 U.S.C. § 3547. Publicizing such information as the schedule of services and the names and telephone numbers of installation chaplains is an appropriate extension of this duty. Thus, GAO advised the Army that it could procure and distribute calendars on which this information was printed. 62 Comp. Gen. 566 (1983). Applying a similar rationale, the decision also held that information on the Community Services program, which provides various social services for military personnel and their families, could be included. *See also* B-290900, Mar. 18, 2003 (approving the Bureau of Land Management's use of appropriated funds to pay its share of the costs of disseminating information under a cooperative agreement); B-280440, Feb. 26, 1999 (allowing the Border Patrol's use of appropriated funds to purchase uniform medals that, in part, served to advance "knowledge and appreciation for the agency's history and mission").

Some agencies have specific authority to disseminate information. Such authority will permit a broader range of activities and gives the agency

discretion to choose the appropriate means, the selection being governed by the necessary expense doctrine.

The agency may use common devices such as buttons or magnets (*e.g.*, 72 Comp. Gen. 73 (1992)), newsletters (*e.g.*, B-128938, July 12, 1976) or conferences or seminars (*e.g.*, B-166506, July 15, 1975). In one case, the Comptroller General approved a much less conventional means. Shortly after World War II, the Labor Department wanted to publicize its employment services for veterans. It did this by discharging balloons from a float in a parade. Attached to the balloons were mimeographed messages asking employers to list their available jobs. Since the Department was charged by statute with publishing information on the program, the cost of the balloons was permissible. B-62501, Jan. 7, 1947. Other pertinent cases are 32 Comp. Gen. 487 (1953) (publication of Public Health Service research reports in scientific journals); 32 Comp. Gen. 360 (1953) (the recording of Office of Price Stabilization forum discussions to be used at similar meetings in other regions); B-89294, Aug. 6, 1963 (use of motion picture by United States Information Agency); B-15278, May 15, 1942 (photographs); A-82749, Jan. 7, 1937 (radio broadcasts).

Conversely, in 18 Comp. Gen. 978 (1939), radio broadcasts by the Veterans Administration were held to violate 31 U.S.C. § 1301(a) because the agency did not have statutory authority to disseminate information about its activities. However, in 1958, Congress gave the then-named Veterans Administration the authority to "provide for the preparation, shipment, installation, and display of exhibits, photographic displays, moving pictures, and other visual educational information and descriptive material."[147] The Comptroller General found that this authority, now codified in 38 U.S.C. § 703(d), permitted the Department of Veterans Affairs to use its medical care appropriation for the rental of booth space at the Oklahoma State Fair and for the purchase of imprinted book matches and imprinted jar grip openers to be distributed at the fair for recruiting purposes and to provide veterans with a number to call to obtain information. B-247563.2, May 12, 1993. The Bureau of Printing and Engraving also needed statutory authority to publish a 100-year history to commemorate its centennial because the Bureau is essentially an "industrial and service" establishment and lacked authority to disseminate information. 43 Comp. Gen. 564 (1964).

[147] Pub. L. No. 85-857, § 233, 72 Stat. 1105, 1116 (Sept. 2, 1958).

f. Advertising and the Employment of Publicity Experts

(1) Commercial advertising

Suppose you opened this publication and found on the inside front cover a full-page advertisement for somebody's soap or underwear or aluminum siding or the local pool parlor. We assume most readers would find this offensive. There is in fact a long-standing policy against involving the government in commercial advertising. In the case of government publications, the policy is codified in section 13 of the Government Printing and Binding Regulations issued by the Joint Committee on Printing (1990 reprint):

> "No Government publication or other Government printed matter, prepared or produced with either appropriated or nonappropriated funds or identified with an activity of the Government, shall contain any advertisement inserted by or for any private individual, firm, or corporation; or contain material which implies in any manner that the Government endorses or favors any specific commercial product, commodity, or service."

S. Pub. No. 101-9 at 13 (1990). An explanatory paragraph included in the regulations summarizes many of the reasons for this prohibition. Advertising would be unfair to competitors in that it would, regardless of intent, unavoidably create the impression of government endorsement. It would also be unfair to nongovernment publications that compete for advertising dollars and need those dollars to stay in business. Acceptance of advertising could also pose ethical, if not legal, problems. (Imagine, for example, lobbyists scrambling to purchase advertising space in the Congressional Record.)

A different situation was presented in 67 Comp. Gen. 90 (1987). The United States Information Agency (USIA) was authorized to accept donations of radio programs from private syndicators for broadcast over the Voice of America. Some donations were conditioned on the inclusion of commercial advertising. GAO noted that, in the case of public broadcast stations (which are supported by the Corporation for Public Broadcasting), commercial advertising is expressly prohibited by 47 U.S.C. § 399b(b). However, there was no comparable statute applicable to USIA. Therefore, the conditional donations were not subject to any legal prohibition. In view of the traditional policy against commercial advertising, GAO suggested that USIA first consult the appropriate congressional committees.

(2) Advertising of government programs, products, or services

Even the casual viewer of commercial television will note that the government is heavily "into" advertising. From the ever-present "Smokey

Bear" reminding us that only we can prevent wildfires[148] to Vince and Larry, the Crash Test Dummies, and the recruitment efforts of the U.S. Army and its message "An Army of One," the government has sponsored a variety of campaigns designed to either encourage or discourage various behaviors. Whether an agency's appropriations are available for advertising, like any other expenditure, depends on the agency's statutory authority.

Whether to advertise and, if so, how far to go with it[149] are determined by the precise terms of the agency's program authority in conjunction with the necessary expense doctrine and general restrictions on the use of public funds such as the various anti-lobbying statutes. *See* B-251887, July 22, 1993 (Forest Service may pay for newspaper advertisements informing the public of activities in the national forests because these activities are within the Service's statutory authority and the advertisements are reasonable ways of disseminating information related to the purposes of the Service's appropriation); B-229732, Dec. 22, 1988 (Department of Housing and Urban Development had no authority to incur promotional expenses at a trade show in the Soviet Union when the purpose of the show was to enhance the potential for sale of American products and services in the Soviet Union, a purpose unrelated to HUD's mission).

As noted previously, some agencies have express promotional authority. For example, the Department of Energy may promote energy conservation. *See* B-139965, Apr. 16, 1979 (nondecision letter). Similarly, the United States Postal Service has statutory authority to advertise its philatelic

[148] Smokey Bear and his famous warning, "Only You Can Prevent Forest Fires" was introduced to Americans in 1944. In response to an outbreak of wildfires in 2000, the campaign was changed to "Only You Can Prevent Wildfires." Whatever his slogan, Smokey is recognized and protected by act of Congress. *See* 16 U.S.C. § 580p. Mess with Smokey and you can go to jail. 18 U.S.C. § 711.

[149] Even with specific authority to advertise, agencies still need to be careful. *See Federal Express Corp. v. United States Postal Service*, 151 F.3d 536 (6th Cir. 1998) and *Federal Express Corp. v. United States Postal Service*, 40 F. Supp. 2d 943 (W.D. Tenn. 1999) (involving claims that the U.S. Postal Service engaged in false advertising).

services to encourage stamp collecting. B-114874.30, Mar. 3, 1976 (nondecision letter).

As with the dissemination of information, where promotional authority exists, agencies have reasonable discretion, subject to "necessary expense" considerations, in selecting appropriate means. Thus, the Navy could exercise its statutory authorization to promote safety and accident prevention by procuring book matches with safety slogans printed on the covers and distributing them without charge at naval installations. B-104443, Aug. 31, 1951. Another example is B-184648, Dec. 3, 1975.

Activities of the United States Mint furnish additional illustrations. In B-206273, Sept. 2, 1983, GAO considered the Mint's promotional authority under legislation authorizing coins to commemorate the 1984 Los Angeles Summer Olympics. GAO concluded that the Mint could stage media events and receptions, and could give away occasional sample coins at these events, if (1) the expenditures were deemed necessary to further the statutory objectives, (2) a reasonable relationship were found to exist between a given expenditure and a marketing benefit for the program, and (3) promotional expenses were recouped from sales proceeds. In 68 Comp. Gen. 583 (1989), GAO applied the same standards to the commemorative coin program generally.[150] Subsequent Mint legislation expressly authorizes marketing, promotion, and advertising. *See*, *e.g.*, 31 U.S.C. § 5136.

The line between promotion and information dissemination is occasionally thin, but the concepts are nevertheless different. Thus, an agency may be authorized to disseminate information but not to promote. If so, its "advertising" must be tailored accordingly. For example, the Federal Housing Administration could disseminate authentic information on available benefits or related procedures under a loan insurance program, but could not use its funds for an advertising campaign to create demand. 14 Comp. Gen. 638 (1935). Similarly, when the United States Metric Board was first created, it could provide information, assistance, and coordination for voluntary conversion to metrics but could not advocate metric conversion. *See* U.S. General Accounting Office, *Getting A Better Understanding of the Metric System—Implications If Adopted by the*

[150] This case also held that the scope of legitimate promotional activities could not include the printing of business cards for sales representatives. Business cards are now approved expenditures where they are a necessary expense of agency operations. B-280759, Nov. 5, 1998. There is a lengthy discussion of business cards in this chapter, section C.13.b.

United States, CED-78-128 (Washington, D.C.: Oct. 20, 1978); B-140339, June 19, 1979.

(3) Publicity experts

A statute originally enacted in 1913, now found at 5 U.S.C. § 3107, provides:

> "Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose."

GAO has had little occasion to interpret or apply 5 U.S.C. § 3107 and, from the earliest cases, has consistently noted certain difficulties in enforcing the statute. In GAO's first substantive discussion of 5 U.S.C. § 3107, the Comptroller General stated "[i]n its present form, the statute is ineffective." A-61553, May 10, 1935. The early cases[151] identified three problem areas, summarized in B-181254(2), Feb. 28, 1975.

First, the prohibition is against compensating any "publicity expert," but the statute does not define the term "publicity expert" nor does it provide criteria for determining who is one. Traditionally, persons employed for or engaged in so-called publicity work have not been appointed as "publicity experts" but under some other designation, and often have other duties as well. Everyone who prepares a press release is not a "publicity expert." Testifying before the House Select Committee on Lobbying Activities in 1950, Assistant Comptroller General Weitzel said:

> "I might mention one of the great difficulties in enforcing that language is it is very, very rare, if ever, the case that a man is on the pay roll as publicity experts [sic]. He can be called almost anything else, and usually and frequently will have other duties, so that that in itself, is a very difficult statute to enforce."[152]

[151] There is no mention of the 1913 statute before the 1930s. A small group of cases then arose. In addition to A-61553, cited in the text, see B-26689, May 4, 1943; A-93988, Apr. 19, 1938; A-82332, Dec. 15, 1936; A-57297, Sept. 11, 1934. Another stretch of silence followed and the statute did not arise again until B-181254(2), Feb. 28, 1975.

[152] *The Role of Lobbying in Representative Self-Government*, Hearings before the House Select Committee on Lobbying Activities, 81st Cong., pt. 1, at 156 (1950).

Second, employees engaged in so-called publicity work are normally assigned to their duties by their supervisors. It would be harsh, in the absence of much more definitive legislative or judicial guidance, to withhold the compensation of an employee who is merely doing his or her assigned job. Some thought was given in the 1930s and early 1940s to amending the statute to cure this problem, but the legislation was not enacted. *See* B-181254(2), *supra*; B-26689, May 4, 1943; A-82332, Dec. 15, 1936.

Third, the effective implementation of the duties of some agencies requires the acquisition and dissemination of information, although agencies normally do not receive specific appropriations for the required personnel.

Based on these considerations, GAO does not view 5 U.S.C. § 3107 as prohibiting an agency's legitimate informational functions or legitimate promotional functions where authorized by law. The apparent intent of the statute is to prohibit publicity activity "for the purpose of reflecting credit upon an activity, or upon the officials charged with its administration, rather than for the purpose of furthering the work which the law has imposed upon it." A-82332, Dec. 15, 1936. *See also* B-181254(2), *supra*. In this sense, 5 U.S.C. § 3107 is closely related to the prohibition on self-aggrandizement previously discussed, although the focus is different in that, to violate 5 U.S.C. § 3107, the activity must be performed by a "publicity expert."

In the only two cases in the 1970s with any substantial discussion of 5 U.S.C. § 3107, GAO considered a mass media campaign by the Federal Energy Administration (FEA), now part of the Department of Energy, to educate the American public on the need for and means of energy conservation. Based on the considerations discussed above and on the FEA's statutory authority to disseminate information and to promote energy conservation, GAO found no basis on which to assess a violation of 5 U.S.C. § 3107. B-181254(2), *supra*; B-139965, Apr. 16, 1979 (nondecision letter). In both cases GAO stressed its view that the statute is not intended to interfere with the dissemination of information that an agency is required or authorized by statute to disseminate, or with promotional activities authorized by law.

The only case in the 1980s to apply 5 U.S.C. § 3107 is B-222758, June 25, 1986. The Chemical Warfare Review Commission, a presidential advisory committee, hired a public affairs consultant. The Commission's functions were solely advisory; it had no authority to engage in promotional activities

or to maintain a public affairs program. In view of the consultant's duties, job title, and reputation, GAO found that he was a "publicity expert." As such, and given the nature of the Commission's functions and its lack of statutory authority, the hiring was held to violate 5 U.S.C. § 3107.

12. Membership Fees

a. 5 U.S.C. § 5946

Appropriated funds may not be used to pay membership fees of an employee of the United States or the District of Columbia in a society or association. 5 U.S.C. § 5946. The prohibition does not apply if an appropriation is expressly available for that purpose, or if the fee is authorized under the Government Employees Training Act. Under the Training Act, membership fees may be paid if the fee is a necessary cost directly related to the training or a condition precedent to undergoing the training. 5 U.S.C. § 4109(b).

The rule that has evolved under 5 U.S.C. § 5946 is that membership fees for individuals may not be paid, regardless of the resulting benefit to the agency. An agency may, however, purchase a membership in its own name upon an administrative determination that the expenditure would further the authorized activities of the agency, and this determination is not affected by any incidental benefits that may accrue to individual employees.[153]

In 24 Comp. Gen. 814 (1945), the Veterans Administration (VA) asked whether it could pay membership fees for VA facilities in the American Hospital Association. Facility membership would enable individual employees to apply for personal membership at reduced rates. The Comptroller General responded that the facility memberships were permissible if administratively determined necessary to accomplish the objectives of the appropriation to be charged. The indirect benefit to individual officials would not operate to invalidate the agency membership. However, the expenditure would be improper if its purpose was merely to

[153] A few very early decisions will be found to the effect that 5 U.S.C. § 5946 prohibits agency memberships as well as individual memberships. *E.g.*, 19 Comp. Gen. 838 (1940); 24 Comp. Dec. 473 (1918). While these decisions do not appear to have been explicitly overruled or modified, they must be regarded as implicitly repudiated by the subsequent body of case law to the extent they purport to prohibit adequately justified agency memberships.

enable the officials to obtain the reduced rates for personal memberships. VA could not, of course, pay for the individual memberships.

Similarly, GAO advised the Environmental Protection Agency (EPA) that it could not pay the membership fees for its employees in professional organizations (such as the National Environment Research Center and the National Solid Waste Management Association), notwithstanding the allegation that the benefits of membership would accrue more to the agency than to the individuals. EPA could, however, purchase a membership in its own name if it justified the expenditure as being of direct benefit to the agency and sufficiently related to carrying out the purposes of its appropriation. 53 Comp. Gen. 429 (1973).[154]

In another 1973 decision, the Comptroller General held that the Justice Department could not reimburse an electronics engineer employed by the Bureau of Narcotics and Dangerous Drugs for membership in the Institute of Electrical and Electronic Engineers. The Justice Department had argued that the government benefited from the membership by virtue of reduced subscription rates to Institute publications and because the membership contributed to employee development. These factors were not sufficient to overcome the prohibition of 5 U.S.C. § 5946. Once again, GAO pointed out that the Bureau could become a member of the Institute in its own name if membership was administratively determined to be necessary. 52 Comp. Gen. 495 (1973). To the same effect is B-205768, Mar. 2, 1982 (Federal Mediation and Conciliation Service can purchase agency membership in Association of Labor Related Agencies upon making appropriate administrative determinations).

In another case, the Comptroller General held that the National Oceanic and Atmospheric Administration could not pay the membership fee of one of its employees in Federally Employed Women, Inc., notwithstanding the employee's designation as the agency's regional representative. The mere fact that membership may be job-related does not overcome the statutory prohibition. B-198720, June 23, 1980. *See also* 19 Comp. Dec. 650 (1913) (Army could not pay for Adjutant General's membership in International Association of Chiefs of Police). Similarly, the fact that membership may result in savings to the government, such as reduced travel rates for

[154] The last sentence of the decision uses the term "essential." This word is too strong. The necessary expense doctrine does not require that an expenditure be essential.

members, does not overcome the prohibition against individual memberships. 3 Comp. Gen. 963 (1924).

As noted, an agency may purchase membership in its own name in a society or association since 5 U.S.C. § 5946 prohibits only memberships for individual employees. The distinction, however, is not a distinction in name only. An expenditure for an agency membership must be justified on a "necessary expense" theory. To do this, the membership must provide benefits to the agency itself. For example, in 31 Comp. Gen. 398 (1952), the Economic Stabilization Agency was permitted to become a member of a credit association because members could purchase credit reports at reduced cost and the procurement of credit reports was determined to be necessary to the enforcement of the Defense Production Act. In 33 Comp. Gen. 126 (1953), the Office of Technical Services, Commerce Department, was permitted to purchase membership in the American Management Association. The appropriation involved was an appropriation under the Mutual Security Act to conduct programs including technical assistance to Europe, and the membership benefit to the agency was the procurement of Association publications for foreign trainees and foreign productivity centers. *See also* 70 Comp. Gen. 190 (1991) (prohibition in 5 U.S.C. § 5946 does not prohibit an agency from using appropriated funds to purchase access for its employees to a private fitness center's exercise facilities as part of the agency's health service program as authorized by 5 U.S.C. § 7901); B-241706, June 19, 1991 (Public Health Service may reimburse physicians for annual medical staff dues since hospital privileges are essential to the performance of the agency's business); B-236763, Jan. 10, 1990 (GAO may pay fees for agency membership in certain professional organizations and designate appropriate GAO employees to attend functions for recruitment purposes).

Citing 31 Comp. Gen. 398 and 33 Comp. Gen. 126, the Comptroller General held in 57 Comp. Gen. 526 (1978), that the Department of Housing and Urban Development could purchase, in the name of the Department, air travel club memberships to obtain discount air fares to Hawaii. Similarly, the General Services Administration could join a shippers association to obtain the benefit of volume transportation rates. B-159783, May 4, 1972.

GAO has also approved membership by the Federal Law Enforcement Center in the local Chamber of Commerce, B-213535, July 26, 1984, and by a naval installation in the local Rotary Club, 61 Comp. Gen. 542 (1982). In the latter decision, however, GAO cautioned that the result was based on the specific justification presented, and that the decision should not be

taken to mean that "every military installation or regional Government office can use appropriated funds to join the Rotary, Kiwanis, Lions, and similar organizations." *Id.* at 544.

The acquisition of needed publications for the agency is sufficient benefit to justify purchase of an agency membership. 20 Comp. Gen. 497 (1941) (membership of Naval Academy in American Council on Education); A-30185, Feb. 5, 1930 (membership of Phoenix Indian School in National Education Association). *See also* 33 Comp. Gen. 126 (1953). Compare 52 Comp. Gen. 495 (1973), holding that acquisition of publications is not sufficient to justify an individual, as opposed to agency, membership.

A variation occurred in 19 Comp. Gen. 937 (1940). The Cleveland office of the Securities and Exchange Commission (SEC) desired access to a law library maintained by the Cleveland Law Library Association. Access was available only to persons who were stockholders in the Association. The alternative to the SEC would have been the purchase of its own library at a much greater cost. Under the circumstances, GAO advised that 5 U.S.C. § 5946 did not prohibit the stock purchases or the payment of stockholders assessments. GAO further noted, however, that a preferable alternative would be a contract with the Association for a flat-rate service charge.

Where there is no demonstrable benefit to the agency, the membership expense is improper. Thus, in 32 Comp. Gen. 15 (1952), the cost of membership fees for the New York Ordnance District of the Army in the Society for Advancement of Management was disallowed. The membership was in actuality four separate memberships for four individuals and the primary purpose was to enhance the knowledge of those individuals.

Since the benefit to the agency must be in terms of furthering the purposes for which its appropriation was made, a benefit to the United States as a whole rather than the individual agency may not be sufficient. In 5 Comp. Gen. 645 (1926), the former Veterans Bureau owned herds of livestock and wanted to have them registered. Reduced registration costs could be obtained by joining certain livestock associations. The benefit of registration would be a higher price if the agency sold the livestock. However, sales proceeds would have to be deposited in the Treasury as miscellaneous receipts and would thus not benefit the agency's appropriations. Membership was therefore improper. (The agency's appropriation language was subsequently changed and the membership was approved in A-38236, Mar. 30, 1932.)

Several of the decisions have pointed out that an agency may accept a gratuitous membership without violating the Antideficiency Act. 31 Comp. Gen. 398, 399 (1952); A-38236, Mar. 30, 1932, *quoted in* 24 Comp. Gen. 814, 815 (1945).

In addition, payment of a membership fee at the beginning of the period of membership does not violate the prohibition on advance payments found in 31 U.S.C. § 3324. For example, in B-221569, June 2, 1986, the Coast Guard could properly use its funds to pay the membership fees in certain unspecified private organizations (not physical fitness facilities) at the beginning of the membership period. The advance payment prohibition was not applicable since the agency got the benefit of what it purchased upon payment. What was being purchased was a "membership," and the membership was received upon payment. Compare B-288013, Dec. 11, 2001, holding that agency payments of membership fees to a private fitness center at the beginning of each option year, under a contract for providing fitness facilities and services for government employees, before it is known how many and when agency employees use the contractor's facilities and services, would violate the advance payment provision in 31 U.S.C. § 3324. There is a fuller discussion of the advance payment provision in Chapter 5, section C.

The evolution of the statutory law on membership fees produced a somewhat anomalous result in some of the early cases. Section 5946 of Title 5 of the United States Code originally prohibited—and still prohibits—not only membership fees but also the expenses of attending meetings. In the early decades of the statute, some agencies received specific authority to pay the expenses of attendance at meetings, but many did not. Thus, as the individual *versus* agency membership distinction developed, some of the decisions were forced to conclude that an agency could purchase a membership in an association but that nobody could attend the meetings since attending meetings could not be done by "the agency" but only through an individual. *See*, *e.g.*, 24 Comp. Gen. 814, 815 (1945); A-30185, Feb. 5, 1930. Two provisions of the Government Employees Training Act, 5 U.S.C. §§ 4109 and 4110, now permit attendance at meetings and conferences in certain situations. Thus, as a general proposition, if an organization is closely enough related to an agency's official functions to justify agency membership, it is presumably closely enough related to justify sending a representative to its meetings. *See also* section C.2 of this chapter, entitled "Attendance at Meetings and Conventions."

As noted above, the prohibition in 5 U.S.C. § 5946 against individual memberships does not apply if the fee is authorized by the Government Employees Training Act. An illustration is 61 Comp. Gen. 162 (1981), holding that the Defense Department could pay the licensing fees of Methods Time Measurement instructors for the Army Management Engineering Training Agency. The instructors had to be trained and certified—hence the fee—before they could train others. Further, the fee was not a matter of "personal qualification" since the certifications would be restricted to the training of Defense Department personnel and would be of no personal use to the instructors apart from their Defense Department jobs. For more on the issue of personal qualification see section C.13.e of this chapter.

Compare that case with the decision in B-286026, June 12, 2001, in which the Pension Benefit Guaranty Corporation (PBGC) asked whether it could use appropriated funds to pay, as training costs, fees for actuary accreditation. PBGC employs a number of actuaries to calculate pension benefits. Although actuaries do not need a professional license for employment, as part of a collective bargaining agreement PBGC proposed to use training funds to send actuaries to the examination review courses, provide on-the-job study time, and pay for the accreditation examinations. PBGC determined that this course of study and testing would enhance the ability of the PBGC actuaries to carry out their assignments. PBGC has the discretion under the Government Employees Training Act to determine that the review courses constitute appropriate training for its actuaries. Accordingly, GAO agreed that PBGC has authority, under 5 U.S.C. § 4109(a), to use appropriated funds for review courses and on-the-job study time. However, there was no authority to pay the cost of the accreditation examination itself, since a licensing accreditation examination does not fall within the Government Employees Training Act's definition of training. In the absence of statutory authority, an agency may not pay the costs of its employees taking licensing examinations since professional accreditation is personal to the employee and should be paid with personal funds. Here, the actuarial accreditation belongs to the employee personally and would remain so irrespective of whether the employee remains with the federal government. This case predated enactment of 5 U.S.C. § 5757, which gave agencies the discretionary authority to reimburse employees for expenses incurred in obtaining professional credentials, including the costs of examinations. This authority is discussed in more detail in this chapter in the next section on attorneys' expenses related to admission to the bar, and in section C.13.e of this chapter on professional qualification expenses.

Another example of the inapplicability of 5 U.S.C. § 5946 when the membership fee is authorized under the Government Employees Training Act is B-223447, Oct. 10, 1986, approving certain individual memberships for employees of the U.S. Army Corps of Engineers in the Toastmasters International organization as a source of public speaking training. The organization required membership in order to obtain the training. Because the Government Employees Training Act does not apply to active duty members of the uniformed services (68 Comp. Gen. 127 (1988)), the Act's exception to 5 U.S.C. § 5946, and cases applying the Act or the exception, apply to civilian employees of the military departments but not to uniformed personnel.

b. Attorneys

Over the years a number of cases have dealt with the expenses of admission to the bar and related items for attorneys employed by the government. Generally these expenses have been viewed as personal qualification expenses to be paid by the attorney. Recent legislation codified at 5 U.S.C. § 5757 provides authority for agencies, at their discretion, to pay some or all of these expenses. See the discussion at the end of this section.

The question first came up in 22 Comp. Gen. 460 (1942), when the Federal Trade Commission asked if it could reimburse one of its attorneys the fee he paid to be admitted to the bar of the Tenth Circuit Court of Appeals. The attorney had paid the fee in order to make an appearance to represent the agency in a suit filed against it. The Comptroller General said no, stating the rule as follows:

> "It has been the consistent holding of the accounting officers of the United States that an officer or employee of the Government has upon his own shoulders the duty of qualifying himself for the performance of his official duties and that if a personal license is necessary to render him competent therefor, he must procure it at his own expense."

Id. at 461.

In 1967, the National Labor Relations Board asked GAO to reconsider the rule in a fact situation similar to that in 22 Comp. Gen. 460. GAO reviewed the basis for the prior decision in light of the Government Employees Training Act, but found no reason to change it. Pointing out that "the privilege to practice before a particular court is personal to the individual and is his for life unless disbarred regardless of whether he remains in the Government service," the Comptroller General again held that the bar

admission fee was personal to the attorney and could not be paid from appropriated funds. 47 Comp. Gen. 116 (1967).

The same result was reached in B-161952, June 12, 1978, again to the National Labor Relations Board. The fact that an attorney might require admission to several courts rather than just one in the performance of official duties was found immaterial and GAO rejected the suggestion that the court admission would be of very limited value to the attorney after leaving the government.

Questions have also arisen over the requirement for a government attorney to remain a member in good standing of the bar of some state or the District of Columbia. In a jurisdiction with a "unified" or "integrated" bar, the attorney must pay an annual fee to remain a member in good standing, and membership in the state's bar association goes along with the fee. (Some states require annual fees to remain on the active rolls but do not include bar association membership.) In B-171667, Mar. 2, 1971, the annual fee for an Internal Revenue Service attorney to remain in good standing in the California bar, an integrated bar jurisdiction, was held not reimbursable from appropriated funds. The fee remains a matter of personal qualification and the principle is the same whether applied to a one-time fee or to dues or fees charged on a recurring basis. The decision cited 5 U.S.C. § 5946 as an additional reason. GAO reached the same result in 51 Comp. Gen. 701 (1972), concerning a Patent Office attorney's membership in the unified bar of the District of Columbia; again in B-204213, Sept. 9, 1981, concerning mandatory dues for continued membership in the North Carolina bar; and still again in B-204215, Dec. 28, 1981, concerning the membership of an Internal Revenue Service estate tax attorney in the New Jersey bar.

Another case applying the prohibition is B-187525, Oct. 15, 1976. The decision further pointed out that an agency may not pay the costs incurred by one of its attorneys in taking a bar examination since the examination is part of the employee's personal qualification process. *See also* 55 Comp. Gen. 759 (1976) concerning examinations in general.

In 61 Comp. Gen. 357 (1982), GAO held that the Merit Systems Protection Board could not pay the bar membership fees of its appeals officers. It made no difference that the requirement for appeals officers to be bar-admitted attorneys was a new one the Board had imposed on incumbent employees. In addition, the Board could not pay bar review course fees. (The decision distinguished B-187525, cited above, which had permitted bar review course fees in a very limited situation.)

In 2001, section 1112 of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1238 (Dec. 28, 2001) amended Title 5, United States Code, by adding a new section 5757. Under 5 U.S.C. § 5757(a), agencies may, at their discretion, use appropriated funds to pay expenses incurred by employees to obtain professional credentials, state-imposed and professional licenses, professional accreditations, and professional certifications, including the costs of examinations to obtain such credentials. This authority is not available to pay such fees for employees in or seeking to be hired into positions excepted from the competitive service because of the confidential, policy-determining, policy-making, or policy-advocating character of the position. 5 U.S.C. § 5757(b). Nothing in the statute or its legislative history defines or limits the terms "professional credentials," "professional accreditation," or "professional certification." Agencies have the discretion to determine whether resources permit payment of credentials, and what types of professional expenses will be paid under the statute. Thus, if an agency determines that the fees its attorneys must pay for admission to practice before federal courts are in the nature of professional credentials or certifications, the agency may exercise its discretion under 5 U.S.C. § 5757 and pay those fees out of appropriated funds. B-289219, Oct. 29, 2002.

13. Personal Expenses and Furnishings

a. Introduction

Items that are classified as personal expenses or personal furnishings may not be purchased with appropriated funds without specific statutory authority. Most of the cases tend to involve government employees, the theory being simply that there are certain things an employee is expected to provide for him(her)self. A prime example is food, covered in detail previously in this chapter.

The rule on personal expenses and furnishings was stated as follows in 3 Comp. Gen. 433 (1924):

> "[P]ersonal furnishings are not authorized to be purchased under appropriations in the absence of specific provision therefor contained in such appropriations or other acts, if such furnishings are for the personal convenience, comfort, or protection of such employees, or are such as to be reasonably required as a part of the usual and necessary

equipment for the work on which they are engaged or for which they are employed."

This decision is still cited frequently and the rule is applied in many contexts. Of course, over the years, exceptions have evolved, both statutory and nonstatutory. The remainder of this section explores several categories of personal expenses.

b. Business or Calling Cards

Business cards or calling cards are commonly used in the commercial world. (We use the terms synonymously here even though there may be technical distinctions.) Until 1998, we considered them inherently personal in nature, and therefore, a personal expense that was not payable from appropriated funds, absent specific statutory authority. *See* B-246616, July 17, 1992. In 1998, however, we agreed that an agency, applying a necessary expense analysis, may reasonably determine that its appropriations are available to obtain business cards for employees who regularly deal with the public or organizations outside their immediate office. B-280759, Nov. 5, 1998.

The previous rule had its origins in decisions of the Comptroller of the Treasury. For example, in 20 Comp. Dec. 248 (1913), the Comptroller of the Treasury considered the argument that was usually presented in every case—that the cards were to be used for official business purposes. Nonetheless, business or calling cards were considered more a matter of personal convenience than necessity. Therefore, the Comptroller advised federal agencies that the cost of business cards is a personal expense and, therefore, is not chargeable to public funds.[155]

In more recent years, the Comptroller General applied the long-standing prohibition of the use of appropriated funds for: reimbursement of an employee of the National Highway Traffic Safety Administration who had purchased business cards at his own expense (B-195036, July 11, 1979); purchase of a Forest Service public affairs officer's "identification cards," since the cards were to be used for the same purposes as traditional business cards (68 Comp. Gen. 467 (1989)); and payment for "cards of introduction" (B-149151, July 20, 1962).

[155] "[I]n official life it has been the practice for the official himself to furnish his own cards, the salaries in most instances being adequate for such expenditures," the Comptroller of the Treasury chided. 20 Comp. Dec. at 250.

In 1998, GAO re-examined the prohibition. In B-280759, Nov. 5, 1998, GAO did not object to the use of Operation and Maintenance (O&M) funds for the purchase of business cards for use by civilian personnel specialists of the Army Civilian Personnel Advisory Center. The Advisory Center acts as a liaison between Army employing units and their employees, and provides advice and assistance to employers and employees. The specialists would use the business cards to provide the Center's customers with accurate information on how to contact the specialist assigned to a customer's case. Applying a necessary expense analysis, we concluded that business cards would advance the Center's mission, and that use of the Army's O&M appropriation (which funds the Center's activities) to purchase business cards for the specialists was proper. *See also* Memorandum from Richard L. Shiffrin, Deputy Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Emily C. Hewitt, General Counsel, General Services Administration, Aug. 11, 1997.

We have considered the cost of business or calling cards for Members of Congress and their staff who require them a necessary and justifiable expense, given the nature of Members' constituent responsibilities. *See* B-198419, Nov. 25, 1980; B-198419, July 8, 1980.

Also, we have considered reception and representation (or comparable forms of "entertainment") appropriations to be available to purchase business cards for employees whose jobs included representation. B-223678, June 5, 1989 (noting that business cards are a "legitimate and accepted" representation device, so the expenditure is subject to the limitation of that appropriation). *See also* 72 Comp. Gen. 146 (1993); 68 Comp. Gen. 467, 468 n.1 (1989); B-246616, July 17, 1992).

We considered a variation on business cards in B-173239, June 15, 1978. The Board for International Broadcasting wanted to use what it termed "transmittal slips" to accompany the distribution of its annual report. The transmittal slip resembled a business card and contained the words "With the compliments of (name and title), Board for International Broadcasting." It was not necessary to decide whether the "slips" were business cards or not, because 44 U.S.C. § 1106 expressly provides that documents distributed by an executive department or independent establishment may not contain or include a notice that they are being sent with "the compliments" of a government official. Use of the transmittal slips was therefore unauthorized.

Also, "name tags" to be worn on the person were not considered the same as business cards and could be provided from appropriated funds. B-236763, Jan. 10, 1990. A name tag is more closely analogous to a government identification card, which is clearly not a personal expense. 2 Comp. Gen. 429 (1923). *See also* 11 Comp. Gen. 247 (1931) (identification insignia to be worn on caps).

c. Health, Medical Care and Treatment

(1) Medical care

The rule for medical care is that, except for illness directly resulting from the nature of the employment, medical care and treatment are personal to the employee and payment may not be made from appropriated funds unless provided for in a contract of employment or by statute or valid regulation. 57 Comp. Gen. 62 (1977); 53 Comp. Gen. 230 (1973). The case most frequently cited for this rule is 22 Comp. Gen. 32 (1942), which contains citations to many of the earlier decisions.[156]

Exceptions have been recognized where a particular item could be justified as being primarily for the benefit of the government rather than the employees. The exceptions involve primarily physical examinations and inoculation. For example, appropriated funds were held available in the following cases:

- 41 Comp. Gen. 387 (1961) (desensitization treatment for a Department of Agriculture horticulturist with a known history of severe reaction to bee and wasp stings).
- 23 Comp. Gen. 888 (1944) (purchase of drugs and their administration by private doctor to employees exposed to spinal meningitis in line of duty; otherwise, agency would have risked having to quarantine the employees and close the facility).
- B-108693, Apr. 8, 1952 (X-rays for Weather Bureau personnel being assigned to Alaska, presumably necessitated by a high incidence of tuberculosis among Eskimos).

[156] Although not directly related to medical care, there is a very early group of cases, on which the earlier medical care cases partly relied, standing for the proposition that appropriated funds are not available for the burial of a deceased civilian employee unless necessary for the health and/or safety of other employees, in which event the "reasonable expenses of a decent burial" are permissible. 3 Comp. Gen. 111 (1923); 11 Comp. Dec. 789 (1905); 6 Comp. Dec. 447 (1899); 2 Comp. Dec. 347 (1896).

By virtue of legislation enacted in 1946 and now found at 5 U.S.C. § 7901, each agency is authorized to establish a health service program to promote and maintain the physical and mental fitness of employees under its jurisdiction. The statute expressly limits authorized health service programs to (1) treatment of on-the-job illness and dental conditions requiring emergency attention; (2) pre-employment and other examinations; (3) referral of employees to private physicians and dentists; and (4) preventive programs relating to health.

Under this legislative authority, the Comptroller General advised, for example, that an agency could, upon determining that it will be in the government's interest to do so, provide immunization against specific diseases without charge to employees. 47 Comp. Gen. 54 (1967).

In 57 Comp. Gen. 62 (1977), the Comptroller General held that the Environmental Protection Agency was authorized by 5 U.S.C. § 7901 to procure diagnostic and preventive psychological counseling services for its employees. The service could encompass problem identification, referral for treatment or rehabilitation to an appropriate service or resource, and follow-up to help an employee readjust to the job during and after treatment, but could not include the actual treatment and rehabilitation. Actual treatment and rehabilitation remain the employee's responsibility.

In B-270446, Feb. 11, 1997, provision of psychological assessment and referral services for Customs Service employees' family members was determined to be for the benefit of the government and, therefore, permitted under 5 U.S.C. § 7901. The Service's Employee Assistance Program may render these services for family members adversely affected by work-related activities of, or traumatic incidents involving death or serious injury to, an employee in the line of duty carrying out the agency's law enforcement activities. *Cf.* 71 Comp. Gen. 527 (1992) (a federal agency may not use appropriated funds to provide space for eldercare facilities for the adult relatives of agency employees, but may provide employee referral and counseling programs).

In B-198804, Dec. 31, 1980, GAO refused to expand the holding in 57 Comp. Gen. 62 to permit an agency to pay the expenses of alcoholism treatment and rehabilitation for one of its employees. Treatment and rehabilitation, as stressed in 57 Comp. Gen. 62, are the employee's responsibility. It made no difference that the employee had been erroneously advised that the expenses would be covered by her health insurance and had already

incurred the expenses, since the government cannot be bound by the unauthorized acts or representations of its agents.

Federal agencies are authorized under 5 U.S.C. § 7901 to establish smoking cessation programs for their employees, and may use their operating appropriations to pay the costs. 68 Comp. Gen. 222 (1989). In light of the body of evidence of the health hazards of smoking, the decision reasoned, programs to help employees quit smoking are clearly "preventive programs relating to health" for purposes of the statute.[157]

Physical fitness programs may qualify as preventive health programs under 5 U.S.C. § 7901 to the extent permissible under applicable regulations such as Office of Management and Budget Circulars, the Federal Personnel Manual, and regulations of the General Services Administration. In addition, it may be possible to justify some programs under the necessary expense concept without the need to invoke the statute. For example, in 63 Comp. Gen. 296 (1984), GAO applied the necessary expense doctrine to conclude that Bureau of Reclamation funds were available for physical exercise equipment to be used in a mandatory physical fitness program for firefighters.

In 64 Comp. Gen. 835 (1985), GAO considered the scope of a permissible fitness program under section 7901, concluding that a program could include comprehensive physical fitness evaluations and laboratory blood tests. Based on the statute alone, it could also include physical exercise. However, regulations then in effect precluded use of appropriated funds for physical exercise as part of a health service program. The decision further noted, as 63 Comp. Gen. 296 had held, that physical exercise costs incident to a mandatory program necessitated by the demands of designated positions could be paid as a necessary expense without the need to rely on 5 U.S.C. § 7901. *See also* B-216852-O.M., Mar. 6, 1985 (discussing GAO's own authority to establish a fitness program); B-216852, Dec. 17, 1984 (nondecision letter).

Subsequent to 64 Comp. Gen. 835, the Office of Personnel Management revised its regulations to include physical fitness programs and facilities as

[157] The 1989 decision modified 64 Comp. Gen. 789 (1985), which had found smoking cessation programs unauthorized. The 1985 case had correctly held that such programs were not a form of "medical care," but had failed to properly evaluate them as preventive programs.

permissible preventive health services. Based on the revised regulations, an agency may now use appropriated funds to provide access to a private fitness center's exercise facilities, although both GAO and OPM caution that expenditures of this type should be carefully monitored and should be undertaken only where all other resources have been considered and rejected. 70 Comp. Gen. 190 (1991). However, appropriated funds are not authorized for payment of: (1) employees' membership fees to a contracted private fitness center in advance of employees' use of facilities (B-288013, Dec. 11, 2001); or (2) registration fees for employee members of an agency's on-site fitness center to participate in local competitive fitness or sports activities. Participation in such events is generally a personal activity, not an essential part of a government-sponsored preventive health program. 73 Comp. Gen. 169 (1994).

Medical treatment not within the scope of 5 U.S.C. § 7901 remains subject to the general rule expressed in cases such as 22 Comp. Gen. 32. Thus, the cost of an ambulance called by an agency medical officer to take an employee to a hospital could not be paid from appropriated funds. B-160272, Nov. 14, 1966. (This is the kind of expense that can be covered by employee health insurance plans.) In another case, GAO rejected the contention that medical expenses are automatically "necessary expenses," and concluded that Internal Revenue Service (IRS) appropriations were not available to reimburse the State Department for medical services provided to IRS overseas employees and their dependents under the Foreign Service Act of 1946. 53 Comp. Gen. 230 (1973). The decision noted that several other agencies had received specific statutory authority to participate in the program.

A review of the decisions involving medical examinations will further illustrate the relationship of 5 U.S.C. § 7901 to the decisional rules. Prior to the enactment of section 7901, a pre-employment physical examination, the purpose of which was to determine an applicant's eligibility for a federal job, was the applicant's responsibility and was not chargeable to appropriated funds. 22 Comp. Gen. 243 (1942).

Applying the "primary benefit of the government" standard, however, the Comptroller General found post-employment examinations permissible in certain situations. Thus, in 22 Comp. Gen. 32 (1942), GAO told the Army that it could use its appropriations to provide periodic physical examinations to detect arsenic poisoning in civilian workers in a chemical warfare laboratory. The decision noted that instances of arsenic poisoning

"might have a depressing effect on the morale of fellow workers"[158] and might make it more difficult to find qualified people to do the work.[159] In another case, a civilian employee joined the Army during World War II. He received a medical discharge, and thereafter applied for reinstatement to his former civilian job. GAO advised that the agency could pay for a physical examination which it required prior to reinstatement. 23 Comp. Gen. 746 (1944).

In 1946, 5 U.S.C. § 7901 was enacted. Now, agencies have specific authority to include medical examinations, including pre-employment examinations, without charge to applicants, in the health programs they are authorized to establish. 30 Comp. Gen. 493 (1951). While the statute authorizes establishment of government programs, it does not authorize the reimbursement of privately incurred expenses. Thus, an applicant who declines to use an available government doctor for a pre-employment examination and instead chooses to have it performed by a private doctor may not be reimbursed. 31 Comp. Gen. 465 (1952).

In situations not covered by the statute, the "primary benefit of the government" test continues to apply. Thus, based on the earlier precedents, the cost of medical examinations by private physicians was approved in the following cases:

- 30 Comp. Gen. 387 (1951) (physical examinations of Department of Agriculture employees engaged in testing repellents and insecticides for use by the armed forces; no government medical facilities available).
- 41 Comp. Gen. 531 (1962) (annual physical examinations for Saint Lawrence Seaway Development Corporation employees engaged in strenuous physical work, often under severe weather conditions; no public health facilities in area).

The examinations in both of the above cases could have been included in an authorized health service program. As noted, however, facilities were not available in either case. Thus, since the examinations were for the primary benefit of the government, appropriated funds were available to have them

[158] The morale of the poisoned workers would not be particularly enhanced either.

[159] While this may sound heartless, the expenditure could be justified only if it was determined to be necessary to carry out the objects of the appropriation, and the appropriation in this instance was for chemical warfare service, not for employee health.

performed by private physicians. *See also* 73 Comp. Gen. 219 (1994) (National Transportation Safety Board could reimburse air safety investigators for the costs of physical exams required to obtain a Federal Aviation Administration (FAA) medical certificate if the agency's public health facility has no FAA-certified physician); B-286137, Feb. 21, 2001 (U.S. Geological Survey could pay for eye examinations for employees whose work requires visual acuity, but may not pay for their prescription eyeglasses, which are personal and useful to employees who need them inside, as well as outside, the workplace).

In 65 Comp. Gen. 677 (1986), the Navy could pay for a medical examination required for a private individual joining a government research exercise under invitational travel orders. Although government medical facilities were presumably available, there was no need to note this fact in the decision. Since the individual was neither a government employee nor an applicant for a government job, she could not be required to use the government facility and, since the Navy wanted her participation, it could not very well expect her to bear the expense.

Conversely, in B-253159, Nov. 22, 1993, the costs of medical examinations performed by private physicians for two Centers for Disease Control and Prevention employees and their dependents were not reimbursable because the examinations were neither required by the agency nor for the benefit of the government. The two employees and their dependents obtained the examinations in preparation for their relocation to assignments outside the United States. *See also A. Carter, Jr.*, GSBCA No. 15435, 01-1 B.C.A. ¶ 31,404 (Apr. 9, 2001) (Department of Defense should reimburse its civilian employee for dependents' immunizations, and may reimburse him for dependents' physical examinations (both required to obtain return visas to the United States), if the Navy determines that the examinations were primarily for the benefit of the government).

(2) Purchase of health-related items[160]

The purchase of health-related items, while conceptually related to the medical care cases, is also an application of the "personal expense" rule set forth in 3 Comp. Gen. 433, cited at the beginning of this section, that personal equipment needed to qualify an employee to perform the regular duties of his or her position may not be paid from appropriated funds. The

[160] See also "Wearing Apparel" in section C.13.i for related cases.

rule is illustrated in B-187246, June 15, 1977. There, a Community Services Administration employee's doctor had placed him under certain restrictions because of a back injury. Specifically, he was to use a "sacro-ease positioner" for his office chair and could drive cars only with a minimum 116-inch wheel base, bucket seats, and full power. While the equipment may have been necessary for that particular individual to perform his duties, it was not essential to the transaction of official business from the government's standpoint. Therefore, the items could not be provided from appropriated funds.

In B-166411, Sept. 3, 1975, an employee who, as a result of a back injury, needed a bedboard while traveling could not be reimbursed beyond the normal per diem. The bedboard was a personal expense. Similarly, gratuities for wheelchair services while traveling were held nonreimbursable in B-151701, July 3, 1963.

A different type of situation arose in B-215640, Jan. 14, 1985. An agency asked whether it could purchase a heavy-duty office chair for an employee who needed extra physical support because he weighed over 300 pounds and had broken 15 regular chairs. While the particular type of chair in question was necessitated by the employee's physical condition, it is nevertheless the case that an office chair is not "personal equipment" but is an item the government is normally expected to provide for its employees. The purchase was therefore authorized.

Another exception occurred in 23 Comp. Gen. 831 (1944). There, GAO approved the rental of an amplifying device to be attached to an official telephone for use by an employee with a hearing handicap. The device was seen as a means of obtaining the best results from available personnel. The precedent value of this decision is somewhat speculative. On the one hand, the device would not become the property of the individual. Yet on the other hand, the decision seems to have been based largely on the difficulty of hiring "qualified" employees in view of the wartime draft situation. (Whether consideration was given to hiring women is not mentioned.)

Generally, however, exceptions stem from some statutory basis. Thus, in 56 Comp. Gen. 398 (1977), the Comptroller General approved the purchase of a motorized wheelchair for use by a Social Security Administration employee. The decision emphasized that a wheelchair is normally the employee's personal expense. In this case, however, the employee had his own nonpowered wheelchair and needed a motorized wheelchair only because the agency had not complied with the Architectural Barriers Act of

1968. The wheelchair would, of course, become the property of the government and was approved only as a temporary expedient pending compliance with the statute.

One important statute in this regard is the Rehabilitation Act of 1973, 29 U.S.C. § 791. Pursuant to the Rehabilitation Act, federal agencies are required to make "reasonable accommodations" for the known physical or mental limitations of qualified employees with disabilities. *See* 29 C.F.R. §§ 1614.203(b), 1630.9(a). We discuss the Rehabilitation Act in the next section.

Health-related items may also be authorized as "special protective equipment" under 5 U.S.C. § 7903, discussed later in this chapter in section C.13.i. Thus, prescription ground safety glasses may be purchased for employees engaged in hazardous duties. The glasses become and remain the property of the government. The government can also pay the cost of related eye refraction examinations in limited circumstances. 51 Comp. Gen. 775 (1972).

Relying on 3 Comp. Gen. 433 rather than 5 U.S.C. § 7903, GAO, in 45 Comp. Gen. 215 (1965), approved the purchase of special prescription filter spectacles and clinical eye examinations necessary to obtain the proper prescription for employees operating stereoscopic map plotting instruments. Employees who did not use special glasses frequently lost the required visual skills before reaching the normal retirement age. Also, the special glasses would be of no personal use to the employees except during working hours and would remain the property of the government. However, the purchase of eyeglasses for employees who work at video display terminals is not authorized. There is no applicable safety standard in the Occupational Safety and Health Act, 29 U.S.C. §§ 651–678, the work is not (or at least has not yet been found to be) hazardous to the eyes if proper care is used, and not all employees who work at terminals need eyeglasses. 63 Comp. Gen. 278 (1984). *See also* B-286137, Feb. 21, 2001 (U.S. Geological Survey may use appropriated funds to provide eye examinations for certain employees for the benefit of the government, but it may not provide these employees with prescription eyeglasses that would not be for exclusive use at work).

The 1980s saw a veritable flood of cases involving the purchase of air purifiers ("smokeeaters") as the campaign against smoking became a *cause celebre*. The rules, distilled from several decisions,[161] are as follows:

- Appropriated funds are not available to purchase air purifiers for the private office of an employee who objects to tobacco smoke unless the employee's hypersensitivity to smoke qualifies him or her as handicapped under the Rehabilitation Act of 1973.
- Air purifiers may be purchased for "common areas" such as reading rooms.
- Air purifiers may be placed on the desks of employees who smoke if they will provide a general benefit to all employees working in the area.

In 2002, consistent with Executive Order No. 13058, *Protecting Federal Employees and the Public From Exposure to Tobacco Smoke in the Federal Workplace*, 62 Fed. Reg. 43,451 (Aug. 9, 1997), the General Services Administration prohibited the smoking of tobacco products in all interior space owned, rented, or leased by the executive branch, and in any outdoor areas under executive branch control in front of air intake ducts. 41 C.F.R. § 102-74.315.

Another related line of decisions addresses the purchase of bottled drinking water for use in federal work facilities where the safety of municipal or locally provided water is at issue. Generally, appropriated funds are not available to pay for bottled water for the personal use of employees. GAO has made an exception where a building's water supply is unhealthy or unpotable. See, for example, B-247871, Apr. 10, 1992, where a problem with the water supply system in a building caused lead content to exceed the maximum contaminant level and justified the purchase of bottled water for employees until the problems with the system could be resolved.

(3) The Rehabilitation Act

The Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701–797, establishes a federal policy in support of nondiscriminatory employment of

[161] 64 Comp. Gen. 789 (1985), *modified on other grounds*, 68 Comp. Gen. 222 (1989); 63 Comp. Gen. 115 (1983); 62 Comp. Gen. 653 (1983); 61 Comp. Gen. 634 (1982); B-213666, July 26, 1984; B-215108, July 23, 1984.

individuals with a disability. Consistent with that policy, the federal government, its contractors, and federally funded entities are prohibited from discriminating against employees who have physical or mental impairments that substantially limit one or more major life activities but who can perform the essential functions of the position they hold (or apply for), with or without reasonable accommodation. 29 U.S.C. § 791; 29 C.F.R. §§ 1614.203, 1630(2). The Rehabilitation Act requires federal agencies to assume an affirmative leadership role in promoting the employment of qualified handicapped individuals. 29 U.S.C. § 791(b); *see also* 29 U.S.C. § 701(b)(2).

The Rehabilitation Act is related to the probably better known Americans With Disabilities Act (ADA) of 1990, Pub. L. No. 101-336, title I, § 101, 104 Stat. 330 (July 26, 1990), codified at 42 U.S.C. §§ 12101 *et seq.* Although the ADA does not apply to federal employers [42 U.S.C. § 12111(5)(B)(i); 29 C.F.R. § 1630.2(e)(2)(i)], the ADA's standards are used to determine whether agencies are in compliance with the Rehabilitation Act's requirements for employment of qualified individuals with disabilities. 29 U.S.C. § 791(g).[162] Under Equal Employment Opportunity regulations, federal agencies are required to make "reasonable accommodations" for the known physical or mental limitations of qualified employees with disabilities, unless the accommodation(s) would impose an undue hardship on the agency's program. 29 C.F.R. §§ 1630.9(a), 1614.203(b). *See* B-291208, Apr. 9, 2003; B-243300, Sept. 17, 1991.

While GAO has no jurisdiction over substantive claims brought against federal agencies under the Rehabilitation Act, we have responded to agency inquiries concerning the propriety of using appropriated funds for expenditures or informal settlement awards under the Act. *See* 72 Comp. Gen. 111 (1993); 69 Comp. Gen. 470 (1990). Questions occasionally arise concerning whether an agency's provision of a proposed, or requested, accommodation complies with federal appropriations principles (*see*, *e.g.*, B-240271, Oct. 15, 1990); whether an expense claimed by an employee is reimbursable or must be borne by the employee (*see*, *e.g.*, 68 Comp. Gen. 242 (1989)); or whether an item or service may appropriately be provided under the Rehabilitation Act as a reasonable accommodation,

[162] We note that Congress enacted the Rehabilitation Act in 1973. It modeled the now more familiar Americans With Disabilities Act on the Rehabilitation Act, adopting the same definition of "disability" and its interpretation by courts. 42 U.S.C. § 12201(a). *See Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184, 193 (2002).

even though not initially viewed as such (*see*, *e.g.*, B-291208, Apr. 9, 2003). We discuss these three decisions, and others, below.

In addressing these questions, we recognize that agencies may expend appropriated funds to accomplish the purposes of the Rehabilitation Act when acting under the Act's authority and the regulatory standards that govern its application. B-240271, Oct. 15, 1990. An expenditure that might be viewed as personal in nature but for the Rehabilitation Act is a proper use of an agency's appropriation when incurred in satisfaction of the Act's requirements.

Thus, in B-240271, *supra*, GAO advised that the purchase of a motorized wheelchair for a quadriplegic employee who spent half of his time on official travel could be regarded as a "reasonable accommodation" under 29 C.F.R. § 1630.9, on condition that the wheelchair remain the property of the government. Similarly, in B-243300, Sept. 17, 1991, GAO determined that an agency could pay for wheelchair van transportation as a reasonable accommodation under the Rehabilitation Act for an employee severely handicapped by cerebral palsy. The employee needed the service for assistance in returning home when her disability affected her at work in a manner that temporarily rendered her unable to walk. Since this condition occurred only about three times a year, the cost to the agency for the service would be minimal.

The employment of reading assistants for blind employees and interpreting assistants for deaf employees is covered. *Cf.* 72 Comp. Gen. 305 (1993) (the Department of Education may pay for personal assistants for handicapped grant and compliance reviewers who are not federal employees as a cost of acquiring the personal services of these reviewers).

The Rehabilitation Act has also been held applicable to parking expenses. As a general matter, parking incident to an employee's commute between his residence and permanent duty station is a personal expense (*see* section C.13.k). However, if severely disabled employees must pay parking costs higher than those paid by nondisabled employees working at the same facility,[163] the agency can subsidize the difference. 63 Comp. Gen. 270 (1984); (*see also* B-291208, Apr. 9, 2003, discussed in detail in this chapter, section C.13.j).

[163] For example, the disabled employee may have to park closer to the facility at higher rates.

Other types of personal expenses that have been recognized as reasonable accommodations under the Rehabilitation Act for employees with disabilities include—

- Baggage handling fees, to the extent they were incurred as the result of the employee's disability and exceeded similar expenses a non-disabled person would incur in a similar situation (68 Comp. Gen. 242 (1989));

- Additional subsistence expenses incurred by an employee who, with supervisory approval, began a required temporary duty assignment 3 days early, driving from Denver through mountainous terrain to San Francisco, and delayed the return trip by 2 days because of a severe snowstorm. Under the circumstances the employee exercised good judgment and prudence by extending his travel time in view of his disability (64 Comp. Gen. 310 (1985));

- Shipment of an employee's specially equipped vehicle in connection with a permanent change of duty station from California to Washington, D.C., which the agency clearly justified as a cost beneficial, reasonable accommodation under the circumstances (64 Comp. Gen. 30 (1984)); and

- Travel expenses and per diem for an attendant accompanying an employee who was required to travel to an unfamiliar area in connection with a permanent change of duty station. The attendant's travel expense and per diem constituted a necessary expense under the circumstances. 59 Comp. Gen. 461 (1980).

The costs of structural changes to an employee's home were not considered a reasonable accommodation under the Rehabilitation Act. The employee had argued that the changes were required as a result of his assignment to a new permanent duty station. Even though the modifications were necessary to facilitate his mobility, they were made to his privately owned property, and therefore, did not constitute a "reasonable accommodation" under the statute or regulations. B-266286, Oct. 11, 1996.

d. Office Furnishings (Decorative Items)

An agency's appropriations are available without question to furnish the space it occupies with such necessary items as desks, filing cabinets, and other ordinary office equipment. Questions occasionally arise when the item to be procured is decorative rather than utilitarian.

The availability of appropriations for certain decorative items has long been recognized. In 7 Comp. Dec. 1 (1900), the Comptroller of the Treasury advised the Secretary of the Treasury that "paintings suitable for the decoration of rooms" were within the meaning of the term "furniture." Therefore, an appropriation for the furnishing of public buildings was available to purchase cases and glass coverings for paintings of deceased judges. The paintings had been donated to the government for display in a courtroom.

The Comptroller followed this decision in 9 Comp. Dec. 807 (1903), holding that Treasury appropriations were available to buy portraits as furniture for the Ellis Island immigration station if administratively determined "necessary for the public service."

Citing both of these decisions, the Comptroller General held in B-178225, Apr. 11, 1973, that the appropriation for Salaries and Expenses of the Tax Court was available for portraits of the Chief Judges of the Tax Court, to be hung (the portraits, not the judges) in the main courtroom. Similarly, the Tax Court could purchase artwork and other decorative items for judges' individual offices. 64 Comp. Gen. 796 (1985).

Other decisions approving the use of appropriated funds for decorative items are B-143886, Sept. 14, 1960 (oil painting of agency head for "historical purposes" and public display); B-121909, Dec. 9, 1954 ("solid walnut desk mount attached to a name plate"); B-114692, May 13, 1953 (framing of Presidential Certificates of Appointment for display in the appointee's office).

Purchase of decorative items for federal buildings is now covered in the Federal Property Management Regulations, 41 C.F.R. § 101.26.103-2 (2003). The regulations authorize expenditures for pictures, objects of art, plants, flowers (both artificial and real), and other similar items. However, such items may not be purchased solely for the personal convenience or to satisfy the personal desire of an official or employee.

The regulation was discussed and the rule restated in 60 Comp. Gen. 580 (1981). Decorative items may be purchased if the purchase is consistent with work-related objectives and the items to be purchased are not

"personal convenience" items.[164] The determination of "necessity" is within the agency's discretion, subject to the regulations. The regulations apply equally to space leased by an agency in a privately owned building. *See also* 64 Comp. Gen. 796 (1985); 63 Comp. Gen. 110, 113 (1983).

As noted, one type of permissible decorative item is plants. A restriction in a 1980 appropriation act prohibited the use of funds for plant maintenance contracts. The Comptroller General construed this provision to apply to office space to which particular federal employees were actually assigned. The provisions legislative history suggested that it was not intended to apply to outdoor plants or to plants in common areas that were not the assigned work space of any particular employee or group of employees. 59 Comp. Gen. 428 (1980).

e. Personal Qualification Expenses

Generally, expenses necessary to qualify a government employee to do his or her job are personal expenses and not chargeable to appropriated funds. As stated in an early decision:

> "That which is required of a person to become invested with an office must be done at his own expense unless specific provision is made by law for payment by the Government."

2 Comp. Dec. 262, 263 (1895). Somewhat coldly, the Comptroller added, "if he does not desire the office, he need not accept it." *Id. See also United States v. Van Duzee*, 140 U.S. 169, 171 (1891) ("it is the duty of persons receiving appointments from the government …to qualify themselves for the office").

In a 1994 decision, GAO recognized that federal law has subjected the federal government to state regulation in some areas, particularly in the area of environmental regulation, and concluded that where federal employees are required by federal law to comply with state and local licensing regulations, the employee's agency can use appropriations to cover the cost of obtaining the license necessary to perform the regulated activity. 73 Comp. Gen. 171 (1994) (asbestos abatement license required by South Carolina; water treatment foreman's license required by Texas;

[164] The decision also noted that the items must be for permanent rather than "seasonal" use. 60 Comp. Gen. at 582. The rule prohibiting use of appropriated funds for seasonal (*e.g.*, holiday) decorations has since been modified. *See* 67 Comp. Gen. 87 (1987), discussed in this chapter, section C.13.g.

pesticide and herbicide application license required by North Carolina). In that decision, GAO noted that federal law required that Air Force activities in these areas conform to the regulatory requirements of the states.

> "While the license or permit is often obtained in the name of the [Air Force] member, the primary interest in obtaining the license lies with the Air Force …Any personal benefit that Air Force members receive from the acquisition of the licenses is nominal and incidental to the performance of their official duties."

Id. at 173. GAO distinguished such licenses from the licensing requirements of professional personnel such as teachers, accountants, engineers, lawyers, doctors, and nurses.

> "These individuals are fully aware of the licensing requirements of their professions from the time they begin their professional education, and of the fact that society expects them to fully qualify themselves for the performance of their chosen professions. In that sense, the licensing requirements are considered to be more for the personal benefit of the individuals than for their employers."

Id. GAO noted, also, that driver's licenses are considered for the personal benefit of the employee. *Id.*

In 2001, Congress enacted legislation permitting agencies to use appropriations for "expenses for employees to obtain professional credentials, including expenses for professional accreditation, State-imposed and professional licenses, and professional certification; and examinations to obtain such credentials." Pub. L. No. 107-107, § 1112(a), 115 Stat. 1238 (Apr. 12, 2001), codified at 5 U.S.C. § 5757.[165] The statutory language does not create an entitlement; instead, it authorizes agencies to consider such expenses as payable from agency appropriations if the agency chooses to cover them.

[165] The reader should note that in Pub. L. No. 107-273, § 207(a), 116 Stat. 1757, 1779–1780 (Nov. 2, 2002), Congress enacted another section 5757 of Title 5 of the United States Code. There are now two sections in the Code numbered 5757. They are not related.

Neither the statute nor its legislative history defines the terms "professional credentials," "professional accreditation," and "professional certification." GAO has not had occasion to interpret and apply the statute. Nevertheless, the statute and the 1994 decision together appear to cover many, if not most, qualification expenses that GAO previously found to be personal to the employee, including actuarial accreditation (B-286026, June 12, 2001), licenses to practice medicine (B-277033, June 27, 1997), a Certified Government Financial Manager designation (B-260771, Oct. 11, 1995), and professional engineering certificates (B-248955, July 24, 1992). *See also* section C.12.b of this chapter for a discussion of attorneys' bar membership fees.

It is not clear whether the statute covers driver's licenses. Historically, with a few exceptions, a driver's license was considered a personal expense. 21 Comp. Gen. 769, 772 (1942); 6 Comp. Gen. 432 (1926); c23 Comp. Dec. 386 (1917). An exception was recognized in B-115463, Sept. 18, 1953, for Army civilian employees on temporary duty (TDY) of at least 6 months' duration in foreign countries, where the employees did not already possess drivers licenses, operating a motor vehicle was not part of the job for which the employees were hired, but the Army wanted to include driving as part of their TDY duties as a less expensive alternative to hiring additional personnel, and the license was required by the host country. *See also* B-257895, Oct. 28, 1994 (National Security Agency may pay for commercial licenses where the license benefited the Agency and was not a personal qualification for the employee's position); B-87138-O.M., July 19, 1949 (Virgin Islands). As noted above, in 73 Comp. Gen. 171, which concluded that agencies may pay for licenses required by certain state and local regulations, GAO expressly excluded driver's licenses. 73 Comp. Gen. at 173 ("the cost of driver's licenses are considered for the personal benefit of federal employees"). To the extent that an agency refers to the 2001 statute as authority to pay the cost of an employee's driver's license, the agency will have to find that the license is a professional credential, professional accreditation, State-imposed and professional license, or professional certification.

Another statute, 5 U.S.C. § 5945, specifically covers notary publics. It permits agencies to reimburse an employee whose job includes serving as a notary public the expense required to obtain the commission. 5 U.S.C. § 5945. The expense is reimbursable even though the employee uses the notarial power for private as well as government business. 36 Comp. Gen. 465 (1956).

f. Photographs

General rule: The cost of photographs of individual government employees is a personal expense not chargeable to appropriated funds in the absence of specific statutory authority. 31 Comp. Gen. 452 (1952). Thus, the dissemination to the press of photographs of a new agency official upon his appointment was held to be an improper expenditure in B-111336, Sept. 16, 1952.

The rule is intended to prevent the use of public funds for the personal publicity of a particular individual. Exceptions have accordingly been recognized where there is adequate justification that the expenditure is necessary to accomplish some purpose for which the appropriation was made. For example, the distribution of photographs of an area director of the Equal Employment Opportunity Commission (EEOC) was held permissible in 47 Comp. Gen. 321 (1967) where the purpose was to increase cooperation with the EEOC by publicizing its activities and functions. The decision further pointed out that the expense was chargeable to the fiscal year in which the photographs were taken rather than the year in which they were actually used.

Another acceptable justification is illustrated in B-123613, June 1, 1955, involving photographs of the Under Secretary of the Interior. One of the Under Secretary's functions is to represent the Secretary in various parts of the country. The photographs were obtained in order to respond to requests by organizations in preparing programs or by the press, in connection with this official travel. Similar justifications were found sufficient in B-114344, May 19, 1953, and B-47547, Feb. 15, 1945.

Photographs for use on identification cards or badges are permissible when administratively determined necessary to protect government property or for security reasons. 23 Comp. Gen. 494 (1944); 20 Comp. Gen. 566 (1941); 20 Comp. Gen. 447 (1941); 2 Comp. Gen. 429 (1923).

At one time, travel regulations did not provide for the reimbursement of passport photographs, and they were held to be nonreimbursable personal expenses unless and until the regulations should be amended. 9 Comp. Gen. 311 (1930). The regulations were subsequently amended and passport photographs are now reimbursable under 41 C.F.R. § 301-12.1 (2003). *See* 52 Comp. Gen. 177 (1972).

While earlier decisions state the rule in terms of photographs of individual employees, it applies to other photographs as well. The expense will be

permitted where it clearly constitutes a means of effecting a proper agency function and disallowed where adequate justification does not exist.

For example, distribution of photographs of a department store display was viewed as a proper means of carrying out a statutory function of encouraging public cooperation toward economic stabilization. B-113464, Jan. 29, 1953. Similar types of justification were found sufficient in B-175434, Apr. 11, 1972; B-113026, Jan. 19, 1953; and B-15278, May 15, 1942. However, inadequate justification was found in B-149493, Dec. 28, 1977, in which a group photograph of interagency participants in a training symposium, sent free to participants, was held a personal, rather than a necessary, expense. Similarly, photographs taken at the dedication of the Klondike Gold Rush Visitor Center to be sent by the National Park Service as "mementos" to persons attending the ceremony were disallowed as a personal gift in B-195896, Oct. 22, 1979.

g. Seasonal Greeting Cards and Decorations

(1) Greeting cards

The cost of seasonal greeting cards is a personal expense to be borne by the officer who ordered and sent them, and may not be charged to public funds.

In a 1957 case, an agency with overseas posts wanted to send Christmas cards to "important individuals" in the countries where the posts were located. The agency tried to justify the expense as a means of disseminating information and thereby to promote mutual understanding. The Comptroller General ruled, however, that the expense was a personal one and could not be paid from the agency's appropriations. 37 Comp. Gen. 360 (1957). As to the purported justification, the Comptroller General said "it seems to us that very little, if any, information in that regard is contained on the ordinary Christmas greeting card." *Id.* at 361. *See also* 7 Comp. Gen. 481 (1928); B-247563.4, Dec. 11, 1996; B-115132, June 17, 1953.

It is immaterial that the card is "nonpersonal," that is, sent by the agency and not containing the names of any individuals. The expenditure is still improper. 47 Comp. Gen. 314 (1967); B-156724, July 7, 1965.

In 47 Comp. Gen. 314, it was also held immaterial that the expenditure had been charged to a trust fund in which donations, which the agency was statutorily authorized to accept, had been deposited.

Transmitting the greetings in the form of a letter rather than a card does not legitimize the expenditure. In 64 Comp. Gen. 382 (1985), an agency

head sent out a letter stating that the entire staff of the agency "joins me in wishing you a joyous holiday. We look forward to working with you and your staff throughout the coming year." A Member of Congress questioned the propriety of sending these letters in penalty mail envelopes. GAO noted that the letter "transacts no official business" and "is the essence of a Christmas card." *Id.* at 384. Therefore, the costs should not have been charged to appropriated funds.

While all of the above cases deal with Christmas greetings, the rule would presumably apply equally to other holiday or seasonal cards. It would also apply to "greetings" not tied in to any particular holiday. B-149151, July 20, 1962 ("thank you for hospitality" cards). The point is that while sending greetings may be a nice gesture, it is not the sort of thing that should be charged to the taxpayers.

(2) Seasonal decorations

Prior to 1987, based in part on the reasoning that seasonal decorations are significantly different from ordinary office furnishings designed for permanent use, it had been GAO's position that Christmas decorations (trees, lights, ornaments, *etc.*) were not a proper charge to appropriated funds. 52 Comp. Gen. 504 (1973); B-163764, Feb. 25, 1977 (nondecision letter).

In 1987, GAO overruled 52 Comp. Gen. 504, concluding that the rules for office decorations should be the same whether the decorations are seasonal or permanent. 67 Comp. Gen. 87 (1987). Thus, seasonal decorations are now permissible "where the purchase is consistent with work-related objectives [such as enhancement of morale], agency or other applicable regulations, and the agency mission, and is not primarily for the personal convenience or satisfaction of a government employee." *Id.* at 88. *See also* B-226781, Jan. 11, 1988. In implementing this decision, agencies should be appropriately sensitive (whatever that means) with respect to the display of religious symbols. 67 Comp. Gen. at 89.

The rationale of 67 Comp. Gen. 87 does not apply to Christmas cards, which remain "basically individual good will gestures and are not part of a general effort to improve the work environment." *Id. See also* B-247563.4, Dec. 11, 1996.

h. Traditional Ceremonies

Expenditures that might otherwise be prohibited as personal may be permissible when they are incurred incident to certain traditional

ceremonies. Groundbreaking ceremonies and dedication ceremonies for the laying of cornerstones in public buildings are the most common examples of such traditional ceremonies.

For example, in B-158831, June 8, 1966, the cost of flowers used as centerpieces at a dedication ceremony was held to be a proper expenditure. *See also* B-247563.4, Dec. 11, 1996 (floral centerpiece for use at awards ceremony). Similarly, the cost of engraving and chrome-plating a ceremonial shovel used in a groundbreaking ceremony was viewed as a necessary expense of the ceremony. 53 Comp. Gen. 119 (1973). In the cited decision, however, the voucher could not be paid because there was no evidence as to who authorized the work, where the shovel originated, the subsequent use to be made of the shovel, and why there was a year's delay between the ceremony and the engraving.

Expenses necessarily incident to a groundbreaking or cornerstone ceremony are chargeable to the appropriation for the construction of the building. B-158831, June 8, 1966; B-11884, Aug. 26, 1940 (cost of printing programs and invitations to cornerstone ceremony); A-88307, Aug. 21, 1937 (recording of presidential speech and group photograph at cornerstone ceremony); B-107165-O.M., Apr. 3, 1952 (cost of dedication ceremony). *But see* B-250450, May 3, 1993 (grand opening of a new cafeteria located inside an existing federal building does not fall within the "traditional ceremony" exception. Costs of food and entertainment provided for this event are not payable from appropriations for operating expenses, but may be chargeable to reception and representation funds then available).

In 56 Comp. Gen. 81 (1976), the rationale of these cases was extended to Armed Forces change of command ceremonies. The decision held that the cost of printing invitations to a change of command ceremony for a Coast Guard vessel could be paid from the Coast Guard's appropriations for operating expenses. In view of the traditional role of change of command ceremonies in the military, the Comptroller General concluded that the invitations were not inherently personal. (The case was therefore distinguishable from the decisions previously discussed prohibiting the use of public funds for business cards and greeting cards.) However, since expenditure of operating funds had not been approved for the costs of a reception following the change of command ceremony as required by Army regulations, those costs were determined to be payable from official reception and representation funds (for which the agency required no prior approval) because these activities met the prerequisites for an "official reception for an incoming commander." 69 Comp. Gen. 242 (1990). (See

section C.5 of this chapter for a more general discussion of related subject matter.)

The "traditional ceremony" concept has also been applied to a vessel "christening" ceremony at a Navy Yard (A-74436, May 19, 1936), a Uniformed Services University of the Health Sciences annual graduation ceremony (B-211700, Mar. 16, 1984), and a Federal Law Enforcement Training Center's graduation ceremony (B-240365.2, Mar. 14, 1996).

i. Wearing Apparel

The starting point is the principle that "every employee of the Government is required to present himself for duty properly attired according to the requirements of his position." 63 Comp. Gen. 245, 246 (1984), quoting from B-123223, June 22, 1955. In other words, the government will not clothe the naked, at least where the naked are receiving government salaries.

Nevertheless, there are certain out-of-the-ordinary items, required by the nature of the job, which the government should furnish. The test was described in 3 Comp. Gen. 433 (1924), and that discussion is still relevant today:

> "In the absence of specific statutory authority for the purchase of personal equipment, particularly wearing apparel or parts thereof, the first question for consideration in connection with a proposed purchase of such equipment is whether the object for which the appropriation involved was made can be accomplished as expeditiously and satisfactorily from the Government's standpoint, without such equipment. If it be determined that use of the equipment is necessary in the accomplishment of the purposes of the appropriation, the next question to be considered is whether the equipment is such as the employee reasonably could be required to furnish as part of the personal equipment necessary to enable him to perform the regular duties of the position to which he was appointed or for which his services were engaged. Unless the answer to both of these questions is in the negative, public funds can not be used for the purchase. In determining the first of these questions there is for consideration whether the Government or the employee receives the principal benefit resulting from use of the equipment and whether an employee reasonably could be required to perform the service without the equipment. In connection with the

> second question the points ordinarily involved are whether the equipment is to be used by the employee in connection with his regular duties or only in emergencies or at infrequent intervals and whether such equipment is assigned to an employee for individual use or is intended for and actually to be used by different employees."

Id. at 433–34. Under the rule set forth in 3 Comp. Gen. 433, most items of apparel were held to be the personal responsibility of the employee. *E.g.*, 5 Comp. Gen. 318 (1925) (rubber boots and coats for custodial employees in a flood-prone area); 2 Comp. Gen. 258 (1922) (coats and gloves for government drivers). But there were limited exceptions. Thus, caps and gowns for staff workers at Saint Elizabeth's Hospital in Washington were viewed as for the protection of the patients rather than the employees and could therefore be provided from appropriated funds as part of the hospital equipment. 2 Comp. Gen. 652 (1923). *See also* 5 Comp. Gen. 517 (1926). Similarly, aprons for general laboratory use were held permissible in 2 Comp. Gen. 382 (1922). Another exception was wading trousers for Geological Survey engineers as long as the trousers remained the property of the government and were not for the regular use of any particular employee. 4 Comp. Gen. 103 (1924). One category of apparel not permissible under the early decision was uniforms. Uniforms were viewed as personal furnishings to be procured at the expense of the wearer. 24 Comp. Dec. 44 (1917).

There are now three general statutory provisions that permit the purchase of items of apparel from appropriated funds in certain circumstances.

The first is 5 U.S.C. § 7903, enacted as part of the Administrative Expenses Act of 1946. It provides:

> "Appropriations available for the procurement of supplies and material or equipment are available for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks. For the purpose of this section, 'appropriations' includes funds made available by statute [to wholly owned government corporations]."

Id. (explanatory information provided). In order for an item to be authorized by 5 U.S.C. § 7903, three tests must be met: (1) the item must be "special" and not part of the ordinary and usual furnishings an employee

may reasonably be expected to provide for himself; (2) the item must be for the benefit of the government, that is, essential to the safe and successful accomplishment of the work, and not solely for the protection of the employee, and (3) the employee must be engaged in hazardous duty. *See* 32 Comp. Gen. 229 (1952); B-193104, Jan. 9, 1979. Thus, this provision is but a slight liberalization of the rule in 3 Comp. Gen. 433.

Applying 5 U.S.C. § 7903, the Comptroller General has held that raincoats and umbrellas for employees who must frequently go out in the rain are not special equipment but are personal items that the employee must furnish. B-193104, Jan. 9, 1979; B-122484, Feb. 15, 1955. Similarly unauthorized are coveralls for mechanics (B-123223, June 22, 1955) and running shoes for Department of Energy nuclear materials couriers (B-234091, July 7, 1989). Nor does 5 U.S.C. § 7903 authorize reimbursement for ordinary clothing and toiletry items purchased by narcotics agents on a "moving" surveillance. B-179057, May 14, 1974.

An illustration of the type of apparel authorized by 5 U.S.C. § 7903 is found in 51 Comp. Gen. 446 (1972). There, the Comptroller General advised the Department of Agriculture that snowmobile suits, mittens, boots, and crash helmets for personnel required to operate snowmobiles over rough and remote forest terrain were clearly authorized by the statute. Similarly authorized are down-filled parkas for Office of Surface Mining employees temporarily assigned to Alaska or the high country of the western states. 63 Comp. Gen. 245 (1984).[166] Conversely, the purchase of insulated coveralls by the U.S. Army Corps of Engineers for the use of employees working outdoors in near-freezing temperatures would be an improper use of appropriated funds, absent the agency's determination that such cold weather clothing is necessary to satisfy Occupational Safety and Health Act standards, discussed in more detail below. B-289683, Oct. 7, 2002; B-288828, Oct. 3, 2002.

Items other than wearing apparel may be furnished under 5 U.S.C. § 7903 if the tests set forth above have been met. *See*, *e.g.*, 28 Comp. Gen. 236 (1948) (mosquito repellent for certain Forest Service employees).

[166] The distinction between this case and the "foul weather" cases cited in the preceding paragraph is that an employee is expected to provide his or her own clothing suitable for the climate in which the employee normally works or resides. *See* B-230820, Apr. 25, 1988 (nondecision letter). For example, it is not reasonable to expect an employee who normally lives and works in Florida to own clothing suitable for Alaska in January.

Continuing the old rule, however, the Comptroller General held that 5 U.S.C. § 7903 does not constitute general authority for the purchase of uniforms. 32 Comp. Gen. 229 (1952).

Congress addressed the uniform problem with the second general statutory provision under consideration, 5 U.S.C. § 5901, the so-called Federal Employees Uniform Act, most recently amended by section 202 of the Federal Employees Pay Comparability Act of 1990, contained in section 529 of the fiscal year 1991 Treasury, Postal Service, and General Government Appropriation Act, Pub. L. No. 101-509, 104 Stat. 1389, 1456 (Nov. 5, 1990)1456 (Nov. 5, 1990). This provision authorizes annual appropriations to each agency, on a showing of necessity or desirability, to provide a uniform allowance of up to $400 a year (or more if authorized under Office of Personnel Management regulations) to each employee who wears a uniform in the performance of official duties. The agency may pay a cash allowance or may furnish the uniform.

Note that 5 U.S.C. § 5901 is merely an authorization of appropriations. An appropriation is still required in order for payments to be made or obligations incurred. 35 Comp. Gen. 306 (1955). While the decision stated that specific appropriation language is preferable, it recognized that the inclusion of an item for uniforms in an agency's budget request that is then incorporated into a lump-sum appropriation is legally sufficient.

An example of an item that could properly be required under 5 U.S.C. § 5901 is frocks for Department of Agriculture meat grader employees. 57 Comp. Gen. 379, 383 (1978). Another example is robes for administrative law judges of the Occupational Safety and Health Review Commission. B-199492, Sept. 18, 1980. (The decision concluded merely that the expenditure would be legal, not that it was an especially good idea, pointing out that federal judges pay for their own robes.)

In 48 Comp. Gen. 678 (1969), a National Park Service employee was given a uniform allowance but, in less than a year, was promoted to a higher position that required substantially different uniforms. The Comptroller General held that the employee could receive the uniform allowance of his new position even though the sum of the two allowances would exceed the statutory annual ceiling. To hold otherwise would have been inconsistent with the statutory purpose.

While the uniform allowance under 5 U.S.C. § 5901 may be in cash or in kind, there is no similar option for "special clothing or equipment" under

5 U.S.C. § 7903. The latter statute authorizes the furnishing of covered items in kind only. 46 Comp. Gen. 170 (1966).

The third piece of legislation that may permit the purchase of items of apparel from appropriated funds is the Occupational Safety and Health Act of 1970 (OSHA). Section 19 of OSHA, 29 U.S.C. § 668, requires each federal agency to establish an occupational safety and health program and to acquire necessary safety and protective equipment. Thus, protective clothing may be furnished by the government if the agency head determines that it is necessary under OSHA and its implementing regulations.

Under the OSHA authority, the following items have been held permissible:

- Snowmobile suits, mittens, boots, and crash helmets for Department of Agriculture employees required to operate snowmobiles over rough and remote terrain. 51 Comp. Gen. 446 (1972). (This decision has already been noted in the discussion of 5 U.S.C. § 7903 above. The decision held that the items were justifiable on either basis.)

- Down-filled parkas for Interior Department employees temporarily assigned to Alaska or the high country of the western states during the winter months. 63 Comp. Gen. 245 (1984). (This decision is also noted under 5 U.S.C. § 7903. As with 51 Comp. Gen. 446, the items could be justified under either statute.)

- Protective footwear for Drug Enforcement Administration agents assigned to temporary duty in jungle environments. The footwear remains the property of the United States and must be disposed of in accordance with the Federal Property Management Regulations. B-187507, Dec. 23, 1976.

- Cooler coats and gloves for Department of Agriculture meat grader employees. 57 Comp. Gen. 379 (1978).

- Ski boots for Forest Service snow rangers, where determined to be necessary protective equipment in a job-hazard analysis. B-191594, Dec. 20, 1978.

- Steel-toe safety shoes for an Internal Revenue Service supply clerk whose work includes moving heavy objects. 67 Comp. Gen. 104 (1987). This item also could have been justified under 5 U.S.C. § 7903. *Id.*

If an item is authorized under OSHA, it is unnecessary to determine whether it meets the tests under 5 U.S.C. § 7903. *E.g.*, B-187507, *supra.* As noted in the above listing, however, several of the decisions have discussed both statutes. If an item does not qualify under OSHA, it is still necessary to examine the other possibilities. *E.g.* B-234091, July 7, 1989 (running shoes unauthorized under either statute).

Thus, three statutes under which purchase of wearing apparel may be authorized are 5 U.S.C. § 7903 (special clothing for hazardous occupations), 5 U.S.C. § 5901 (uniform allowances), and 29 U.S.C. § 668 (protective clothing under OSHA). Two decisions summarizing all three statutes are 63 Comp. Gen. 245 (1984) and B-289683, Oct. 7, 2002. Some agencies also have specific authority to provide uniforms or clothing allowances to their employees. *See*, *e.g.*, 10 U.S.C. §§ 775 and 1593; 22 U.S.C. §§ 1474(14), 2396(a)(12), and 2669(e); and 37 U.S.C. §§ 415–419. However, if neither general nor specific authorities apply, then the rule of 3 Comp. Gen. 433 continues to govern. For example, in B-251189, Apr. 8, 1993, GAO held that the costs of business suits worn by Agency for International Development chauffeurs may not be reimbursed. Such suits are not uniforms under section 636(a)(12) of the Foreign Service Act of 1961 (22 U.S.C. § 2396(a)(12)) since they are worn as a part of customary business attire and provide no distinctive identification of the employees as a group. As such, the suits are a personal expense of the employees.

Another illustration of the continued applicability of the decisional rules is the rental of formal evening wear, a situation which, thus far at least, no one has suggested fits under any of the three statutes.

In a 1955 case, an employee on travel status in England rented a dinner jacket to attend a dinner related to the purposes of the trip. Based on the rule of 3 Comp. Gen. 433, the Comptroller General denied reimbursement for the cost of renting the jacket. 35 Comp. Gen. 361 (1955). "The claimant's failure to take with him necessary clothing to meet reasonably anticipated personal necessities is not considered sufficient to shift the burden of the cost of procuring such clothing from personal to official business." *Id.* at 362. This decision was followed in a similar situation involving the rental of a tuxedo in 45 Comp. Gen. 272 (1965), and again in 64 Comp. Gen. 6 (1984). *But see* B-256936, June 22, 1995 (the Department of State may use its representation appropriation funds to reimburse rental costs for formal morning attire required by Ambassador and Deputy Chief of Mission in representing the United States on occasions of State in Great Britain).

A different situation was presented in 48 Comp. Gen. 48 (1968), in which it was held that the Secret Service could pay the rental charges on formal dress attire required to be used by special agents when attending formal functions incident to their furnishing protective services to persons whom they are assigned to protect. In this situation, the purpose of the formal attire is not merely to be "socially acceptable," but is necessary for security purposes, to make the agents less readily identifiable as such. *See also* 71 Comp. Gen. 447 (1992).

Similarly, in the not-too-distant past, attorneys arguing before the Supreme Court were required to wear formal cutaway coats and striped pants. In B-164811, July 28, 1969, GAO approved reimbursement for the rental of these items by Justice Department attorneys who were only occasionally required to appear before the Supreme Court. A more recent case restating the rules is 67 Comp. Gen. 592 (1988) (advising agency to resolve certain conflicting information and pay or deny the claim accordingly).

Finally, the rules we have been discussing for wearing apparel apply to government employees. Questions may arise with respect to nongovernment employees, in which event the answer is a pure application of the necessary expense doctrine, in light of whatever statutory authority may exist. For example, in B-62281, Dec. 27, 1946, the State Department was administering a training program for citizens of the Philippines to assist in post-war rehabilitation. The decision held that the government could provide "special purpose" clothing required for the training, such as uniforms, overalls, or work aprons. However, this could not include the furnishing of complete wardrobes adaptable to the cooler climate of the United States; this was a personal expense. *See also* 29 Comp. Gen. 507 (1950) (clothing for indigent narcotic patients upon release from Public Health Service Hospitals, as therapeutic measure to aid rehabilitation).

j. Miscellaneous Personal Expenses

Several personal expense matters are dealt with elsewhere in this chapter, for example, the sections on entertainment and membership fees. Apart from those topics specifically covered elsewhere, the preceding portions of this section cover the situations that have generated the largest number of cases. There are, however, other frequently encountered situations.

(1) Commuting and parking

One personal expense everyone is familiar with is commuting to and from work (more precisely, between permanent residence and permanent duty location). The employee is expected to be at work; how the employee

chooses to get there is entirely his or her own business. 27 Comp. Gen. 1 (1947); 16 Comp. Gen. 64 (1936).

Along with commuting goes parking. It is equally clear that parking incident to ordinary commuting is also a personal expense. 63 Comp. Gen. 270 (1984); 43 Comp. Gen. 131 (1963); B-162021, July 6, 1977. These cases stand for the proposition that the government may not be required to provide parking facilities for its employees. However, an agency may provide employee parking facilities if it determines that the lack of parking facilities will significantly impair the operating efficiency of the agency and will be detrimental to the hiring and retention of personnel. 72 Comp. Gen. 139 (1993); 49 Comp. Gen. 476 (1970); B-168946, Feb. 26, 1970; B-155372-O.M., Nov. 6, 1964. If severely disabled employees are forced to pay parking costs higher than those paid by nondisabled employees working at the same facility,[167] the agency can subsidize the difference. 63 Comp. Gen. 270 (1984). For further information, see the Rehabilitation Act discussion in this chapter, section C.13.c.

As several of the cases cited in the preceding paragraph discuss, agencies must generally obtain parking accommodations through the General Services Administration (GSA) under the Federal Property and Administrative Services Act of 1949, as amended (ch. 288, 63 Stat. 377 (June 30, 1949)), unless they have independent statutory authority or a delegation from GSA. *See generally* 40 U.S.C. §§ 581 *et seq.* GSA regards a delegation of authority to lease parking facilities as a delegation of authority to enter into a service contract, which can be approved at the regional level, rather than a delegation of leasing authority. 41 C.F.R. § 102-73.235 (2003). If an agency has independent statutory or delegated authority to procure space and facilities and has made the requisite morale and efficiency determinations, it may provide for employee parking in a collective bargaining agreement. *See* 55 Comp. Gen. 1197 (1976).

A governmentwide provision in the fiscal year 1991 Treasury, Postal Service, and General Government Appropriation Act authorizes federal agencies to participate in state or local government programs designed to encourage employees to use public transportation. Pub. L. No. 101-509, § 629, 104 Stat. 1389, 1478 (Nov. 5, 1990). Thus, an agency could use its general operating appropriations to subsidize the use of discounted transit passes by its employees. The "subsidy" is not additional pay for purposes of

[167] For example, the disabled employee may have to park closer to the facility at higher rates.

the prohibition in 5 U.S.C. § 5536. *Id. See also* B-243677, B-243674, May 13, 1991. The legislation had a sunset date of December 31, 1993. In 1993, 5 U.S.C. § 7905 was enacted, which authorizes each agency head to establish a program to encourage employees to use means other than single occupancy motor vehicles to commute to and from work.

The purposes of this authority are to improve air quality and reduce traffic congestion. 5 U.S.C. § 7905 note. Programs established under section 7905 may include such options as: transit passes or cash reimbursements for transit passes; furnishing space, facilities, or services to bicyclists; and nonmonetary incentives. 5 U.S.C. § 7905(b)(2). On April 21, 2000, the President issued Executive Order No. 13150, set out at 5 U.S.C. § 7905 note, requiring federal agencies to implement a transportation fringe benefit program under the authority of section 7905 no later than October 1, 2000.

In B-291208, Apr. 9, 2003, the Commission on Civil Rights asked whether parking benefits for employees with disabilities, who commute to work in privately owned vehicles rather than by mass transit or in vanpools, may be included in the federal government's transportation fringe benefit program. In this case, the parking fees could not be paid under the program authorized by 5 U.S.C. § 7905 and E xecutive Order No. 13150, since payment would encourage employees to use privately owned vehicles for commuting contrary to the stated purposes of the program. However, GAO noted that, if the Commission employees with disabilities pay substantially more to park closer to the building than employees without disabilities, the differential portion may be paid under our holding in 63 Comp. Gen. 270 (1984).

(2) Flexiplace

An emerging issue for the federal government is "flexiplace." Employees on flexiplace schedules, also called telecommuting or telework, typically work at home but can work at other agency-approved locations. Over the past several years, both the President and Congress have increasingly sought to encourage more widespread use of flexiplace. In 1994, then President Clinton directed the head of each executive department or agency to establish a program to encourage and support the expansion of flexible family-friendly work arrangements, including telecommuting and satellite locations. Memorandum, *Expanding Family-Friendly Work Arrangements in the Executive Branch*, 30 Weekly Comp. Pres. Doc. 1468, 59 Fed. Reg. 36017 (July 11, 1994). In section 260 of the Treasury, Postal Service and General Government Appropriations Act for Fiscal Year

1996, Congress enacted permanent authority for federal agencies to spend money for the installation of telephone lines and related equipment in an employees residence and pay monthly fees for an employee authorized to work at home. Pub. L. No. 104-52, § 620, 106 Stat. 468, 501 (Nov. 19, 1995) (31 U.S.C. § 1348 note). Federal telework centers were authorized in 40 U.S.C. § 587, and executive agencies are required to make at least $50,000 available annually for expenses necessary to carry out a flexiplace work program. 40 U.S.C. § 587(d)(2). More recently, section 359 of the 2001 Department of Transportation Appropriations Act required all executive agencies to establish a policy under which eligible employees may participate in telecommuting. The law also directed the Office of Personnel Management to ensure that this requirement was applied to 25 percent of the federal workforce by April 2001 and to an additional 25 percent each year thereafter. Pub. L. No. 106-346, § 101(a) [title III, § 359], 114 Stat. 1356, 1356A-36 (Oct. 23, 2000).

While telephone lines and related equipment may be provided by the agency, increased utility expenses (heating, air conditioning, lighting, *etc.*) incurred by the employee by virtue of working at home are personal expenses and may not be reimbursed in the absence of statutory authority. 68 Comp. Gen. 502 (1989). As the decision points out, along with the increased utility costs, the employee also incurs savings from reduced commuting, child care, meal, and/or clothing expenses. "How the balance should be struck, if at all, …is a legislative judgment." *Id.* at 506. The fact that the employee is participating in a mandatory work-at-home program, as opposed to voluntary, does not matter. The incremental costs of utilities associated with the residential workplace may not be reimbursed. 70 Comp. Gen. 631 (1991).

(3) Miscellaneous employee expenses

Personal expense questions may occur in contexts that arise infrequently and for which there is little precedent. The rationale of the decisions cited and discussed throughout this section should provide the approach necessary to analyze the problem.

For example, the Forest Service requested a lodge owner to furnish lodging and meals to a group of summer employees on temporary duty on a forest project in Maine. While the Forest Service made the request on behalf of the employees, it did not contract directly with the lodge owner. The individual employees received a per diem allowance and were expected to settle their own accounts with the lodge. One of the employees left at the end of the

summer without paying his bill and the lodge owner filed a claim against the government. Under these circumstances, the unpaid bill was nothing more than a personal debt of the individual and there was therefore no basis for government liability. B-191110, Sept. 25, 1978. (Had the government contracted directly with the lodge, the result might have been different. See section on canceled hotel reservations in Chapter 12 (Volume III of the second edition of *Principles of Federal Appropriations Law*).)

In another case, the Navy asked whether it could use appropriated funds to buy luggage for use by members of the Navy's Recruit Mobile Training Team. Normally, luggage is a personal expense. The employee who travels on government business is generally expected to provide his or her own luggage. In this case, however, the members of the team traveled an average of 26 weeks a year. The Comptroller General applied the test set forth in 3 Comp. Gen. 433 (1924), discussed at various points throughout this section, and accepted the Navy's judgment that it would be unreasonable to require the team members to furnish their own luggage in view of this excessive amount of travel. Therefore, Navy could buy the luggage, but only on the conditions that it would become Navy property and be stored in Navy facilities. In other words, the members could not use the luggage for any personal business. B-200154, Feb. 12, 1981. The Comptroller General declined to state a precise rule as to how much travel is enough to justify government purchase of luggage, and emphasized that the purchase would be permitted only in highly unusual circumstances.

The payment of a federal employee's union dues is the employee's personal obligation even though payment by payroll withholding is authorized. If an agency wrongfully fails to withhold the dues, it may use appropriated funds to reimburse the labor union, but must then recover the payment from the employee unless the debt can be waived. 60 Comp. Gen. 93 (1980); B-235386, Nov. 16, 1989.

Another personal expense issue concerns payments for professional liability insurance. As discussed in section C.3.c of this chapter, concerning lawsuits against employees, certain federal employees may be vulnerable to civil tort suits by plaintiffs alleging that they have been injured by the actions of the employees. Where liability is established, plaintiffs may be awarded compensatory damages, and in appropriate cases punitive damages, which the federal employee- defendants would be required to pay. Consequently, government employees whose jobs place them in

positions where they risk being sued may purchase liability insurance as a protection against such suits. *See* B-211883-O.M., Dec. 14, 1983.

In 1996, Congress enacted legislation authorizing the reimbursement of "qualified employees" of the executive and legislative branches for up to one-half the costs incurred by such employees for professional liability insurance. Pub. L. No. 104-208, title VI, § 636, 110 Stat. 3009-363 to 3009-364 (Sept. 30, 1996). A qualified employee is an agency employee whose position is that of a law enforcement officer or a supervisor or management official. These reimbursements were to be paid from amounts appropriated for Salaries and Expenses.

In 1998, Congress amended the law to include as qualified employees justices, judges, judicial officers, supervisors, and managers within the judicial branch. Pub. L. No. 105-277, title VI, § 644, 112 Stat. 2681, 2681-526 (Oct. 21, 1998). Then, in 1999, Congress once again amended the law to make the reimbursement mandatory as of October 1, 1999. Pub. L. No. 106-58, title VI, § 642(a), 113 Stat. 430, 477 (Sept. 29, 1999). These provisions were not enacted in the form of an amendment or addition to Title 5 of the United States Code, although their text is set out as an uncodified note under subchapter IV, "Miscellaneous Expenses," preceding 5 U.S.C. § 5941. *See generally* B-300866, May 30, 2003.

14. Rewards

This section discusses when appropriated funds may be used to offer and pay rewards. As a general proposition, statutory authority is needed. Exactly how explicit this statutory authority has to be depends somewhat on the nature of the information or services for which the reward is contemplated and its relationship to the authority of the paying agency.

a. Rewards to Informers

(1) Reward as "necessary expense"

One group of decisions deals with rewards for the furnishing of information regarding violations of civil and criminal laws. The rule is that, if the information is "essential or necessary" to the effective administration and enforcement of the laws, a reward may be offered if it can be tied in to a

particular appropriation under the "necessary expense" theory.[168] In that situation, the statutory authority does not have to expressly provide for the payment of rewards. If, however, the information is merely "helpful or desirable," then more explicit statutory authority is needed. Since the distinction is difficult to administer as a practical matter, statutory authority has been granted in many situations.[169]

The Comptroller General addressed the issue in 8 Comp. Gen. 613, 614 (1929), stating:

> "An appropriation general in terms is available to do the things essential to the accomplishment of the work authorized by the appropriation to be done. As to whether such an appropriation may properly be held available to pay a reward for the furnishing of information, not essential but probably helpful to the accomplishment of the authorized work, the decisions of the accounting officers have not been uniform. The doubt arises generally because such rewards are not necessarily in keeping with the value of the information furnished and possess elements of a gratuity or gift made in appreciation of helpful assistance rendered."

While the reward in that particular case was permitted, the decision announced that specific legislative authority would be required in the future. *See also* 9 Comp. Gen. 309 (1930); A-26777, May 22, 1929.

[168] Some of the "contest" cases, discussed above, do not concern payment of "rewards" to "informers," yet nonetheless use a "necessary information" analysis. *See*, *e.g.*, 70 Comp. Gen. 720 (1991) (National Oceanic and Atmospheric Administration could pay cash prizes to certain fortunate fisherman returning "fish tags" to the government); B-286536, Nov. 17, 2000 (Public Buildings Service could use appropriated funds to pay for prizes in a drawing held in connection with customer satisfaction surveys, in order to develop customer satisfaction information).

[169] In addition to the statutes discussed in the text, other examples are: 16 U.S.C. § 668 (information on capturing, buying or selling of bald eagles); 16 U.S.C. § 1540(d) (violations of Endangered Species Act); 16 U.S.C. § 2409 (Antarctic Conservation Act of 1978); 18 U.S.C. § 1751(g) (information concerning presidential assassinations or attempted assassinations); 18 U.S.C. § 3056 (rewards by the Secret Service); 21 U.S.C. § 886 (Drug Abuse Act); 39 U.S.C. § 404(a)(8) (violations of postal laws); 50 U.S.C. § 47a (illegal introduction, manufacture, acquisition, or export of special nuclear material or atomic weapons).

Whether a reward to an informer is necessary or merely helpful depends largely on the nature of the agency's organic authority and its appropriations language. For example, the Forest Service is responsible for protecting the national forests "against destruction by fire and depredations." 16 U.S.C. § 551. It receives appropriations for expenses necessary for "forest protection and utilization." Under this authority, the Comptroller General held that information relating to violations (such as deliberately set forest fires, theft of timber, unauthorized occupancy, and vandalism) could be considered necessary rather than just helpful, and the Forest Service could therefore offer rewards to informers without more specific statutory authority. B-172259, Apr. 29, 1971. *See also* 5 Comp. Dec. 118 (1898). The ruling was extended in B-172259, Aug. 2, 1972, to cover "endorsements" (the "endorsement" by an informant of an undercover agent to help him gain acceptance with the suspects).

Similarly, the Commerce Department could pay rewards to informers as a necessary expense under a provision of the Export Control Act of 1949, ch. 11, § 6, 63 Stat. 7 (Feb. 26, 1949), which authorized the obtaining of confidential information incident to enforcement of the act. B-117628, Jan. 21, 1954.

The rule was also applied in B-106230, Nov. 30, 1951, in which GAO advised the Treasury Department that rewards to informers for information or evidence on violations of the revenue, customs, or narcotics laws could be offered under an appropriation for the necessary expenses of law enforcement. As long as the information was necessary and not just helpful, more specific appropriations language was not needed. The result would be different if the agency did not have specific law enforcement authority. A.D. 6669, May 15, 1922.

(2) Payments to informers: Internal Revenue Service

One reward to informers most people are familiar with is the reward offered by the Internal Revenue Service (IRS) for the detection of tax cheats. While the pertinent Internal Revenue Code provision does not use the term "reward," it authorizes the payment of sums deemed necessary "for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws." 26 U.S.C. § 7623. Where information leads to an actual recovery of back taxes or penalties, IRS may pay the informer a reward based on a percentage of the amount recovered, up to a 10 percent maximum set by regulation. GAO approved this scheme as within the statutory authority in 3 Comp. Gen. 499 (1924). The

determinations of whether to pay a reward and, if so, its amount are discretionary and, short of a showing of no rational basis, are not reviewable by the courts or by GAO. *Saracena v. United States*, 508 F.2d 1333 (Ct. Cl. 1975); *Krug v. United States*, 168 F.3d 1307 (Fed. Cir. 1999) *aff'g* 41 Fed. Cl. 96 (1998); *Informant v. United States*, 46 Fed. Cl. 1 (2000); B-131689, June 7, 1957; B-10761, June 29, 1940; B-5768, Sept. 18, 1939; A-96942, Aug. 23, 1938. The same statute has been held to authorize rewards for information on violations where no tax or fine is collected. 24 Comp. Dec. 430 (1918).

The IRS statute has been held to constitute an "indefinite reward offer." The informant responds by his conduct, and an "enforceable contract" arises when the parties fix the amount of the reward. *Merrick v. United States*, 846 F.2d 725 (Fed. Cir. 1988). The plaintiff in that case provided information on an illegal tax shelter in which 1,585 persons had invested, resulting in the recovery of over $10 million. The court upheld the position of the IRS that the taxpayers were "related taxpayers" in a single tax avoidance scheme, thereby limiting the reward to $50,000 for the aggregate recovery rather than $50,000 per person as the plaintiff had sought. *Merrick v. United States*, 18 Cl. Ct. 718 (1989). *See also Lewis v. United States*, 70 F.3d 597, 601 (Fed. Cir. 1995) (applying a "similar statute" that authorized Customs Service awards).

The issue in B-137762.32, July 11, 1977 was whether IRS could contract with an attorney representing an unnamed informant (*i.e.*, a "partially disclosed principal"). The decision discussed the general prohibition against contracting with a partially disclosed principal, but approved the proposed agreement, noting that the reasons for the rule in the ordinary procurement context did not apply to the IRS reward situation. *See also* B-117628, Jan. 21, 1954. However, Treasury regulations required that the informant's identity be disclosed before any claim could actually be paid. Therefore, disclosure would be necessary if and when a reward became payable but not before then.

An additional issue in B137762.32 was when an obligation has to be recorded under 31 U.S.C. § 1501(a). No contractual liability to make payment exists until IRS has evaluated the worth of the information and has assessed and collected any underpaid taxes and penalties. This is when the appropriate IRS official determines that a reward should be paid and its amount, and it is at this point that a recordable obligation arises. This is consistent with the Federal Circuit's holding in *Merrick*.

The Internal Revenue Service may also make "support and maintenance" payments to informers under its general investigation and enforcement authority. In B-183922, Aug. 5, 1975, the Comptroller General held that IRS could not make payments to an informer who was simultaneously being paid by the Justice Department under its Witness Protection Program. However, IRS could make the payments if administratively determined to be necessary after the informer had been disenrolled from the Justice Departments program.

(3) Payments to informers: Customs Service

The Customs Service also has statutory authority to pay rewards. Under 19 U.S.C. § 1619, a person (other than a government employee) who detects and seizes any vessel, vehicle, aircraft, merchandise, or baggage subject to seizure and forfeiture under the customs or navigation laws, or who furnishes original information, leading to a monetary recovery, may be paid a reward of 25 percent of the amount recovered, not to exceed $250,000 in any case. Rewards are payable from "appropriations available for the collection of the customs revenue." *Id.* § 1619(d).

This reward is in the nature of compensation for services rendered rather than a personal gratuity. 5 Comp. Gen. 665 (1926). The statute has been deemed mandatory in the sense that an informant who complies with its terms has a legal and judicially enforceable claim for the reward. *Doe v. United States*, 100 F.3d 1576, 1582 (Fed. Cir. 1996); *Wilson v. United States*, 135 F.2d 1005 (3rd Cir. 1943); *Rickard v. United States*, 11 Cl. Ct. 874 (1987); B-217636, Mar. 4, 1985 (nondecision letter).

The information furnished must be "original" information, that is, the first information the Customs Service has concerning the particular fraud or violation. *Lacy v. United States*, 607 F.2d 951, 953 (Ct. Cl. 1979); *Cornman v. United States*, 409 F.2d 230, 234 (Ct. Cl.), *cert. denied*, 396 U.S. 960 (1969); *Tyson v. United States*, 32 F. Supp. 135, 136 (Ct. Cl. 1940).

In cases where the furnishing of information leads to recoveries from multiple parties, the monetary ceiling on the reward "for any case" applies to the information furnished, not to the number of recoveries it produces. *Cornman v. United States*, *supra*, *citing and following* 24 Comp. Dec. 17 (1917).

Liquidated damages assessed under customs bonds are "recoveries" for purposes of 19 U.S.C. § 1619. 34 Comp. Gen. 70 (1954). So are recoveries under bail bonds. 19 U.S.C. § 1619(e). Moneys received by customs officers as bribes, however, are not recoveries for purposes of the reward. 11 Comp. Gen. 486 (1932).

The statute applies to recoveries under the "customs laws or the navigation laws." *See* 16 Comp. Gen. 1051 (1937). Recoveries under other laws generally do not qualify. Thus, in 32 Comp. Gen. 405 (1953), a reward could not be paid where recovery was made under several laws and the amount attributable to the customs laws or navigation laws could not be ascertained. Similarly, a violation of the Anti-Dumping Act is not a violation of the customs laws for purposes of 19 U.S.C. § 1619. *Fraters Valve & Fitting Co. v. United States*, 347 F.2d 990 (Ct. Cl. 1965). Nor is a violation of the internal revenue laws. *Wilson v. United States*, *supra*. *But see Doe v. United States*, 47 Fed. Cl. 367 (2000).

The reward is authorized, based on appraised value, if the item forfeited is destroyed or "delivered to any governmental agency for official use" rather than sold. Under this provision, seized merchandise donated to state governmental agencies under General Services Administration (GSA) regulations qualifies for the reward since the statutory language is not limited to federal agencies. B-146223, Nov. 27, 1961. Similarly, where forfeited distilled spirits, wines, or beer, which are required by statute to be delivered to GSA for disposal, are subsequently given to "eleemosynary institutions" for medicinal purposes, the reward is payable because the initial delivery to GSA counts as delivery to a "governmental agency for official use" under 19 U.S.C. § 1619. B-146223, Feb. 2, 1962.

b. Missing Government Employees

The only decisions that exist on rewards for locating missing government employees concern military deserters. No decision has been found discussing whether a reward could be offered for the apprehension of a military deserter in the absence of statutory authority, although one early case stated that "[t]here is no reward for the apprehension or delivery of a deserter by operation of law." 20 Comp. Dec. 767 (1914). The reason the issue has not been discussed is probably that the authority has existed by statute for a long time. For many years, a provision in the annual Defense Department appropriation acts authorized payment of expenses of the apprehension and delivery of deserters, including a small reward. In 1984, the provision was made permanent and is now found at 10 U.S.C. § 956(1). The Coast Guard also has permanent authority to offer rewards for the apprehension of deserters. 14 U.S.C. § 644.

Thus, the decisions that do exist concern mainly questions of interpretation under the statutory language and implementing regulations. For example, the term "apprehension" was construed to permit payment of the reward where an Army deserter voluntarily surrendered to a civil officer. 6 Comp. Gen. 479 (1927).

The statute and implementing regulations limit the amount payable as expenses, but this limitation applies only to the period before the deserter is returned to military control. Expenses incurred after return to military control, for example, continued civil detention at the request of military authorities, are not subject to the limitation and may be paid. B-179920, July 18, 1974; B-147496-O.M., Jan. 4, 1962. Three early decisions permitted payment of expenses incurred in apprehending a deserter in excess of the statutory limit where the deserter was also wanted for other criminal offenses (such as forgery or embezzlement). 16 Comp. Dec. 132 (1909); 11 Comp. Dec. 124 (1904); B-3591, May 27, 1939.[170]

c. Lost or Missing Government Property

It has long been established that no payment may be made to one who finds lost government property unless a reward has been offered prior to the return of the property. 11 Comp. Dec. 741 (1905); 5 Comp. Dec. 37 (1898); A-23019, May 24, 1928; B-117297-O.M., Feb. 12, 1954. To offer a reward for the recovery of lost or missing property, an agency needs some statutory basis. Examples are 10 U.S.C. § 2252 (Defense, military departments) and 14 U.S.C. § 643 (Coast Guard). While the degree of explicitness required has not been definitively addressed, the rules appear to be the same as in the case of rewards for information discussed above.

Two early decisions permitted the use of military "contingent expense" appropriations. In 6 Comp. Gen. 774 (1927), GAO told the Army that it could offer a reward from its contingent expense appropriation for the recovery of stolen platinum. In B-33518, Apr. 23, 1943, prior to the enactment of 10 U.S.C. § 2252, the Navy wanted to use a general appropriation to offer rewards for locating lost aircraft. The Comptroller General advised that the general appropriation could not be used since the reward was not essential to carrying out its purposes, but, relying on

[170] The excess payment in each of these cases was authorized from the Army's appropriation for "contingent expenses." While the "contingent expense" language is no longer used, the military departments receive similar appropriations for "emergencies and extraordinary expenses." *See* 53 Comp. Gen. 707 (1974).

6 Comp. Gen. 774, the Navy could use its contingent expense appropriation.

In 41 Comp. Gen. 410 (1961), the Treasury Department asked if the Coast Guard had any general authority beyond 14 U.S.C. § 643 to make reasonable payments to persons who found lost property. The Comptroller General replied that he knew of none. Based on these decisions, it appears that a general operating appropriation is not available to offer or pay rewards for the recovery of lost property.

In B-79173, Oct. 18, 1948, the Civil Aeronautics Administration had an appropriation for the temporary relief of distressed persons. The question presented was whether the appropriation was available to pay a reward to someone who had found a lost airplane 4 months after it disappeared. The Comptroller General said no, because the passengers could all be presumed dead after 4 months, but expressly declined to decide whether the appropriation would have been available if the airplane had been found "with such promptness as to afford reasonable hope that survivors might be found and given relief." The reasoning is similar to that in the information cases—the reward might have been considered necessary to carrying out the relief appropriation if there was a reasonable chance of survivors, but after the passage of several months it would be at best helpful. As with the necessary expense theory in general, "necessary" relates not to the importance of the object itself but to carrying out the purposes of the particular appropriation.

Stolen property was involved in 53 Comp. Gen. 707 (1974). The Air Force asked if it could pay a reward, pursuant to local custom, to two Thai police officers whose services had been instrumental in recovering a stolen road grader. Based on 6 Comp. Gen. 774, the Comptroller General held that the Air Force could pay the reward from its appropriation for emergencies and extraordinary expenses, successor to the old contingent expense appropriation. However, apart from that particular appropriation, the decision held that there was no authority for the reward. This part of the decision was based on 8 Comp. Gen. 613 (1929), once again implying that the rules in the information cases would apply to missing property as well. (This case would now be covered by 10 U.S.C. § 2252.)

d. Contractual Basis

The basis of the right to a reward is contractual; that is, there must be an offer and an acceptance. The rationale is that "no person by his voluntary act can constitute himself a creditor of the Government." 20 Comp. Dec. 767, 769 (1914).

Where a reward is based on the "necessary expense" theory rather than on explicit statutory authority, the decisions hold that there must be an offer of reward before a reward can be claimed. Performance of the service constitutes the acceptance. *See, e.g.*, 26 Comp. Gen. 605 (1947); 3 Comp. Gen. 734 (1924). *See also* 70 Comp. Gen. 720 (1991). The offer may be in the form of a "standing offer" promulgated by regulation. *See, e.g.*, B-131689, June 7, 1957, in which a Treasury Decision constituted the offer for an Internal Revenue Service (IRS) reward. Another example is 28 C.F.R. pt. 7, a standing offer by the Attorney General for rewards for the capture, or information leading to the capture, of escaped federal prisoners.

Consistent with contract theory in general, it is also possible for an offer to be implied from practice or course of conduct. For example, a reward was held payable to an informer under the prohibition laws without a specific offer in 4 Comp. Gen. 255 (1924). The informer was a member of a "gang of whiskey thieves" and the Comptroller General noted that "[u]nder such conditions no specific agreement for compensation is generally made, but with a man of such character there is, and practically must be, to obtain the information, an understanding that there will be compensation." *Id.* at 256. The course of conduct and standing offer concepts were combined in A-23019, May 24, 1928, involving a reward for finding a lost Navy torpedo. In view of the prevailing understanding in the area and past practice, the Navy's regulations were viewed as "implicitly" making a standing offer.

Similarly, where a reward is based on express statutory authority and the statute either is discretionary or authorizes the agency to "offer and pay" a reward, there must be an offer before payment can be made. 41 Comp. Gen. 410 (1961) (14 U.S.C. § 643); 20 Comp. Dec. 767 (1914) (apprehension of a deserter). On the other hand, if a statute provides for a reward as a matter of entitlement, the reasons for requiring an offer are less compelling; the terms of the statute and any implementing regulations will determine precisely how and when the "contract" comes into existence. *E.g.*, *Merrick v. United States*, 846 F.2d 725 (Fed. Cir. 1988), discussed above in section C.14.a in connection with the Internal Revenue Service statute.

As to whether the claimant must have knowledge of the offer, the decisions are not entirely consistent. Cases involving the apprehension of deserters have held that performance of the service gives rise to an obligation on the part of the government to pay the offered reward notwithstanding the claimant's lack of knowledge of the offer when he performed the service. 27 Comp. Dec. 47 (1920); 20 Comp. Dec. 767 (1914); B-41659, May 26, 1944. On the other hand, cases involving the finding of lost property have held

that knowledge is required. Thus, in 26 Comp. Gen. 605 (1947), a reward the Navy had offered for the discovery of a lost airplane was denied where the person discovering the airplane had no knowledge of the offer at the time he performed the service. This ruling was followed in 41 Comp. Gen. 410 (1961), holding that the Coast Guard could not pay a reward under 14 U.S.C. § 643 to one who had no knowledge of the published offer. *See also* A-35247, Apr. 1, 1931 (escaped prisoner). The latter group of decisions purports to be based on the "great weight of authority." 26 Comp. Gen. at 606.

Since reward payments for information furnished to the government are in the nature of compensation for services rendered rather than personal gratuities, the right to file a claim for the reward vests at the time the compensation is earned (*i.e.*, the services performed). Consequently, that right is not defeated where the informant dies prior to filing a claim or receiving the reward. The issue was discussed in 5 Comp. Gen. 665 (1926), in which GAO approved the payment of a reward to the legal representative of an informant's estate for information furnished under the predecessor of 19 U.S.C. § 1619, even though the informant had not filed a claim prior to his death. *See also* 2 Comp. Dec. 514 (1896) (customs); B-131689, June 7, 1957 (internal revenue); B-129886-O.M., Dec. 28, 1956 (internal revenue).

e. Rewards to Government Employees

A reward may not be paid to a government employee for services rendered within the scope of his or her official duties. For example, in 4 Comp. Gen. 687 (1925), a Deputy United States Marshal claimed a reward for apprehending a military deserter. The Comptroller General held that the reward could not be paid since the Marshal had been acting in his official capacity (*i.e.*, doing his job) rather than his personal capacity. *See also* 7 Comp. Gen. 307 (1927); A-35247, Apr. 1, 1931; A-17808, Mar. 30, 1927. Under the Defense Department's statutory authority to pay expenses plus a small reward, a federal employee may be reimbursed actual expenses incurred, but may not be paid the reward. 32 Comp. Gen. 219 (1952). In addition, some statutes, 19 U.S.C. § 1619 for one example, expressly exclude government employees from eligibility.

However, if an employee performs services beyond the scope of his official duties for which a reward has been offered, the reward may be paid since the employee was acting in his capacity as a private citizen. Thus, a reward was held payable to a patrol inspector for the Immigration Service who had apprehended a military deserter since the action was outside the scope of his official duties. 5 Comp. Gen. 447 (1925). *See also* A-17066, Mar. 2, 1927.

The prohibition against an employee's receiving a reward for services performed in the course of his official duties applies as well to rewards offered by nongovernment sources. The principle is illustrated in 49 Comp. Gen. 819 (1970). An Air Force major, flying a low-level training mission in the Republic of Colombia, spotted a cargo plane unloading in a suspicious location. He notified the Colombian authorities, who seized what turned out to be a load of contraband. Under Colombian law, the informant was entitled to a reward of 25 percent of the total value of the contraband. However, any earnings of an employee in excess of his regular compensation, earned in the course of performing his official duties, belong to the government. Therefore, the major could not keep the reward but had to turn it in for deposit in the Treasury. Another reason the major could not keep the reward is the prohibition in the United States Constitution (art. I, § 9, cl. 8) against the acceptance by a government officer or employee of gifts or emoluments from a foreign government without the consent of Congress.

15. State and Local Taxes

a. Introduction

The doctrine of sovereign immunity and the Supremacy Clause of the Constitution (U.S. Const. art. VI, cl. 2) prohibit states from taxing the federal government or its activities. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). The Supreme Court's early interpretation was aimed at the preservation of the federal system, which includes Chief Justice Marshall's famous dictum in *McCulloch* that "the power to tax involves the power to destroy." 17 U.S. at 431.

Since Chief Justice Marshall's time, federal activity and state taxing schemes have grown in complexity and sophistication. Today, while the basic rule of federal immunity from state and local taxation is easy to state, it is far less easy to apply. In the words of the Supreme Court, federal immunity from state and local taxation is a "much litigated and often confused field." *United States v. City of Detroit*, 355 U.S. 466, 473 (1958). It "has been marked from the beginning by inconsistent decisions and excessively delicate distinctions" (*United States v. New Mexico*, 455 U.S. 720, 730 (1982)), with the line between taxability and immunity "drawn by an unsteady hand" (*United States v. Allegheny County*, 322 U.S. 174, 176 (1944)).

In the simplest situation, federal tax immunity applies to attempts to tax directly the property or activities of a federal department or agency. More difficult problems arise when the entity being taxed is not a typical federal agency. The test enunciated by the Supreme Court on whether federal immunity from taxation applies is whether the entity is "so closely connected to the [federal] Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *United States v. New Mexico*, 455 U.S. at 735. The most common situation calling for the application of this test—the taxation of government contractors—will be discussed later.

The government's constitutional immunity from state taxation has been held to extend to federal credit unions. *United States v. Michigan*, 851 F.2d 803 (6th Cir. 1988). However, a municipal sales tax imposed on a "village corporation" established under the Alaska Native Claims Settlement Act and funded in part by federal funds is not a tax on the United States since the village corporation is not a federal agency and the funds, once distributed to the corporation, are essentially private funds. B-205150, Jan. 27, 1982. Similarly, funds paid over to a grantee under a federal grant program may be used to pay a nondiscriminatory state sales tax on purchases made with grant funds. 37 Comp. Gen. 85 (1957). The reason is that the funds, once paid to the grantee, are no longer federal funds subject to many of the restrictions on the direct expenditure of appropriations. *Id.* at 86–87. *See also* 62 Comp. Gen. 531, 533 (1983) (grant funds become funds of grantees subject only to grant terms and applicable regulations).[171]

In 46 Comp. Gen. 363 (1966), the Comptroller General considered a program where the United States was to share the cost of materials and services procured by farmers to carry out a conservation program. The Department of Agriculture had proposed a procedure whereby the United States would make its cost-sharing payments directly to the vendors. Since the materials purchased would not become the property of the United States, the procedure was viewed as essentially a "credit device" provided to the farmers, and the Comptroller General concluded that the payments could include state sales taxes.

[171] The same result would apply to purchases by a contractor under a contract with a grantee financed from federal grant funds (B-177215, Nov. 30, 1972), and to state or local taxation of the income of a grantee's employees (14 Comp. Gen. 869 (1935)). Note that appropriations for National Guard operations, however, are not grants to the states so that the federal government's immunity from taxation applies. 42 Comp. Gen. 631 (1963).

Evidence of tax-exempt status because of the federal government's immunity may take various forms, depending on the circumstances. For example, use of a government credit card or purchase order identifies the purchaser as an agent, agency, or instrumentality of the United States.[172] Other forms are listed in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 29.305. When other evidence is not available or is inapplicable, immunity is often established by use of a "tax exemption certificate" such as Standard Form 1094, which is usually processed individually. It is prescribed by and illustrated in the FAR. 48 C.F.R. §§ 29.302(b), 53.229, 53.301–1094.[173]

In some jurisdictions, tax exemption can be established by reciting a "tax-exempt number" obtained from the taxing authority. Where this procedure exists, it is governed by state regulation. Where available, this can be a simple and cost-effective way of invoking the government's tax immunity in situations where the amounts involved do not justify obtaining a tax exemption certificate *See* B-206804, Feb. 7, 1983.

State taxation problems center on two distinct types of taxing schemes: taxes linked to business transactions involving the federal government, typically sales and use taxes, and property-oriented taxes linked to ownership or use of various types of real and personal property located within a state's geographical boundaries. In addition, federal government employees frequently incur various types of state and local taxes while performing government business. These three broad categories form the framework of our discussion.

[172] The use of a government travel or purchase card does not necessarily demonstrate that the purchase was for the federal government, however. *See*, *e.g.*, U.S. General Accounting Office, *Travel Cards: Control Weaknesses Leave Navy Vulnerable to Fraud and Abuse*, GAO-03-147 (Washington, D.C.: Dec. 23, 2002) (reporting government travel card use for legalized brothels, gentlemen's clubs, cruise lines, and other inappropriate transactions).

[173] The FAR also provides that when economically feasible agencies should take maximum advantage of all exemptions from state and local taxation. 48 C.F.R. § 29.302(b). This provision does not imply that small taxes should automatically be paid without asserting the government's immunity, but instead suggests that taxes in small amounts should be paid regardless of the government's immunity where no other evidence is available and where a tax exemption certificate would otherwise be required to take advantage of the immunity. The use of blanket and multiple exemption certificates is discussed in 41 Comp. Gen. 560 (1962).

b. Tax on Business Transactions Where the Federal Government Is a Party

(1) General principles

The key question in determining whether the federal government may pay a sales or other tax imposed on its purchase of goods or services within a state depends, according to the Supreme Court in *Alabama v. King & Boozer*, 314 U.S. 1 (1941), on where the legal incidence of the tax falls. There, a construction contractor building a federal project objected to the state's imposition of sales tax on its purchase of building materials used in construction. It argued that such purchases should be exempt from state taxation, as the costs would ultimately be borne by the federal government and thereby violate federal immunity from state taxation. The Supreme Court disagreed, drawing a distinction between the economic burden imposed on the United States when it must pay more for goods and services because of sales taxes levied against the seller of goods, and the constitutionally impermissible burden occurring when the government, as a purchaser of goods, is directly liable to the state for taxes imposed on a transaction. In other words, if the "legal incidence" of a tax falls on the vendor-seller and the seller alone is obligated to pay, the government may reimburse the seller for the total cost, including any tax.[174] But if the vendee-buyer is in any way legally responsible for the payment of the tax, the federal government as a buyer cannot be required to pay. *Id.* at 12–14. *See James v. Dravo Contracting Co.*, 302 U.S. 134 (1937) (state gross receipts tax imposed on a government contractor).[175]

The rule that the government is constitutionally immune from a "vendee tax" but may pay a valid "vendor tax"—even if the government ultimately bears its economic burden—has been recognized and applied in numerous Comptroller General decisions. *E.g.*, 46 Comp. Gen. 363 (1966); 24 Comp. Gen. 150 (1944); 23 Comp. Gen. 957 (1944); 21 Comp. Gen. 1119 (1942); 21 Comp. Gen. 733 (1942). The same rule applies to state tax levies on

[174] Of course, "no matter on whom the tax nominally falls, the market price (including the tax) and the quantity sold will be the same. Accordingly, the economic incidence will be shared in the same way: if the tax is nominally on the buyer, part of it will be passed back to the seller in the form of reduced quantity demanded." *United States v. Delaware*, 958 F.2d 555, 561 n.11 (3rd Cir. 1992). That the imposition of a particular fee may ultimately burden the Unites States financially is an insufficient ground to invalidate a tax. *United States Postal Service v. Town of Greenwich*, 901 F. Supp. 500, 507 (D. Conn. 1995).

[175] In the context of sales taxes, the hallmark of a vendor tax is that the law establishing the tax requires the seller to pay it notwithstanding any inability or unwillingness on the part of the seller to collect it from the purchaser. *E.g.*, B-239608, Dec. 14, 1990 (nondecision letter); B-225123, May 1, 1987 (nondecision letter).

rental fees. *See* 49 Comp. Gen. 204 (1969); B-168593, Jan. 13, 1971; B-170899, Nov. 16, 1970.

Determining whether the legal incidence of a particular tax is on the vendor or the vendee is a question of federal law, *e.g.*, *United States v. Nevada Tax Commission*, 439 F.2d 435, 439 (9th Cir. 1971), and GAO will follow federal judicial precedent where available. If there are no federal judicial decisions on point, GAO will follow the determination of the states highest court. 21 Comp. Gen. 843 (1942); B-211093, May 10, 1983.

Nowhere is the vendor/vendee concept more clearly illustrated than in the many cases considered by GAO on the payment of state gasoline taxes. In 57 Comp. Gen. 59 (1977), the Comptroller General held that the Vermont tax on gasoline distributors, which was required by law to be passed along to dealers and in turn to consumers, was a legal obligation on consumers to pay the tax. Since this tax collection mechanism constituted a vendee tax, the federal government was constitutionally immune from its payment as a purchaser. In 1979, Vermont amended its tax law to delete the requirement for pass-through to dealers and consumers. With this amendment, the tax became a vendor tax and the federal government's immunity no longer applied. 63 Comp. Gen. 49 (1983). It remains immaterial that, as a practical matter, the tax will be reflected in the retail price of the fuel. While the economic incidence still fell on the federal government as purchaser, the legal incidence no longer did.

Another example of a vendee tax for which the United States was immune was the California state gasoline tax, which the dealer was required to collect from a consumer "insofar as it can be done." 55 Comp. Gen. 1358 (1976). GAO's finding that this was a vendee tax drew support from *Diamond National Corp. v. State Board of Equalization*, 425 U.S. 268 (1976), where the Supreme Court concluded that an identically worded sales tax requirement was imposed on the vendee.

In 55 Comp. Gen. 1358, GAO also considered gasoline taxes in Pennsylvania, Hawaii, and New Mexico. Pennsylvania's tax was an excise tax on dealer-users (meaning retail service station operators). The statute did not provide any mechanism for the dealer-user to seek reimbursement from the consumer and therefore it was assumed that the tax levied against the dealer-user would become a part of that retailer's operating expenses. Accordingly, the federal government could pay, as a part of the purchase price, the amount of tax on the retailer who was statutorily required to assume that tax as a cost of doing business. In Hawaii the tax was in the

form of a license fee paid by retail distributors of gasoline. This license fee was imposed directly on the distributors with no direct recourse against the consumers of gasoline, although the amount of the license fee was undoubtedly considered in setting the basic cost of fuel sold by those retailers. For this reason the federal government was authorized to pay the full retail price, including any amount attributable to the tax.[176] The New Mexico gasoline tax, however, was a tax on the users of state highways, collected by the retail dealer of gasoline. The tax was added at the pump to the per-gallon cost of gasoline. Since the incidence of this tax was on the vendee, when the United States purchased fuel in New Mexico, it was exempt from the tax.[177]

A type of vendor tax that the federal government must nearly always pay is a business privilege or gross receipts tax, a personal tax on domestic and foreign concerns for the privilege of doing business in the state commonly measured as a percentage of gross receipts. An example of this kind of tax is the Illinois Retailers' Occupational Tax discussed in 43 Comp. Gen. 721 (1964), 42 Comp. Gen. 517 (1963), and B-162452, Oct. 6, 1967. Similar taxes have been held to be payable in the states of Arizona (27 Comp. Gen. 767 (1948) and B-167150, Feb. 17, 1970); Hawaii (49 Comp. Gen. 204 (1969) and 37 Comp. Gen. 772 (1958)); New Mexico (B-147615, Dec. 14, 1961); and South Dakota (B211093, May 10, 1983). A "business privilege" tax on motor fuel sellers imposed by Kansas City, Missouri, was held payable in 32 Comp. Gen. 423 (1953).

The imposition of state taxes—sales, use, gross receipts, *etc.*—on federal government contractors has produced more than its share of litigation. Questions arise, for example, because the tax may be based on the value of property in the contractor's possession but owned by the federal government, or purchased for use in performing the contract. For the most part, the taxes will be upheld. The most comprehensive discussion by the

[176] In 28 Comp. Gen. 706 (1949), a Washington State tax on gasoline distributors was similarly found to be a vendor tax and the United States was therefore required to pay the amount added to the purchase price of gasoline to represent the tax. *See also* B-154266, June 25, 1964, considering the same tax as applied to government-rented commercial vehicles.

[177] In the 1960s, California law provided for a refund of the tax paid on gasoline for vehicles operated entirely off state highways. The state courts had found that the term "highway" did not encompass roads running in and through national parks. Therefore, relying on the state's interpretation of its own statute, GAO concluded that no tax was payable on gasoline used in vehicles driven only on the grounds of a national monument. 42 Comp. Gen. 593 (1963).

Supreme Court is *United States v. New Mexico*, 455 U.S. 720 (1982). The Court reviewed prior cases and concluded:

> "[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned."

Id. at 735. Government contractors will generally be unable to meet this test except in very limited circumstances. Thus, a contractor can claim constitutional immunity from tax where there is an agency relationship between the United States and a contractor such that the contractor is acting solely as the government's purchasing agent and title to goods purchased never vests in the contractor. *Kern-Limerick v. Scurlock*, 347 U.S. 110, 120–23 (1954); *United States v. Lohman*, 74 F.3d 863, 867 (8th Cir.), *cert. denied*, 518 U.S. 1018 (1996); B-177215, Nov. 30, 1972. *See also United States v. Kabeiseman*, 970 F.2d 739 (10th Cir. 1992) (United States and not contractor was the real purchaser of diesel fuel, so state tax levied on the diesel fuel purchasers could not be enforced against the United States). However, the "contractor as agent" has limited application. For example, in *United States v. New Mexico*, 455 U.S. 720, 742 (1982), the Court sustained use and gross receipts taxes imposed on government contractors which, in that case, operated under an "advance funding" system whereby the contractors met their obligations by using Treasury funds that had been placed in a special bank account. *Id.* at 725–26.[178]

In imposing taxes on government contractors, a state may not discriminate against the federal government (*South Carolina v. Baker*, 485 U.S. 505, 523 (1988); *see*, *e.g.*, B-156561, June 22, 1965), or substantially interfere with its activities. *New Mexico*, 455 U.S. at 735 n.11; *Phillips Chemical Co. v. Dumas Independent School District*, 361 U.S. 376, 387 (1960); *City of Detroit v. Murray Corp.*, 355 U.S. 489, 495 (1958); *United States v. City of Manassas*, 830 F.2d 530, 533 (4th Cir. 1987), *aff'd mem.*, 485 U.S. 1017

[178]Some additional Supreme Court cases sustaining the imposition of state taxes on government contractors in various contexts include *Washington v. United States*, 460 U.S. 536 (1983); *United States v. Boyd*, 378 U.S. 39 (1964); *City of Detroit v. Murray Corp.*, 355 U.S. 489 (1958); *Alabama v. King & Boozer*, 314 U.S. 1 (1941); *James v. Dravo Contracting Co.*, 302 U.S. 134 (1937). *Dravo* is regarded as starting the current trend. *New Mexico*, 455 U.S. at 731–32.

(1988). This does not prevent states from taxing private parties who use federal property, even when the private parties are providing goods to the United States. *United States v. Nye County*, 178 F.3d 1080, 1084 (9th Cir. 1999).

The United States can be required to pay a state tax obligation imposed on its contractor when the federal government assumes responsibility for the tax by contract. *United States v. Department of Revenue of State of Illinois*, 202 F. Supp. 757, 760 (N.D. Ill.), *aff'd per curiam*, 371 U.S. 21 (1962). The typical language in government contracts for the purchase of goods or services recites that the offered price includes all applicable state and local taxes. (See the Federal Acquisition Regulation (FAR) provisions on state and local taxes at 48 C.F.R. subpt. 29.3, and its prescribed contract clauses at 48 C.F.R. § 52.229.) Shifting the burden of determining which taxes apply to the contractor is premised on the belief that contractors are in a better position to know what taxes are applicable. B-251628, Apr. 2, 1993; B-242303, Mar. 21, 1991; B-209430, Jan. 25, 1983. Unless otherwise specified in the contract, the government cannot be required to pay any additional amount for taxes (B162667, Dec. 19, 1967; B-134347, Mar. 1, 1966), even when the taxes were first imposed during contract performance. B-160129, Dec. 7, 1966. In such circumstances it is irrelevant that the tax involved is a valid vendor tax from which the United States is not immune; there can be no liability unless the contract so provides. 45 Comp. Gen. 192 (1965); 23 Comp. Gen. 957 (1944). Note however, that a contract can include a contingency clause for after-imposed state and local taxes. The failure to include such a clause is regarded as the contractors business decision so that the government will not be liable for any additional taxes. *Cannon Structures, Inc.*, ICBA No. 3968-98, 99-1 B.C.A. ¶ 30,236 (1999); *Midcon of New Mexico, Inc.*, ASBCA No. 37249, 90-1 B.C.A. ¶ 22,621 (1990).

Other contract language, of course, may dictate different results. A contract that provides for the payment of "the actual direct costs" includes reimbursement of state taxes paid by a contractor. 72 Comp. Gen. 107 (1993). Similarly, a contract for the "actual costs" justifies reimbursement to a contractor of back taxes and interest assessed against him when a court found that the contractor was not exempt from taxation. B-147316-O.M., Jan. 9, 1962. The same result would apply in the case of a contract for a cost plus fixed fee, such as the contract in *Alabama v. King & Boozer*, *supra*. 35 Comp. Gen. 378 (1955). Likewise, a contract to pay 50 percent of any new tax imposed by a state would include the obligation to pay half of

the business privilege tax assessed against a corporate contractor. B-152325, Dec. 12, 1963.

A contractor may be entitled to equitable relief in certain limited circumstances where both the contractor and the government are mistaken as to the applicability of a state tax to a particular contract and where the contractor reasonably relies on an innocent representation of a government agent that no tax applies. In such cases, the contract may be reformed and the price increased to include the applicable state tax. Cases reaching this result in various fact situations include 64 Comp. Gen. 718 (1985); B-186949, Oct. 20, 1976; B-180071, Feb. 25, 1974; B-169959, Aug. 3, 1970; B-159064, May 11, 1966; and B-153472, Dec. 2, 1965. The underlying legal principle is to avoid unjust enrichment so that a party making a misrepresentation, however innocently, should not benefit at the expense of a party who reasonably relies on that misrepresentation. Mutual mistake is an essential element of recovery in these cases. If the contractor cannot establish mutual mistake, the contract is payable as written and the contractor must absorb the additional expense. *E.g.*, *Hugh S. Ferguson Co.*, PSBCA No. 2178, 89-1 B.C.A. ¶ 21,294 (1988) (distinguishing 64 Comp. Gen. 718); *see Foley Co. v. United States*, 36 Fed. Cl. 788, 792 (1996) (agency employee's misrepresentation about tax-exempt status is not a mutual mistake of fact requiring contract reformation); *see also Cannon Structures*, *Inc.*, *supra* at 99-1 B.C.A. ¶ 30,236 (FAR prohibits post-contractual relief for after-imposed state taxes).

If a contractor entitled under the contract to be reimbursed for state taxes pays a state tax that is later judicially determined to be invalid, the contractor is nevertheless entitled to reimbursement (43 Comp. Gen. 721 (1964)), unless the contractor paid the tax without being required to do so (38 Comp. Gen. 624 (1959)).

Throughout the preceding discussion, the government has been the buyer. Tax problems may also arise where the government is the seller, although there have been few decisions in this area. In one case, the Texas use tax statute required sellers to obtain a permit, collect the tax, and remit collections to the State Comptroller. The Comptroller General held that the state could not impose these requirements on the disposal of surplus federal property by the General Services Administration under the Federal Property and Administrative Services Act of 1949. 41 Comp. Gen. 668 (1962). The theory is that a state may not infringe on the right of the federal government to conduct its official activities free from state control or regulation. *See Mayo v. United States*, 319 U.S. 441, 447 (1943) (ruling that

imposition of state "inspection fees" on federal property interfered with federal functions in violation of the Supremacy Clause, U.S. Const. art. VI, cl. 2).

(2) Public utilities

As with any other occupant of a building, the federal government is a consumer of services from public utilities. A utility bill may include various elements in addition to the basic charge for services used. Some of these elements may be taxes the federal government may properly pay; others may be taxes from which the government is immune; still others may not be taxes at all.

In determining whether appropriated funds may be used to pay taxes appearing on or included in utility bills, the principles described above apply—such as the distinction between a vendor and vendee tax—with one additional feature based on the nature of the rate-fixing process. Utility rates are usually set by the state legislature or by a public service commission. Rates established through this process apply to federal and nonfederal users alike. Unless they are unreasonable or discriminatory, federal agencies are expected to pay them. *E.g.*, 67 Comp. Gen. 220 (1988); 27 Comp. Gen. 580 (1948). *See also* B-300538, Mar. 24, 2003 (appropriated funds may be used to pay the costs of relocating public utility facilities on federal lands when the government—acting as a customer—requests that the facility be moved).

For example, state sales taxes that qualify as vendor taxes and that have been factored into the utility rates through the applicable rate-setting process are payable by the government. 45 Comp. Gen. 192 (1965); B-300538, *supra;* B-134602, Dec. 26, 1957; B-123206, June 30, 1955. The same result applies with respect to a vendor sales tax on the utility billed separately to the agency. B-211093, May 10, 1983.

Business privilege or gross receipts taxes are frequently imposed on public utilities by law. The utility companies are permitted to treat these taxes as operating expenses and to incorporate them into their basic billing rates, thereby creating a constitutionally permissible vendor tax. B-300538, *supra;* B-144504, June 9, 1967; B-148667, May 15, 1962. This is true even where a state utility regulatory authority requires the pass-through, if the tax itself is a vendor tax. *See* 61 Comp. Gen. 257 (1982) (Veterans Administration medical centers were liable for that portion of their electric

bills which were attributable to a rate increase reflecting the states public utility license tax).[179]

Where the business privilege tax is a valid vendor tax, it can be paid even if it is attributed as a tax and stated on the utility bill as a separate item. 32 Comp. Gen. 577 (1953); B-300538, *supra;* B-260063, June 30, 1995; B-171756, Feb. 22, 1971; B-144504, June 30, 1970; B-225123, May 1, 1987 (nondecision letter).[180] The theory is that the "tax," even though separately stated, is, in effect, an authorized rate increase designed to recover the revenue necessary to permit the utility to maintain the allowed rate of return on its investment. *See* B-167999, Dec. 31, 1969. *See also* B-288161, Apr. 8, 2002 (vendees do not bear the legal incidence of a utility tax even when a utility increases its rates to pass the tax on to the vendee). However, payment may not be approved where the tax is collected only from the federal government or where the collection of the tax would have a discriminatory effect on federal activities. B-159685, Apr. 7, 1967.

Another charge occasionally encountered is a "lifeline" surcharge. This is a surcharge designed to subsidize the providing of reduced cost utility service to low-income or elderly customers. GAO regards a lifeline surcharge not as a tax, but merely part of the authorized rate properly payable by federal users. 67 Comp. Gen. 220 (1988); B-189149, Sept. 7, 1977.

c. Property-Related Taxes

Federal land located within state borders is also exempt from state property taxes on the same constitutional theory discussed above. *E.g.*, *Clallam County v. United States*, 263 U.S. 341, 343–44 (1923); *Van Brocklin v. Tennessee*, 117 U.S. 151, 180 (1886). However, as with the contractor cases previously discussed, the immunity is generally limited to attempts to levy the tax directly against the federal government. Thus, the Supreme Court has sustained a state property tax on federally owned land leased to a private party for the conduct of for-profit activities (*United States v. City of Detroit*, 355 U.S. 466, 469 (1958)), and on the "possessory interest" of Forest Service employees living in government-owned housing

[179] The Department of Justice considered the same situation with the same result. 6 Op. Off. Legal Counsel 273 (1982).

[180] Another type of "tax" appearing on utility bills is a charge for 9-1-1 emergency service. See B-300737, June 27, 2003; B-253695, July 28, 1993; and the discussion in section C.7.c of this chapter.

(*United States v. County of Fresno*, 429 U.S. 452 (1977)).[181] Similarly, the court of federal claims in *Wright Runstad Properties Ltd. Partnership v. United States*, 40 Fed. Cl. 820, 824 (1998), ruled that a landlord to the federal government had to pay a special assessment levied against the property, observing that the government's tax immunity was not implicated because the government was not being taxed.

Just as states and their political subdivisions are barred from levying general property taxes against federal property, they are likewise prevented from making assessments against federal land for local improvements, even if the improvements would be made to federally owned property. B-157435, Oct. 6, 1965. Such assessments are typically made for paving or repairing streets or sidewalks, installing sewers, and similar local governmental services. An assessment for local improvements is an involuntary exaction in the nature of a tax. *Hagar v. Reclamation District No. 108*, 111 U.S. 701, 707 (1884); *City of Cincinnati v. United States*, 39 Fed. Cl. 271, 275 (1997), *aff'd*, 153 F.3d 1375 (Fed. Cir. 1998). As such, the decisions have uniformly held that the United States is not required to pay. *E.g.*, *United States v. City of Huntington*, 999 F.2d 71 (4th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994); *National Railroad Passenger Corp. v. Pennsylvania Public Utility Commission*, 665 F. Supp. 402 (E.D. Pa. 1987), *aff'd*, 848 F.2d 436 (3rd Cir.), *cert. denied*, 488 U.S. 893 (1988);[182] *United States v. Harford County*, 572 F. Supp. 239 (D. Md. 1983); 27 Comp. Gen. 20 (1947); 18 Comp. Gen. 562 (1938); B-243004, Sept. 5, 1991; B-226503, Sept. 24, 1987; B-184146, Aug. 20, 1975; B-160936, Mar. 13, 1967; B-155274, Oct. 7, 1964; B-150207, Nov. 8, 1962. Any assessment based on a fixed dollar amount multiplied by the number of front feet of the government's property, or computed on a square footage

[181] A tax lien that attaches to property before title passes to the government is not a tax on government property. The lien is a valid encumbrance against the property, although it is unenforceable as long as the government holds the property. *United States v. Alabama*, 313 U.S. 274 (1941). *See United States v. Lewis County*, 175 F.3d 671, 678 (9th Cir.), *cert. denied*, 528 U.S. 1018 (1999) (foreclosure against federally owned property impossible without consent of the United States). In a series of early decisions, however, GAO advised that the acquiring agency could use its appropriations to extinguish the lien if administratively determined to be in the best interests of the government, for example, to clear title prior to disposition of the property. B-40548, Jan. 26, 1945; B-41677, May 8, 1944; B-28443, Dec. 9, 1943; B-21817, Feb. 12, 1942.

[182] Amtrak's status as an instrumentality of the United States for this purpose was irrelevant because Amtrak's enabling legislation specifically provides for tax immunity. *E.g.*, *Pennsylvania Public Utility Commission*, 665 F. Supp. at 411; 49 U.S.C. § 24301.

basis, is a tax and not payable by the government. *E.g.*, *Harford County*, *supra;* B-168287, Feb. 12, 1970; B-159084, May 11, 1966.

Naturally, the determination of whether a particular assessment can be paid does not depend on the taxing authority's characterization of the assessment. Thus, payment has been denied where the assessment was termed a "benefit assessment" (B-168287, Nov. 9, 1970), a "systems development charge" (B-183094, May 27, 1975), or an "invoice for services" (49 Comp. Gen. 72 (1969)). Regardless of the designation, if the charge is computed on a footage basis or in the same manner as the taxes levied against other property owners, it cannot be paid.

However, even though an assessment may not be paid as a tax, a state or municipality may be compensated on a *quantum meruit* basis for the fair and reasonable value of the services actually received by the United States. *Harford County*, *supra;* 49 Comp. Gen. 72 (1969); 18 Comp. Gen. 562 (1938); B-226503, Sept. 24, 1987; B-168287, Nov. 9, 1970; *see* 70 Comp. Gen. 687 (1991) (federal government may pay reasonable user fees to a county for use of its landfill). To be paid on a *quantum meruit* basis, it must be clear that the government could have acquired the services it received in a normal procurement, that the federal government received and accepted the benefit of the services provided, the persons seeking payment acted in good faith, and the amount claimed represents the reasonable value of the benefit received. 64 Comp. Gen. 727, 728 (1985). Not surprisingly, most of GAO's decisions in this area involve an evaluation of the reasonableness of the claim.

The method for computing the assessment is the primary means of determining whether the charge represents the fair value of services received. *Quantum meruit* claimants must show how they arrived at the amount claimed: An unsupported statement that the sum represents the fair and reasonable value of the services rendered is insufficient. Although the claim need not be presented on a strict "quantity of use" basis, only when it is clearly shown that the specified method of computation is based purely upon the value of the particular services rendered to the government may any payment be made. B-177325, Nov. 27, 1972; B-168287-O.M., July 28, 1972; B-168287-O.M., Mar. 29, 1971. However, where a precise determination of the benefit received by the government cannot reasonably be made, payment has been allowed where the method of computation used did not appear unreasonable under the circumstances. B-168287O.M., *supra*.

Applying the above principles, the Comptroller General concluded in one case that a special assessment based on the federal property's ratable share of the cost of necessary repairs and improvements to a septic sewage system could be paid on a *quantum meruit* basis. B-177325, Nov. 27, 1972. However, in B-179618, Nov. 13, 1973, an assessment against an Air Force base for maintenance of a drainage ditch based on the "benefit" to the land could not be paid since there was no indication of how the amount of the benefit had been computed and no showing that the assessment represented the fair and reasonable value of the services rendered to the government. Similarly, a municipal assessment based on such factors as land area, structure value, and size was found to be a tax and therefore not payable in B-183094, May 27, 1975.

Using the same analysis, GAO advised the Air Force in B-207695, June 13, 1983, that it was not required to pay fees for well registration and withdrawal of groundwater, which a state had attempted to impose on the Air Force's right to draw water from wells on federal property. There was no showing that the fees bore any relationship to any services provided to the government. Similarly, an assessment levied against a federal facility for sewer charges unrelated to actual sewer usage could not be paid as a tax. B-226503, Sept. 24, 1987. However, fees for permits or certificates for the right to use state-owned water represent charges for services rendered rather than taxes and may therefore be paid. 5 Comp. Gen. 413 (1925); 1 Comp. Gen. 560 (1922). And one-time connection fees for hooking up federal facilities to local sewer systems, whether new construction or improvements, are payable as authorized service charges. 39 Comp. Gen. 363 (1959); 9 Comp. Gen. 41 (1929). Where the hook-up is incident to new construction, the fee is chargeable to the construction appropriation. 19 Comp. Gen. 778 (1940).

The principle that a state or municipality may be paid on a *quantum meruit* basis for services actually rendered provides a justification for the payment of a "service charge" for services rendered, as distinguished from a tax. *E.g.*, 70 Comp. Gen. 687 (1991); 49 Comp. Gen. 72 (1969). However, a local government cannot collect a service charge for services that the governmental unit is required by law to provide, such as police or firefighting services. *E.g.*, B-243004, Sept. 5, 1991 (special assessment to finance new city fire truck in support of municipal duty to provide fire

protection is a tax not payable by the United States). *See also* section C.7 of this chapter.[183]

Where a local government finances major improvements, such as sewers, by means of issuing revenue bonds, and then levies a surcharge on its service charge to liquidate the bonded indebtedness, a federal user of the sewer service who is under a contractual obligation to pay the service charge may also pay the surcharge. 42 Comp. Gen. 653 (1963). However, GAO has questioned the payment of bond interest where that interest was attributable to the municipality's share of initial construction costs. B-180221-O.M., Mar. 19, 1974.

The United States' exemption from property-related taxes has an obvious effect on some state and local jurisdictions. Congress may choose to compensate local taxing authorities for the loss of income attributable to federal holdings of real property within a particular jurisdiction by payments in lieu of taxes. *See* B-149803, May 15, 1972.[184] Payments may also be made pursuant to specific legislation establishing a new federal enclave. *See* B-145801, Sept. 20, 1961.

The assessments we have been discussing thus far are assessments levied by governmental entities. Tax immunity would not apply to assessments levied by private entities, where the federal government's liability is determined by application of traditional concepts of contract and property law, subject to any applicable federal statutory provisions. For example, in B-210361, Aug. 30, 1983, GAO advised that the Forest Service was liable for assessments levied by a private homeowners' association on a parcel the Forest Service had acquired by donation. The obligation to pay the assessments amounted to a covenant running with the land, and the United

[183] State and local jurisdictions are also prohibited from imposing "inspection fees" on the federal government, not because these fees are "taxes," but because they are a prerequisite to the federal government's execution of a government function, they interfere with the United States and violate the Supremacy Clause, U.S. Const. art. VI, cl. 2). *Mayo v. United States*, 319 U.S. 441, 447 (1943). The result would be different if a federal statute established the obligation of a federal agency to comply with state regulatory processes, however, including the payment of permit fees. B-286951, Jan. 10, 2002.

[184] The most important statute in this area is the Payments in Lieu of Taxes Act (PILT), 31 U.S.C. §§ 6901–6907, which authorizes the Secretary of the Interior to make payments, pursuant to statutory criteria, to units of local governments in which "entitlement land" is located. GAO has issued a number of decisions and opinions construing the PILT statute. *See*, *e.g.*, 65 Comp. Gen. 849 (1986); 58 Comp. Gen. 19 (1978); B-212145, Oct. 2, 1984; B-214267, Aug. 28, 1984.

States became contractually bound by accepting the deed with notice of the covenant.

The principles we have discussed in the context of real property also apply to personal property. *E.g.*, 27 Comp. Gen. 273 (1947) (no legal basis to pay state registration fee on government-owned outboard motors). Several earlier decisions applied the federal government's immunity against state motor vehicle license plate and title registration fees. 21 Comp. Gen. 769 (1942); 4 Comp. Gen. 412 (1924); 1 Comp. Gen. 150 (1921); 15 Comp. Dec. 231 (1908). (Most federal government-owned vehicles today would have federal government plates.)

A final type of property-related state tax we may mention briefly are the so-called "death taxes." Death taxes are of two types, estate taxes and inheritance taxes. An estate tax is based on the value of the taxable estate in its entirety; an inheritance tax is based on the value of taxable property passing to a particular beneficiary. Property given to the United States by testamentary disposition may be subject to a state inheritance tax. The Supreme Court has held that a state may impose an inheritance tax on property bequeathed to the United States, and indeed may completely prohibit testamentary gifts to the United States by its domiciliaries. *United States v. Burnison*, 339 U.S. 87, 93 (1950). Death taxes on gifts to the United States do not involve federal immunity because the taxes are imposed before the property reaches the hands of the beneficiary. (See also Chapter 6, section E on donations to the federal government, which includes citations to the leading cases.)

There may be situations, although they should be uncommon, when it may be desirable to pay a state death tax from appropriated funds. In an early case, the Comptroller of the Treasury advised the Smithsonian Institution that it could use its appropriation for "preservation of collections" to pay a state inheritance tax on a legacy bequeathed to the Smithsonian. 26 Comp. Dec. 480 (1919). This type of situation could arise, for example, if a decedent bequeathed specific real or personal property to the United States and the estate contained insufficient assets to pay an applicable death tax without liquidating the property.

d. Taxes Paid by Federal Employees

Another way the federal government sometimes pays a state or local tax is by the reimbursement to a federal employee who incurred the tax during the performance of official business or other activities. For example, a member of the Armed Services was entitled to reimbursement under a government-supported health insurance plan for the full amount of a

doctor's bill, including the amount that was attributable to the New Mexico gross receipts tax, a valid vendor tax. B-130520, Nov. 30, 1970. *See also* 36 Comp. Gen. 681 (1957) (state gasoline tax); B-203151, Sept. 8, 1981 (local sales tax on rental vehicle); B-160040, July 13, 1976 (certain intangible property taxes reimbursable as relocation expenses incident to transfer). Some other commonly encountered situations are described below.

(1) Parking taxes

Questions here arise in two contexts: parking meter fees and municipal taxes on parking in parking lots or garages.

The rule for parking meters on public streets is: Unless and until there is a contrary judicial determination, appropriated funds may be used to reimburse a federal employee for street parking meter fees incurred while driving a government-owned vehicle on official business, except (1) where the fee would impose an impermissible burden on the performance of a federal function or (2) where the particular fee has been held by a court to be a tax or a revenue raising measure (as opposed to a traffic regulation device). 46 Comp. Gen. 624 (1967).[185]

To the extent a parking meter fee may be held to be a tax under the above rule, it cannot be imposed against the federal government or against the employee-driver as the government's agent. 41 Comp. Gen. 328 (1961). However, even where the fee is a tax, if the car is unmarked and being used in investigative work, the fee can be reimbursed as a necessary cost of the investigation. 38 Comp. Gen. 258 (1958).

The two preceding paragraphs apply to government-owned vehicles. A statute expressly authorizes employee reimbursement of parking fees when using a privately owned vehicle on official business. 5 U.S.C. § 5704; 41 Comp. Gen. 328.

Parking meter fees in a municipally owned, off-street parking lot are not viewed as taxes for purposes of the rule stated in 46 Comp. Gen. 624. These fees may therefore be reimbursed whether the employee is driving a

[185] Several earlier decisions were overruled by 46 Comp. Gen. 624 and several others were modified. The text attempts to reflect those elements of the modified decisions that remain valid.

government-owned or privately owned vehicle. 44 Comp. Gen. 578 (1965).[186]

A local tax on parking in a parking lot or garage cannot be imposed on a government-owned vehicle on official business. 51 Comp. Gen. 367 (1971). However, if the amount of the tax is so small as not to justify issuance of a tax exemption certificate, the employee may be reimbursed notwithstanding the government's immunity. 52 Comp. Gen. 83 (1972). The rationale is that the administrative cost of asserting the immunity by using the certificate would be prohibitive for very small amounts. As with the parking meter fees, an employee using a privately owned vehicle on official business may be reimbursed under 5 U.S.C. § 5704 for local taxes levied on parking in lots or garages. 51 Comp. Gen. 367 (1971).

To sum up the rules on parking taxes and fees:

1. *Privately owned vehicles on official business*. Employee may be reimbursed for meter fees either on a street or in a municipal lot, and for taxes on parking in a lot or garage.

2. *Government-owned vehicle*, *metered parking*. Employee may be reimbursed for meter fees on a public street unless one of the exceptions in 46 Comp. Gen. 624 applies, and for meter fees in a municipal lot.

3. *Government-owned vehicle*, *unmetered parking*. Employee may be reimbursed for local taxes on parking in a lot or garage if the amount is too small for the issuance of a tax exemption certificate, at least where the taxing entity requires the certificate as evidence of tax-exempt status.

(2) Hotel and meal taxes

State and local governments frequently add one or more taxes to the cost of a stay at a hotel or motel. When a federal employee rents a room directly from the proprietor, even when on official business, the federal employee becomes personally liable for the amount of the rental, including associated

[186] Note, however, that although federal employees may be reimbursed for parking fees, they remain personally liable for fines incurred when the employees fail to "feed" the meter, unless the employees had no control over the situation. B-250880, Nov. 3, 1992.

taxes.[187] Since the United States is not a party to the transaction, the Comptroller General reasoned that the tax was not levied on the federal government. Accordingly, the employee must pay the tax and cannot assert the government's immunity from local taxes.[188] That the government may reimburse the employee for the full rental price, including the tax, does not transform the tax into a tax on the federal government. 55 Comp. Gen. 1278 (1976); B-172621-O.M., Aug. 10, 1976.[189] If local law exempts federal employees from the tax, the employees should use tax exemption certificates to claim the exemption.

However, if the government rents the rooms directly, that is, if there is a direct contractual relationship between the United States and a hotel or motel for the rental of rooms to federal employees or others, then the government is entitled to assert its immunity from local taxes. 55 Comp. Gen. 1278. The Department of Justice reached the same result in 5 Op. Off. Legal Counsel 348 (1981), opining that the Office of the Vice President was not required to pay local hotel taxes when reserving a block of rooms for an official trip.[190]

Similar results would occur where a tax was imposed on commercial rental of a vehicle or any other travel-related activity such as meals or other transportation. B-167150, Apr. 3, 1972. On the theory that the contract defines the limits of liability, however, a meal ticket good for the purchase of food up to a maximum dollar amount may include amounts attributable to a valid vendor tax up to the specified dollar limit. In the event the dollar limit was exceeded, however, the remainder of the expense would be personal, including the extra amounts for tax. 41 Comp. Gen. 719 (1962).

[187] Federal employees are required to use credit cards issued by government contractors for their temporary duty travel, 41 C.F.R. § 301-51.1, and are personally responsible for paying the credit card bill according to the cardholder agreement. *See id.* § 301-52.24.

[188] 41 C.F.R. § 301-11.28.

[189] Note that 41 C.F.R. § 301-11.27 expressly permits reimbursement of lodging taxes to federal employees as a miscellaneous travel expense.

[190] The Department of Justice notes that even where an individual employee is procuring the accommodation, the government could, if it wanted to change existing practice, compel recognition of federal immunity. 5 Op. Off. Legal Counsel at 349 n.2.

(3) Tolls

State and local authorities frequently charge tolls for the use of state-owned highways, bridges, or tunnels. "A tax is a demand of sovereignty; a toll, a demand of proprietorship." *In re State Freight Tax*, 82 U.S. (15 Wall.) 232, 278 (1872). Thus, it has long been established that a toll is not a tax, but is a charge for the use of the road, bridge, or tunnel. *Sands v. Manistee River Improvement Co.*, 123 U.S. 288, 294 (1887). Because tolls do not raise questions of federal tax immunity, they are properly payable where necessarily incurred in the performance of official business. 9 Comp. Gen. 41, 42 (1929); 4 Comp. Gen. 366 (1924); 24 Comp. Dec. 45 (1917). Statutory authority now exists for the reimbursement of tolls incurred by government employees on official travel. 5 U.S.C. § 5704(d); 35 Comp. Gen. 92 (1955).

GAO has also held that appropriated funds may be used to purchase annual toll road permits where justified by anticipated usage.[191] Similarly, if an employee who frequently uses a toll road on official business purchases an annual permit for his or her own automobile, the agency may reimburse the toll charges that would otherwise have been incurred, on a per trip basis, not to exceed the cost of the annual permit. 34 Comp. Gen. 556 (1955).

Some of the early decisions held that a toll could not be paid if the particular highway, bridge, or tunnel was constructed with the aid of federal funds. 9 Comp. Gen. at 42; 24 Comp. Dec. at 48. The statement in 24 Comp. Dec. was based on legislation that authorized federal financial assistance but also prohibited the charging of "tolls of all kinds." *Id.* at 47. The Federal-Aid Highway Act includes an almost identical prohibition (23 U.S.C. § 301), but also authorizes tolls in certain circumstances (23 U.S.C. § 129). The editors have found no discussion of this issue under the modern legislation, nor have we found any guidance as to how, apart from the interstate highway system, a federal employee would know which roads were constructed with aid. Regardless, it would seem prudent to apply the concept of 52 Comp. Gen. 83 (1972), discussed above under parking taxes, in conjunction with the reimbursement authority of 5 U.S.C. § 5704.

[191] These purchases do not violate the statutory prohibition on advance payments because, GAO reasoned, the government did not make an advance payment but rather purchased a present right to use the thoroughfare in the future. 36 Comp. Gen. 829 (1957).

(4) State and local income withholding taxes

In the absence of statutory authority, state or local withholding requirements would not apply to the federal government because a state may not "regulate" the governmental activities of the United States. 28 Comp. Gen. 101 (1948); 27 Comp. Gen. 372 (1948). The requisite statutory authority now exists. For the District of Columbia and any other state, city, or county that provides for the collection of income tax by withholding, the Secretary of the Treasury must enter into an agreement with the applicable jurisdiction to withhold the tax from federal employees. 5 U.S.C. §§ 5516, 5517, 5520.

(5) Possessory interest taxes

A possessory interest tax is a tax on the exclusive right to the beneficial use of real property or its improvements held by a tax-exempt public agency. *See United States v. County of San Diego*, 965 F.2d 691 (9th Cir. 1992) (interpreting California law). The Supreme Court upheld the validity of a possessory interest tax on federal employees required to live in housing owned by the Forest Service. The Court found that the tax was nondiscriminatory and that its legal incidence fell upon the employees and not the United States. *United States v. County of Fresno*, 429 U.S. 452 (1977); *see also* B-251228, July 20, 1993; B-191232, June 20, 1978. Similarly, a tax on a federal contractor who had the beneficial use of a government-owned experimental fusion device was held lawful and payable by the contractor. *County of San Diego*, 965 F.2d at 691. The device, which weighed between 400 and 500 tons, was deemed a "fixture" annexed to the property by gravity. *United States v. County of San Diego*, 53 F.3d 965, 968 (9th Cir.), *cert. denied*, 516 U.S. 867 (1995).

Where the government provides quarters for employees and collects rent under 5 U.S.C. § 5911, the rental rate may be adjusted to discount an applicable possessory interest tax, but the adjustment must be approved by the Office of Management and Budget and may not be retroactive. B-194420, Oct. 15, 1981.

(6) Occupational license fees

Occupational license fees or employment taxes are fees imposed by a state or local jurisdiction, usually on members of a particular occupation or profession, such as doctors, attorneys, and accountants, as a prerequisite to being able to work or practice in that jurisdiction. Apart from the question

of a state's authority to impose such fees on federal employees performing federal functions, GAO had consistently ruled that absent specific statutory authority, agencies could not use appropriated funds to pay these fees. *E.g.*, 47 Comp. Gen. 116 (1967). GAO reasoned that federal employees have the burden of qualifying themselves for the performance of official duties and, therefore, federal employees had to pay any expense associated with becoming qualified. 22 Comp. Gen. 460 (1942). Thanks to a statutory change, however, agencies now have the discretion to use available funds to pay the expenses of an employee to obtain professional credentials, including state-imposed professional licenses, certifications, and for the examinations required to obtain these credentials. 5 U.S.C. § 5757. For further discussion and case citations, see sections C.13.e (Personal Qualification Expenses) and C.12.b (Membership Fees—Attorneys) of this chapter.

e. Refund and Recovery of Tax Improperly Paid

GAO has held that improperly paid taxes may be recovered by setoff against other moneys payable to a state. B-150228, Aug. 5, 1973; *see United States v. Munsey Trust Co.*, 332 U.S. 234, 239–40 (1947) (United States as a creditor is entitled to set off amounts it is owed from amounts otherwise payable). Setoff may be asserted against any money payable to any other agency of the state, whether or not related to the source of the erroneous payments. B-154778, Aug. 6, 1964; B-154113, June 24, 1964; B-150228, Aug. 5, 1963.[192]

Some states provide for refunds of certain taxes paid by the United States. In evaluating these refund provisions, it is important to determine whether the tax subject to refund is a vendor tax or a vendee tax. If the tax is a vendor tax, the United States is not constitutionally immune from payment. Thus, any right to a refund of a vendor tax is purely a creature of state law and the United States must comply with any conditions and limitations imposed by state law. B-100300, June 28, 1965.[193] If, however, the tax is a vendee tax, the government's right to a refund is based on the Constitution and is wholly independent of state law. Therefore, in claiming a refund in

[192] As explored in Chapter 13 (Volume III of the second edition of *Principles of Federal Appropriations Law*), the Debt Collection Act of 1982 permits using offset against state or local governments. Setoff against advances under a federal grant program is discussed in Chapter 10 (Volume III of the second edition of *Principles*).

[193] That a state law permits refunds to the United States as the ultimate bearer of the tax in certain situations does not transfer the legal incidence of the tax to the vendee. B-152995, Jan. 30, 1964. *See also* 27 Comp. Gen. 179 (1947).

this situation, the United States is not bound by restrictions in state law, such as state statutes of limitations. *United States v. Michigan*, 851 F.2d 803, 809–10 (6th Cir. 1988); B-154778, Aug. 6, 1964; B-100300, Feb. 10, 1956.

Using an established refund mechanism is the preferred method of recovering improperly paid taxes. 42 Comp. Gen. 593 (1963). Thus, upon the request of a state, and as long as the interests of the United States will be protected, setoff may be deferred pending the filing of a formal claim with the appropriate state agency. B-151095, Jan. 2, 1964. However, if the state refuses a refund to which the United States is entitled, setoff is again the proper remedy if legally available. 39 Comp. Gen. 816 (1960); B-162005, Apr. 8, 1968.

Where a sales tax has been improperly paid, the vendor is little more than a collection agent for the state and the state is the ultimate beneficiary of the improper payment. Therefore, collection action should proceed against the state rather than by setoff against the vendor. 42 Comp. Gen. 179 (1962).

In the course of resolving problems over the liability of the United States to pay a particular tax, the government has entered into various arrangements with states pending the outcome of litigation. In one case, the government agreed with a state taxing authority to file tax forms without remitting any money, and to make the actual payments upon a final judicial determination in a pending test case that the tax was valid. B-160920, May 10, 1967. (The decision, after the Supreme Court upheld the validity of the tax, held that the back taxes should be paid notwithstanding expiration of the state statute of limitations.) In another case, the government negotiated an agreement with contractors whose contracts were being subjected to a questionable state sales tax, under which the General Services Administration agreed to pay the tax and the contractors promised to refund the amounts paid if it was ultimately determined that the government's immunity applied. B-170899, Nov. 16, 1970. *See also* 50 Comp. Gen. 343 (1970).

16. Telephone Services

a. Telephone Service to Private Residences

(1) The statutory prohibition and its major exception

A problem that existed during the early years of the twentieth century was an apparent tendency on the part of government officials to have

telephones installed in their homes at government expense. *See* 53 Comp. Gen. 195, 197 (1973); 19 Comp. Dec. 350, 352 (1912). It must be remembered that telephones were much more of a novelty in those days; we were still decades from the point where almost every American home has a private home telephone, not to mention a mobile or cellular phone. In any event, Congress enacted legislation in 1912 to prevent the use of public funds for private telephone service for government officials. The portion of the statute we are concerned with here, 31 U.S.C. § 1348(a)(1), provides:

> "Except as provided in this section, appropriations are not available to install telephones in private residences or for tolls or other charges for telephone service from private residences."

Over time statutory exceptions have been passed, however, eroding the once almost blanket prohibition against the payment for telephones in residences. For example, in 1995, with the advent of telecommuting and the flexible workplace, Congress passed a major exception to the latter prohibition. Agencies are expressly authorized to use appropriated funds:

> "to install telephone lines, and necessary equipment, and to pay monthly charges, in any private residence or private apartment of an employee who has been authorized to work at home in accordance with guidelines issued by the Office of Personnel Management: *Provided*, That the head of the department, division, bureau, or office certifies that adequate safeguards against private misuse exist, and that the service is necessary for direct support of the agency's mission."

Pub. L. No. 104-52, title VI, § 620, 109 Stat. 468, 501 (Nov. 19, 1995). So in the case of employees authorized to work at home under OPM's telework/telecommuting guidelines, (*see* http://www.telework.gov), once the agency certifies that adequate safeguards against private misuse exist, agencies may pay for the very same charges that 31 U.S.C. § 1348(a)(1) otherwise would have prohibited.

However, barring application of the 1995 statutory provision allowing payment for residential telephone expenses in a telework situation (and several other situation-specific statutory exceptions to be discussed later), the decisions under 31 U.S.C. § 1348(a)(1) are still applicable.

The decisions are fond of saying that the statute, for the most part, has been strictly applied. Indeed, the earlier decisions are packed with the "reflex" observations that the language of the statute is "plain and comprehensive," the "prohibition is mandatory," and the statute "leaves no room for the exercise of discretion on the part of the accounting officers of the Government." *E.g.*, 21 Comp. Gen. 997, 999 (1942). As late as 1996 one decision stated that:

> "The statute is plain on its face and although in today's era of instant communications the statute may appear outdated, we may not rewrite the statute to fit a fashionable view of what the norm should be. Certainly if the statute is to retain any meaning, we may not, under the guise of being essential, routinely grant exceptions of convenience, however beneficial the result may appear."

B-262013, Apr. 8, 1996.

Thus, the rule remains that charges for residential telephones (installation, connection, monthly equipment rental, and basic service charges) may not be paid from appropriated funds unless one of the statutory exceptions applies. As we shall see at the end of this section, technological advances have also created end runs around the statutory prohibition.

(2) Funds to which the statute applies

The statute is a direct restriction on the use of appropriated funds. As such, it applies not only to direct appropriations from the Treasury but also to funds that constitute appropriated funds by operation of law. Thus, the statute applies to expenditures from the revolving fund established by the Federal Credit Union Act since the authority to maintain a revolving fund constitutes a continuing appropriation. 35 Comp. Gen. 615, 618 (1956).[194]

Along these same lines, the Comptroller General held in 4 Comp. Gen. 19 (1924) that the Alaska Railroad could not designate residential telephones as "operating expenses" and pay for them from revenues derived from

[194] *But see Core Concepts of Florida, Inc. v. United States*, 327 F.3d 1331, 1337 (Fed. Cir. 2003) (holding that revenues from revolving funds not deposited into the General Fund are not "appropriated funds" under the Tucker Act, 28 U.S.C. § 1346). The Tucker Act provides for jurisdiction of claims against the United States.

operating the railroad. The Comptroller General pointed out in that case that the authority to do "all necessary things" to accomplish a statutory purpose confers legal discretion, not unlimited discretion, and the authority is therefore subject to statutory limitations such as 31 U.S.C. § 1348. *Id.* at 20. The same point was made in 35 Comp. Gen. at 618, and in B-130288, Feb. 27, 1957.

(3) What is a private residence?

Simply stated, a private residence is where you live as opposed to where you work, assuming the two can be distinguished. Cases where the two cannot be distinguished are discussed later. For purposes of 31 U.S.C. § 1348, it makes no difference that the residence is government-owned or on public land. 35 Comp. Gen. 28 (1955); 7 Comp. Gen. 651 (1928); 19 Comp. Dec. 198 (1912). The statute therefore fully applies to permanent residential quarters on a military installation. 21 Comp. Gen. 997 (1942); B-61938, Sept. 8, 1950; A-99355, Jan. 11, 1939. It does not apply, however, to tents or other temporary structures on a military post, which are not available for family occupancy, notwithstanding that military personnel may use them as temporary sleeping quarters. 21 Comp. Gen. 905 (1942).

In 41 Comp. Gen. 190 (1961), the statutory prohibition was held not applicable to the installation of telephones in hotel rooms occupied by officials on temporary duty where necessitated by the demands of the mission. (One would have thought that all hotel rooms were already equipped with telephones by 1961.)

An early decision stated that "private" means set apart for the exclusive personal use of any one person or family. 19 Comp. Dec. at 199. In this light, the Comptroller General held that appropriated funds could be used to install and operate local-service telephones in Army barracks occupied by large numbers of enlisted personnel. 53 Comp. Gen. 195 (1973). An earlier decision, 35 Comp. Gen. 28, applied the prohibition to several government-owned residences, one of which was used to house a number of employees. While these two cases may appear inconsistent at first glance in that the telephones in both instances would be available for the personal use of the residents, the apparent distinction is that Army appropriations are available for the welfare and recreation of military personnel so that the "personal use" aspect in the Army barracks case was not necessarily dispositive.

Since the statute uses only the term "residence," it has been held not to prohibit service charges for a dedicated telephone line, on which a Navy-supplied fax machine was installed for official use, in the private business office of a Naval Reserve officer. B-236232, Oct. 25, 1990.

Note that although the principles in the above cases still are pertinent where 31 U.S.C. § 1348(a) applies, 31 U.S.C. § 1348(c) authorizes the Department of Defense to "install, repair, and maintain telephone wiring in residences owned or leased by the United States Government and, if necessary for national defense purposes, in other private residences."

The location of the installation of the telephone service is determinative even though it facilitates an employees receipt of phone messages at her residence. In this connection, the Commodity Futures Trading Commission was allowed to install call forwarding service in the government office of an employee who was permitted to work part time from her home for 6 months in order to care for her newly born child so as to facilitate her conducting business with Commission staff and persons having business with the Commission. Since the employee would not be paid for charges for calls or other services originating from the employee's residence, but rather the government was being billed for forwarding calls from the employee's government office to her residence, 31 U.S.C. § 1348(a)(1) did not bar payment. Moreover, the call forwarding was not designed to improve the employee's personal telephone service or facilitate her receipt of private or personal messages. 73 Comp. Gen. 44 (1993).

(4) Application of the general rule

A large number of decisions have established that the prohibition applies even though the telephones are to be extensively used in the transaction of public business and even though they may be desirable or necessary from an official standpoint. 59 Comp. Gen. 723, 724 (1980) and cases cited therein. In this respect, there is no discretion involved. A rather stark application of this rule can be found in the 1996 decision quoted above, which held that the Centers for Disease Control and Prevention could not use appropriated funds to install telephone lines in the private residence of its Director. The agency tried to justify the telephone lines by arguing that the Director might need to respond quickly to emerging health crises around the world, but the agency had not explained its role in responding to emergent or urgent health crises and the consequences for public health and safety if it were to fail to respond immediately upon learning of the problems. B-262013, Apr. 8, 1996.

Relevant factors are whether the telephone will be freely available for the employee's personal use and whether facilities other than the employee's residence exist for the transaction of official business. The employee's personal desires are irrelevant. Thus, it makes no difference that the employee doesn't want the telephone and has asked to have it removed. 33 Comp. Gen. 530 (1954); A-99355, Jan. 11, 1939. The fact that a telephone is unlisted is also immaterial. 15 Comp. Gen. 885 (1936).

The rule is well illustrated in a 1980 decision in which the District Commander of the Seventh Coast Guard District sought to be reimbursed for a telephone installed in his residence. The Commander was in charge of the Cuban Refugee Freedom Flotilla in the Florida Straits. He was in daily contact with the various federal, state, and local agencies involved and was required to be available 24 hours a day. Since this situation placed a burden on the Commander's immediate family by restricting their personal use of the home telephone, he had another telephone installed for official business. In view of the statutory prohibition, and since the Commander was already provided with an office by the Coast Guard, reimbursement could not be allowed. 59 Comp. Gen. 723, *supra.* For an earlier decision applying the prohibition notwithstanding the need for employees to be available on a 24-hour basis, see 11 Comp. Gen. 87 (1931).

A somewhat similar situation was presented in B-130288, Feb. 27, 1957. There, the Federal Mediation and Conciliation Service sought authority to pay for telephones in the homes of mediators stationed in cities where office accommodations were not provided. The mediators had to work out of their homes and were required to be available 24 hours a day. Applying the statutory prohibition, the Comptroller General concluded that the agency could not pay for the telephones, nor could it pay for an answering service. However, there was no reason a mediator couldn't list his private telephone number under the agency's name, and the government could pay for this listing. By doing this, the government would not be paying for personal use of the telephone.

In B-175732, May 19, 1976, it was proposed to install a telephone in the "galley" (kitchen) of the Coast Guard Commandant's home, for use by a "subsistence specialist" who worked there and presumably had no access to other telephones. The argument was that while the galley may have been part of the Commandant's private residence, it was the subsistence specialist's duty station and since he had no other office, he had to conduct government business from the galley. GAO found the proposal prohibited by 31 U.S.C. § 1348(a)(1). Although the duties of the subsistence

specialist—the procurement of food, supplies, and services—were official to him, they nevertheless accrued largely if not exclusively to the personal benefit of the Commandant and were not sufficient to justify an exception.

(5) Exceptions

As we have seen above, although the statute has been strictly applied, there are exceptions.

First, there are statutory exceptions.

- One example is 31 U.S.C. § 1348(a)(2), for residences owned or leased by the United States in foreign countries for use of the Foreign Service.

- Another statutory exception is 31 U.S.C. § 1348(b), enacted in 1922, covering telephones deemed necessary in connection with the construction and operation of locks and dams for navigation, flood control, and related water uses, under regulations of the Secretary of the Army.

- A further and broader exception enacted in 1984 provides that under regulations prescribed by the Secretary of Defense, Department of Defense appropriations are available to install, repair, and maintain telephone wiring in residences owned and leased by the United States government and, if necessary for national defense purposes, in other private residences. 31 U.S.C. § 1348(c).

- Yet another statutory exception is provided in 10 U.S.C. § 1588(f)(1) which allows the Secretary concerned to install telephone lines and any necessary telecommunications equipment in the private residences of persons, designated in accordance with the regulations, to provide voluntary services for programs providing services to members of the armed forces and their families.

- Still another is 16 U.S.C. § 580f, for telephones necessary for the protection of national forests.

Next, there are some nonstatutory exceptions. They fall generally into two categories. The first, dictated by common sense, involves situations where private residence and official duty station are one and the same. If the government has made available office facilities elsewhere, it is clear that a residential telephone cannot be charged to appropriated funds no matter

how badly it is needed for official business purposes. *E.g.*, 59 Comp. Gen. 723 (1980); 22 Comp. Dec. 602 (1916). However, exceptions have been recognized where a government-owned private residence was the only location available under the circumstances for the conduct of official business. *E.g.*, 4 Comp. Gen. 891 (1925) (isolated lighthouse keeper); 19 Comp. Dec. 350 (1912) (lock tender); 19 Comp. Dec. 212 (1912) (national park superintendent).

Note that in all of these cases the combined residence/duty station was government-owned. The exception has not been extended to privately owned residences that are also used for the conduct of official business. 26 Comp. Gen. 668 (1947); B-130288, Feb. 27, 1957; B-219084-O.M., June 10, 1985. The theory seems to be that, in a privately owned residence, the degree of personal use as opposed to likely official need is considered so great as to warrant a stricter prohibition since there would be no other practical way to control abuse, whereas some flexibility is afforded for government-owned residences where sufficient official use for telephones exists. 53 Comp. Gen. 195, 197–98 (1973). Note that, as stated, the express prohibition in 31 U.S.C. § 1348(a)(1) applies to residences and does not apply when telephone services are provided in a private business office. B-236232, Oct. 25, 1990.

It should also be noted that isolation alone is not sufficient to justify an exception. In 35 Comp. Gen. 28 (1955), 31 U.S.C. § 1348(a)(1) was held to prohibit payment for telephones in government-owned residences of Department of Agriculture employees at a sheep experiment station. The employees claimed a need for the telephones because they frequently received calls outside of normal office hours from Washington or to notify them of unexpected visitors and shipments of perishable goods, and because they were sometimes stranded in their residences by severe blizzards. Here 4 Comp. Gen. 891 was distinguished because the telephone in that case was installed in a room equipped and used only as an office and was not readily available for personal use.

The second category of nonstatutory exceptions stems from the recognition that the "evil" that 31 U.S.C. § 1348(a)(1) is intended to address is not the physical existence of a telephone, but the potential for charging the government for personal use. Thus, a series of cases has approved exceptions where (1) there is an adequate justification of necessity for a telephone in a private residence and (2) there are adequate safeguards to prevent abuse.

This category seems to have first developed in the context of "military necessity" and national security justifications. For example, an exception was made to permit the installation in the residence of the Pearl Harbor Fire Marshal (a civilian employee) of a telephone extension that was mechanically limited to emergency fire calls. 32 Comp. Gen. 431 (1953), *modifying* 32 Comp. Gen. 271 (1952). *See also* 21 Comp. Gen. 905 (1942). In B-128144(3), June 29, 1956, GAO approved a proposal to install direct telephone lines from an Air Force Command Post switchboard to the private residences of certain high-level civilian and military officials to ensure communications in the event of a national emergency. Air Force regulations prohibited the use of these lines for anything but urgent official business in the event of a national emergency and authorized the recording of conversations as a safeguard against abuse.

However, a "necessity" that is little more than a matter of convenience is not enough to overcome the prohibition. For example, in A-99355, Jan. 11, 1939, a telephone could not be maintained at government expense in the private quarters of the Officer-in-Charge on a Navy installation because several telephones were available in established offices on the station. This decision was followed in 21 Comp. Gen. 997 (1942) and 33 Comp. Gen. 530 (1954). The prohibition applies equally to an intra-base system not connected to outside commercial trunk lines. B-61938, Sept. 8, 1950.[195]

Relying largely on B128144(3), GAO approved a General Services Administration proposal to install Federal Secure Telephone Service telephones in the residences of certain high-level civilian and military officials certified by their agency heads as having national security responsibilities. 61 Comp. Gen. 214 (1982). The system was designed to provide a secure communications capability to permit the discussion of classified material that could not be discussed over private telephones. As in B-128144(3), the proposal included a number of safeguards against abuse, which GAO deemed adequate.

The concept established in the military necessity/national security cases would subsequently be applied in other contexts as well. Thus, GAO approved exceptions in the following cases:

[195] The Navy now has statutory authority to use its appropriations to pay for the installation and use (except for personal long-distance calls) of extension telephones connecting public quarters occupied by naval personnel (but not civilian employees) with station switchboards. 10 U.S.C. § 7576.

- Installation of dedicated Integrated Services Digital Network (ISDN) lines to transmit data from computers in the private residences of the commissioners of the Federal Communications Commission to the agency's local area network as it permitted data encryption necessary to secure confidential communications and the Commission had imposed adequate safeguards to prevent private use of the separate ISDN lines. In this decision it was also noted that, although section 620 of Pub. L. No. 104-52, 109 Stat. 468, 501 (Nov. 19, 1995), permitting installation of phone lines for employees permitted to work at home, did not by its terms address presidentially appointed officers such as the Commissioners, "it would be anomalous for us to overlook the public policy established in section 620 and apply the section 1348(a)(1) prohibition in a manner to preclude government officials who are on duty 24 hours from the same conveniences as other government employees." B-280698, Jan. 12, 1999. Compare B-262013, Apr. 8, 1996, a decision that was issued less than 3 years earlier, in which the GAO held that the Centers for Disease Control and Prevention could not install telephone lines in the private residence of its Director, in part because the agency had not demonstrated that adequate safeguards to prevent misuse of the telephone lines would be in place.

- Installation of telephone equipment by the Internal Revenue Service in the homes of customer "assistors" who were intermittent, part-time employees. The phones to be installed had no outcall capability and could receive calls only from IRS switching equipment. Separate lines were essential because the employee's personal phones could not be used with the IRS equipment. B-220148, June 6, 1986. See also B-247857, Aug. 25, 1992, in which GAO held when telephone service installation in a private residence is of restricted use or when there are numerous safeguards and the service is deemed essential, the prohibition is inapplicable. The National Mediation Board had demonstrated the essential nature of the computer data transmission service and would prevent private misuse by installing dedicated telephone lines.

- Installation of telephones in the homes of Internal Revenue Service criminal investigators who were authorized to work from their homes, to be used for portable computer data transmission. GAO found the agency's justification adequate and approved the expenditure, contingent upon the establishment of adequate safeguards, such as

those in 61 Comp. Gen. 214, to prevent personal use. 65 Comp. Gen. 835 (1986).

- Installation of separate telephone lines in the homes of IRS data transcribers authorized to work at home under a "flexiplace" program, again subject to the establishment of adequate safeguards. 68 Comp. Gen. 502 (1989).

- Installation of telephones in the homes of certain high level Nuclear Regulatory Commission (NRC) officials to ensure immediate communication capability in the event of a nuclear accident. The phones would be capable of dialing only internal NRC numbers, with any other calls to be placed through the NRC operator. B-223837, Jan. 23, 1987.

Some of the cases noted earlier in which the prohibition was applied, such as 59 Comp. Gen. 723 and B-262013, also presented strong justifications. The primary feature distinguishing these cases from the exceptions described above is the existence in the latter group of adequate safeguards against abuse.

Finally, a couple of cases have dealt with payment for telephone services during periods of nonoccupancy. In order to ensure continuous service, the government secures telephone service for the residence of the Air Deputy for the Allied Forces Northern Europe in Norway by long-term lease with the Norwegian Telephone Company. Normally, the Air Deputy pays the charges. The question presented in 60 Comp. Gen. 490 (1981) was who should pay the charges accruing during a vacancy in the position. The Comptroller General held that since the quarters were not the private residence of either the outgoing or the incoming Air Deputy during the period of vacancy, no public official received the benefit of the service during that period. Therefore, payment from appropriated funds would not thwart the statutory purpose.

The decision distinguished an earlier case, 11 Comp. Gen. 365 (1932), denying payment for telephone service to the residence of the U.S. Ambassador to Mexico during a period when the position was vacant. In the 1932 case, the service had been retained during the interim period mainly through inadvertence. In 60 Comp. Gen. 490, on the other hand, retention of the service was necessary to avoid delays in reinstallation when the new Air Deputy moved in. The decision did note, however, that except in limited situations of public necessity such as the one involved,

telephone service should ordinarily be canceled during periods of nonoccupancy.

b. Long-distance Calls

The long-distance telephone call certification requirement which existed at former 31 U.S.C. § 1348(b), has been repealed by section 1721 of Pub. L. No. 104-201, div. A, title XVII, subtitle B, 110 Stat. 2422, 2758 (Sept. 23, 1996). Note also that agencies have adopted policies to allow limited personal use of office equipment, including telephones. See, *e.g.*, 28 C.F.R. § 45.4(2) in which the Department of Justice allows limited personal telephone/fax calls to locations within the office's commuting area, or that are charged to nongovernment accounts; and GAO Order No. 0645.1, *Limited Personal Use of Government-Provided Office and IT Equipment, Including Internet*, Jan. 16, 2001, at 6(a)(3), which allows employees to make occasional brief domestic telephone calls.

c. Mobile or Cellular Phones

Just as significant statutory exceptions have eroded the once almost blanket prohibition against the payment for telephones in residences, likewise, technological advancements are eroding the application of 31 U.S.C. § 1348(a) in a more practical manner as mobile or cellular phones become ubiquitous.

In a 1988 case, B-229406, Dec. 9, 1988, an agency official used his own funds to purchase a cellular telephone and have it installed in his personal automobile. GAO stated with respect to 31 U.S.C. § 1348(a) that the statute addresses residences, not automobiles. Concluding that "section 1348 does not apply to cellular phones located in private automobiles," GAO advised that the agency could reimburse business calls as long as there were adequate safeguards to prevent abuse. The safeguards existed in this case because all calls were individually itemized on a monthly basis. The decision cautioned, however, that "agency heads should strictly scrutinize automobile telephone calls before certifying them for reimbursement," to ensure that the most economical means of communication are being used.

Subsequent decisions have approved agencies' reimbursement, on an actual expense basis, for access to and use of an employee's personal cell phone. B-291076, Mar. 6, 2003; B-287524, Oct. 22, 2001. However the decisions have held that reimbursement may not be made on a flat rate basis. In B-287524 GAO found that flat rate reimbursement was prohibited by 5 U.S.C. § 5536 as a flat rate plan raises the risk of improperly reimbursing employees for personal use—setting a flat fee tends to result in either a gain or a loss to the reimbursed employee.

In B-291076 GAO stated that an agency may reimburse its employees for the actual costs of maintaining personal cell phone services that meet the agency's minimum needs and the additional costs that may arise from any official calls actually made or received on the employee's cell phone. Safeguards included in the agency proposal (requiring monthly, itemized service provider invoices, limiting claims to the expenses the agency would otherwise pay for such services, and adjusting claims to exclude hidden costs of "free" services included in the service provider's plan) provided adequate assurance that the reimbursements will be limited to government-related calls.

GAO's most recent decisions have assumed that an agency has the authority to purchase and issue government-owned cellular phones, along with accessories, to its employees so that the employees may conduct government business. B-291076 and B-287524, *supra*.

Prior to the latter decisions GAO had considered the purchase of cellular telephones for use by Members of the Senate and concluded that the expenditure was authorized from the Senate's contingent fund. B-227763, Sept. 17, 1987; B-186877, Aug. 12, 1976. The 1976 opinion had taken a negative view of the question from the policy perspective and suggested that more specific legislative authority would be appropriate. This was done and there is now express statutory authority to use the contingent fund of the Senate to provide telecommunications services and equipment. 2 U.S.C. §§ 58(a)(1) and 58a.

However, as the later decisions, B-291076 and B-287524, demonstrate, GAO did not require the agencies requesting those decisions to show express statutory authority for the purchase and issuance of cellular phones to their employees. GAO did not object to the agencies purchasing cellular phones and issuing them to their employees for the conduct of government business. (In B-229406, *supra*, the purchase price of a cellular phone could not be reimbursed but it was clear in that case that the official intended the phone to be his own property.)

Chapter 5

Availability of Appropriations: Time

A. General Principles—Duration of Appropriations 5-3
1. Introduction 5-3
2. Types of Appropriations 5-4
a. Annual Appropriations 5-4
b. Multiple Year Appropriations 5-7
c. No-Year Appropriations 5-7
3. Obligation or Expenditure Prior to Start of Fiscal Year 5-9
B. The *Bona Fide* Needs Rule 5-11
1. Background 5-11
a. Introduction 5-11
b. The Concept 5-12
2. Future Years' Needs 5-15
3. Prior Years' Needs 5-18
4. Delivery of Materials beyond the Fiscal Year 5-22
5. Services Rendered beyond the Fiscal Year 5-23
6. Replacement Contracts 5-28
7. Contract Modifications and Amendments Affecting Price 5-33
8. Multiyear Contracts 5-37
a. Introduction 5-37
b. Multiple Year and No-Year Appropriations 5-39
c. Fiscal Year Appropriations 5-41
d. Contracts with No Financial Obligation 5-43
9. Specific Statutes Providing for Multiyear and Other Contracting Authorities 5-44
a. Severable Services Contracts 5-44
b. 5-year Contract Authority 5-45
(1) 10 U.S.C. §§ 2306b, 2306c 5-45
(2) 41 U.S.C. § 254c 5-46
c. Examples of Agency-Specific Multiyear Contracting Authorities 5-47
10. Grants and Cooperative Agreements 5-48
C. Advance Payments 5-50
1. The Statutory Prohibition 5-50
2. Government Procurement Contracts 5-54
a. Background 5-54
b. Contract Financing 5-55
c. Payment 5-60
3. Lease and Rental Agreements 5-62
4. Publications 5-63
5. Other Governmental Entities 5-65
D. Disposition of Appropriation Balances 5-67
1. Terminology 5-67

2. Evolution of the Law 5-68
3. Expired Appropriation Accounts 5-71
4. Closed Appropriation Accounts 5-73
5. Exemptions from the Account Closing Procedures 5-75
6. No-Year Appropriations 5-77
7. Repayments and Deobligations 5-78
a. Repayments 5-78
b. Deobligations 5-80
E. Effect of Litigation on Period of Availability 5-81

Availability of Appropriations: Time

A. General Principles—Duration of Appropriations

1. Introduction

As we have emphasized in several places in this publication, the concept of the "legal availability" of appropriations is defined in terms of three elements—purpose, time, and amount. Chapter 4 focused on purpose; this chapter addresses the second element, time.

The two basic authorities conferred by an appropriation law are the authority to incur obligations and the authority to make expenditures. An obligation results from some action that creates a liability or definite commitment on the part of the government to make an expenditure. (The concept of "obligation" and the criteria for charging obligations against appropriations are discussed in detail in Chapter 7.) The expenditure is the disbursement of funds to pay the obligation. While an obligation and expenditure may occur simultaneously, ordinarily the obligation precedes the expenditure in time. This chapter discusses the limitations on the use of appropriations relating to time—when they may be obligated and when they may be expended. Many of the rules are statutory and will be found in the provisions of Title 31, United States Code, cited throughout this chapter.

Our starting point is the firmly established proposition that—

> "Congress has the right to limit its appropriations to particular times as well as to particular objects, and when it has clearly done so, its will expressed in the law should be implicitly followed."

13 Op. Att'y Gen. 288, 292 (1870). The placing of time limits on the availability of appropriations is one of the primary means of congressional control. By imposing a time limit, Congress reserves to itself the prerogative of periodically reviewing a given program or agency's activities.

When an appropriation is by its terms made available for a fixed period of time or until a specified date, the general rule is that the availability relates to the authority to obligate the appropriation, and does not necessarily

prohibit payments after the expiration date for obligations previously incurred, unless the payment is otherwise expressly prohibited by statute. 37 Comp. Gen. 861, 863 (1958); 23 Comp. Gen. 862 (1944); 18 Comp. Gen. 969 (1939); 16 Comp. Gen. 205 (1936). Thus, a time-limited appropriation is available to incur an obligation only during the period for which it is made. However, it remains available beyond that period, within limits, to make adjustments to the amount of such obligations and to make payments to liquidate such obligations. In this connection, 31 U.S.C. § 1502(a) provides:

> "The balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501 of this title. However, the appropriation or fund is not available for expenditure for a period beyond the period otherwise authorized by law."

In addition, there are situations in which appropriations may be "held over" by statute and by judicial decree for obligation beyond their expiration date. The concepts summarized in this paragraph will be explored in depth elsewhere in this chapter.

2. Types of Appropriations

Classified on the basis of duration, appropriations are of three types: annual, multiple year, and no-year appropriations.

a. Annual Appropriations

Annual appropriations (also called fiscal year or 1-year appropriations) are made for a specified fiscal year and are available for obligation only during the fiscal year for which made. The federal government's fiscal year begins on October 1 and ends on September 30 of the following year. 31 U.S.C. § 1102. For example, fiscal year 2005 begins on October 1, 2004, and ends on September 30, 2005.

All appropriations are presumed to be annual appropriations unless the appropriation act expressly provides otherwise. There are several reasons for this. First, as required by 1 U.S.C. § 105, the title and enacting clause of all regular and supplemental appropriation acts specify the making of appropriations "for the fiscal year ending September 30, (here insert the calendar year)." Thus, everything in an appropriation act is presumed to be

applicable only to the fiscal year covered unless specified to the contrary. Second, 31 U.S.C. § 1301(c) provides that, with specified exceptions:

> "An appropriation in a regular, annual appropriation law may be construed to be permanent or available continuously only if the appropriation—
>
> ….
>
> "(2) expressly provides that it is available after the fiscal year covered by the law in which it appears."

Third, appropriation acts commonly include a general provision similar to the following:

> "No part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein."[1]

Under the plain terms of this provision, the origin of which has previously been discussed in Chapter 2, section C.2.d, the availability of an appropriation to incur a new obligation may not be extended beyond the fiscal year for which it is made absent express indication in the appropriation act itself. 71 Comp. Gen. 39 (1991); 58 Comp. Gen. 321 (1979); B-118638, Nov. 4, 1974.

A limitation item included in an appropriation (for example, a lump-sum appropriation with a proviso that not to exceed a specified sum shall be available for a particular object) is subject to the same fiscal year limitation attaching to the parent appropriation unless the limitation is specifically

[1] See, *e.g.*, the following fiscal year 2002 appropriation acts: Pub. L. No. 107-76, § 706, 115 Stat. 704, 732 (Nov. 28, 2001) (Agriculture); Pub. L. No. 107-77, § 602, 115 Stat. 748, 798 (Nov. 28, 2001) (Commerce, Justice, State); Pub. L. No. 107-117, § 8003, 115 Stat. 2230, 2247 (Jan. 10, 2002) (Defense); Pub. L. No. 107-96, § 104, 115 Stat. 923, 946 (Nov. 21, 2001) (District of Columbia); Pub. L. No. 107-115, § 511, 115 Stat. 2118, 2141 (Jan. 10, 2002) (Foreign Operations); Pub. L. No. 107-63, § 303, 115 Stat. 414, 465 (Nov. 5, 2001) (Interior); Pub. L. No.107-116, § 502, 115 Stat. 2177, 2217 (Jan. 10, 2002) (Labor, Health and Human Services, Education); Pub. L. No. 107-68, § 302, 115 Stat. 560, 591 (Nov. 12, 2001) (Legislative); Pub. L. No. 107-87, § 306, 115 Stat. 833, 855 (Dec. 18, 2001) (Transportation); Pub. L. No. 107-67, § 501, 115 Stat. 514, 543 (Nov. 12, 2001) (Treasury).

exempted from it in the appropriation act. 37 Comp. Gen. 246, 248 (1957); B-274576, Jan. 13, 1997.

Annual appropriations are available only to meet *bona fide* needs of the fiscal year for which they were appropriated. The so-called "*bona fide* needs rule" is covered in detail in this chapter in section B.

If an agency fails to obligate its annual funds by the end of the fiscal year for which they were appropriated, they cease to be available for incurring and recording new obligations and are said to have "expired." This rule—that time-limited budget authority ceases to be available for incurring new obligations after the last day of the specified time period—has been termed an "elementary principle" of federal fiscal law. *City of Houston, Texas v. Department of Housing & Urban Development*, 24 F.3d 1421, 1426 (D.C. Cir. 1994); *West Virginia Ass'n of Community Health Centers, Inc. v. Heckler*, 734 F.2d 1570, 1576 (D.C. Cir. 1984). *See also* 18 Comp. Gen. 969, 971 (1939). Annual appropriations remain available for an additional five fiscal years beyond expiration, however, to adjust and make payments to liquidate liabilities arising from obligations made within the fiscal year for which the funds were appropriated. 31 U.S.C. § 1553(a), as amended by Pub. L. No. 101-510, § 1405(a), 104 Stat. 1676 (Nov. 5, 1990). The principles summarized in this paragraph are discussed in this chapter in section D.

The above principles are illustrated in 56 Comp. Gen. 351 (1977). In that case, the Interior Department proposed to obtain and exercise options on certain land, obligate the full purchase price, and take immediate title to and possession of the property. Payment of the purchase price, however, would be disbursed over a period of up to 4 years. The reason being that, in view of the capital gains tax, the seller would have insisted on a higher purchase price if payment was to be made in a lump sum. The Comptroller General concluded that the proposal was not legally objectionable, provided that (a) a *bona fide* need for the property existed in the fiscal year in which the option was to be exercised and (b) the full purchase price was obligated against appropriations for the fiscal year in which the option was exercised. As long as these conditions were met—obligation within the period of availability for a legitimate need existing within that period—the timing of actual disbursements over a 4-year period was irrelevant.

Just as Congress can by statute expand the obligational availability of an appropriation beyond a fiscal year, it can also reduce the availability to a fixed period less than a full fiscal year. To illustrate, a fiscal year 1980 appropriation for the now defunct Community Services Administration

included funds for emergency energy assistance grants. Since the program was intended to provide assistance for increased heating fuel costs, and Congress did not want the funds to be used to buy air conditioners, the appropriation specified that awards could not be made after June 30, 1980.[2] Appropriations available for obligation for less than a full fiscal year are, however, uncommon.

Finally, Congress may pass a law to rescind the unobligated balance of a fixed (annual or multiple year) appropriation at any time prior to the accounts closing.[3] The law may be passed at the initiation of the President pursuant to the impoundment procedures (see discussion in Chapter 1, section D.3) or by Congress as part of its regular legislative process.

b. Multiple Year Appropriations

Multiple year appropriations are available for obligation for a definite period in excess of one fiscal year. 37 Comp. Gen. 861, 863 (1958). For example, if a fiscal year 2005 appropriation act includes an appropriation account that specifies that it shall remain available until September 30, 2006, it is a 2-year appropriation. As a more specific illustration, the appropriation accounts for military construction are typically 5-year appropriations.[4]

Apart from the extended period of availability, multiple year appropriations are subject to the same principles applicable to annual appropriations and do not present any special problems.

c. No-Year Appropriations

A no-year appropriation is available for obligation without fiscal year limitation. For an appropriation to be considered a no-year appropriation, the appropriating language must expressly so provide. 31 U.S.C. § 1301(c). The standard language used to make a no-year appropriation is "to remain available until expended." 40 Comp. Gen. 694, 696 (1961); 3 Comp. Dec. 623, 628 (1897); B-279886, Apr. 28, 1998; B-271607, June 3, 1996.

[2] Department of the Interior and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-126, 93 Stat. 954, 978 (Nov. 27, 1979). Due to a severe heat wave in the summer of 1980, the program was expanded to include fans and the appropriation was subsequently extended to the full fiscal year Pub. L. No. 96-321, 94 Stat. 1001 (Aug. 4, 1980).

[3] *E.g.*, Emergency Wartime Supplemental Appropriations Act, 2003, Pub. L. No. 108-11, 117 Stat. 559, 571, 591–593 (Apr. 16, 2003); Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 106, 107 (Feb. 20, 2003).

[4] *See*, *e.g.*, the Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, 115 Stat. 474 (Nov. 5, 2001).

However, other language will suffice as long as its meaning is unmistakable, such as "without fiscal year limitation." 57 Comp. Gen. 865, 869 (1978).

Unless canceled in accordance with 31 U.S.C. § 1555 or rescinded by another law, there are no time limits as to when no-year funds may be obligated and expended and the funds remain available for their original purposes until expended. 43 Comp. Gen. 657 (1964); 40 Comp. Gen. 694 (1961). This includes earmarks applicable to the use of no-year funds since they are coextensive with, and inseparable from, the period of availability of the no-year appropriation to which they relate. B-274576, Jan. 13, 1997.

A small group of decisions involves the effect of subsequent congressional action on the availability of a prior years no-year appropriation. In one case, Congress had made a no-year appropriation to the Federal Aviation Administration for the purchase of aircraft. A question arose as to the continued availability of the appropriation because, in the following year, Congress explicitly denied a budget request for the same purpose. The Comptroller General held that the subsequent denial did not restrict the use of the unexpended balance of the prior no-year appropriation. The availability of the prior appropriation could not be changed by a later act "except in such respects and to such extent as is expressly stated or clearly implied by such act." 40 Comp. Gen. 694, 696 (1961). *See also Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220 (1st Cir. 2003); B-200519, Nov. 28, 1980.

In another case, a no-year appropriation for the National Capital Park and Planning Commission included a monetary ceiling on noncontract services during the fiscal year. Based on the apparent intent of the ceiling, GAO concluded that the specific restriction had the effect of suspending the "available until expended" provision of prior unrestricted no-year appropriations as far as personal services were concerned, for any fiscal year in which the restriction was included. Thus, unobligated balances of prior unrestricted no-year appropriations could not be used to augment the ceiling. 30 Comp. Gen. 500 (1951). A similar issue was considered in 62 Comp. Gen. 692 (1983). The Nuclear Regulatory Commission received a no-year appropriation that included a prohibition on compensating intervenors. The decision held that the unobligated balance of a prior unrestricted no-year appropriation could be used to pay an Equal Access to Justice Act award to an intervenor made in a restricted year, where part of the proceeding giving rise to the award was funded by an unrestricted appropriation. Unlike the situation in 30 Comp. Gen. 500, the restriction in

the 1983 case was expressly limited to "proceedings funded in this Act," and thus could have no effect on the availability of prior appropriations.

Similar issues were considered in the context of multiple year appropriations in 31 Comp. Gen. 368 (1952) and 31 Comp. Gen. 543 (1952), overruling 31 Comp. Gen. 275 (1952). In both of these cases, based on a determination of congressional intent, it was held that the current restriction had no effect on the availability of unobligated balances of prior unrestricted appropriations.

No-year appropriations have advantages and disadvantages. The advantages to the spending agency are obvious. From the legislative perspective, a key disadvantage is a loss of congressional control over actual program levels from year to year. GAO has expressed the position that no-year appropriations should not be made in the absence of compelling programmatic or budgetary reasons. *See* U.S. General Accounting Office, *No-Year Appropriations in the Department of Agriculture*, PAD-78-74 (Washington, D.C.: Sept. 19, 1978).

3. Obligation or Expenditure Prior to Start of Fiscal Year

In considering what may and may not be done before the start of a fiscal year, it is necessary to keep in mind the Antideficiency Act, which prohibits obligations or expenditures in advance of appropriations, 31 U.S.C. § 1341(a), and apportionments, 31 U.S.C. § 1517(a).[5] By virtue of this law, certainly no obligations may be incurred before the appropriation act is enacted and amounts apportioned to the agency, unless specifically authorized by law.[6]

There are some decisions that stand for the proposition that if the appropriation act is passed by both houses of Congress and signed by the President prior to the start of the fiscal year for which the appropriation is being made, contracts may be entered into upon enactment and before the start of the fiscal year, provided that no payments or expenditures may be made under them until the start of the fiscal year. Any such contract should make this limitation clear. 20 Comp. Gen. 868 (1941); 16 Comp. Gen. 1007 (1937); 4 Comp. Gen. 887 (1925); 2 Comp. Gen. 739 (1923); 11 Comp. Dec. 186 (1904); 4 Lawrence, First Comp. Dec. 132 (1883); B-20670, Oct. 18,

[5] See Chapter 6, section C for a discussion of the apportionment process.

[6] *See* Chapter 5, section B.

1941; A-19524, Aug. 26, 1927. GAO did not view the contract as an obligation in violation of the Antideficiency Act since, even though the time period covered by the appropriation to be charged had not yet started, the appropriation had already been enacted into law. These decisions addressed these contracts from an Antideficiency Act perspective, and did not address the *bona fide* needs rule.

In other decisions, the Comptroller General has expressed the opinion that, in the absence of any other statutory authority, the awarding o32"conditional contract" prior to the enactment of the appropriation act to be charged with the obligation does not raise Antideficiency Act or *bona fide* needs issues when the government's liability is contingent upon the future availability of appropriations. The contract must expressly provide:

1. that no legal liability on the part of the government arises until the appropriation is made available within the agency to fund the obligation and

2. that notice is to be given by the agency to the contractor before the contractor may proceed.

See B-171798(1), Aug. 18, 1971, at 11–12.[7] Such express provisions are necessary to make explicit what is meant by the term "contingent upon the future availability of appropriations" in order to avoid Antideficiency Act problems,[8] and to permit the agency to maintain effective internal controls over the obligating of appropriations.

Of course, Congress may by statute authorize the actual expenditure of appropriations prior to the beginning of the fiscal year, in which event the above rule does not apply. 4 Comp. Gen. 918 (1925). This result may also follow if an appropriation is made to carry out the provisions of another law that clearly by its terms requires immediate action. *E.g.*, 1 Comp. Dec. 329 (1895).

[7] *See also* 39 Comp. Gen. 776 (1960); 39 Comp. Gen. 340 (1959); 21 Comp. Gen. 864 (1942); B-239435, Aug. 24, 1990. *See also* the discussion in Chapter 6, section C.2.b.

[8] See Chapter 6, section C.2.b, "Multiyear or continuing contracts," particularly the discussion of *Leiter v. United States*, 271 U.S. 204 (1925). *See also Cray Research, Inc. v. United States*, 44 Fed. Cl. 327, 332–333 (1999) (discussing *Leiter* and the Antideficiency Act).

B. The *Bona Fide* Needs Rule

1. Background

a. Introduction

Over a century ago, the Comptroller of the Treasury stated, "An appropriation should not be used for the purchase of an article not necessary for the use of a fiscal year in which ordered merely in order to use up such an appropriation." 8 Comp. Dec. 346, 348 (1901). The *bona fide* needs rule is one of the fundamental principles of appropriations law: A fiscal year appropriation may be obligated only to meet a legitimate, or *bona fide*, need arising in, or in some cases arising prior to but continuing to exist in, the fiscal year for which the appropriation was made. Citations to this principle are numerous. *See*, *e.g.*, 33 Comp. Gen. 57, 61 (1953); 16 Comp. Gen. 37 (1936); B-289801, Dec. 30, 2002; B-282601, Sept. 27, 1999; B-235678, July 30, 1990.

Does the quotation above, from the Comptroller of the Treasury, mean that an agency's obligation of an annual appropriation on the last day of the fiscal year can never constitute a *bona fide* need of that fiscal year? While it certainly should raise a question, the answer is, "it depends." An agency may have perfectly valid reasons for year-end spending. For example, some programs have predictable 4th quarter surges due to cyclical or seasonal requirements. When using time-limited funding, an agency must dissect its ongoing business into discrete units of time in order to determine whether a particular transaction may be obligated against, or charged to, a specific appropriation. The *bona fide* needs rule provides an analytical framework for analyzing an agency's financial transactions to determine the period of time to which a transaction relates.

Bona fide needs questions arise in many forms. Historically, as the discussion that follows will show, *bona fide* needs issues have arisen most frequently in the context of the acquisition of goods or services. An agency may enter into a contract in one fiscal year, but the contractor does not complete performance until the next fiscal year. Which fiscal year should be charged? Or, an agency may modify a contract in the year following the fiscal year in which it originally entered into the contract. Sometimes, as a result of an audit, the question may be whether an obligation already recorded was a proper charge against that fiscal year's appropriation. Or,

an agency may have taken certain actions that it should have recorded as an obligation but did not; when the time for payment arrives, the question again is which fiscal year to charge. These are all facets of the same basic question—whether an obligation bears a sufficient relationship to the legitimate needs of the time period of availability of the appropriation charged or sought to be charged.

Although the *bona fide* needs rule remains one of the bedrock principles of appropriations law, its application has changed over the years as Congress enacted statutes redefining in some instances what constitutes a *bona fide* need of a fiscal year appropriation. During a period of ever increasing budget constraints in the 1990s, Congress enacted laws providing civilian agencies more flexibility in their use of fiscal year appropriations, and expanded already existing authorities of defense agencies. Today, there is general authority permitting agencies to use fiscal year funds to acquire goods and services *via* multiyear acquisitions, and to enter into 1-year contracts for severable services that cross fiscal years. These laws have provided agencies with substantial flexibility to allocate the cost of goods and services across fiscal years, or to allocate the costs to the first fiscal year of the contract even though the goods or services may be delivered in future fiscal years.

Notwithstanding the increased flexibilities agencies now have, the *bona fide* needs rule remains an important and often complex consideration for an agency as it executes its budget. In this section, we discuss the basic concept underlying the rule. We then discuss the traditional application of the rule in sections B.2 through B.7, followed by a discussion of the recent statutory developments in the acquisition of goods and services area in sections B.8 and B.9. It is important to know both the traditional application as well as recently enacted flexibilities in order to understand the contracting options now available to agencies as they decide how to use their appropriations. We discuss the application of the rule in the grants and cooperative agreements context in section B.10.

b. The Concept

The *bona fide* needs rule has a statutory basis. As noted in Chapter 1, the first general appropriation act in 1789 made appropriations "for the service of the present year," and this concept continues to this time. This "one-year" concept is also reflected in 31 U.S.C. § 1502(a), sometimes called the "*bona fide* needs statute." Originally enacted in 1870 (16 Stat. 251 (July12, 1870)), section 1502(a) provides that the balance of a fixed-term appropriation "is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that

period…." The key word here is "properly"—expenses "properly incurred" or contracts "properly made" within the period of availability. *See*, *e.g.*, 37 Comp. Gen. 155, 158 (1957). Additional statutory support for the rule is found in the Antideficiency Act, 31 U.S.C. § 1341(a), and the so-called Adequacy of Appropriations Act, 41 U.S.C. § 11. (*Bona fide* needs questions may involve other statutory restrictions as well. It also should be apparent that they are closely related to the subject matter covered in Chapter 7 on obligations.) For an early but still relevant and useful discussion, see 6 Comp. Dec. 815 (1900).

While the rule itself is universally applicable, determination of what constitutes a *bona fide* need of a particular fiscal year depends largely on the facts and circumstances of the particular case. 70 Comp. Gen. 469, 470 (1991); 44 Comp. Gen. 399, 401 (1965); 37 Comp. Gen. at 159.

In its most elementary form—where the entire transaction (contract or purchase, delivery or other performance, and payment) takes place during the same fiscal year—the rule means simply that the appropriation is available only for the needs of the current year. A common application of the rule in this context is that an appropriation is not available for the needs of a future year. For example, suppose that, as the end of a fiscal year approaches, an agency purchases a truckload of pencils when it is clear that, based on current usage, it already has in stock enough pencils to last several years into the future. It would seem apparent that the agency was merely trying to use up its appropriation before it expired, and the purchase would violate the *bona fide* needs rule.

We do not mean to suggest that an agency may purchase only those supplies that it will actually use during the fiscal year. Agencies normally maintain inventories of common use items. The *bona fide* needs rule does not prevent maintaining a legitimate inventory at reasonable and historical levels, the "need" being to maintain the inventory level so as to avoid disruption of operations. The problem arises when the inventory crosses the line from reasonable to excessive. Future years' needs and year-end spending are covered further in section B.2 of this chapter. Prior years' needs are covered in section B.3 of this chapter.

Bona fide needs questions also frequently involve transactions that cover more than one fiscal year. In the typical situation, a contract is made (or attempted to be made) in one fiscal year, with performance and payment to extend at least in part into the following fiscal year. The question is which fiscal year should be charged with the obligation. In this context, the rule is

that, in order to obligate a fiscal year appropriation for payments to be made in a succeeding fiscal year, the contract imposing the obligation must have been made within the fiscal year sought to be charged, and the contract must have been made to meet a *bona fide* need of the fiscal year to be charged. *E.g.*, 70 Comp. Gen. 664, 667 (1991); 64 Comp. Gen. 359, 362 (1985); 35 Comp. Gen. 692 (1956); 20 Comp. Gen. 436 (1941); 16 Comp. Gen. 37 (1936); 21 Comp. Dec. 822 (1915); 4 Comp. Dec. 553 (1898); B-289801, Dec. 30, 2002; B-257977, Nov. 15, 1995.

The principle that payment is chargeable to the fiscal year in which the obligation is incurred as long as the need arose, or continued to exist in, that year applies even though the funds are not to be disbursed and the exact amount owed by the government cannot be determined until the subsequent fiscal year. *E.g.*, 71 Comp. Gen. 502 (1992); 21 Comp. Gen. 574 (1941). Thus, in a case where the United States entered into an agreement with a state to provide assistance for the procurement of civil defense items for the state and to pay a specified percentage of the cost, the Comptroller General found that the need arose in the year the agreement with the state was made. Therefore, appropriations current at that time were to be charged with the cost, notwithstanding the fact that the states or the United States may not have negotiated and executed the actual procurement contracts with suppliers, including the exact price, until a subsequent fiscal year. 31 Comp. Gen. 608 (1952).

Several sections of this chapter, starting with B.4, explore the application of the *bona fide* needs rule in various aspects of government contracting in which transactions cover more than one fiscal year. We have structured these sections in large measure on a comprehensive and well-documented article by Capt. Dale Gallimore entitled *Legal Aspects of Funding Department of the Army Procurements*, 67 Mil. L. Rev. 85 (1975).

The *bona fide* needs rule applies to multiple year as well as fiscal year appropriations. 55 Comp. Gen. 768, 773–74 (1976); B-235678, July 30, 1990. *See also* 64 Comp. Gen. 163, 166 (1984). In other words, an agency may use a multiple year appropriation for needs arising at any time during the period of availability.

An argument can be made, not wholly without logic, that a multiple year appropriation can be obligated at any time during its availability, but only to meet a *bona fide* need of the year in which the funds were appropriated. Suppose, for example, that an agency receives a 2-year appropriation every year. For fiscal year 1989, it receives an appropriation available through

fiscal year 1990; for fiscal year 1990, it receives an appropriation available through fiscal year 1991, and so on. It is possible to apply the *bona fide* needs rule to require that the fiscal year 1990 appropriation be used only for needs arising in fiscal year 1990, although obligation may occur any time prior to the end of fiscal year 1991. The Comptroller General specifically rejected this approach in 68 Comp. Gen. 170 (1989), holding that the Defense Logistics Agency could use its fiscal year 1987 2-year Research and Development appropriation for a need arising in fiscal year 1988. "There is no requirement that 2-year funds be used only for the needs of the first year of their availability." *Id.* at 172.

It follows that the *bona fide* needs rule does not apply to no-year funds. 43 Comp. Gen. 657, 661 (1964). *See also* B-279886, Apr. 28, 1998. Without a prescribed period of availability, there is no fixed period during which the *bona fide* need must arise, and thus no fixed period in which the funds must be obligated and expended.

2. Future Years' Needs

An appropriation may not be used for the needs of some time period subsequent to the expiration of its period of availability. With respect to annual appropriations, a more common statement of the rule is that an appropriation for a given fiscal year is not available for the needs of a future fiscal year.[9] Determining the year to which a need relates is not always easy. Some illustrative cases are listed below:

- The balance of an appropriation for salaries remaining unexpended at the end of one fiscal year could not be used to pay salaries for services rendered in the following fiscal year. 18 Op. Att'y Gen. 412 (1886).

- The Department of Housing and Urban Development recorded certain obligations for public housing subsidies on an estimated basis. At the end of the fiscal year, obligations were found to be in excess of actual needs. It was held improper to send excess funds to the state agency's operating reserve to offset the subsidy for the following year, since this amounted to using the funds for the needs of a subsequent year. The

[9] The topic of obligating for needs of a future year arises in a variety of contexts and is also involved in several later sections of this chapter on delivery of materials and services beyond the fiscal year (B.4 and B.5), multiyear contracts (B.8 and B.9), and grants and cooperative agreements (B.10).

proper course of action was to deobligate the excess. 64 Comp. Gen. 410 (1985).

- Rent on property leased by the National Park Service from the National Park Foundation could be paid in advance, but the lease could not cross fiscal year lines. The proposal was for the lease to run from May 1 through April 30 and for the full annual rent to be paid in advance on May 1. However, appropriations available as of May 1 could not be used for the period from October 1 through April 30 since rent for these months constituted a need of the following fiscal year. B-207215, Mar. 1, 1983.

Any discussion of obligating for future years' needs inevitably leads to the question of year-end spending. Federal agencies as a fiscal year draws to a close are often likened to sharks on a feeding frenzy, furiously thrashing about to gobble up every appropriated dollar in sight before the ability to obligate those dollars is lost. The Comptroller of the Treasury stated the legal principle very simply in an early decision:

> "An appropriation should not be used for the purchase of an article not necessary for the use of a fiscal year in which ordered merely in order to use up such appropriation. This would be a plain violation of the law."

8 Comp. Dec. 346, 348 (1901).

Thus, where an obligation is made toward the end of a fiscal year and it is clear from the facts and circumstances that the need relates to the following fiscal year, the *bona fide* needs rule has been violated. The obligation is not a proper charge against the earlier appropriation, but must be charged against the following year's funds. This was the result, for example, in 1 Comp. Gen. 115 (1921), in which an order for gasoline had been placed 3 days before the end of fiscal year 1921, with the gasoline to be delivered in monthly installments in fiscal year 1922. The Comptroller General stated:

> "It is not difficult to understand how the need for an article of equipment, such as a typewriter, might arise during the fiscal year 1921 and its purchase be delayed until the latter part of June [the end of the fiscal year in 1921], but as to supplies that are consumed as used, such as gasoline, it can not be held that they were purchased to supply a need of the

> fiscal year 1921 when the contract is made late in the month of June and expressly precludes the possibility of delivery before July 1, 1921."

Id. at 118 (explanatory information provided). *See also* 4 Comp. Dec. 553 (1898) (cement ordered late in one fiscal year to be delivered several months into the following fiscal year).[10]

Yet, this is only one side of the coin. The other side is illustrated in another passage from 8 Comp. Dec. at 348:

> "An appropriation is just as much available to supply the needs of the [last day] of a particular year as any other day or time in the year."

Thus, a year-end obligation perhaps raises the possibility that the agency is trying to "dump" its remaining funds and warrants a further look, but the timing of the obligation does not, in and of itself, establish anything improper. 38 Comp. Gen. 628, 630 (1959); 6 Comp. Dec. 815, 818 (1900).

GAO has conducted several studies of year-end spending and has consistently reported that year-end spending is not inherently more or less wasteful than spending at any other time of the year. In one report, GAO suggested that year-end spending surges are really symptomatic of a larger problem—inadequate management of budget execution—and that the apportionment process could be more effectively used to provide the desired management. U.S. General Accounting Office, *Federal Year-End*

Spending: Symptom of a Larger Problem, GAO/PAD-81-18 (Oct. 23, 1980), pp. 7–9.[11]

[10] "There is no authority in an appropriation made specifically for the service of a particular fiscal year to enter into contracts for supplies, *etc.*, for the service of a subsequent fiscal year, and therefore as to that appropriation such a contract is not properly made within that year." 4 Comp. Dec. at 556.

[11] Other GAO reports in this area are: U.S. General Accounting Office, *Year-End Spending: Reforms Underway But Better Reporting and Oversight Needed*, GAO/AIMD-98-185 (Washington, D.C.: July 31, 1998); *Federal Year-End Spending Patterns for Fiscal Years 1982, 1983, and 1984*, GAO/AFMD-85-75 (Washington, D.C.: Nov. 4, 1985); *Limitations on Fiscal Year 1981 Fourth Quarter Obligations in Certain Agencies*, GAO/PAD-82-43 (Washington, D.C.: July 16, 1982); *Government Agencies Need Effective Planning to Curb Unnecessary Year-End Spending*, GAO/PSAD-80-67 (Washington, D.C.: July 28, 1980).

GAO also noted in its October 1980 report that there are several reasons for year-end spending, some of which are perfectly valid. For example, some programs have predictable 4th quarter surges due to cyclical or seasonal fund requirements. If, for example, you are administering a fire suppression program, you should expect a 4th quarter surge because the 4th quarter of the federal fiscal year is the major fire season in many states. GAO/PAD-81-18 at 3. In other situations, it may be desirable to delay obligations to have funds available for emergencies that may arise during the year. *Id.* at 4.

In evaluating a year-end obligation, it is important to determine exactly what the need is from the agency's perspective. In one case, for example, the Small Business Administration (SBA) awarded cooperative agreements to certain Small Business Development Centers on the last day of a fiscal year. The Centers then provided management and technical assistance to small businesses, all of which would obviously be done in the following year. GAO found no *bona fide* needs violation because the need, from the perspective of implementing SBA's appropriation, was merely to provide assistance to the Centers, and there was no reason this could not be done on the last day of the year. B-229873, Nov. 29, 1988. *See also* B-289801, Dec. 30, 2002; section B.5 of this chapter.

One device Congress has employed to control year-end spending surges is legislation limiting the amount of obligations that may be incurred in the last month or 2-month period or quarter of the fiscal year. For example, the Defense Department's 1990 appropriation contained a provision limiting obligations during the last 2 months of the fiscal year to not more than 20 percent of the total fiscal year appropriations.[12] In comments on legislative proposals of this type, GAO has pointed out that they are difficult to administer, but has supported them as temporary measures pending more fundamental improvements in budget execution management and procurement planning.[13] In addition, there is the risk that limitations of this type may have the effect of simply moving the spending surges back a few months, accomplishing nothing.

3. Prior Years' Needs

There are situations in which it is not only proper but mandatory to use currently available appropriations to satisfy a need that arose in a prior

[12] Pub. L. No. 101-165, § 9007, 103 Stat. 1112, 1130 (Nov. 21, 1989).

[13] *E.g.*, B-198666, May 20, 1980.

year.[14] We refer to this as the "continuing need." If a need arises during a particular fiscal year and the agency chooses not to satisfy it during that year, perhaps because of insufficient funds or higher priority needs, and the need continues to exist in the following year, the obligation to satisfy that need is properly chargeable to the later years funds. "An unfulfilled need of one period may well be carried forward to the next as a continuing need with the next periods appropriation being available for funding." B-197274, Sept. 23, 1983. Thus, an important corollary to the *bona fide* needs rule is that a continuing need is chargeable to funds current for the year in which the obligation is made, regardless of the fact that the need may have originated in a prior year.

An illustration is B-207433, Sept. 16, 1983. The Army contracted for a specific quantity of thermal viewers. The contract provided for a downward adjustment in the contract price in the case of an "underrun," that is, if the contractor was able to perform at less than the contract price. After the appropriation charged with the contract had expired, the contractor incurred an underrun and proposed to use the excess funds to supply an additional quantity of viewers. It was undisputed that the need for additional viewers could be attributed to the year in which the contract was entered into, and that the need continued to exist. GAO agreed with the Army that the proper course of action was to deobligate the excess funds and, if the Army still wished to procure them, to charge the obligation for the additional quantity to current years appropriations. The fact that the need arose in a prior year was immaterial. The decision, at pages 4–5, offered the following explanation:

> "Certainly the Army could have used underrun funds to procure additional viewers at any time during the period those funds remained available for obligation. Also, we are of course aware that an unmet need does not somehow evaporate merely because the period of availability has expired. However, nothing in the *bona fide* needs rule suggests that expired appropriations may be used for an item for which a valid obligation was not incurred prior to expiration merely because there was a need for that item during that period …Once the obligational period has

[14] *See also* 31 U.S.C. §1553(b), which requires that obligations and adjustments properly made to closed accounts may be charged to any current appropriation, and section D.4 of this chapter.

> expired, the procurement of an increased quantity must be charged to new money, and this is not affected by the fact that the need for that increased quantity may in effect be a 'continuing need' that arose during the prior period."

Another illustration is B-226198, July 21, 1987. In late fiscal year 1986, the U.S. Geological Survey ordered certain microcomputer equipment, to be delivered in early fiscal year 1987, charging the purchase to fiscal year 1986 funds. The equipment was delivered and accepted, but was stolen before reaching the ordering office. The decision held that a reorder, placed in fiscal year 1987, had to be charged to fiscal year 1987 funds. As with the thermal viewers in B-207433, the fact that the need for the equipment arose in 1986 was immaterial. *See also* B-286929, Apr. 25, 2001; B-257617, Apr. 18, 1995.

In another case, cost overruns caused the Army to delete certain items from a fiscal year 1979 procurement. The Army repurchased the canceled items in 1981, charging 1981 appropriations. GAO agreed that the repurchase was properly chargeable to 1981, rather than 1979 funds. B-206283-O.M., Feb. 17, 1983.

The essential requirements of the "continuing need" corollary are that (1) the need, unmet in the year in which it arose, must continue to exist in the subsequent obligational period; (2) the incurring of an obligation must have been discretionary with the agency to begin with; and (3) no obligation was in fact incurred during the prior year.

If the agency has no discretion as to the timing of an obligation (for example, in situations where the obligation arises by operation of law), or, even in discretionary situations, if the agency has actually incurred a valid obligation in the prior year (whether recorded or unrecorded), then the "continuing need" concept has no application and the obligation must be charged to the prior year. Absent statutory authority, current appropriations are not available to fund an obligation or liability (as opposed to an unmet and unobligated-for need) of a prior obligational period. If insufficient funds remain in the prior years' appropriation, the agency must seek a supplemental or deficiency appropriation and must further consider the possibility that the Antideficiency Act, 31 U.S.C. § 1341(a), has been violated.

In an early case, for example, an agency had contracted for repairs to a building toward the end of fiscal year 1904. Since it was clear that the

repairs were needed at the time they were ordered, they were chargeable to fiscal year 1904 appropriations, and the exhaustion of the 1904 appropriation did not permit use of 1905 funds. 11 Comp. Dec. 454 (1905). *See also* 21 Comp. Dec. 822 (1915).

In B-226801, Mar. 2, 1988, GAO considered various entitlement programs administered by the Department of Veterans Affairs (VA). Under these programs, the obligation arises when VA determines eligibility through its adjudication process and must be recorded at that time. If the obligations would exceed available funds, it is not proper to defer the recording and charge the following year's appropriation. Since the obligations are required by law, overobligation would not violate the Antideficiency Act, but they must still be recognized and recorded when they arise. Congress subsequently began including an administrative provision in VA's appropriation act permitting the use of appropriations for these programs to pay obligations required to be recorded in the last quarter of the preceding fiscal year.[15] *See also* B-287619, July 5, 2001.

For additional cases, see 55 Comp. Gen. 768, 773–74 (1976) (current year's appropriations not available to fund prior year's Antideficiency Act violation); 54 Comp. Gen. 393, 395 (1974) (deficiency appropriation necessary to pay claims against exhausted appropriation); B-133001, Mar. 9, 1979 (fiscal year refugee assistance appropriation not available to pay for services performed in prior year); B-14331, Jan. 24, 1941; A-76081, June 8, 1936 (appropriations not available for past obligations unless clearly indicated by language and intent of appropriation act); B-221204-O.M., Jan. 31, 1986 (meals under child nutrition program served in September of one fiscal year may not be charged to subsequent year's appropriation). Congressional denial of a request for a deficiency appropriation does not make current appropriations available to satisfy the prior year's obligation. B-114874, Sept. 16, 1975 (postage charges under 39 U.S.C. § 3206).

[15] *E.g.*, Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. No. 101-144, title I, 103 Stat. 839, 843–44 (Nov. 9, 1989); Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997, Pub. L. No. 104-204, title I, § 105, 110 Stat. 2874, 2881 (Sept. 26, 1996); and Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 2002, Pub. L. No.107-73, title I, § 105, 115 Stat. 651, 657 (Nov. 26, 2001).

4. Delivery of Materials beyond the Fiscal Year

When the government purchases goods or materials in one fiscal year and delivery occurs in whole or in part in a subsequent fiscal year, the question is whether the contract meets a *bona fide* need of the fiscal year in which it was made. This was the central legal issue in our discussion of year-end spending in section B.2 of this chapter, but the issue exists regardless of when in the fiscal year the contract is made. In this section we will explore those contracts where the agency intends to meet the needs of the fiscal year in which it entered into the contract. We will discuss multiyear contracts, where an agency intends to meet its needs for more than one fiscal year, in sections B.8 and B.9.

An agency may not obligate funds when it is apparent from the outset that there will be no requirement until the following fiscal year. For example, it was found that annual appropriations obligated to fund an agreement between the General Services Administration (GSA) and the Federal Power Commission (FPC), whereby GSA agreed to renovate space in a federal building incident to relocation of FPC personnel, were not available since the relocation was not required to, and would not, take place by the end of the fiscal year, and because the space in question would not be made "tenantable" until the following fiscal year. B-95136-O.M., Aug. 11, 1972.

If deliveries are scheduled only for a subsequent fiscal year, or if contract timing effectively precludes delivery until the following fiscal year, one could question whether the contract was made in the earlier fiscal year only to obligate funds from an expiring appropriation and that the goods or materials were not intended to meet a *bona fide* need of that year. *See* 38 Comp. Gen. 628, 630 (1959); 35 Comp. Gen. 692 (1956); 33 Comp. Gen. 57, 60–61 (1953); 21 Comp. Gen. 1159 (1941); 1 Comp. Gen. 115 (1921); 27 Comp. Dec. 640 (1921).

However, the timing of delivery, while obviously a relevant factor, is not conclusive. There are perfectly legitimate situations in which an obligation may be incurred in one fiscal year with delivery to occur in a subsequent year. Thus, where materials cannot be obtained in the same fiscal year in which they are needed and contracted for, provisions for delivery in the subsequent fiscal year do not violate the *bona fide* needs rule as long as the time intervening between contracting and delivery is not excessive and the procurement is not for standard commercial items readily available from other sources. 38 Comp. Gen. at 630.

Similarly, an agency may contract in one fiscal year for delivery in a subsequent year if the material contracted for will not be obtainable on the

open market at the time needed for use, provided the intervening period is necessary for production or fabrication of the material. 37 Comp. Gen. 155, 159 (1957).

If an obligation is proper when made, unforeseen delays that cause delivery or performance to extend into the following fiscal year will not invalidate the obligation. In one case, for example, although work under a construction contract was performed during the fiscal year following its execution, the Comptroller General approved payment to the contractor under the original obligation since the agency had awarded the contract as expeditiously as possible and had made provision for the work to begin within the current fiscal year, but experienced a delay in obtaining certain materials the government had agreed to provide. 1 Comp. Gen. 708 (1922). *See also* 23 Comp. Gen. 82 (1943); 20 Comp. Gen. 436 (1941).

An order or contract for the replacement of stock is viewed as meeting a *bona fide* need of the year in which the contract is made as long as it is intended to replace stock used in that year, even though the replacement items will not be used until the following year. *See* 44 Comp. Gen. 695 (1965). "Stock" in this context refers to "readily available common-use standard items." *Id.* at 697. *See also* 73 Comp. Gen. 259 (1994); 32 Comp. Gen. 436 (1953). Generally, scheduling delivery for the following year would seem irrelevant. There are limits, however. GAO has questioned the propriety, from the *bona fide* needs perspective, of purchases of materials carried in stock for more than a year prior to issuance for use. B-134277, Dec. 18, 1957.

5. Services Rendered beyond the Fiscal Year

Services procured by contract are generally viewed as chargeable to the appropriation current at the time the services are rendered.[16] 38 Comp. Gen. 316 (1958). However, a need may arise in one fiscal year for services that, by their nature, cannot be separated for performance in separate fiscal years. The Comptroller General has held that the question of whether to charge the appropriation current on the date the contract is made, or to charge funds current at the time the services are rendered, depends upon whether the services are "severable" or "entire":

[16] This section does not discuss services rendered by an employee. Services provided by employees are chargeable to the fiscal year in which the services are rendered, regardless of whether the services are severable or nonseverable. *E.g.*, 38 Comp. Gen. 316 (1958) (salaries of government employees).

> "The fact that the contract covers a part of two fiscal years does not necessarily mean that payments thereunder are for splitting between the two fiscal years involved upon the basis of services actually performed during each fiscal year. In fact, the general rule is that the fiscal year appropriation current at the time the contract is made is chargeable with payments under the contract, although performance thereunder may extend into the ensuing fiscal year."

23 Comp. Gen. 370, 371 (1943). A contract that is viewed as "entire" is chargeable to the fiscal year in which it was made, notwithstanding that performance may have extended into the following fiscal year. The determining factor for whether services are severable or entire is whether they represent a single undertaking. Thus, in 23 Comp. Gen. 370, a contract for the cultivation and protection of a tract of rubber-bearing plants, payable on completion of the services, was chargeable against fiscal year funds for the year in which the contract was made. Because the services necessarily covered the entire growing period, which extended into the following fiscal year, the Comptroller General characterized them as a single undertaking, which "although extending over a part of two fiscal years, nevertheless was determinable both as to the services needed and the price to be paid therefor at the time the contract was entered into." *Id.* at 371.

The rationale of 23 Comp. Gen. 370 was applied in 59 Comp. Gen. 386 (1980) (requisition for printing accompanied by manuscript sufficient for Government Printing Office to proceed with job). *See*, *e.g.*, 65 Comp. Gen. 741 (1986) (contract for study and final report on psychological problems among Vietnam veterans); B-257977, Nov. 15, 1995 (contract for 2-year intern training program since interns are required to complete entire training program to be eligible for noncompetitive Presidential Management Intern appointment). *See also* 73 Comp. Gen. 77 (1994) (subsequent modifications to Fish and Wildlife Service research work orders should be charged to the fiscal year current when the work orders were issued since the purpose of the research is to provide a final research report and the services under the contract are nonseverable). The last opinion is noteworthy because it pointed out that a limitation of funds clause does not affect the application of the *bona fide* needs rule and the severable test. 73 Comp. Gen. at 80.

However, where the services are continuing and recurring in nature, the contract is severable. Service contracts that are "severable" may not cross

fiscal year lines unless authorized by statute. 71 Comp. Gen. 428 (1992); 58 Comp. Gen. 321, 324 (1979); B-192518, Aug. 9, 1979; B-133001, Mar. 9, 1979; B-187881, Oct. 3, 1977. *See also* B-287619, July 5, 2001 (TRICARE contractors provide on-going services such as enrolling beneficiaries, adjudicating claims, *etc.*, that are severable into components that independently provide value). Most federal agencies have authority to enter into a 1-year severable service contract, beginning at any time during the fiscal year and extending into the next fiscal year, and to obligate the total amount of the contract to the appropriation current at the time the agency entered into the contract.[17] 10 U.S.C. § 2410a (defense agencies); 41 U.S.C. § 253*l* (civilian agencies); 41 U.S.C. § 253*l*-1 (Comptroller General); 41 U.S.C. § 253*l*-2 (Library of Congress); 41 U.S.C. § 253*l*-3 (Chief Administrative Officer of the House of Representatives); 41 U.S.C. § 253*l*-4 (Congressional Budget Office). *See also* B-259274, May 22, 1996. Otherwise, the services must be charged to the fiscal year(s) in which they are rendered. 65 Comp. Gen. at 743; 33 Comp. Gen. 90 (1953) (trucking services); 10 Comp. Dec. 284 (1903) (contract for services of various categories of skilled laborers in such quantities and at such times as may be deemed necessary is severable). As stated in 33 Comp. Gen. at 92:

> "The need for current services, such as those covered by the contract here under consideration, arises only from day to day, or month to month, and the Government cannot, in the absence of specific legislative authorization, be obligated for such services by any contract running beyond the fiscal year."

See also 35 Comp. Gen. 319 (1955), *amplified by* B-125444, Feb. 16, 1956 (gardening and window cleaning services).

In addition to the recurring nature of the services, another factor identified in some of the decisions is whether the contracted-for services are viewed as personal or nonpersonal. Personal services are presumptively severable by their nature and are properly chargeable to the fiscal year in which the services are rendered. B-174226, Mar. 13, 1972 (performance on an evaluation team). Legal services have been viewed as either personal or

[17] For a discussion of contracts for more than 1 year, see later sections in this chapter on multiyear contracts (B.8) and specific statutes providing for multiyear and other contracting authorities (B.9).

nonpersonal, depending on the nature of the work to be done. B-122596, Feb. 18, 1955; B-122228, Dec. 23, 1954.

The distinction appears to have derived from the distinction inherent in 5 U.S.C. § 3109, which authorizes agencies to procure services of experts or consultants by employment (personal) or contract (nonpersonal). B-174226, *supra.* In the context of applying the *bona fide* needs rule, however, the distinction is not particularly useful since it is still necessary to look at the nature of the services involved in the particular case. In other words, characterizing services as personal or nonpersonal does not provide you with an automatic answer. In fact, some of the more recent cases have merely considered the nature of the work without characterizing it as personal or nonpersonal, which would have added nothing to the analysis. *E.g.*, 50 Comp. Gen. 589 (1971) (fees of attorneys contracted for under Criminal Justice Act chargeable to appropriations current at time of appointment); B-224702, Aug. 5, 1987 (contract for legal support services held severable since it consisted primarily of clerical tasks and required no final report or end product).

A 1981 decision applied the above principles to agreements made by the Small Business Administration (SBA) with private organizations to provide technical and management assistance to businesses eligible for assistance under the Small Business Act. The typical agreement covered one calendar year and crossed fiscal year lines. Under the agreement, payment was to be made only for completed tasks and SBA was under no obligation to place any orders, or to place all orders with any given contractor. The question was whether the "contract" was chargeable to the fiscal year in which it was executed. The Comptroller General found that the services involved were clearly severable and that the agreement was not really a contract since it lacked mutuality of obligation. Accordingly, SBA created a contract obligation only when it placed a definite order, and could charge each fiscal year only with obligations incurred during that fiscal year. 60 Comp. Gen. 219 (1981). The principles were reiterated in 61 Comp. Gen. 184 (1981).

In another 1981 case, GAO considered the District of Columbia's recording of obligations for social security disability medical examinations. A person seeking to establish eligibility for disability benefits is given an appointment for a medical examination and a purchase order is issued at that time. However, for a number of reasons beyond the District's control, the examination may not take place until the following fiscal year (for example, a person makes an application at end of fiscal year or does not

show up for initial appointment). Nevertheless, the need for the examination arises when the applicant presents his or her claim for disability benefits. The decision concluded that the obligation occurs when the purchase order is issued and is chargeable to that fiscal year. 60 Comp. Gen. 452 (1981).

Training tends to be nonseverable. Thus, where a training obligation is incurred in one fiscal year, the entire cost is chargeable to that year, regardless of the fact that performance may extend into the following year. B-233243, Aug. 3, 1989; B-213141-O.M., Mar. 29, 1984. In 70 Comp. Gen. 296 (1991), training that began on the first day of fiscal year 1990 was held chargeable to 1989 appropriations where the training had been identified as a need for 1989, scheduling was beyond the agency's control, and the time between procurement and performance was not excessive. If some particular training were severable (it is not entirely clear when this might be the case), the contract could not cross fiscal year lines and payment would have to be apportioned between the fiscal years in which the training is actually conducted. *See* 34 Comp. Gen. 432 (1955).

After a confusing start, we have determined that the type of contract does not affect the severable *versus* nonseverable distinction. For example, "level-of-effort" contracts may be severable or nonseverable. A level-of-effort contract is a type of cost-reimbursement contract in which the scope of work is defined in general terms, with the contractor being obligated to provide a specified level of effort (*e.g.*, a specified number of person-hours) for a stated time period. Federal Acquisition Regulation, 48 C.F.R. § 16.306(d)(2). The *bona fide* needs determination is based not on the contract type but on the nature of the work being performed and is, in the first instance, the responsibility of the contracting agency. B-235678, July 30, 1990. A 1985 case, 65 Comp. Gen. 154, had implied that all level-of-effort contracts were severable by definition (*id.* at 156), and to that extent was modified by B-235678. *See also* B-277165, Jan. 10, 2000 (cost-plus-fixed-fee contracts are presumptively severable unless the actual nature of the work warrants a different conclusion).

The Comptroller General has noted that to some degree an agency can control whether services are severable or nonseverable by selecting the type of contract and crafting the statement of work. B-277165, *supra* ("one might reasonably conclude that the initial agency determination whether the contract is for funding purposes severable or nonseverable takes place roughly contemporaneously with agency selection of contract type").

As a final thought, there is a fairly simple test that is often helpful in determining whether a given service is severable or nonseverable. Suppose that a service contract is to be performed half in one fiscal year and half in the next. Suppose further that the contract is terminated at the end of the first fiscal year and is not renewed. What do you have? In the case of a window-cleaning contract, you have half of your windows clean, a benefit that is not diminished by the fact that the other half is still dirty. What you paid for the first half has not been wasted. These services are clearly severable. Now consider a contract to conduct a study and prepare a final report, as in 65 Comp. Gen. 741 (1986). If this contract is terminated halfway through, you essentially have nothing. The partial results of an incomplete study, while perhaps beneficial in some ethereal sense, do not do you very much good when what you needed was the complete study and report. Or suppose the contract is to repair a broken frammis.[18] If the repairs are not completed, certainly some work has been done but you still don't have an operational frammis. The latter two examples are nonseverable.

6. Replacement Contracts

In an early decision, the Comptroller of the Treasury was asked whether fiscal year 1902 funds, originally obligated under a contract but unexpended because of contractor default, could be used in the following year to continue the original object of the contract. The Comptroller stated:

> "A contract was properly made within the fiscal year 1902, and it would seem that any part of the consideration of that contract which failed of use owing to the default of the contractor could still be used in carrying out the object of the original contract within the meaning of [31 U.S.C. § 1502(a)]. Appropriations are made to be used and not to be defeated in their use, and it would be a narrow construction to hold that a default on a properly made contract would prevent the use of the appropriation for the

[18] According to "Harvey the Pooka," the word "frammis" denotes "something that, in reality, one hasn't a clue what it does or what it is for …but one wants to give others the impression that he does." The word was coined by The Three Stooges, and, to some, it is a more literate form of the word "widget." (e-mail to "Newsgroups: it.cultura.linguistica.inglese" dated January 28, 2003, found at http://groups.google.com/groups?q=frammis+word&hl=en&lr=&ie=UTF8&selm=TXrZ9.54710%24YG2.1568240%40twister1.libero.it&rnum=1).

> object for which it was made and for carrying out which the contract was executed."

9 Comp. Dec. 10, 11 (1902). This marked the beginning of the replacement contract theory.

In its traditional form, the rule is well settled that, where it becomes necessary to terminate a contract because of the contractor's default, the funds obligated under the original contract are available, beyond their original period of obligational availability, for the purpose of engaging another contractor to complete the unfinished work. 60 Comp. Gen. 591 (1981); 55 Comp. Gen. 1351 (1976); 44 Comp. Gen. 623 (1965); 40 Comp. Gen. 590 (1961); 32 Comp. Gen. 565 (1953); 2 Comp. Gen. 130 (1922); 21 Comp. Dec. 107 (1914); B-160834, Apr. 7, 1967; B-105555, Sept. 26, 1951; A-22134, Apr. 12, 1928.

Implicit in the rule is the premise that the original contract validly obligated then current funds. *See* 34 Comp. Gen. 239 (1954). In addition, the rule is based on the notion that the default termination does not eliminate the *bona fide* need of the fiscal year in which the original contract was executed. 44 Comp. Gen. 399, 401 (1965). In accordance with 31 U.S.C. § 1502, amounts from the appropriation available at the time the original contract was entered would remain available to fund costs properly chargeable to that appropriation. *See* B-242274, Aug. 27, 1991. Accordingly, the replacement contract seeks only to meet the agency's preexisting and continuing need relying on the budget authority obligated by the original contract.

In order for funds to remain available beyond expiration for a replacement contract, three conditions must be met:

- A *bona fide* need for the work, supplies, or services must have existed when the original contract was executed, and it must continue to exist up to the award of the replacement contract. *E.g.*, 55 Comp. Gen. 1351, 1353 (1976); 34 Comp. Gen. 239, 240 (1954). If a terminated contract is found to have been improperly made to fulfill a need of a fiscal year other than the year against which the obligation was recorded, it would also be improper to charge that same appropriation for obligations incident to a replacement contract. 35 Comp. Gen. 692 (1956). In addition, if contracts made in a subsequent fiscal year do not satisfy a continuing need for the goods and/or services provided under the original contract from a prior fiscal year, then the subsequent fiscal

year contracts are not replacements and those contracts are not chargeable to the prior fiscal year appropriation. *See* B-242274, Aug. 27, 1991.

- The replacement contract must not exceed the scope of the original contract. If it does, it is a new obligation and must be charged to funds currently available for obligation at the time the replacement contract is entered into. *E.g.*, 44 Comp. Gen. 399 (1965); B-181176-O.M., June 26, 1974.

- The replacement contract must be awarded within a reasonable time after termination of the original contract. *E.g.*, 60 Comp. Gen. at 593. Excessive delay raises the presumption that the original contract was not intended to meet a then existing *bona fide* need. The same result may follow if there is unwarranted delay in terminating the original contract. 32 Comp. Gen. 565 (1953).

At one time, the replacement contract rule was mostly (but not exclusively) limited to the default situation. *E.g.*, 24 Comp. Gen. 555 (1945), *overruled by* 55 Comp. Gen. 1351. It has, however, been expanded. In 34 Comp. Gen. 239 (1954), a default termination was found to be erroneous and was converted to a termination for convenience by agreement of the parties to permit settlement of the contractor's claim for damages. The decision held that, in view of the original termination, the funds originally obligated were available for the timely execution of a new contract for the performance of the unfinished work.[19] A further question in that case was whether the replacement contract rule was affected by the newly enacted 31 U.S.C. § 1501(a), which requires that contractual obligations be supported by a binding agreement in writing executed prior to expiration of the appropriations availability. The decision held that the original contract met these requirements. 34 Comp. Gen. at 241.

[19] A 1981 case, 60 Comp. Gen. 591, drew a distinction based on whether the awarding of the replacement contract preceded or followed the conversion to a termination for convenience, suggesting that the original obligation was extinguished when the replacement contract followed the conversion to a termination for convenience, the precise sequence involved in 34 Comp. Gen. 239. Although 60 Comp. Gen. 591 cites 34 Comp. Gen. 239 several times, it does not address this point. In view of later decisions where GAO determined that an agency could award a replacement contract following a termination for convenience because of an improper award, the distinction regarding when the replacement contract is awarded would not appear to be relevant. *See* 68 Comp. Gen. 158 (1988).

In a later case, a contract for flooring repairs was awarded in fiscal year 1975, obligating fiscal year 1975 funds, conditioned upon a determination from the Small Business Administration (SBA) that the contractor qualified as a small business. SBA found the contractor not to be a small business. Concluding that the original award was sufficient to support an obligation under 31 U.S.C. § 1501(a), the Comptroller General applied the replacement contract rule and held that the funds obligated for the contract in fiscal year 1975 could be used to resolicit in fiscal year 1976. 55 Comp. Gen. 1351 (1976).

In 66 Comp. Gen. 625 (1987), however, the Comptroller General declined to extend the rule in a situation involving a voluntary modification that reduced the scope of a contract. The Navy had contracted for the construction of 12 ships. The contractor encountered financial difficulties and filed for reorganization under Chapter 11 of the Bankruptcy Act under which the contractor could, with court approval, reject the contract. *See* 11 U.S.C. §§ 365(a) and (d)(2). To avert this possibility, the Navy agreed to a contract modification that, among other things, reduced the number of ships to be provided from 12 to 10. The question was whether the funds originally obligated for the 2 ships deleted by the modification were available after expiration to fund a reprocurement. GAO concluded that they were not because there had been no default, nor was there an actual rejection under the Bankruptcy Code. "[T]he modification was an essentially voluntary act on the part of the Navy, and as such is beyond the scope of the replacement contract rule." *Id.* at 627. Therefore, any replacement contract for the 2 deleted ships would have to be charged to appropriations current at the time it was made.

Cases involving the termination of erroneously or improperly awarded contracts have been less than consistent, although a clear direction now appears evident. The earliest decisions applied the replacement contract rule. Thus, 17 Comp. Gen. 1098 (1938) held, without much discussion, that funds obligated by an award to a bidder subsequently determined not to have been the low bidder could be used for an award to the otherwise low bidder in the following fiscal year. In a 1953 case, a contract had to be partially canceled because the contractor's bid had not conformed to the advertised specifications. GAO noted that "the obligating instrument was legally defective in such a way as to render the contract voidable at the election of the Government," but nevertheless applied the replacement contract rule. B-116131, Oct. 19, 1953. *See also* B-89019, May 31, 1950.

GAO's position seemed to change with the enactment of 31 U.S.C. § 1501(a) in 1954, on the theory that a contract award found to be invalid did not constitute a binding agreement so as to support a recordable obligation. 38 Comp. Gen. 190 (1958); B-118428, Sept. 21, 1954, *overruling* B-116131 and B-89019. However, B-116131 was at least arguably "reinstated" by B-152033, May 27, 1964, which followed both the "voidable at the election of the government" rationale and the result of B-116131, without citing either it or the case that presumably overruled it. *See also* B-173244(2), Aug. 10, 1972; B-158261, Mar. 9, 1966. This latter group of cases was in turn cited with approval in 55 Comp. Gen. 1351, 1353 (1976).

The apparent direction indicated by 55 Comp. Gen. 1351 (1976) and the cases it cited was called into question by statements in 60 Comp. Gen. 591 (1981) to the effect that the replacement contract rule does not apply to terminations for the convenience of the government, whether initiated by the contracting agency or on recommendation of some other body such as GAO. Of course, the typical situation in which a replacement contract is needed following a termination for convenience is where the original contract is found to have been improperly awarded. An important clarification occurred in 68 Comp. Gen. 158 (1988), which modified 60 Comp. Gen. 591 and held the replacement contract rule applicable where a contract must be terminated for convenience, without a prior default termination, pursuant to a determination by competent administrative or judicial authority (court, board of contract appeals, GAO) that the contract award was improper. As noted previously, the *bona fide* need of the original contract must continue, and the replacement contract must be made without undue delay after the original contract is terminated and must be awarded on the same basis as, and be substantially similar in scope and size to, the original contract.

Logically and inevitably, the next question would be why the rule should not be the same regardless of whether the defect leading to termination is determined by an external reviewing body or by the contracting agency itself. It should make no difference, GAO concluded in 70 Comp. Gen. 230 (1991). The essence of the problem—a legal impropriety in the procurement process requiring corrective action—is no different. Thus, the replacement contract rule, with its attendant conditions, applies where the contracting agency determines that a contract award was improper and terminates the contract for the convenience of the government, provided there is clear evidence that the award was erroneous and the agency documents its determination with appropriate findings of fact and law. *Id.*

It is worth noting that with regard to agencies that terminate their contracts based on improper awards, the 1991 GAO decision added a fourth condition to the three articulated earlier in this section that determine whether funds remain available in a subsequent fiscal year for replacement contracts. In addition to the existence of a continuing *bona fide* need, a replacement contract of the same size and scope as the original, and the execution of the replacement without undue delay, the decision added that the original contract had to be made in "good faith" before an agency could use prior year appropriations to fund a replacement contract after terminating the original for convenience due to an improper award; 70 Comp. Gen. 287, 289 (1991).

The issue of whether an agency is required to avail itself of the replacement contract rule arose in a protest submitted to GAO alleging the improper award of a contract. GAO found that the agency properly awarded the contract and that, even when available, the replacement contract rule is not mandatory on an agency. B-270723, Apr. 15, 1996. The 1996 decision stated that since the replacement contract rule "provides a mechanism to allow agencies to administer their contract effectively when there is a reason to terminate a contract, its use is solely at the government's discretion." *Id.* At least one federal district court has adopted the position that the availability of funds for a replacement contract does not require the agency to procure a replacement contract. *LeBoeuf, Lamb, Greene & MacRae, L.L.P. v. Abraham*, 215 F. Supp. 2d 73, 81 (D.D.C. 2002). *See, e.g.*, B-276334.2, Oct. 27, 1997.

7. Contract Modifications and Amendments Affecting Price

Contract performance may extend over several years. During this time, the contract may be modified or amended for a variety of reasons at the instigation of either party. An amendment within the general scope of the contract that does not increase the contract price remains an obligation of the year in which the contract was executed. B-68707, Aug. 19, 1947. If the modification results in an increase in contract price, the question from the *bona fide* needs perspective is which fiscal year to charge with the modification.

If the modification exceeds the general scope of the original contract, for example, by increasing the quantity of items to be delivered, the modification amounts to a new obligation and is chargeable to funds current at the time the modification is made. 37 Comp. Gen. 861 (1958); B-207433, Sept. 16, 1983. When the Internal Revenue Service (IRS) benefited from a contractual provision that allowed its contractor to pass

along cost savings to the agency in a fiscal year subsequent to when it entered the contract, IRS could not use those cost savings to increase the quantity of items that the contract required the contractor to deliver. B-257617, Apr. 18, 1995. Although there was a *bona fide* need for an increased quantity of items that had continued from the fiscal year that IRS entered the contract, it was not within the scope of the contract to increase the quantity of items delivered. If the contractual provision had stated that a cost savings would be passed on to IRS in the form of an increased quantity of items delivered, then increasing the quantity would not have constituted a contract modification creating a new obligation. *Id.*

In the case of a contract for severable services, a modification providing for increased services must be charged to the fiscal year or years in which the services are rendered, applying the principles discussed in this chapter in section B.5.[20] 61 Comp. Gen. 184 (1981), *aff'd upon reconsideration*, B-202222, Aug. 2, 1983; B-224702, Aug. 5, 1987. *See also* B-235086, Apr. 24, 1991. In 61 Comp. Gen. 184, for example, a contract to provide facilities and staff to operate a project camp was modified in the last month of fiscal year 1980. The modification called for work to be performed in fiscal year 1981. Regardless of whether the contract was viewed as a service contract or a contract to provide facilities, the modification did not meet a *bona fide* need of fiscal year 1980. The modification amounted to a separate contract and could be charged only to fiscal year 1981 funds, notwithstanding that it purported to modify a contract properly chargeable to fiscal year 1980 funds.

For modifications within the general scope of the original contract, the situation is a bit more complicated. Most government contracts contain provisions which, under certain conditions, render the government liable to make equitable adjustments in the contract price. Such liability may arise due to changes in specifications, government-caused delay, changed conditions, increased overhead rates, *etc.* These conditions are set out in standard contract clauses such as the "Changes" clause, "Government Property" clause, or "Negotiated Overhead Rates" clause.

[20] Presumably, if an agency, acting under authority to charge a 12-month severable services contract that crosses fiscal years to the appropriation current in the first fiscal year, had charged the original obligation to the first fiscal year, the agency should charge the costs of the modification to that same appropriation. We discuss this authority for civilian agencies and 10 U.S.C. § 2410a for military departments) in section B.9.a of this chapter. We found no case law addressing this point, however. *See generally* B-259274, May 22, 1996 (discussing 10 U.S.C. § 2410a).

Because there is no way to know whether the government will actually incur liability under these provisions, and if so, the amount of such liability, until the occurrence of the specified conditions (*cf.* 50 Comp. Gen. 589, 591 (1971)), the appropriations charged with the cost of the contract are not firmly obligated to cover future price increases, which arise due to the operation of these clauses. Nevertheless, as noted, government contracts frequently contemplate that performance will extend into subsequent fiscal years. When an upward price adjustment is necessitated in a subsequent year, the general approach is to ask whether the adjustment is attributable to an "antecedent liability"—that is, whether the government's liability arises and is enforceable under a provision in the original contract. If the answer to this question is yes, then a within-scope price adjustment, which is requested and approved in a subsequent fiscal year, for example, under the "Changes" clause, will—with one important qualification to be noted later—be charged against the appropriation current at the time the contract was originally executed. Cases supporting this proposition in various contexts are 59 Comp. Gen. 518 (1980); 23 Comp. Gen. 943 (1944); 21 Comp. Gen. 574 (1941); 18 Comp. Gen. 363 (1938); A-15225, Sept. 24, 1926; B-146285-O.M., Sept. 28, 1976.[21] *See also* B-197344, Aug. 21, 1980, where supplemental work was done without issuance of a formal contract modification. This principle is occasionally referred to as the doctrine of "relation back." *E.g.*, 37 Comp. Gen. 861, 863 (1958).

The reasoning is that a change order does not give rise to a new liability, but instead only renders fixed and certain the amount of the government's preexisting liability to adjust the contract price. Since that liability arises at the time the original contract is executed, the subsequent price adjustment is viewed as reflecting a *bona fide* need of the same year in which funds were obligated for payment of the original contract price. The concept was stated as follows in 23 Comp. Gen. 943, 945 (1944) (explanatory information provided):

> "It is true that at the time the contract was executed it was not known that there would, in fact, be any changes ordered …for which the contractor would be entitled to be paid an amount in addition to amounts otherwise payable under the contract. Also, it is true that [the Changes clause] contemplates the execution of amendments to the contract

[21] Similarly, costs incurred under a termination for convenience are chargeable to the appropriation originally obligated for the contract. B-203074, Aug. 6, 1981.

> from time to time covering such changes. However, the fact remains that the obligations and liabilities of the parties respecting such changes are fixed by the terms of the original contract, and the various amendments merely render definite and liquidated the extent of the Government's liability in connection with such changes."

In order to avoid overobligating the original appropriation, the contracting officer must estimate the expected net additional obligations to insure that available appropriations are not committed to other purposes. *E.g.*, 61 Comp. Gen. 609, 612 (1982); B-192036, Sept. 11, 1978. It is also true, however, that estimated liabilities of this type require constant review to ensure that appropriations do not remain encumbered in excess of the amounts that will actually be needed to meet the total liability under the contract.

For contracts spanning lengthy periods of time, funding of within scope modifications involves the use of expired appropriations. As discussed later in this chapter, the balances in expired accounts prior to closing are available without further congressional action.

Not all price adjustments arising from contract modifications or amendments represent a *bona fide* need of the year in which the agreement was made. If, as noted above, the change or amendment exceeds the general scope of the contract, or is not made pursuant to a provision in the original contract, then it is not based on any antecedent liability, in which event it may obligate only appropriations current at the time it is issued. 56 Comp. Gen. 414 (1977). *See also* 25 Comp. Gen. 332 (1945) (purported change order issued after completion of contract, covering work the contractor was not legally bound to do under the original contract, amounted to a new contract).

As noted above, there is an important exception or qualification to the antecedent liability rule. In cost reimbursement contracts, discretionary cost increases (*i.e.*, increases that are not enforceable by the contractor), which exceed funding ceilings established by the contract, may be charged to funds currently available when the discretionary increase is granted by the contracting officer. 61 Comp. Gen. 609 (1982). It would be unreasonable, the decision pointed out, to require the contracting officer to reserve funds in anticipation of increases beyond the contract's ceiling. *Id.* at 612. Changes that do not exceed the stipulated ceiling continue to be chargeable to funds available when the contract was originally made (*id.*

at 611), as do amounts for final overhead in excess of the ceiling where the contractor has an enforceable right to those amounts (*id.* at 612). Since prior decisions such as 59 Comp. Gen. 518 had not drawn the below-ceiling/above-ceiling distinction, 61 Comp. Gen. 609 modified them to that extent. A more recent case applying 61 Comp. Gen. 609 is 65 Comp. Gen. 741 (1986).

Once an appropriation account has closed (generally five fiscal years after the expiration of obligational availability), questions of antecedent liability or relation back are no longer relevant for purposes of determining the availability of amounts in the closed accounts since, at that time, appropriation balances cease to be available for expenditure. However, questions of antecedent liability or relation back are used to determine the extent to which current funds are available since, once an appropriation closes, only current funds may be used, up to specified limits, for such obligations. 31 U.S.C. §§ 1552 and 1553.

8. Multiyear Contracts

a. Introduction

Any discussion of multiyear contracting must inevitably combine the *bona fide* needs rule with material from Chapter 6 on the Antideficiency Act and from Chapter 7 on obligations.

The term "multiyear contract" has been used in a variety of situations to describe a variety of contracts touching more than one fiscal year. To prevent confusion, we think it is important to start by establishing a working definition. A multiyear contract, as we use the term in this discussion, is a contract covering the requirements, or needs, of more than one fiscal year.[22] A contract for the needs of the current year, even though performance may extend over several years, is not a multiyear contract. We discuss contracts such as these, where performance may extend beyond the end of the fiscal year, in sections B.4 and B.5 of this chapter. Thus, a contract to construct a ship that will take 3 years to complete is not a multiyear contract; a contract to construct one ship a year for the next 3 years is.

[22] This is essentially the same as the definition in the Federal Acquisition Regulation, "a contract for the purchase of supplies or services for more than 1, but not more than 5, program years." 48 C.F.R. § 17.103.

Multiyear contracting, like most things in life, has advantages and disadvantages. Some of the potential benefits are:[23]

- Multiyear contracting can reduce costs by permitting the contractor to amortize nonrecurring "start up" costs over the life of the contract. Without multiyear authority, the contractor may insist on recovering these costs under the 1-year contract (since there is no guarantee of getting future contracts), thus resulting in increased unit prices.

- Multiyear contracting may enhance quality by reducing the uncertainty of continued government business and enabling the contractor to maintain a stable workforce.

- Multiyear contracting may increase competition by enabling small businesses to compete in situations where nonrecurring start-up costs would otherwise limit competition to larger concerns.

However, the situation is not one-sided. Multiyear contracting authority also has potential disadvantages:[24]

- Competition may decrease because there will be fewer opportunities to bid.

- A contractor who is able to amortize start-up costs in a multiyear contract has, in effect, a government-funded competitive price advantage over new contractors in subsequent solicitations. This could evolve into a sole-source posture.

- Being locked into a contract for several years is not always desirable, particularly where the alternative is to incur cancellation charges that could offset initial savings.

[23] S. Rep. No. 98-417, at 4–8 (1984). This is a report by the Senate Committee on Governmental Affairs on a bill (S. 2300) designed to extend limited multiyear contracting authority to civilian agencies. That legislation was not enacted. Ten years later, in 1994, Congress enacted the Federal Acquisition Streamlining Act, permitting civilian agencies to use fiscal year appropriations to enter into contracts for as many as 5 years. Pub. L. No. 103-355, § 1072, 108 Stat. 3243, 3270 (Oct. 13, 1994), codified at 41 U.S.C. § 254c. We discuss the Federal Acquisition Streamlining Act in section B.9.b of this chapter.

[24] H.R. Rep. No. 97-71, pt. 3, at 21 (1981) (report of the House Committee on Government Operations on the 1982 Defense Department authorization bill).

An agency may engage in multiyear contracting only if it has (1) no-year funds or multiple year funds covering the entire term of the contract or (2) specific statutory authority. *Cray Research, Inc. v. United States*, 44 Fed. Cl. 327, 332 (1999); 67 Comp. Gen. 190, 192 (1988); B-171277, Apr. 2, 1971 (multiyear contract permissible under no-year trust fund). An agency may enter into a multiyear contract with fiscal year appropriations (or for a term exceeding the period of availability of a multiple year appropriation) only if it has specific statutory authority to do so. *See* 71 Comp. Gen. 428, 430 (1992); B-259274, May 22, 1996. Most agencies now have some form of multiyear contracting authority, as we will describe in the next section.

b. Multiple Year and No-Year Appropriations

If an agency does not have specific multiyear contracting authority but enters into a multiyear contract solely under authority of a multiple year or no-year appropriation, the full contract amount must be obligated at the time of contract award.[25] B-195260, July 11, 1979. This is also true for revolving funds, which authorize expenditures without fiscal year limitation. Revolving funds must have sufficient budget authority against which to record the entire amount of long-term contracts at the time of the obligation. 72 Comp. Gen. 59, 61 (1992). A revolving fund may not count anticipated receipts from future customer orders as budget authority. B-288142, Sept. 6, 2001. *See also* U.S. General Accounting Office, *The Air Force Has Incurred Numerous Overobligations In Its Industrial Fund*, AFMD-81-53 (Washington, D.C.: Aug. 14, 1981).

However, there have been some circumstances under which GAO approved the incremental funding of a multiyear contract using no-year funds. For example, 43 Comp. Gen. 657 (1964) involved a scheme in which funds would be made available, and obligated, on a year-by-year basis, together with a "commitment" to cover maximum cancellation costs. The cancellation costs represented amortized start-up costs, which would be adjusted downward each year. Thus, funds would be available to cover the government's maximum potential liability in each year. *See also* 62 Comp. Gen. 143 (1983) (similar approach for long-term vessel charters under the Navy Industrial Fund); 51 Comp. Gen. 598, 604 (1972) (same); 48 Comp. Gen. 497, 502 (1969) (either obligational approach acceptable under

[25] When an agency uses multiyear or other contracting authorities, such as the Federal Acquisition Streamlining Act, that authority may permit the agency to obligate its appropriations differently. We discuss the Federal Acquisition Streamlining Act and other examples of multiyear contracting authorities in section B.9 of this chapter.

revolving fund).[26] (As we will see later, this type of arrangement under a fiscal year appropriation presents problems.)

If an agency has neither multiple year or no-year funds, nor uses multiyear contracting authority, a multiyear contract violates statutory funding restrictions, including the Antideficiency Act (prohibiting obligations in advance of an appropriation for that fiscal year, 31 U.S.C. § 1341(a))[27] and the *bona fide* needs statute (prohibiting the obligation of an appropriation in advance of need, 31 U.S.C. § 1502(a)). *See Cray Research, Inc. v. United States*, 44 Fed. Cl. 327,332 (1999). *E.g.*, 67 Comp. Gen. 190 (1988); 66 Comp. Gen. 556 (1987); 64 Comp. Gen. 359 (1985); 48 Comp. Gen. 497 (1969); 42 Comp. Gen. 272 (1962); 27 Op. Att'y Gen. 584 (1909). Multiyear commitments were found illegal in various contexts in each of these cases, although each case does not necessarily discuss each funding statute.

In 42 Comp. Gen. 272, for example, the Air Force, using fiscal year appropriations, awarded a 3-year contract for aircraft maintenance, troop billeting, and base management services on Wake Island. Because an agency typically incurs an obligation at the time it enters into a contract, and must charge that obligation to an appropriation current at that time,[28] the Air Force contract raised two issues: (1) whether the services to be provided in the second and third years of the contract constituted a *bona fide* need of the Air Force's fiscal year appropriation, and (2) if not, whether the Air Force had incurred an obligation in the first fiscal year for the needs of the second and third years in advance of appropriations for those 2 years. The Air Force contended that no funds were obligated at time of contract award; instead, the Air Force argued that it had a "requirements" contract, and that it incurred no obligation unless and until it issued requisitions, thereby exempting the contract from the statutory funding restrictions. However, the Comptroller General refused to adopt this characterization of the contract. Although the contractor had expressly agreed to perform only services for which he had received the contracting officer's order, GAO found that there was no need for an administrative determination that requirements existed since the contract services were "automatic incidents of the use of the air field." *Id.* at 277. Only a decision

[26] While 43 Comp. Gen. 657 had used the somewhat cryptic term "commitment," the three subsequent decisions require the actual obligation of the cancellation costs.

[27] We discuss the Antideficiency Act in Chapter 6.

[28] We discuss the concept of obligations in Chapter 7.

to close the base would eliminate the requirements. Consequently, the contract was found to be an unauthorized multiyear contract—the Air Force, using fiscal year appropriations, had entered into a contract for its needs of subsequent fiscal years in advance of appropriations for those years.

c. Fiscal Year Appropriations

If an agency is contracting with fiscal year appropriations and does not have multiyear contracting authority, the only authorized course of action, apart from a series of separate fiscal year contracts, is a fiscal year contract with renewal options, with each renewal option (1) contingent on the availability of future appropriations and (2) to be exercised only by affirmative action on the part of the government (as opposed to automatic renewal unless the government refuses). *Leiter v. United States*, 271 U.S. 204 (1926); 66 Comp. Gen. 556 (1987); 36 Comp. Gen. 683 (1957); 33 Comp. Gen. 90 (1953); 29 Comp. Gen. 91 (1949); 28 Comp. Gen. 553 (1949); B-88974, Nov. 10, 1949. The inclusion of a renewal option is key; with a renewal option, the government incurs a financial obligation only for the fiscal year, and incurs no financial obligation for subsequent years unless and until it exercises its right to renew. The government records the amount of its obligation for the first fiscal year against the appropriation current at the time it awards the contract. The government also records amounts of obligations for future fiscal years against appropriations current at the time it exercises its renewal options. The mere inclusion of a contract provision conditioning the government's obligation on future appropriations without also subjecting the multiyear contract to the government's renewal option each year would be insufficient. *Cray Research, Inc. v. United States*, 44 Fed. Cl. 327, 332 (1999). Thus, in 42 Comp. Gen. 272 (1962), the Comptroller General, while advising the Air Force that under the circumstances it could complete that particular contract, also advised that the proper course of action would be either to use an annual contract with renewal options or to obtain specific multiyear authority from Congress. *Id.* at 278.

In a 1-year contract with renewal options, the contractor can never be sure whether the renewal options will be exercised, thereby preventing the contractor from amortizing initial investment costs. To protect against this possibility, contractors occasionally seek a contract termination penalty equal to the unamortized balance of initial investment costs if the government fails to renew the contract for any fiscal year. However, the Comptroller General has held that these provisions contravene the *bona fide* needs rule:

> "The theory behind such obligations (covering amortized facility costs unrecovered at time of termination) has been that a need existed during the fiscal year the contracts were made for the productive plant capacity represented by the new facilities which were to be built by the contractor to enable him to furnish the supplies called for by the contracts. After thorough consideration of the matter, we believe that such obligations cannot be justified on the theory of a present need for productive capacity.
>
> " …The real effect of the termination liability is to obligate the Commission to purchase a certain quantity of magnesium during each of five successive years or to pay damages for its failure to do so. In other words, the termination charges represent a part of the price of future, as distinguished from current, deliveries and needs under the contract, and for that reason such charges are not based on a current fiscal year need."

36 Comp. Gen. 683, 685 (1957). *See also* 37 Comp. Gen. 155 (1957).

Attempts to impose penalty charges for early termination (sometimes called "separate charges") have occurred in a number of cases involving automated data processing (ADP) procurements. In one case, a competitor for a contract to acquire use of an ADP system for a 65-month period proposed to include a provision under which the government would be assessed a penalty if it failed to exercise its annual renewal options. The Comptroller General noted that the penalty was clearly intended to recapitalize the contractor for its investment based on the full life of the system in the event the government did not continue using the equipment. Accordingly, the Comptroller General concluded that the penalty did not reasonably relate to the value of the equipment's use during the fiscal year in which it would be levied. The penalty charges would, therefore, not be based on a *bona fide* need of the current fiscal year and their payment would violate statutory funding restrictions. 56 Comp. Gen. 142 (1976), *aff'd in part*, 56 Comp. Gen. 505 (1977). *See also* 56 Comp. Gen. 167 (1976); B-190659, Oct. 23, 1978.

One scheme, however, has been found to be legally sufficient to permit the government to realize the cost savings that may accrue through multiyear contracting. The plan approved by the Comptroller General in 48 Comp. Gen. 497, 501–02 (1969) provided for a 1-year rental contract with an

option to renew each subsequent year. If the government completed the full rental period by continuing the contract on a year-by-year basis, it would be entitled to have monthly rental credits applied during the final months of the rental period. The Comptroller General noted that:

> "Under this arrangement the Government would not be obligated to continue the rental beyond the fiscal year in which made, or beyond any succeeding fiscal year, unless or until a purchase order is issued expressly continuing such rental during the following fiscal year. In effect, the company is proposing a 1 year rental contract with option to renew. Also, under this proposal rental for any contract year would not exceed the lowest rental otherwise obtainable from [the contractor] for one fiscal year. We have no legal objection to this type of rental plan for ADP equipment."

d. Contracts with No Financial Obligation

Multiyear arrangements may be permissible, even without specific statutory authority, if they are structured in such a way that the agency, at time of contract award, incurs no financial obligation. Without a financial obligation, the agency does not violate the Antideficiency Act or the *bona fide* needs rule. In 63 Comp. Gen. 129 (1983), the Comptroller General considered the General Services Administration proposal to use 3-year "Multiple Award Schedule" (MAS) contracts for Federal Supply Schedule items. There was no commitment to order any specific quantity of items. Rather, the commitment was for an agency with a requirement for a scheduled item to order it from the contractor if the contractor has offered the lowest price. If an agency found the item elsewhere for less than the contract price, it was free to procure the item from that other source without violating the contract. Since entering into the MAS contracts did not require the obligation of funds, there was no violation of statutory funding restrictions. Obligations would occur only when agencies placed specific orders, presumably using funds currently available to them at the time. Another example is a 1935 decision, A-60589, July 12, 1935, which concerned a requirements contract for supplies in which no definite quantity was required to be purchased and under which no financial obligation would be imposed on the government until an order was placed. In order to retain the availability of the vendor and a fixed price, the government agreed not to purchase the items elsewhere. *See also* B-259274, May 22, 1996.

Also, contracts that do not require the expenditure of appropriated funds are not subject to the same fiscal year strictures. *E.g.*, 10 Comp. Gen. 407

(1931) (no legal objection to multiyear leases or contracts for the operation of concessions on federal property).

9. Specific Statutes Providing for Multiyear and Other Contracting Authorities

As we noted at the beginning of our discussion of the *bona fide* needs rule, a fixed-term appropriation is available only "to complete contracts properly made within that period of availability." *See* 31 U.S.C. § 1502(a). For multiyear contracts, "properly made" means that the *bona fide* needs rule is satisfied if an agency has statutory authority to obligate its fiscal year funds for a contract that crosses fiscal years or is for multiple years. While these statutes are sometimes referred to as exceptions to the *bona fide* needs statute, it is clear that by using the phrase "contracts properly made," the *bona fide* needs statute anticipates that Congress may authorize agencies to obligate funds across fiscal years, either generally or for a particular agency or program. In so doing, Congress defines the *bona fide* need in the particular statute.

a. Severable Services Contracts

There are several general authorities to contract across a fiscal year or to enter into multiyear contracts. For example, 41 U.S.C. § 253*l* authorizes the heads of executive agencies to enter into procurement contracts for severable services for periods beginning in one fiscal year and ending in the next fiscal year as long as the contracts do not exceed 1 year. It permits agencies to obligate the total amount of the contract to appropriations of the first fiscal year. Without specific statutory authority such as this, such action would violate the *bona fide* needs rule (*see* section B.5 of this chapter). Section 253*l*, in effect, redefines for an agency that elects to contract under authority of section 253*l* its *bona fide* need for the severable services for which it is contracting. Related statutes extend this authority to various legislative branch entities.[29] Similarly, 10 U.S.C. § 2410a authorizes the military departments to use current fiscal year appropriations to finance severable service contracts into the next fiscal year for a total period not to exceed 1 year. GAO states in B-259274, May 22, 1996, that "[t]he purpose of 10 U.S.C. § 2410a is to overcome the *bona fide* needs rule," which is another way of saying that Congress has provided the military departments with authority to properly enter into a contract not to exceed 1 year that crosses fiscal years. The statute specifically authorizes the departments to obligate "[f]unds made available

[29] For example, the Comptroller General (41 U.S.C. § 253*l*-1), Library of Congress (41 U.S.C. § 253*l*-2), Chief Administrative Officer of the House of Representatives (41 U.S.C. § 253*l*-3), and Congressional Budget Office (41 U.S.C. § 253*l*-4).

for a fiscal year …for the total amount of a contract entered into" under section 2410a(a).

In B-259274, May 22, 1996, the Air Force took full advantage of this authority to maximize efficient use of fiscal year appropriations. The Air Force had intended to award a 12-month severable services contract for vehicle maintenance beginning on September 1, 1994 (fiscal year 1994), and running until August 31, 1995 (fiscal year 1995). Using 10 U.S.C. § 2410a, the Air Force had planned to obligate the contract against its fiscal year 1994 appropriation, until it learned that it did not have sufficient unobligated amounts to cover the contract. To avoid Antideficiency Act problems, but taking advantage of section 2410a, the Air Force entered into a 4-month contract, beginning September 1, 1994, and running until December 31, 1994, and included an option to renew the contract at that time. The option, as in the *Leiter* decision we discussed in section B.8, could be exercised only by the Air Force, not the contractor, by affirmative written notification to the contractor. GAO concluded that the Air Force's obligation was only for 4 months, and under authority of section 2410a, it constituted a *bona fide* need of fiscal year 1994 and was properly chargeable to fiscal year 1994. Also, GAO found no Antideficiency Act violation. GAO said that with the option to renew for 8 months, the Air Force had incurred "a naked contractual obligation that carries with it no financial exposure to the government."

b. 5-year Contract Authority

(1) 10 U.S.C. §§ 2306b, 2306c

In addition to the severable services contracting authority, Congress has provided executive, legislative, and judicial entities substantial authority for multiyear contracting for goods and services using annual funds. The military departments are authorized by 10 U.S.C. §§ 2306b and 2306c to enter into multiyear contracts for goods and services, respectively, for periods of not more than 5 years if certain administrative determinations are made. Section 2306b applies not only to routine supplies, but also to the military departments acquisition of weapon systems and items and services associated with such systems. Section 2306c, enacted in response to the Wake Island decision (*see* 67 Comp. Gen. 190, 193 (1988)), applies to such services as installation maintenance and support, maintenance or modification of aircraft and other complex military equipment, specialized training, and base services. Sections 2306b and 2306c permit the military departments to obligate the entire amount of the 5-year contract to the fiscal year appropriation current at the time of contract award, even though the goods or services procured for the final 4 years of the contract

do not constitute needs of that fiscal year. Alternatively, sections 2306b and 2306c permit the military departments to obligate the amount for each of the 5 years against appropriations enacted for each of those years. If funds are not made available for continuation in a subsequent fiscal year, cancellation or termination costs may be paid from appropriations originally available for the contract, appropriations currently available for the same general purpose, or appropriations made specifically for those payments. 10 U.S.C. §§ 2306b(f) and 2306c(e). The authority contained in sections 2306b and 2306c is also available to the Coast Guard and the National Aeronautics and Space Administration. 10 U.S.C. § 2303.

A multiyear contract entered into under authority of 10 U.S.C. §§ 2306b or 2306c is binding on both parties for the full term of the contract unless terminated as provided in the statute. *See Beta Systems*, *Inc. v. United States*, 838 F.2d 1179, 1183 n.2 (Fed. Cir. 1988); *Beta Systems*, *Division of Velcon Filters*, *Inc. v. United States*, 16 Cl. Ct. 219, 228 (1989).

A contract under sections 2306b or 2306c must relate to the *bona fide* needs of the contract period as opposed to the need only of the first fiscal year of the contract period. The statute does not authorize the advance procurement of materials not needed during the 5-year term of the contract. *See* 64 Comp. Gen. 163 (1984); B-215825-O.M., Nov. 7, 1984. *See also* 35 Comp. Gen. 220 (1955).

(2) 41 U.S.C. § 254c

The Federal Acquisition Streamlining Act of 1994 (FASA) and related statutes extended multiyear contracting authority with annual funds to nonmilitary departments.[30] FASA authorizes an executive agency to enter into a multiyear contract for the acquisition of property or services for more than 1, but not more than 5 years, if the agency makes certain administrative determinations. 41 U.S.C. § 254c. Related laws extend this authority to various legislative branch agencies.[31] Through FASA and the related laws, Congress has relaxed the constraints of the *bona fide* needs rule by giving agencies the flexibility to structure contracts to fund the obligations up front, incrementally, or by using the standard *bona fide*

[30]Pub. L. No. 103-355, § 1072, 108 Stat. 3243, 3270 (Oct. 13, 1994).

[31] For example, the General Accounting Office (41 U.S.C. § 253*l*-1), Library of Congress (41 U.S.C. § 253*l*-2), Chief Administrative Office of the House of Representatives (41 U.S.C. § 253*l*-3, and Congressional Budget Office (41 U.S.C. § 253*l*-4).

needs rule approach. B-277165, Jan. 10, 2000. To the extent an agency elects to obligate a 5-year contract incrementally, it must also obligate termination costs.

The enactment of FASA satisfied the GAO recommendation for the enactment of legislation to authorize all federal agencies to engage in limited multiyear procurement. *See* U.S. General Accounting Office, *Federal Agencies Should Be Given General Multiyear Contracting Authority For Supplies and Services*, PSAD-78-54 (Washington, D.C.: Jan. 10, 1978). *See also* B-214545, Aug. 7, 1985 (comments on proposed legislation).

c. Examples of Agency-Specific Multiyear Contracting Authorities

An example of a specific authority is 41 U.S.C. § 11a, which authorizes the Secretary of the Army "to incur obligations for fuel in sufficient quantities to meet the requirements for one year without regard to the current fiscal year," and to pay from appropriations either for the fiscal year in which the obligation is incurred or for the ensuing fiscal year. *See* 28 Comp. Gen. 614 (1949) (construing the term "fuel" in that statute to include gasoline and other petroleum fuel products).

Another example is 31 U.S.C. § 1308, which permits charges for telephone and other utility services for a time period beginning in one fiscal year and ending in another to be charged against appropriations current at the end of the covered time period. In addition, 42 U.S.C. § 2459a authorizes the National Aeronautics and Space Administration to enter into contracts for certain "services provided during the fiscal year following the fiscal year in which funds are appropriated."

A further example of statutory authority for multiyear contracting is 40 U.S.C. § 481(a)(3), which authorizes contracts for public utility services for periods not exceeding 10 years. The purpose of the statute is to enable the government to take advantage of discounts offered under long-term contracts. 62 Comp. Gen. 569, 572 (1983); 35 Comp. Gen. 220, 222–3 (1955). For purposes of applying this statute, the nature of the product or service and not the nature of the provider is the governing factor. 70 Comp. Gen. 44, 49 (1990). Thus, the statute applies to obtaining utility services from other than a "traditional" form of public utility. 62 Comp. Gen. 569. When entering into a contract under 40 U.S.C. § 481(a)(3), the contracting agency needs to have sufficient budget authority only to obligate the first years costs. 62 Comp. Gen. at 572; 44 Comp. Gen. 683, 687–88 (1965).

Other examples of specific multiyear authority are 40 U.S.C. § 490(h), which authorizes the General Services Administration (GSA) to enter into leases for periods of up to 20 years; 40 U.S.C. § 757(c), which authorizes GSA to use the Information Technology Fund for contracts up to 5 years for information technology hardware, software, or services; and 10 U.S.C. § 2828(d), under which the military departments may lease family housing united in foreign countries for periods up to 10 years, to be paid from annual appropriations.

10. Grants and Cooperative Agreements

The *bona fide* needs rule applies to all federal government activities carried out with appropriated funds, not just contracts, including grants and cooperative agreements. B-289801, Dec. 30, 2002; 73 Comp. Gen. 77, 78–79 (1994). Because of the fundamentally different purposes of contracts and grants, a *bona fide* needs analysis in the context of grants and cooperative agreements is different from an analysis in a contract context. The purpose of a contract is to acquire goods or services; the purpose of a grant is to provide financial assistance. It is for that reason that we do not import into a grant analysis the contract concepts of supplies and services, particularly severable and nonseverable services. In the world of contracts, the analysis focuses, necessarily, on the agency's need for the goods or services for which it has contracted. In that context, these concepts have particular relevance. The agency's "need" in the grant context, however, is to make a grant in furtherance of the goals Congress hoped to achieve when it enacted the grant-making authority. In this context, the agency's "need" is to make a grant, and the grantee's use of grant funds has no relevance in the assessment of agency needs.

For that reason, a *bona fide* needs analysis in the grant context focuses on whether the grant was made during the period of availability of the appropriation charged and furthers the authorized purpose of program legislation. B-289801, Dec. 30, 2002. Thus, where a statute authorizes grants to be made for up to 5 years to support childhood education, an award of a 5-year grant fulfills a *bona fide* need in the year that the grant is awarded even though the 5-year grant is funded with a fiscal year appropriation. *Id.* However, where the "School Improvement Programs" appropriation for fiscal year 2002 authorizes grants only for "academic year 2002–2003," only grants providing funding for the 2002–03 academic year are a *bona fide* need of the fiscal year 2002 appropriation, notwithstanding that the program statute authorizes grants for up to 4 years. *Id.*

The application of contract concepts to grants has not been without doubt. Prior to our 2002 decision, the application of the severability concept to grants and cooperative agreements had evolved over the years. In cases where agencies did not have explicit multiyear award authority, GAO used to treat grants and cooperative agreements in much the same way that it treated service contracts with regard to severability. In 64 Comp. Gen. 359 (1985), GAO held that since the National Institutes of Health (NIH) grant program did not contemplate a required outcome or product but, instead, sought to stimulate research that would be needed year after year, NIH was required to use appropriations available in the year that services were rendered to fund the grants.

However, GAO significantly departed from that reasoning in a 1988 decision involving Small Business Administration (SBA) grants. In that decision, GAO stated that when reviewing grants or cooperative agreements in the context of the *bona fide* needs rule, the principle of severability is irrelevant. B-229873, Nov. 29, 1988. GAO held that SBA did not violate the *bona fide* needs rule when it used its current appropriation on September 30, the last day of the fiscal year, to award cooperative agreements to Small Business Development Centers that would use the money in the next fiscal year. GAO concluded that, unlike a contract, a cooperative agreement satisfies the *bona fide* need of the agency—to financially assist the awardee—at the time SBA makes the award to the Small Business Development Centers. *Id.* Thus, the dates on which the Centers actually used the financial assistance are irrelevant for purposes of assessing SBA's *bona fide* need. *Id.*

Building on the SBA decision, GAO held that the Department of Education could use 1-year appropriations to award multiyear grants where the legislation creating the grant program explicitly stated that the grants could last multiple years and even in instances where the legislation did not address the duration of the grants. B-289801, Dec. 30, 2002. The determining factor is that the grants, at the time of award, further the objective of the grant legislation. Thus, GAO held that Education could use its fiscal year appropriations to fund a 4-year grant when the statute directed the agency to award grants "for periods of not more than 4 years." *See* 20 U.S.C. § 6651(e)(2)(B)(i). Furthermore, GAO determined that Education could use its fiscal year appropriation to provide 5- and 2-year grants even though the statutes creating the grants were silent with regard to grant duration. *See* 20 U.S.C. §§ 1070a-21 *et seq.* and Pub. L. No. 106-554, app. A, 114 Stat. 2763A-33–34 (Dec. 21, 2000). GAO reasoned that, in addition to authorizing awards, the grant statutes conferred broad

discretion on Education to help ensure the accomplishment of grant objectives; and it was within that discretion for Education to determine whether the grant objectives would best be accomplished through the use of multiyear grant awards. B-289801, Dec. 30, 2002.

C. Advance Payments

1. The Statutory Prohibition

Advance payments in general are prohibited by 31 U.S.C. § 3324, which provides in part:

> "(a) Except as provided in this section, a payment under a contract to provide a service or deliver an article for the United States Government may not be more than the value of the service already provided or the article already delivered.
>
> "(b) An advance of public money may be made only if it is authorized by—
>
> "(1) a specific appropriation or other law …."

The quoted portion of 31 U.S.C. § 3324 is derived from legislation originally enacted in 1823 (3 Stat. 723).

The primary purpose of 31 U.S.C. § 3324 is to protect the government against the risk of nonperformance—"to preclude the possibility of loss to the Government in the event a contractor—after receipt of payment—should fail to perform his contract or refuse or fail to refund moneys advanced." 25 Comp. Gen. 834, 835 (1946). *See also* 65 Comp. Gen. 806, 809 (1986); B-256692, June 22, 1995; B-249006, Apr. 6, 1993; B-180713, Apr. 10, 1974. Thus, in its simplest terms, the statute prohibits the government from paying for goods before they have been received or for services before they have been rendered. *The Floyd Acceptances*, 74 U.S. (7 Wall.) 666, 682 (1868); 10 Op. Att'y Gen. 288, 301 (1862). The statute has been described as "so plain that construction of it is unnecessary." 27 Comp. Dec. 885, 886 (1921). While that may be true if section 3324 is viewed in isolation, the situation today is nowhere near that simple. Advance payments are now permissible in a number of situations. What we now have is a basic

statutory prohibition with a network of exceptions, both statutory and nonstatutory, some of which are of major importance.

Exceptions to the advance payment prohibition may be found in appropriation acts or in "other law." Examples of specific exceptions are: 10 U.S.C. § 2396 (for compliance with foreign laws, rent in foreign countries, tuition, pay, and supplies of armed forces of friendly countries); 31 U.S.C. §§ 3324(b)(2) and (d)(2) (pay and allowances of members of the armed forces at distant stations and publications); and 19 U.S.C. §§ 2076–2077 and 2080 (Customs Service payments). Numerous other statutory exceptions exist in various contexts. A major exception, discussed in this chapter, section C.2, permits advance and progress payments under procurement contracts in certain situations.

Payments to or on behalf of federal civilian employees and members of the uniformed service constitute another area in which exceptions exist. Advances of travel and transportation allowances for federal civilian employees are authorized by, *e.g.*, 5 U.S.C. §§ 5705 and 5724(f). In addition, advances of allowances for basic housing, travel, and transportation, to members of the uniformed services (for themselves and in specified situations their dependents) are authorized by several statutes, *e.g.*, 37 U.S.C. §§ 403(a), 404(b)(1)(A), 404a(b), 405(a), 405a(a), 406(a)(3), and 409(b).

Prior to late 1990, the advance payment of *salary*, as opposed to the various allowances discussed in the preceding paragraph, remained prohibited, with a limited exception in 5 U.S.C. § 5522 for certain emergency or "national interest" evacuations. This situation caused occasional hardship for new employees resulting from delay in receiving their first regular paycheck. In 58 Comp. Gen. 646 (1979), GAO had concurred in a proposal to minimize this hardship by using imprest funds to make partial salary payments to new federal employees early in the week following the first week of employment, but cautioned that, in view of 31 U.S.C. § 3324, no payments could be made before the work had been performed. Section 107 of the Federal Employees Pay Comparability Act of 1990[32] added a new 5 U.S.C. § 5524a, authorizing agencies to make advance

[32] The Act is contained in section 529 of the fiscal year 1991 Treasury, Postal Service, and General Government Appropriation Act, Pub. L. No. 101-509, 104 Stat. 1427, 1449 (Nov. 5, 1990).

payments of up to two pay periods of basic pay to new employees.[33]

Advance payment of salary remains prohibited in situations not covered by statutory exceptions. Thus, GAO has advised that partial or emergency salary payments can be made if a salary check is lost in the mail or an electronic deposit goes astray, but must be subject to "advance payment" safeguards similar to those discussed in 58 Comp. Gen. 646. B-193867.2, Jan. 12, 1990 (nondecision letter). Similarly, GAO concluded that the Nuclear Regulatory Commission could reschedule its commissioners' pay days that fall on weekends or holidays to the preceding workday, provided that payments made prior to the end of a pay period did not include salary applicable to days remaining in the pay period. B-237963, June 28, 1990.

Tuition payments may be paid in advance. The Government Employees Training Act, 5 U.S.C. § 4109, provides general authority for advance tuition payments for civilian employees. Also, 10 U.S.C. § 2396(a)(3) authorizes advance tuition payments for military personnel. Prior to the enactment of these provisions, the Comptroller General held that certain tuition payments could be made in advance. For example, legislation authorizing the Coast Guard to provide training for its personnel at private or state colleges and universities and to pay certain expenses, including tuition, was viewed as authorization by "other law" within the meaning of 31 U.S.C. § 3324. Tuition could therefore be paid at the time of enrollment if required by the educational institution. 41 Comp. Gen. 626 (1962). *See also* B-70395, Oct. 30, 1947 (tuition payments by Public Health Service in connection with research fellowships); B-56585, May 1, 1946 (tuition payments by the former Veterans Administration in connection with schooling of veterans).

Exceptions to the advance payment prohibition may appear in appropriation acts as well as other legislation. The extent of the authority conferred and its duration will of course be determined in accordance with rules applicable to construing appropriations language. Some may be limited by duration and some may be limited to a particular agency. Also, the *bona fide* needs rule applies. In one case, a fiscal year 1955 appropriation for an Indian education program included authority for the Bureau of Indian Affairs to make certain payments in advance. The Comptroller General held that the funds could be obligated only for the

[33] Under the Congressional Budget Act of 1974, the authority is effective only to the extent provided for in advance in appropriation acts. *See* Pub. L. No. 101-509, § 301.

bona fide needs of the period for which appropriated. Therefore, the advance payment authority was limited to the portion of the program to be furnished during fiscal year 1955 and could not operate to extend the period of availability of the appropriation, that is, could not be used to pay for portions of the program extending into fiscal year 1956. 34 Comp. Gen. 432 (1955).[34] This principle would be equally applicable to advance payment authority contained in permanent legislation.

If a given situation does not fall within any existing exception, the statutory prohibition will apply. *E.g.*, 65 Comp. Gen. 806 (1986) (advance payment for published advertisement); 64 Comp. Gen. 710 (1985) (advance payments under contract for office equipment maintenance found to violate statute notwithstanding Federal Supply Schedule contract language to the contrary).

The statutory prohibition on the advance payment of public funds, 31 U.S.C. § 3324, does not apply to grants. Since assistance awards are made to assist authorized recipients and are not primarily for the purpose of obtaining goods or services for the government, the policy behind the advance payment prohibition has less force in the case of assistance awards than in the case of procurement contracts. Accordingly, it has been held that 31 U.S.C. § 3324 does not preclude advance funding in authorized grant relationships. Unless restricted by the program legislation of the applicable appropriation, the authority to make grants is sufficient to satisfy the requirements of 31 U.S.C. § 3324. 60 Comp. Gen. 208 (1981); 59 Comp. Gen. 424 (1980); 41 Comp. Gen. 394 (1961). As stated in 60 Comp. Gen. 209, "[t]he policy of payment upon receipt of goods or services is simply inconsistent with assistance relationships where the government does not receive anything in the usual sense." These concepts are further explored in Chapter 10.[35]

In 70 Comp. Gen. 701 (1991), the Comptroller General held that payments by the Bureau of Indian Affairs for McDonald's gift certificates and movie

[34] This case is cited for the limited purpose of illustrating that advance payment authority does not negate application of the *bona fide* needs rule. It does not illustrate the general application of the *bona fide* needs rule to training obligations. On the contrary, as noted earlier in this chapter, most training tends to be nonseverable.

[35] Although grantees are not subject to the prohibition against advance payments, under the Cash Management Improvement Act of 1990, they may not draw money out of the treasury in advance of need. Pub. L. No. 101-453, 104 Stat. 1058, (Oct. 24, 1990).

tickets, which would be redeemed at a later date for their full value, would not violate 31 U.S.C. § 3324, provided that adequate administrative safeguards for the control of the certificates and tickets were maintained, the purchase of the certificates was in the government's interest, and the certificates and tickets were readily redeemable for cash.

2. Government Procurement Contracts

a. Background

First, it is important to define a few terms. We take our definitions from the Federal Acquisition Regulation (FAR), 48 C.F.R. § 32.102. In the context of government contracting, "advance payments" are payments to a prime contractor "before, in anticipation of, and for the purpose of complete performance under one or more contracts." Advance payments are not measured by performance. "Progress payments" are payments made to the contractor as work progresses on the contract. They may be based on costs incurred by the contractor or a percentage or stage of completion. "Partial payments" are payments "for accepted supplies and services that are only a part of the contract requirements." Advance payments and progress payments based on costs incurred are regarded as forms of "contract financing." Partial payments and progress payments based on a percentage or stage of completion are viewed simply as payment methods.

The extent to which various forms of contract financing are permissible under the advance payment statute was the subject of many early decisions. In one early case, the advance payment statute was applied to a question regarding the legality of government partial (progress) payments for materials that had not been delivered. The Comptroller General held that the statute does not necessarily require withholding of payment under a contract until it has been entirely completed and all deliverables have been provided to the government. The statute "was not intended to prevent a partial payment in any case in which the amount of such payment had been actually earned by the contractor and the United States had received an equivalent therefor." 1 Comp. Gen. 143, 145 (1921). The partial payments proposed in that case were not in excess of the amount actually expended by the contractor in performance of the contract, and because the contract provided that title to all property on which payment was made vested in the government, the government would receive the corresponding benefit. Partial payments in advance of complete delivery were therefore permissible.

In 20 Comp. Gen. 917 (1941), the Comptroller General approved a proposed contract amendment to provide for partial payment of the contract price prior to delivery to the government on the condition that title to the materials would pass to the government at the time of payment.

From these and similar cases, a rule evolved, applied both by the accounting officers and by the Attorney General, that partial payments for equipment or land made in advance of their delivery into the actual possession of the United States would not violate the advance payment statute if title therein had vested in the government at the time of payment, or if the equipment or land was impressed with a valid lien in favor of the United States in an amount at least equal to the payment. 28 Comp. Gen. 468 (1949); 20 Comp. Gen. 917 (1941).[36]

Applying this rule, GAO has approved the payment of "earnest money" under a contract for the sale of real estate to the government. The arrangement was found sufficient to protect the government's interests because the contract (a) vested equitable title in the government prior to the vesting of legal title, which remained in the seller only to secure payment of the purchase price, and (b) obligated the seller to deliver title insurance commitment. 34 Comp. Gen. 659 (1955).

b. Contract Financing

"Contract financing payment" is defined by the Federal Acquisition Regulation (FAR) as an authorized government disbursement of moneys to a contractor prior to acceptance of supplies or services by the government. Such payments include: advance payments; performance-based payments; commercial advance and interim payments; certain cost-based progress payments; certain percentage- or stage-of-completion-based progress payments; and interim payments under certain cost reimbursement contracts. 48 C.F.R. § 32.001. "Advance payments" are payments made to a prime contractor before, in anticipation of, and for the purpose of complete performance under one or more contracts. Such payments are not measured by performance. 48 C.F.R. § 32.102(a). "Progress payments based on costs" are made on the basis of costs incurred by the contractor as work progresses under the contract. 48 C.F.R. § 32.102(b). Progress payments based on percentage or stage of completion are to be made under agency procedures that ensure that payments are commensurate with the work

[36] Some other cases in this evolution are: 17 Comp. Dec. 894 (1911); 17 Comp. Dec. 231 (1910); 29 Op. Att'y Gen. 46 (1911); 20 Op. Att'y Gen. 746 (1894); 18 Op. Att'y Gen. 105 (1885).

accomplished that meets the quality standards established under the contract. 48 C.F.R. § 32.102(e).

The major laws governing acquisition by most agencies of the executive branch of government have for over a half century included provisions relating to agencies making advance and progress payments under contracts for supplies or services. *See* 10 U.S.C. § 2307 (Department of Defense) and 41 U.S.C. § 255 (most civilian agencies). Both provisions permit agencies to make advance, partial, progress, or other payments under contracts for property or services that do not exceed the unpaid contract price. Within their discretion, the agencies may include in bid solicitations a provision limiting advance or progress payments to small business concerns. 10 U.S.C. § 2307(a)(c); 41 U.S.C. § 255(a)(c). The Comptroller General views the authority conferred by both these provisions to apply to both advertised and negotiated procurements. B-158487, Apr. 4, 1966.

Both provisions provide that whenever practicable, payments are to be made based on (1) performance, using quantifiable methods such as delivery of acceptable items, work measurement, or statistical process controls; (2) accomplishment of events defined in a program management plan; or (3) other quantifiable measures of results. 10 U.S.C. § 2307(b); 41 U.S.C. § 255(b). Both provisions establish conditions for progress payments for work in process and limit such payments to 80 percent of the contract price for contracts over $25,000. 10 U.S.C. § 2307(e); 41 U.S.C. § 255(e).

Both provisions provide that advance payments may be made only upon adequate security and a determination by the agency head that such would be in the public interest. Such security interest may be in the form of a lien in favor of the government on the property contracted for, on the balance in an account in which such payments are deposited, and such of the property acquired for performance of the contract as agreed to by the parties. The lien is to be paramount to all other liens and effective immediately upon the first advance of funds without filing, notice, or any other action by the government. 10 U.S.C. § 2307(d); 41 U.S.C. § 255(d). Advance payments for commercial items may not exceed 15 percent of the contract price in advance of any performance of work under the contract. 10 U.S.C. § 2307(f)(2); 41 U.S.C. § 255(f)(2). Section 2307(h) provides that if a contract calls for advance, partial, progress, or other payments and provides for title to property to vest in the United States, the title vests in accordance with the terms of the contract, regardless of any security

interest in the property that is asserted before or after entering into the contract.

Section 2307(g) of title 10 of the United States Code contains special provisions relating to Navy contracts, for example, that progress payments under contracts for repair, maintenance, or overhaul of a naval vessel may not be less than 95 percent for small businesses and 90 percent for any other business.

Generally speaking, the government's preference is that the contractor be able to perform using private financing, that is, the contractor's own resources or financing obtained in the private market. 48 C.F.R. § 32.106. The advance payment authority of 10 U.S.C. § 2307 and 41 U.S.C. § 255 is a financing tool to be used sparingly. It is considered the least preferred method of contract financing. 48 C.F.R. §§ 32.106 and 32.402(b); 57 Comp. Gen. 89, 94 (1977). However, the need for government assistance in various situations has long been recognized. In this context, government contracting, while primarily intended to serve the government's needs, is also designed to foster a variety of social and economic objectives.

The FAR prescribes policies and procedures for agencies to apply in using contract financing. 48 C.F.R. pt. 32. For example, subparts 32.1 and 32.2 provide guidance on the use of such authority when purchasing noncommercial and commercial items, respectively. Subpart 32.4 provides guidance on the use of advance payment authority when contracting for noncommercial items. Subpart 32.5 provides guidance on the use of progress payments based on cost, and subpart 32.10 provides guidance on the use of performance-based payments for noncommercial items. Various provisions of the FAR elaborate further on the statutory requirements with respect to adequate security for advance payments. *See*, *e.g.*, 48 C.F.R. §§ 32.202-4, 32.409-3. Application for advance payments under contracts to acquire noncommercial items may be made before or after the award of the contract under 48 C.F.R. § 32.408.[37]

Security requirements may vary to fit the circumstances of the particular case. 48 C.F.R. § 32.409-3(d). In B-214446, Oct. 29, 1984, GAO considered a proposal to certify payment before the services were rendered. The check

[37] Short of following these procedures, a bid conditioned on receipt of advance payments at variance with the terms of the solicitation may be rejected as nonresponsive. 57 Comp. Gen. 89 (1977); B-205088, Oct. 28, 1981; B-197471.2, Aug. 14, 1981.

would be held in escrow under the government's control until contract obligations were met, at which time it would be released to the contractor. This arrangement was deemed adequate for purposes of 41 U.S.C. § 255. In an earlier case, GAO declined approval of a "purchase order draft" procedure, which called for the government to send a blank check to the supplier upon placing an order. The supplier was to fill in the check for the actual amount due, not to exceed a sum specified on the check, thereby effecting immediate payment and eliminating the need for the supplier to bill the government. GAO concluded that an agency head could not reasonably find that this plan would provide adequate security for the government. B-158873, Apr. 27, 1966. In B-288013, Dec. 11, 2001, a case involving whether the Department of Defense could make payment of membership fees to a private fitness center at the beginning of each option year, GAO found that permitting membership transfers did not provide adequate security to the government to justify an advance payment.

Advance payments are also authorized under Public Law 85-804,[38] 50 U.S.C. §§ 1431–1435. This law permits agencies designated by the President to enter into contracts, or to modify or amend existing contracts, and to make advance payments on those contracts, "without regard to other provisions of law relating to the making, performance, amendment, or modification of contracts, whenever [the President] deems that such action would facilitate the national defense." 50 U.S.C. § 1431. Agencies authorized to utilize Public Law 85-804 are listed in Executive Order No. 10789, Nov. 14, 1958, as amended (reprinted as note following 50 U.S.C. § 1431). The FAR subpart on advance payments includes provisions addressing Public Law 85-804, which applies only during a declared national emergency. 50 U.S.C. § 1435.[39]

Progress payments, where authorized, are made periodically based on costs incurred, with the total not to exceed 80 percent of the total contract price. 48 C.F.R. §§ 32.5011 and 52.232-16 (required contract clause for fixed-price

[38] Pub. L. No. 85-804, 72 Stat. 972 (Aug. 28, 1958).

[39] The National Emergencies Act, enacted in 1976, provided that powers and authorities resulting from the existence of any national emergency still in effect on September 14, 1976, were to terminate 2 years from that date. 50 U.S.C. § 1601. Specifically, the national emergency declared by President Truman in 1950 for the Korean conflict had never been revoked. However, 50 U.S.C. § 1651 makes the termination inapplicable with respect to certain provisions of law, one of which is Public Law 85-804. Thus, for purposes of Public Law 85-804, the Korean War has never ended. This is discussed in more detail in B-193687, Aug. 22, 1979.

contracts). In an incrementally funded fixed-price contract, GAO has construed "total contract price" as the price for complete performance rather than the amount already allotted to the contract, provided that payment may not exceed the total amount allotted. 59 Comp. Gen. 526 (1980). *See also* 48 C.F.R. § 32.5013.

A key condition where cost-based progress payments are authorized is the vesting in the government of title to work in process and certain other property allocable to the contract. 48 C.F.R. §§ 32.503-14 and 52.232-16. These title provisions are an outgrowth of the case law noted earlier in this section.

The nature of the government's interest under this title-vesting provision has produced disagreement among the courts. One view is that title means full, absolute title, which cannot be defeated by subsequent liens. *In re Reynolds Manufacturing Co.*, 68 B.R. 219 (Bankr. W.D. Penn. 1986); *In re Denalco Corp.*, 51 B.R. 77 (Bankr. N.D. Ill. 1985); *In re Economy Cab and Tool Co.*, 47 B.R. 708 (Bankr. D. Minn. 1985); *In re American Pouch Foods, Inc.*, 30 B.R. 1015 (Bankr. N.D. Ill. 1983), *aff'd*, 769 F.2d 1190 (7th Cir.), *cert. denied*, 475 U.S. 1082 (1985); *McDonnell Douglas Corp. v. Director of Revenue*, 945 S.W.2d 437 (Mo. 1997). *See also In re Wincom Corp.*, 76 B.R. 1 (Bankr. D. Mass. 1987), reaching the same result. Another view is that the title-vesting provision gives the government a security interest in the form of a lien relative to progress payments identified with specific property, paramount to the liens of general creditors. *United States v. Dominicci*, 899 F. Supp. 42 (D.P.R. 1995); *United States v. Hartec Enterprises, Inc.*, 967 F.2d 130 (5th Cir. 1992); *Fairchild Industries, Inc. v. United States*, 71 F.3d 868 (Fed. Cir. 1995); *Marine Midland Bank v. United States*, 687 F.2d 395 (Ct. Cl. 1982), *cert. denied*, 460 U.S. 1037 (1983); *Welco Industries, Inc. v. United States*, 8 Cl. Ct. 303 (1985), *aff'd mem.*, 790 F.2d 90 (Fed. Cir. 1986).[40] The *American Pouch* and *Marine Midland* decisions, while reaching different conclusions, contain detailed discussions of the evolution of contract financing in relation to the advance payment statute.

[40] Under the lien theory, however, it has also been held that the government's interest under the title-vesting provision will not be paramount to perfected security interests of other creditors where the government's progress payments have not been used to put value in the specific property involved. *First National Bank of Geneva v. United States*, 13 Cl. Ct. 385 (1987).

c. Payment

Under a strict interpretation of 31 U.S.C. § 3324 standing alone, payment could not be made until property being acquired was actually received and accepted by the government. Thus, in one early case, a supply contract provided for payment "for articles delivered and accepted" and for the contractor to retain responsibility for the supplies or materials until they were actually in the possession of a government representative at their destination. The Comptroller General held that payments on the basis of vouchers or invoices supported by evidence of shipment only, without evidence of arrival of the supplies at the destination and without assurance of receipt or acceptance by the government, would be unauthorized. 20 Comp. Gen. 230 (1940).

As with the forms of contract financing discussed above, the enactment of 10 U.S.C. § 2307 and 41 U.S.C. § 255 permitted more latitude in payment procedures. In view of this statutory authority, the Comptroller General, in B-158487, Apr. 4, 1966, approved an advance payment procedure under which the General Services Administration (GSA) would make payments on direct delivery vouchers prior to the receipt of "receiving reports" from the consignees. The proposal was designed to effect savings to the government by enabling GSA to take advantage of prompt payment discounts.[41] GAO's approval was conditioned on compliance with the conditions specified in 41 U.S.C. § 255 that advance payment be in the public interest and that adequate security be provided.

GAO has since approved similar accelerated payment or "fast pay" procedures for other agencies in B-155253, Mar. 20, 1968 (Defense Department) and B-155253, Aug. 20, 1969 (Federal Aviation Administration), and reaffirmed them for GSA in 60 Comp. Gen. 602 (1981). *See also* B-279620, Mar. 31, 1998, for an extensive discussion of the background of, and adequate controls required for, fast pay.

The Federal Acquisition Regulation provides guidance in using fast payment procedures in 48 C.F.R. subpt. 13.4. An agency may pay for supplies based on the contractor's submission of an invoice under, among others, the following conditions:

[41] For the method of determining the correct date of payment for prompt payment discount purposes, see *Foster Co. v. United States*, 128 Ct. Cl. 291 (1954); 61 Comp. Gen. 166 (1981); B-214446, Oct. 29, 1984; B-107826, July 29, 1954.

- The individual order does not exceed $25,000. Agencies have discretionary authority to set higher limits for specified items or activities.

- Geographical separation and lack of adequate communications facilities between receiving and disbursing activities make it impractical to make timely payment based on evidence of acceptance.

- Title vests in the government upon delivery to a post office or common carrier or, if shipment is by means other than Postal Service or common carrier, upon receipt by the government.

- The contractor agrees to repair, replace, or otherwise correct any items not received at destination, damaged in transit, or not conforming to purchase requirements.

The invoice is the contractor's representation that the goods have been delivered to a post office, common carrier, or point of first receipt by the government.

Accelerated payment procedures should have adequate internal controls. GAO's recommended controls are outlined in 60 Comp. Gen. 602 (1981) and B-205868, June 14, 1982. Fast pay procedures should be subject to monetary ceilings (now required by the FAR), limited to contractors which have an ongoing relationship with the agency, and reviewed periodically to ensure that benefits outweigh costs. The agency must keep records adequate to determine that the agency is getting what it pays for. The system should permit the timely discovery of discrepancies and require prompt follow-up action. GAO has also recommended that an agency test the procedure before agencywide implementation. B-205868, *supra* at 3.

It has also been held that the use of imprest or petty cash funds to purchase supplies under C.O.D. [cash on delivery] procedures does not violate 31 U.S.C. § 3324, even where payment is made prior to examination of the shipment. 32 Comp. Gen. 563 (1953).[42]

[42] The decision refers to something called "Joint Regulations for Small Purchases Utilizing Imprest Funds." This was a regulation, issued jointly by GAO, GSA, and the Treasury Department, and published at 31 Comp. Gen. 768 (1952). It was rescinded in 1959.

Another fast pay issue was discussed in B-203993-O.M., July 12, 1982, in which GAO's General Counsel advised the GAO finance office that it could pay the invoice amount, without the need for further verification, if goods are shipped "f.o.b. [freight on board] origin" and the difference between the estimated price in the purchase order and the amount shown on the invoice is based solely on transportation costs. Any discrepancy regarding the transportation costs could be determined and adjusted through post-audit procedures under 31 U.S.C. § 3726. This would not apply to goods shipped "f.o.b. destination" because transportation charges are included as part of the purchase price.

As a general proposition, since fast pay procedures permit the agency to dispense with prepayment voucher audits, GAO's approval of fast pay procedures has been based on the assumption that the agency would conduct 100 percent post-payment audits. In 67 Comp. Gen. 194 (1988), GAO approved in concept a GSA proposal to combine fast pay procedures with the use of statistical sampling in post-audit for utility invoices. "We see no reason why these two techniques cannot be combined in appropriate circumstances if they result in economies and adequately protect the interests of the government." *Id.* at 199. However, GAO found that the specific proposal did not provide adequate controls. GSA modified its proposal, and the Comptroller General approved it in 68 Comp. Gen. 618 (1989).

3. Lease and Rental Agreements

The advance payment statute has been consistently construed as applicable to lease or rental agreements as well as purchases, and applies with respect to both real and personal property. 18 Comp. Gen. 839 (1939); 3 Comp. Gen. 542 (1924); B-188166, June 3, 1977. Thus, when the government acquires land by leasing, payments must be made "in arrears" unless the applicable appropriation act or other law provides an exemption from 31 U.S.C. § 3324. 19 Comp. Gen. 758, 760 (1940). The Federal Acquisition Regulation advance payment provisions do not apply to rent. 48 C.F.R. § 32.404(a)(1).

In 57 Comp. Gen. 89 (1977), the Comptroller General held that a leasing arrangement of telephone equipment called "tier pricing," under which the government would be obligated to pay the contractor's entire capital cost at the outset of the lease, would violate 31 U.S.C. § 3324. *See also* 58 Comp. Gen. 29 (1978).

The advance payment of annual rent on property leased from the National Park Foundation, a statutorily created charitable nonprofit organization, was found permissible in B-207215, Mar. 1, 1983, based on the "unique status" of the lessor.

Certain long-term lease/rental agreements may present more complicated problems in that they may involve not only 31 U.S.C. § 3324 but also the Antideficiency Act, 31 U.S.C. § 1341. Since appropriations are made only for the *bona fide* needs of a particular fiscal year, and since a lease purporting to bind the government for more than one fiscal year would necessarily include the needs of future years, such a lease would be contrary to the Antideficiency Act prohibition against contracting for any purpose in advance of appropriations made for such purpose. Thus, a lease agreement for the rental of nitrogen gas cylinders for a 25-year period, the full rental price to be paid in the first year, would violate both statutes. 37 Comp. Gen. 60 (1957). A contractual arrangement on an annual basis with an option in the government to renew from year to year was seen as the only way to accomplish the desired objective. *Id.* at 62. *See also* 19 Comp. Gen. 758 (1940).

4. Publications

Advance payment is authorized for "charges for a publication printed or recorded in any way for the auditory or visual use of the agency." 31 U.S.C. § 3324(d)(2).

The original exemption for publications was enacted in 1930 (46 Stat. 580 (June 12, 1930)) and amended in 1961 (Pub. L. No. 87-91, 75 Stat. 211 (July 20, 1961)). It authorized advance payments for "subscriptions or other charges for newspapers, magazines, periodicals, and other publications for official use." Prior to 1974, a seemingly endless stream of cases arose over the meaning of the terms "publications" or "other publications" as used

either in the general exemption or in specific appropriation acts.[43] Based on judicial precedent, GAO construed the terms to mean publications in the customary and commonly understood sense of the word, that is, books, pamphlets, newspapers, periodicals, or prints. B-125979, June 14, 1957. The exemption was also held to include other types of "visual" material such as microfilm products, (41 Comp. Gen. 211 (1961)); 35-millimeter slides (48 Comp. Gen. 784 (1969)); CD-Rom technical databases, online databases that include technical articles updated daily, and a newsletter (B-256692, June 22, 1995). However, the term "publications" was held not to include items made to be heard rather than read, such as phonograph records (21 Comp. Gen. 524 (1941); B-125979, June 14, 1957) or tape-recorded material (46 Comp. Gen. 394 (1966); B-137516, Oct. 28, 1958). In 35 Comp. Gen. 404 (1956), the use of advance payments for the procurement of books through "book club" facilities was held permissible.[44]

In 1974, Congress resolved the problems over the interpretation of "other publications" by enacting legislation to codify some of the GAO decisions and modify others, by defining "other publications" as including "any publication printed, microfilmed, photocopied, or magnetically or otherwise recorded for auditory or visual usage" (Pub. L. No. 93-534, 88 Stat. 1731 (Dec. 22, 1974)). This was condensed into the present version of 31 U.S.C. § 3324(d)(2) when Title 31 was recodified in 1982.

A 1978 decision considered the question of whether a microfilm library could be acquired under a lease/rental arrangement or whether the advance payments were authorized only where the government actually purchased the library. The Comptroller General concluded that in the

[43] The 1930 version of the exemption authorized advance payment only for "newspapers, magazines, and other periodicals," although a few agencies had broader authority under agency-specific legislation. For agencies subject to the quoted language, the sole issue in several decisions was whether a given publication could also be regarded as a "periodical" and thus within the statute. *E.g.*, 37 Comp. Gen. 720 (1958); 17 Comp. Gen. 455 (1937); A-90102, Sept. 3, 1938. The 1961 amendment expanded the authority to include "other publications," rendering these decisions obsolete. In addition, the 1974 legislation discussed in the text further expanded the definition of "publication." Thus, most pre-1974 decisions in this area are wholly or partly obsolete; their continuing validity must be assessed in light of the present statutory language.

[44] This decision originally applied only to the former Veterans Administration, which had specific authority. It did not apply to agencies subject to the then-existing version of the general exemption since the books were not "periodicals." This part of the decision should now be disregarded (*see* prior footnote), and the holding in 35 Comp. Gen. 404 would now apply to any agency which can justify the need.

absence of statutory language or evidence of legislative intent to the contrary, there is no meaningful difference between the purchase and rental of publications needed by the government, and that the rental or leasing of a microfilm library for official government use fell within the purview of the publications exemption. 57 Comp. Gen. 583 (1978). However, advance payments for items of equipment necessary for use in conjunction with a microfilm library are still prohibited. B-188166, June 3, 1977. (The cited decision, although not clear from the text itself, dealt with reader/printers.)

More recent decisions have construed the publications exemption found in 31 U.S.C. § 3324(d)(2) as permitting advance payment for coupons to be used for the purchase of articles from medical journals and redeemable for cash if unused (67 Comp. Gen. 491 (1988)); verification reports of physicians' board certifications (B-231673, Aug. 8, 1988); and hospital evaluation reports based on data submitted by participating government hospitals and including, as part of the subscription price, a laboratory kit for use in obtaining the data required for the reports, the kit being regarded as "a part of the publication process" (B-210719, Dec. 23, 1983).

In B-256692, June 22, 1995, the Comptroller General held that the Centers for Disease Control and Prevention (CDC) could not, under 31 U.S.C. § 3324(d)(2), make an advance payment for telephonic support services offered as part of a technical support package for computer software products. The telephonic support did not constitute a publication under section 3324(d)(2), and because it had significant value to the CDC independent of the package, it could not be classified as so necessary to the other publications in the package that advance payment authority would be available.

The Federal Acquisition Regulation advance payment provisions do not apply to subscriptions to publications. 48 C.F.R. § 32.404(a)(6).

5. Other Governmental Entities

The Comptroller General has not applied the advance payment prohibition to payments to other federal agencies. As noted previously, the primary purpose of the prohibition is to preclude the possibility of loss in the event a contractor, after receipt of payment, should fail to perform and fail or refuse to refund the money to the United States. The danger of such a loss is minimized when the contractor is another government agency. Thus, 31 U.S.C. § 3324 does not prohibit advance payment of post office box

rentals. 25 Comp. Gen. 834 (1946). Also, the Economy Act, 31 U.S.C. § 1535, expressly authorizes advance payments for transactions within its scope.

GAO has applied the same rationale to exempt state and local governments from the advance payment prohibition. *E.g.*, 57 Comp. Gen. 399 (1978) (no objection to advance payment of rent under lease of land from state of Idaho). This exception, however, applies only where the state is furnishing noncommercial services reasonably available only from the state. 39 Comp. Gen. 285 (1959); B-250935, Oct. 12, 1993 (sewer service charge); B-118846, Mar. 29, 1954 (expenses of state water commissioner administering Indian irrigation project pursuant to court order); B-109485, July 22, 1952 (repair, operation, and maintenance of roads in conjunction with permanent transfer of federal roads to county); B-65821, May 29, 1947, and B-34946, June 9, 1943 (state court fees and other items of expense required to litigate in state courts in compliance with the requirements of state law); B-36099, Aug. 14, 1943 (lease of state lands); B-35670, July 19, 1943 (state forest fire prevention and suppression services).

Conversely, where a state provides the federal government with services that are freely and readily available in the commercial market, the statutory advance payment restrictions applicable to private contractors govern. 58 Comp. Gen. 29 (1978) (telephone services).

In B-207215, Mar. 1, 1983, GAO advised the National Park Service that it could make advance payments of annual rent on property leased from the National Park Foundation. The National Park Foundation is a charitable nonprofit organization created by statute to accept and administer gifts to the National Park Service, and its board of directors includes the Secretary of the Interior and the Director of the Park Service. GAO concluded that the Foundation's "unique status virtually assures that there is no threat of loss to the Government." Even though technically the Foundation is neither a state nor a federal agency, it is, in effect, tantamount to one for advance payment purposes.

The exception recognized in the case of state and local governments has not been extended to public utilities. 42 Comp. Gen. 659 (1963) (telephone services). *See also* 27 Comp. Dec. 885 (1921). Thus, a government agency cannot use a utility "budget plan" which would provide for level monthly payments in a predetermined amount throughout the year. B-237127, Dec. 12, 1989 (nondecision letter). In subscribing to a cable service, the National Park Service could only make payment after the service has been rendered. B-254295, Nov. 24, 1993. Similarly, monthly charges under a

utility service contract for cable television service to a Naval hospital may not be paid in advance. B-237789, Dec. 10, 1990. The Federal Aviation Administration (FAA) violated 31 U.S.C. § 3324 by making an advance payment to Pacific Gas and Electric Company for connecting electrical utility service to a remote FAA facility because it failed to obtain "adequate security" as required by 41 U.S.C. § 255 or to follow Federal Acquisition Regulation advance payment requirements. B-260063, June 30, 1995.

D. Disposition of Appropriation Balances[45]

1. Terminology

Annual appropriations that are unobligated at the end of the fiscal year for which they were appropriated are said to "expire" for obligational purposes.[46] In other words, they cease to be available for the purposes of incurring and recording new obligations. The same principle applies to multiple year appropriations as of the end of the last fiscal year for which they were provided. For purposes of this discussion, annual and multiple year appropriations are referred to cumulatively as "fixed appropriations." 31 U.S.C. § 1551(a)(3).

The portion of an appropriation that has not actually been spent at the end of the fiscal year (or other definite period of availability) is called the

[45] While the discussion in this section includes the time period preceding 1990, except as otherwise specified, references to 31 U.S.C. §§ 1551 through 1558 are to the procedures first established in 1990 by Pub. L. No. 101-510, 104 Stat. 1485, 1675 (Nov. 5, 1990), and include any subsequent amendments thereto.

[46] The term "lapse" was sometimes mistakenly used in this context although there was an important distinction. Generally, under prior law an appropriation "lapsed" when it ceased to be available to the agency to pay obligations that were in the first instance incurred and properly charged against the appropriation prior to its lapse. Today we refer to this as a "closed" appropriation account.

"unexpended balance."[47] It consists of two components—the obligated balance and the unobligated balance.

The obligated balance is defined as "the amount of unliquidated obligations applicable to the appropriation less amounts collectible as repayments to the appropriation." 31 U.S.C. § 551(a)(1). Restated, obligated balance means the amount of undisbursed funds remaining in an appropriation against which definite obligations have been recorded.

The unobligated balance is "the difference between the obligated balance and the total unexpended balance." *Id.* at § 1551(a)(2). It represents that portion of the unexpended balance unencumbered by obligations recorded under 31 U.S.C. § 1501.

2. Evolution of the Law

Congressional treatment of unexpended balances has changed a number of times over the years, most recently in November 1990. Some knowledge of the past is useful in understanding the pre-1991 decisions and in determining which portions of them remain applicable.

Prior to 1949, unexpended balances of annual appropriations retained their fiscal year identity for two full fiscal years following expiration, after which time the remaining undisbursed balance had to be covered into the surplus fund of the Treasury. The agency involved no longer had access to the balance for any purpose, and subsequent claims against the appropriation had to be settled by GAO. *E.g.*, B-24565, Apr. 2, 1942; B-18740, July 23, 1941. The appropriation was said to "lapse" when it was covered into the surplus fund of the Treasury. *See* 24 Comp. Gen. 942, 945 (1945); 21 Comp. Gen. 46 (1941).

The problem with this arrangement was that, in view of article I, section 9 of the United States Constitution, once the money was covered into the Treasury, another appropriation was needed to get it back out. *E.g.*, 23 Comp. Gen. 689, 694 (1944). This was true even for simple, undisputed claims. Congress tried various devices to pay claims against lapsed appropriations—reappropriation of lapsed funds, definite and indefinite

[47] Depending on the specific context in which the term is used, "unexpended balance" may refer to the entire undisbursed balance or to the unobligated balance only. 22 Comp. Gen. 59 (1942). We use it here in the broader sense.

appropriations for the payment of claims under $500, and appropriations for specific claims—but none proved entirely satisfactory.

In 1949, Congress enacted the Surplus Fund-Certified Claims Act (ch. 299, 63 Stat. 407 (July 6, 1949)), intended to permit payment of claims against lapsed appropriations without the need for specific appropriations or reappropriations. The statute provided for the transfer of unexpended balances remaining after 2 years to a Treasury account designated "Payment of Certified Claims." Funds in this account remained available until expended for the payment of claims certified by the Comptroller General to be lawfully due and chargeable to the respective balances in the account. *See* B-61937, Sept. 17, 1952. Like the pre-1949 system, this arrangement too proved unsatisfactory in that all claims payable from the certified claims account, undisputed invoices included, still had to come through GAO.

The system changed again in 1956 (Pub. L. No. 84-798, 70 Stat. 647 (July 25, 1956)), on the recommendation of the second Hoover Commission.[48] One of the significant changes made by the 1956 law was to pass the direct responsibility for making payments from lapsed appropriations from GAO to the cognizant agencies. For the first time, agencies could dispose of clearly valid claims against prior year appropriations without the need for any action by either Congress or GAO. The statutory evolution is discussed in more detail in B-179708, Nov. 20, 1973.

The 1956 law, which was to remain in effect until late 1990, prescribed different procedures for obligated and unobligated balances. The obligated balance retained its fiscal year identity for two full fiscal years following the expiration date, at which time any remaining obligated but unexpended balance was transferred to a consolidated successor account, where it was merged with the obligated balances of all other appropriation accounts of that department or agency for the same general purpose. These successor accounts were known as "M" accounts. Funds in an "M" account were available indefinitely to liquidate obligations properly incurred against any of the appropriations from which the account was derived. Upon merger in the "M" account, the obligated but unexpended balances of all annual and multiple year appropriations of the agency lost their fiscal year identity for expenditure purposes.

[48] Second Commission on Organization of the Executive Branch of the Government, created by Pub. L. No. 83-108, ch. 184, 67 Stat. 142 (July 10, 1953).

With fiscal year identity no longer a concern, there was no need to relate a payment from the "M" account to the specific balance that had been transferred from the particular year in which the obligation had occurred. Thus, as a practical matter, once an appropriation balance reached the "M" account, the potential for violations of the Antideficiency Act became highly remote. B-179708, June 24, 1975. An Antideficiency Act violation could occur only if identifiable obligations exceeded the entire "M" account balance plus the aggregate of all funds potentially restorable from withdrawn unobligated balances.

The unobligated balances of fixed-year appropriations were "withdrawn" upon expiration of the period of obligational availability and were returned to the general fund of the Treasury. A withdrawn unobligated balance retained its fiscal year identity on the books of the Treasury for two fiscal years, during which time it was called "surplus authority." At the end of the 2-year period, the balances were transferred to "merged surplus" accounts, at which point they lost their fiscal year identity.

Withdrawn unobligated balances could be restored to adjust previously recorded obligations where the amount originally recorded proved to be less than the actual obligation, or to liquidate obligations that arose but were not formally recorded prior to the appropriations expiration, provided that the obligations met one of the criteria specified in 31 U.S.C. § 1501(a) and were otherwise valid. Some cases discussing this restoration authority are 68 Comp. Gen. 600 (1989); 63 Comp. Gen. 525 (1984); B-236940, Oct. 17, 1989; B-232010, Mar. 23, 1989; B-164031(3).150, Sept. 5, 1979.

From the perspective of congressional control, one weakness of the system described above was that it permitted the accumulation of large amounts in "M" accounts. While agencies were supposed to review their "M" accounts annually and return any excess to the Treasury, this was not always done. This situation, in conjunction with the previously discussed rules on the funding of contract modifications, created the potential for large transactions with minimal congressional oversight. For example, a 1989 GAO report discussed an Air Force proposal, completely legal under existing legislation, to use over $1 billion from expired accounts to fund B-1B contract modifications. U.S. General Accounting Office, *Strategic Bombers: B-1B Programs Use of Expired Appropriations*, GAO/NSIAD-89-209 (Washington, D.C.: Oct. 5, 1989).

Congressional concern mounted during 1990, and the treatment of expired appropriations was changed once again by section 1405 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485, 1675 (Nov. 5, 1990). Section 1405 applies to both military and civilian agencies, and includes transition provisions that dealt with the then-existing merged surplus and "M" accounts. Unrestored merged surplus authority was canceled as of December 5, 1990, with no further restorations authorized after that date. The "M" accounts were phased out over a 3-year period, with any remaining "M" account balances canceled on September 30, 1993.

3. Expired Appropriation Accounts

The current account closing procedures are set forth in 31 U.S.C. §§ 1551–1558.[49] Two of the key provisions provide:

> "On September 30th of the 5th fiscal year after the period of availability for obligation of a fixed appropriation account ends, the account shall be closed and any remaining balance (whether obligated or unobligated) in the account shall be canceled and thereafter shall not be available for obligation or expenditure for any purpose."

31 U.S.C. § 1552(a).

> "After the end of the period of availability for obligation of a fixed appropriation account and before the closing of that account under section 1552(a) of this title, the account shall retain its fiscal-year identity and remain available for recording, adjusting, and liquidating obligations properly chargeable to that account."

31 U.S.C. § 1553(a).

Just as under the prior system, a 1-year or multiple year appropriation expires on the last day of its period of availability and is no longer available

[49] Guidance relating to account closing is also set forth in OMB Cir. No. A-11, *Preparation, Submission and Execution of the Budget*, §§ 20.4(c), 130.3–130.11 (July 25, 2003). *See also* 1 TFM 2-4200.

to incur and record new obligations. However, the unobligated balance no longer reverts immediately to the general fund of the Treasury.

Upon expiration of a fixed appropriation, the obligated and unobligated balances retain their fiscal year identity in an "expired account" for that appropriation for an additional five fiscal years. As a practical matter, agencies must maintain separate obligated and unobligated balances within the expired account as part of their internal financial management systems in order to insure compliance with the Antideficiency Act. Also relevant in this connection is 31 U.S.C. §1554(a), under which applicable audit requirements, limitations on obligations, and reporting requirements remain applicable to the expired account.

During the 5-year period, the expired account balance may be used to liquidate obligations properly chargeable to the account prior to its expiration.[50] The expired account balance also remains available to make legitimate obligation adjustments, that is, to record previously unrecorded obligations and to make upward adjustments in previously under recorded obligations. For example, Congress appropriated funds to provide education benefits to veterans under the so-called "GI bill," codified at 38 U.S.C. § 1662. Prior to the expiration of the appropriation, the Veterans Administration (VA) denied the benefits to certain Vietnam era veterans. The denial was appealed to the courts. The court determined that certain veterans may have been improperly denied benefits and ordered VA to entertain new applications and reconsider the eligibility of veterans to benefits. VA appealed the court order. Prior to a final resolution of the issue, the appropriation expired. GAO determined that, consistent with 31 U.S.C. § 1502(b),[51] the unobligated balance of VA's expired appropriation was available to pay benefits to veterans who filed applications prior to the expiration of the appropriation or who VA determined were improperly denied education benefits. 70 Comp. Gen. 225 (1991). *See also* B-265901, Oct. 14, 1997.

Unobligated balances in the expired account cannot be used to satisfy an obligation properly chargeable to current appropriations (50 Comp.

[50] This is similar to the treatment of the balances during the first two post-expiration fiscal years under the 1956 legislation.

[51] 31 U.S.C. § 1502(b) provides that the expirations of a fixed period appropriation does not "affect the status of lawsuits or rights of action involving the right to an amount payable from the balance" of such appropriation that are instituted prior to its expiration.

Gen. 863 (1971)), or to any other expired account.[52] The authority of 31 U.S.C. § 1553(a) is intended to permit agencies to adjust their accounts to more accurately reflect obligations and liabilities actually incurred during the period of availability. 63 Comp. Gen. 525, 528 (1984). However, arbitrary deobligation in reliance upon the authority to make subsequent adjustments is not consistent with the statutory purpose. B-179708, July 10, 1975.

During the 5-year period, the potential for an Antideficiency Act violation exists if the amount of adjustments to obligations chargeable to the expired account during a year exceeds the adjusted balance available in the expired account against which to charge such adjustments. Should this happen, the excess can be liquidated only pursuant to a supplemental or deficiency appropriation or other congressional action. 73 Comp. Gen. 338, 342 (1994); 71 Comp. Gen. 502 (1992).[53]

4. Closed Appropriation Accounts

At the end of the 5-year period, the account is closed. Any remaining unexpended balances, both obligated and unobligated, are canceled, returned to the general fund of the Treasury,[54] and are thereafter no longer available for any purpose.

Once an account has been closed:

> "[O]bligations and adjustments to obligations that would have been properly chargeable to that account, both as to purpose and in amount, before closing and that are not otherwise chargeable to any current appropriation account

[52] This authority to make obligation adjustments is analogous to the restoration authority of the law prior to 1990, with the exception that there is no longer a point at which balances merge and lose their fiscal year identity.

[53] *Compare* B-179708, June 24, 1975 (applying same principle during first two post-expiration years under prior law).

[54] We commonly talk about "returning" appropriation balances to the Treasury. In point of fact, for the most part, they never leave the Treasury to begin with. An appropriation does not represent cash actually set aside in the Treasury. Government obligations are liquidated as needed through revenues and borrowing. Thus, the reversion of funds to the Treasury is not a movement of actual cash, but a bookkeeping adjustment that in the various ways discussed in the text, affects the government's legal authority to incur obligations and make expenditures.

> of the agency may be charged to any current appropriation account of the agency available for the same purpose."

31 U.S.C. § 1553(b)(1).

This is a major exception to the rule previously discussed that current appropriations are not available to satisfy obligations properly chargeable to a prior year. For example, the Office of Surface Mining (OSM) entered into an Economy Act agreement with the Department of Energy (DOE) for services that DOE provided through a contractor. DOE funded the service from no-year accounts. The final audit of the contractor that was performed after the OSM account obligated by the Economy Act agreement closed revealed that DOE owed the contractor an additional amount for performing services for OSM. DOE asked whether OSM was liable to reimburse it for the additional amount under the Economy Act. GAO replied that the account closing law required OSM to reimburse DOE the additional amounts using current appropriations available for the same general purpose as the closed account. B-260993, June 26, 1996. *Compare* B-257825, Mar. 15, 1995 (Treasury properly refused to restore amount of canceled "M" account to Federal Aviation Administration (FAA) appropriation in order for FAA to reimburse the Federal Highway Administration (FHWA) for services provided that were properly chargeable to the canceled account. This was true notwithstanding the fact that FHWA inadvertently neglected to bill for the services at the time they were rendered. GAO pointed out that the law provided that FAA reimbursement to FHWA was chargeable to current appropriations).

The authority to use current year appropriations to pay obligations chargeable to closed accounts is not unlimited, however. The cumulative total of old obligations payable from current appropriations may not exceed the lesser of 1 percent of the current appropriation or the remaining balance (whether obligated or unobligated) canceled when the appropriation account is closed. 31 U.S.C. § 1553(b). In view of the limitations on the amount of current appropriations that may be used to pay obligations properly charged to closed accounts, agencies must maintain records of the appropriation balances canceled beyond the end of the 5-year period and adjust these balances as subsequently presented obligations are liquidated. 73 Comp. Gen. 338, 341–342 (1994). Otherwise, there is no way for agencies to ensure that payments do not exceed the original appropriation.

Because of the need to keep accurate records, agencies may, in limited circumstances, adjust their records pertaining to closed appropriation accounts. For example, if an agency determines that the balances reflected in the records of a closed account are erroneous because of reporting and clerical errors, it may adjust its records if it discovers that a disbursement actually made before the appropriation account closed and properly chargeable to an obligation incurred during the appropriations period of availability was either not recorded at all or was charged to the wrong appropriation.

Neither of these types of adjustments constitutes charging obligations against or disbursing funds from closed appropriation accounts. They represent corrections of the accounting records. Since the appropriations, in effect, no longer exist, these adjustments affect only the agency's records. They have no effect on the availability or use of obligated or unobligated balances formerly contained in those appropriation accounts. U.S. General Accounting Office, *Canceled DOD Appropriations: $615 Million of Illegal or Otherwise Improper Adjustments*, GAO-01-697 (Washington, D.C.: July 26, 2001) at 7. However, adjustments may not be made to the records of the balances of closed accounts when the initial disbursements:

1. occurred after the appropriation being charged has already been closed,

2. occurred before the appropriation being charged was enacted, or

3. were charged to the correct appropriation in the first place and no adjustment is necessary.

Id. at 9–13.

5. Exemptions from the Account Closing Procedures

Congress may, by specific legislation, exempt an appropriation from the above rules and may otherwise fix the period of its availability for expenditure. 31 U.S.C. §§ 1551(b), 1557. An agency should consider seeking an exemption if it administers a program that by its nature requires disbursements beyond the 5-year period. One form of exemption simply preserves the availability for disbursement of obligated funds. For example, section 511 of the Foreign Operations Appropriation Act, 2001, authorized that the 2-year appropriation made for "Assistance for Eastern Europe and the Baltic States" would remain available until expended if properly

obligated before the appropriation would otherwise have expired on September 30, 2002.[55]

Section 1558(a) of Title 31 of the United States Code provides an automatic stay to the closing of an appropriation account under section 1552 when a protest is filed against the solicitation for, proposed award of, or award of a contract. The appropriation that would have funded the contract remains available for obligation for 100 days after a final ruling on the protest.

To the extent of its applicability, the statutory scheme found at 31 U.S.C. §§ 1551–1558 provides the exclusive method for the payment of obligations chargeable to expired appropriations. B-101860, Dec. 5, 1963. Thus, there is generally no authority to transfer appropriations to some form of trust fund or working fund for the purpose of preserving their availability. *Id. See also* 31 U.S.C. §1532, which prohibits the transfer of appropriations to a working fund without statutory authority. In B-288142, Sept. 6, 2001, customer agencies made advances from their fixed period appropriations to the Library of Congress for deposit to the credit of the no-year FEDLINK revolving fund. The advances were used by the Library of Congress to pay the cost of service provided to the agencies by Library of Congress contractors. Once the service was provided and the cost determined, the Library discovered that some agencies had advanced amounts in excess of the cost of the service ordered. We determined that the Library of Congress lacked authority to apply the excess amount to pay for orders for service placed after the expiration of the fixed period appropriation charged with the advance.

The rules for certain legislative branch appropriations are a bit different. The provisions of 31 U.S.C. §§ 1551–1558 do not apply to appropriations to be disbursed by the Secretary of the Senate, the Clerk of the House of Representatives, and the District of Columbia. 31 U.S.C. § 1551(c). For appropriations of the House and Senate, unobligated balances more than 2 years old cannot be used short of an act of Congress. Instead, obligations chargeable to appropriations that have been expired for more than 2 years "shall be liquidated from any appropriations for the same general purpose, which, at the time of payment, are available for disbursement." 2 U.S.C.

[55] Pub. L. 106-429, app. A, 114 Stat. 1900A-3, 1900A-11 and 1900A-24 (Nov.6, 2001). *See also* Pub. L. No.107-115, § 511, 115 Stat. 2118, 2141 (Jan. 10, 2002). This type of exemption does not create new budget authority. B-243744, Apr. 24, 1991. *See also* U.S. General Accounting Office, *Foreign Assistance: Funds Obligated Remain Unspent for Years*, GAO/NSIAD-91-123 (Washington, D.C.: Apr. 9, 1991), at 21.

§ 102a. *See* B-213771.3, Sept. 17, 1986. There is no comparable account closing procedure currently in effect for the appropriations made to the District of Columbia from its local revenues.

6. No-Year Appropriations

There is one important statutory restriction on the availability of no-year funds. Under 31 U.S.C. § 1555, a no-year account is to be closed if (a) the agency head or the President determines that the purposes for which theappropriation was made have been fulfilled and (b) no disbursement has been made against the appropriation for two consecutive fiscal years.[56] The purpose of section 1555 is to permit the closing of inactive appropriations. 39 Comp. Gen. 244 (1959); B-271607, June 3, 1996; B-182101, Oct. 16, 1974.

Any attempt by an agency to close a no-year account that does not satisfy the requirements of section 1555 is without legal effect and the funds remain available for obligation. B-256765, Jan. 19, 1995. An interesting example of a misplaced attempt to close a permanent appropriation involved the check forgery insurance fund. The check forgery insurance fund was established in 1941 to authorize the Treasury to issue and pay a replacement check to payees whose original check was lost or stolen through no fault of their own and paid on a forged endorsement. 31 U.S.C. § 3343 (1994). In the absence of the fund, the payee would have had to wait for the government to recover the amount paid on the forged endorsement in order to issue a replacement check to the payee. The fund was financed by appropriations made to the fund and recoveries of amounts paid on forged endorsements (reclamations). 31 U.S.C. §§ 3343(a) and (d) (1994). In 1992, the Treasury's Financial Management Service (FMS) closed the fund asserting that it was authorized to do so by 31 U.S.C. § 1555. FMS claimed that the fund was inadequate and obsolete and had been impliedly repealed by the Competitive Equality Banking Act.

In response to a request for an advance decision from the Department of the Navy, GAO determined that Treasury lacked the authority to close the

[56] Prior to the 1990 amendment to section 1555, no-year appropriations were closed when the head of the agency determined that the purpose of the appropriation had been carried out or when no disbursement had been made against the appropriation for two consecutive fiscal years. Thus the law in effect prior to 1990 prevented no-year appropriations from remaining available indefinitely in some circumstances even in the absence of a determination that the purpose of the appropriation had been carried out. B-159687, Oct. 25, 1979.

fund. 72 Comp. Gen. 295 (1993). First, GAO determined that nothing in the language of the Competitive Equality Banking Act or its legislative history reflected the intent by Congress to eliminate the fund. Next, GAO determined that the fund was the only appropriation available to pay forged check claims. While the volume of forged check claims may have become large and exceeded the amount recovered by reclamation that was available to cover issuance of the replacement check, the remedy was for Treasury to request increased funding, not to cancel the only appropriation that was available to make such payments. Finally, GAO determined that the purpose for which the fund was established continued to exist and that Treasury lacked sufficient justification to close the fund under 31 U.S.C. § 1555. Thus, GAO determined that Treasury should restore the balance to the fund and charge all check forgery claims to the fund. Once the fund balance was restored GAO recommended that Treasury request sufficient appropriations or a permanent indefinite appropriation to pay claims. The law was amended in 1995 to make a permanent indefinite appropriation to the fund of amounts necessary to issue and pay replacement checks to payees whose original check was paid on a forged endorsement. 31 U.S.C. § 3343(a).

As with fixed appropriations, obligations attributable to the canceled balance of a no-year account may be paid from current appropriations for the same purpose, and subject to the same 1 percent limitation. 31 U.S.C. § 1553(b).

Like a no-year appropriation, a permanent indefinite appropriation (*e.g.*, 31 U.S.C. §1304) is not subject to fiscal year limitations. However, 31 U.S.C. § 1555 does not apply to permanent indefinite appropriations since the "remaining balance" by definition is the general fund of the Treasury. *Cf.* 11 Comp. Dec. 400 (1905) (applying a prior version of the account closing law to a permanent indefinite appropriation).

7. Repayments and Deobligations

a. Repayments

To prevent the overstatement of obligated balances, the term "obligated balance" is defined in 31 U.S.C. § 1551(a)(1), for purposes of 31 U.S.C. §§ 1551–1557, as the amount of unliquidated obligations applicable to the appropriation, "less amounts collectible as repayments to the appropriation." Once an account has been closed pursuant to either

31 U.S.C. § 1552(a) or 31 U.S.C. § 1555, collections received after closing, which could have been credited to the appropriation account if received prior to closing, must be deposited in the Treasury as miscellaneous receipts. 31 U.S.C. § 1552(b).

The term "repayment" is a general term referring to moneys received by a federal agency that are authorized to be credited to the receiving agency's appropriation and are not required to be deposited in the Treasury as miscellaneous receipts. Treasury Department-General Accounting Office Joint Regulation No. 1, Sept. 22, 1950, reprinted at 30 Comp. Gen. 595 (1950). Section 2 of Joint Regulation No. 1 divides repayments into two subcategories: (1) reimbursements for services or items provided outside parties that the agency is authorized by independent statutory authority to retain and disburse for an authorized purpose[57] and (2) refunds of overpayments and erroneous payments that the agency is authorized to retain and use even in the absence of independent statutory authority.[58]

Generally, in the absence of some other authority, when the appropriation to be credited has expired, reimbursements must be credited to the expired account and not to the current account. For example, reimbursements for items or services provided another agency under the Economy Act[59] are credited to the fiscal year appropriation that earned them regardless of when the reimbursements are collected. If the appropriation that earned the reimbursement remains available for obligation at the time of collection, there is no distinction between a credit to the year earned or to the year collected. If, however, the appropriation that earned the reimbursement has expired for obligation purposes at the time of collection, then reimbursement can be credited only to the expired account. B-194711, June 23, 1980; B-179708, Dec. 1, 1975. After closing, the reimbursement would have to go to miscellaneous receipts.

The same treatment is accorded to refunds.[60] For example, recoveries of amounts paid under a fraudulent contract constitute refunds that may be

[57] These are referred to as "offsetting collections." OMB Cir. No. A-11, *Preparation, Submission and Execution of the Budget*, §§ 20.3, 20.7(c) (July 25, 2003).

[58] *See* Chapter 6, section E.

[59] 31 U.S.C. §§ 1535, 1536.

[60] OMB Cir. No. A-11, §§ 20.10, 20.12(c) provides additional guidance on the availability of, and accounting for, refunds.

deposited to the credit of the appropriations charged with the payments until the appropriation account is closed. Once the account is closed, recoveries should be deposited to the general fund of the Treasury to the credit of the appropriate receipt account. B-257905, Dec. 26, 1995; B-217913.2, Feb. 19, 1993. Certain exceptions to these rules have been recognized in the treatment of *de minimis* amounts. For example, we did not object to an agency accepting a credit of less than $100 from a vendor against the amount owed on a current year obligation to offset an overpayment made to the vendor on a prior year obligation without adjusting the accounts. 72 Comp. Gen. 63 (1992). *See also* B-217913.3, June 24, 1994.

b. Deobligations

The amount of an obligation that is recorded against appropriations in excess of the amount necessary to pay the obligation is accounted for as follows: If the agency deobligated the appropriation before the expiration of the period of availability, the deobligated amount is available to incur new obligations. If an agency deobligates the appropriation after the expiration of the period of availability, the deobligated amount is not available to incur a new obligation, but is available to cover appropriate adjustments to obligations in the expired account. B-286929, Apr. 25, 2001. *See also* 52 Comp. Gen. 179 (1972).

Deobligated no-year funds, as well as no-year funds recovered as a result of cost reductions, are available for obligation on the same basis as if they had never been obligated, subject to the restrictions of 31 U.S.C. § 1555. 40 Comp. Gen. 694, 697 (1961); B-211323, Jan. 3, 1984; B-200519, Nov. 28, 1980. One early decision concerned the disposition of liquidated damage penalties deducted from payments made to a contractor. The Comptroller General concluded that, if the contractor had not objected to the deduction within 2 years, the funds could be treated as unobligated balances available for expenditure in the same manner as other funds in the account, assuming the no-year account contained a sufficient balance for the discharge of unanticipated claims. 23 Comp. Gen. 365 (1943). There was nothing magic about the suggested 2-year period. It was simply GAO's estimate of a point beyond which the likelihood of a claim by the contractor would be sufficiently remote. *Id.* at 367.

Legislation on rare occasion has authorized an agency to reobligate amounts that are deobligated *after the appropriation has expired.* This has been referred to as deobligation-reobligation ("deob-reob") authority. We mention this only to emphasize that deob-reob authority should not be confused with the general authority conferred on agencies by the account

closing law to use amounts freed up as a result of the downward adjustment of obligations occurring prior to closing that are now generally referred to as deobligated amounts.[61]

E. Effect of Litigation on Period of Availability

If the entitlement to unobligated funds is tied up in litigation, the statutory expiration and closing procedures could come into conflict with a claimants right to pursue a claim with the courts.

Suppose, for example, Congress made an appropriation directing the Comptroller General to pay a huge bonus to the editors of this manual. Suppose further that the agency refused to make payment because it thought the idea economically unsound or just plain ridiculous. Maybe the agency would rather use the money for other purposes or simply let it revert to the Treasury. The editors of course could sue and would presumably be entitled to pursue the suit through the appellate process if necessary. But this could take years. If the obligational availability of the appropriation were to expire at the end of the fiscal year, the suit might very well have to be dismissed as moot. *See*, *e.g.*, *Township of River Vale v. Harris*, 444 F. Supp. 90, 93 (D.D.C. 1978). What, then, can be done to prevent what one court has termed (presumably with tongue in judicial cheek) "the nightmare of reversion to the federal treasury"?[62]

The answer is two-fold: the equitable power of the federal judiciary and a statute, 31 U.S.C. § 1502(b). While the cases discussed in this section predate the 1990 revision of 31 U.S.C. §§ 1551–1557 and thus use language that is in some respects obsolete, the concepts would appear applicable either directly or by analogy to the new procedures. For example, if a court could enjoin reversion to the Treasury under the old law, it can presumably equally enjoin expiration under the new law.

The cases establishing the equitable power of the courts involve two distinct situations—the normal expiration of annual appropriations at the end of the fiscal year and the expiration of budget authority in accordance with the terms of the applicable authorizing legislation. For purposes of the principles to be discussed, the distinction is not material. *See* B-115398.48,

[61] See, *e.g.*, B-218762, Sept. 18, 1985 and B-200519, Nov. 28, 1980, for discussions of examples of "deob-reob" authority.

[62] *Burton v. Thornburgh*, 541 F. Supp. 168, 174 (E.D. Pa. 1982).

Dec. 29, 1975 (nondecision letter). Thus, we have generally not specified which of the two each case involves.

The concept of applying the courts' equity powers to stave off the expiration of budget authority seems to have first arisen, at least to any significant extent, in a group of impoundment cases in the early 1970s. A number of potential recipients under various grant and entitlement programs filed suits to challenge the legality of executive branch impoundments. The device the courts commonly used was a preliminary injunction for the express purpose of preventing expiration of the funds. For example, in *National Council of Community Mental Health Centers, Inc.v. Weinberger*, 361 F. Supp. 897 (D.D.C. 1973), plaintiffs challenged the impoundment of grant funds under the Community Mental Health Centers Act. Pending the ultimate resolution on the merits, the court issued a preliminary injunction to prevent expiration of unobligated funds for the grant programs in question. *Id.* at 900.

Other cases employing similar devices to preserve the availability of funds are: *Maine v. Fri*, 486 F.2d 713 (1st Cir. 1973); *Bennettv. Butz*, 386 F. Supp. 1059 (D. Minn. 1974); *Guadamuz v. Ash*, 368 F. Supp. 1233 (D.D.C. 1973); *Community Action Programs Executive Directors Ass'n of New Jersey, Inc. v. Ash*, 365 F. Supp. 1355 (D.N.J. 1973); *Oklahoma v. Weinberger*, 360 F. Supp. 724 (W.D. Okla. 1973).

In several of the cases *(e.g.*, *National Council of Community Mental Health Centers v. Weinberger*, *Community Action Programs Executive Directors Ass'n v. Ash*, *Bennett v. Butz*), the court not only enjoined expiration of the funds but directed the agency to record an obligation under 31 U.S.C. § 1501(a). One of these cases, *Bennett v. Butz*, spawned a decision of the Comptroller General, 54 Comp. Gen. 962 (1975), in which GAO confirmed that such an order would constitute a valid obligation under 31 U.S.C. § 1501(a)(6), which says that no amount shall be recorded as an obligation unless it is supported by documentary evidence of a liability that may result from pending litigation.

The concept has also been applied in nonimpoundment cases. An example is *City of Los Angeles v. Adams*, 556 F.2d 40 (D.C. Cir. 1977). The Airport and Airway Development Act of 1970 established a formula for the apportionment of airport development grant funds. The statute also established minimum aggregate amounts for the grants, but subsequent appropriation acts imposed monetary ceilings lower than the authorized amounts. The court held that the appropriation ceilings controlled, but that

the money still had to be apportioned in accordance with the formula in the enabling legislation. To preserve the availability of the additional grant funds the plaintiff was seeking, the district court had ordered the Federal Aviation Administration to obligate the amount in question prior to the statutory deadline, and the court of appeals confirmed this as proper. *Id.* at 51.[63]

Thus, what we may view as the "first wave" of cases firmly established the proposition that a federal court can enjoin the statutory expiration of budget authority. Inevitably, the next group of cases to arise would involve the power of the courts to act after the funds have expired for obligational purposes—in other words, the power of the courts to "revive" expired budget authority.

The "leading case" in this area appears to be *National Ass'n of Regional Councils v. Costle*, 564 F.2d 583 (D.C. Cir. 1977). The plaintiff sued to force the Environmental Protection Agency to make available unobligated contract authority under the Federal Water Pollution Control Act Amendments of 1972. The court first noted that contract authority is a form of budget authority, and when made available for a definite period, terminates at the end of that period the same as direct appropriations.[64] The court then reaffirmed the proposition that courts may "order that funds be held available beyond their statutory lapse date if equity so requires." *Id.* at 588. However, the court found the rule inapplicable because the suit had not been filed prior to the relevant expiration date, and the court therefore did not acquire jurisdiction of the case prior to expiration. The essence of the *Costle* decision is the following excerpt:

> "Decisions that a court may act to prevent the expiration of budget authority which has not terminated at the time suit is filed are completely consistent with the accepted principle that the equity powers of the courts allow them to take action to preserve the status quo of a dispute and to protect their ability to decide a case properly before them. In such situations, the courts simply suspend the operation

[63] The court also noted that the district court could "obtain assistance from the Comptroller Generals expertise in matters of expenditures, reductions by appropriations, and impoundments." *City of Los Angeles*, 556 F.2d at 51.

[64] GAO had previously expressed the same view. 32 Comp. Gen. 29, 31 (1952), cited in *Costle*, 564 F.2d at 587 n.10.

> of a lapse provision and extend the term of already existing budget authority. If, however, budget authority has lapsed before suit is brought, there is no underlying congressional authorization for the court to preserve. It has vanished, and any order of the court to obligate public money conflicts with the constitutional provision vesting sole power to make such authorizations in the Congress. [Footnote omitted.] Equity empowers the courts to prevent the termination of budget authority which exists, but if it does not exist, either because it was never provided or because it has terminated, the Constitution prohibits the courts from creating it no matter how compelling the equities."

Id. at 588–89.

Costle is also significant in that it explained and clarified several prior cases that had purported to establish a similar, and in one instance even broader, principle. Specifically:

- *National Ass'n of Neighborhood Health Centers, Inc. v. Mathews*, 551 F.2d 321 (D.C. Cir. 1976). This was a suit challenging the administration of the Hill-Burton Act. The court found that certain funds had been improperly used, and directed their recovery and reallocation. The court further noted that the district court could order that the funds be held available if necessary to prevent their expiration upon recovery. However, the *Costle* court pointed out that the funds in *Mathews* had already been obligated and thus had not expired before suit was filed. *Costle*, 564 F.2d at 588.

- *Jacksonville Port Authority v. Adams*, 556 F.2d 52 (D.C. Cir. 1977). The plaintiff, in a suit to obtain additional funds under the Airport and Airway Development Program, had sought a temporary restraining order (TRO) to prevent expiration of the funds, which the district court denied. The court of appeals found denial of the TRO to be an abuse of discretion and held that, in the words of the *Costle* court, "relief was still available because it would have been available if the district court had initially done what should have been done," that is, grant the preservation remedy. *Costle*, 564 F.2d at 588. A similar case is *Wilson v. Watt*, 703 F.2d 395 (9th Cir. 1983) (reversing the district court's denial of preliminary injunction and directing preservation of funds as necessary).

- *Pennsylvania v. Weinberger*, 367 F. Supp. 1378 (D.D.C. 1973). This was an impoundment suit involving the Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (Apr. 11, 1965). Noting the then-existing authority of agencies to restore expired unobligated balances, the court concluded that it had even broader equitable power to order the restoration of expired appropriations. The *Costle* court expressly rejected the broad view that "once it is shown that Congress has authorized the restoration of lapsed authority under some circumstances then the courts may order the restoration and obligation of lapsed authority whenever they deem it appropriate." *Costle*, 564 F.2d at 589. The Pennsylvania decision was nevertheless correct, however, in that a separate statutory provision had extended the availability of the funds in question. *Costle*, 564 F.2d at 589 n.12. A case similar to *Pennsylvania* is *Louisiana v. Weinberger*, 369 F. Supp. 856 (E.D. La. 1973). The analog under current legislation would be obligation adjustments under 31 U.S.C. § 1553(a).

Thus, under *Costle*, the crucial test is not whether the court actually acted before the budget authority expired, but whether it had jurisdiction to act. As long as the suit is filed prior to the expiration date, the court acquires the necessary jurisdiction and has the equitable power to "revive" expired budget authority, even where preservation is first directed at the appellate level.

The principles set forth in *Costle* have been followed and applied in several later cases. *Connecticut v. Schweiker*, 684 F.2d 979 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1207 (1983); *United States v. Michigan*, 781 F. Supp. 492 (E.D. Mich. 1991); *Burton v. Thornburgh*, 541 F. Supp. 168 (E.D. Pa. 1982); *Grueschow v. Harris*, 492 F. Supp. 419 (D.S.D.), *aff'd*, 633 F.2d 1264 (8th Cir. 1980); *Sodus Central School District v. Kreps*, 468 F. Supp. 884 (W.D. N.Y. 1978); *Township of River Vale v. Harris*, 444 F. Supp. 90 (D.D.C. 1978). *See also Dotson v. Department of Housing& Urban Development*, 731 F.2d 313, 317 n.2 (6th Cir. 1984).

The application of the *Costle* doctrine "assumes that funds remain after the statutory lapse date." *West Virginia Ass'n of Community Health Centers, Inc. v. Heckler*, 734 F.2d 1570, 1577 (D.C. Cir. 1984). *See Heleba v. Allbee*, 628 A.2d 1237, 1240 (Vt. 1992). Consequently, where all funds have properly been disbursed (the key word here is "properly"), the *Costle* doctrine no longer applies. *Id.* To an extent, this gives agencies the potential to circumvent the *Costle* doctrine simply by spending the money, as long as the obligations and disbursements are "proper." Recognizing this,

the West Virginia Association court cautioned that "we do not mean to suggest our approval, in every case, of government decisions to expend funds over which a legal controversy exists." 734 F.2d at 1577 n.8. In addition, to prevent this potential loophole from swallowing up the rule, there is a logical corollary to the *Costle* doctrine to the effect that courts may enjoin the obligation of funds or even the disbursement of funds already obligated where disbursement would have the effect of precluding effective relief and thereby rendering the case moot. *See City of Houston v. Department of Housing & Urban Development*, 24 F.3d 1421, 1426–27 (D.C. Cir. 1994); *Population Institute v. McPherson*, 797 F.2d 1062 (D.C. Cir. 1986).[65] Similarly, the district court's injunction in *Bennett v. Butz*, quoted in 54 Comp. Gen. 962, *supra*, included a provision mandating retention of the obligated balances until further order of the court.

When Congress acts to rescind an appropriation, those amounts are no longer available to the court for award. *City of Houston*, 24 F.3d at 1426. It does not matter that the court has issued a temporary restraining order requiring the agency to set aside funds pending the resolution of the plaintiff's timely filed claim. *Rochester Pure Waters District v. EPA*, 960 F.2d 180, 183–84 (D.C. Cir. 1992). A temporary restraining order is not binding on Congress, which has "absolute control of the moneys of the United States." *Id.* at 185. *See Harrington v. Bush*, 553 F.2d 190, 194 n.7 (D.C. Cir. 1977). Thus, after Congress has rescinded an appropriation, a court may not order a permanent injunction awarding the rescinded funds to the plaintiff, as the court cannot order the obligation of funds for which there is no appropriation. *Rochester*, 960 F.2d at 184.

In addition to the judicial authority in *Costle* and the cases that follow, there is a statute that seems to point in the same direction, 31 U.S.C. § 1502(b), which provides:

> "A provision of law requiring that the balance of an appropriation or fund be returned to the general fund of the Treasury at the end of a definite period does not affect the status of lawsuits or rights of action involving the right to an amount payable from the balance."

[65] The premise underlying all of these cases is that any monetary relief ultimately granted to the plaintiff is payable only from, and to the extent of, the preserved balances. See Chapter 14 of Volume III of the second edition of *Principles of Federal Appropriations Law*, section entitled "Impoundment/Assistance Funds" for case citations.

The statute was enacted as part of a continuing resolution in 1973. Pub. L. No. 93-52, § 111, 87 Stat. 134 (July 1, 1973). Its legislative history, which is extremely scant, is found at 119 Cong. Rec. 22326 (June 29, 1973), and indicates that it was generated by certain impoundment litigation then in process.

For the most part, the courts have relied on their equitable powers and have made little use of 31 U.S.C. § 1502(b). *Connecticut v. Schweiker* cited the statute in passing in a footnote. 684 F.2d 979, at 996 n.29. The court in *Township of River Vale v. Harris*, 444 F. Supp. at 94, noted the statute but found it inapplicable because the funds in that case would have reverted to a revolving fund rather than to the general fund of the Treasury. In *Population Institute v. McPherson*, 797 F.2d at 1081, and *International Union*, *United Automobile*, *Aerospace & Agricultural Implement Workers of America v. Donovan*, 570 F. Supp. 210,220 (D.D.C. 1983), the court cited section 1502(b) essentially as additional support for the rule that courts have the equitable power to prevent the expiration of budget authority in appropriate cases.

Note that the statute uses the words "lawsuits or rights of action." One court has relied on this language to reach a result perhaps one step beyond *Costle*. In *Missouri v. Heckler*, 579 F. Supp. 1452 (W.D. Mo. 1984), the plaintiff state sued the Department of Health and Human Services (HHS) for reimbursement of expenditures under the Medicaid program. Based on *Connecticut v. Schweiker*, *supra*, the court concluded that the plaintiff was clearly entitled to be paid. The court then reviewed a provision of the Department's fiscal year 1983 continuing resolution and directed that the claims be paid in fiscal years 1984 through 1986. Alternatively, the court applied 31 U.S.C. § 1502(b) and held that the claims were payable from and to the extent of the unobligated balance of fiscal year 1981 funds. Although Missouri had not filed its lawsuit prior to the end of fiscal year 1981, it had filed its claims for reimbursement with HHS before then. The court found that "Missouri's right to reimbursement arose when it filed its claims in a timely fashion …and otherwise complied with the law and regulations then in effect. With this right to reimbursement came the concomitant right of action to enforce the claim for reimbursement." *Missouri*, 579 F. Supp. at 1456.

The *Missouri* court further noted that if section 1502(b) is to meaningfully preserve the "status" of rights of action, it should also be construed as preserving the availability of funds. *Id.* at 1456 n.4.

The Comptroller General followed a similar approach in 62 Comp. Gen. 527 (1983). A labor union had filed an unfair labor practice charge with the statutorily created Foreign Service Labor Relations Board, based on a refusal by the United States Information Agency to implement a decision of the Foreign Service Impasse Disputes Panel. The dispute concerned fiscal year 1982 performance pay awards for members of the Senior Foreign Service. The question presented to GAO was the availability of fiscal year 1982 funds to pay the awards after the end of the fiscal year. GAO first found 31 U.S.C. § 1501(a)(6) (which provides that an obligation may be recorded when supported by documentary evidence of a liability that may result from pending litigation) inapplicable, then concluded that, by virtue of 31 U.S.C. § 1502(b), the unobligated balance of fiscal year 1982 funds remained available for the awards. The unfair labor practice proceeding was a "right of action," and the statute therefore operated to preserve the availability of the funds.

Under 31 U.S.C. §§ 1551–1557, funds are "returned to the general fund of the Treasury" only when the account is closed, raising the question whether section 1502(b) continues to apply to expiration in addition to closing. If section 1502(b) is to be construed in light of its purpose, then the answer is that expired appropriations will continue to be available to liquidate obligations that arise from injunctive relief ordered by a court or agreed to by an agency in settlement of a legal dispute. *See* 70 Comp. Gen. 225, 229–30 (1991). In general, section 1553(a) "provides that an expired account retains its fiscal year identity and remains available for recording, adjusting, and liquidating obligations *properly chargeable* to that account." (Emphasis in original.) 71 Comp. Gen. 502, 505 (1992).

However, pursuant to section 1552(a), an appropriation may only be used to pay properly chargeable obligations during the period of the appropriation's availability and during the five fiscal years immediately following the period of availability. After that, the appropriation account is closed and the remaining balance is canceled. 73 Comp. Gen. 338, 342 (1994). If a valid obligation arises after the appropriation account is closed, section 1553(b) authorizes payment of the obligation from current appropriations if account records show that sufficient funds remained available to cover the obligation when the account was closed by operation of law. *Id.;* 71 Comp. Gen. at 505–506.

Similar problems exist in the case of bid protests. If a protest is filed near the end of a fiscal year and the contract cannot be awarded until the protest is resolved, the contracting agency risks expiration of the funds.

Congress addressed this situation in late 1989 by enacting a new 31 U.S.C. § 1558(a),[66] which currently reads as follows:

> "(a) …[F]unds available to an agency for obligation for a contract at the time a protest …is filed in connection with a solicitation for, proposed award of, or award of such contract shall remain available for obligation for 100 days after the date on which the final ruling is made on the protest…. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such an appeal or request, whichever is later."

This provision applies to protests filed with GAO, the contracting agency, or a court under 31 U.S.C. §§ 3552 and 3556, and to protests filed with the General Services Board of Contract Appeals, the contracting agency, or a court under 40 U.S.C. § 759(f). 31 U.S.C. § 1558(b).

[66] National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 813, 103 Stat. 1352, 1494 (Nov. 29, 1989). The provision applies governmentwide.

GAO's Mission

The Government Accountability Office, the audit, evaluation and investigative arm of Congress, exists to support Congress in meeting its constitutional responsibilities and to help improve the performance and accountability of the federal government for the American people. GAO examines the use of public funds; evaluates federal programs and policies; and provides analyses, recommendations, and other assistance to help Congress make informed oversight, policy, and funding decisions. GAO's commitment to good government is reflected in its core values of accountability, integrity, and reliability.

Obtaining Copies of GAO Reports and Testimony

The fastest and easiest way to obtain copies of GAO documents at no cost is through GAO's Web site (www.gao.gov). Each weekday, GAO posts newly released reports, testimony, and correspondence on its Web site. To have GAO e-mail you a list of newly posted products every afternoon, go to www.gao.gov and select "Subscribe to Updates."

Order by Mail or Phone

The first copy of each printed report is free. Additional copies are $2 each. A check or money order should be made out to the Superintendent of Documents. GAO also accepts VISA and Mastercard. Orders for 100 or more copies mailed to a single address are discounted 25 percent. Orders should be sent to:

U.S. Government Accountability Office
441 G Street NW, Room LM
Washington, D.C. 20548

To order by Phone: Voice: (202) 512-6000
TDD: (202) 512-2537
Fax: (202) 512-6061

To Report Fraud, Waste, and Abuse in Federal Programs

Contact:

Web site: www.gao.gov/fraudnet/fraudnet.htm
E-mail: fraudnet@gao.gov
Automated answering system: (800) 424-5454 or (202) 512-7470

Congressional Relations

Gloria Jarmon, Managing Director, JarmonG@gao.gov (202) 512-4400
U.S. Government Accountability Office, 441 G Street NW, Room 7125
Washington, D.C. 20548

Public Affairs

Paul Anderson, Managing Director, AndersonP1@gao.gov (202) 512-4800
U.S. Government Accountability Office, 441 G Street NW, Room 7149
Washington, D.C. 20548

PRINTED ON RECYCLED PAPER