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PRINCIPLES OF FEDERAL APPROPRIATIONS LAW

Second Edition

Volume I

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Foreword

We are pleased to present the second edition of Principles of Federal Appropriations Law. Our first edition, published in June 1982, was to our knowledge the first attempt at a comprehensive treatment of the body of law governing the expenditure of federal funds. Response to that effort has been both gratifying and encouraging.

Our objective in Principles is to present a basic reference work covering those areas of law in which the Comptroller General renders decisions and which are not covered in other GAO publications. Our approach has been to lay a foundation with text discussion, using relevant authorities to illustrate the principles discussed, their application, and exceptions. We have tried to be simultaneously basic and detailed—basic so that the book will be useful as a "teaching manual" for the novice or occasional user, lawyer and non-lawyer alike; detailed so that it will also be a useful reference for those whose work requires a more in-depth understanding. Principles is essentially expository in nature, and should not be regarded as an independent source of legal authority.

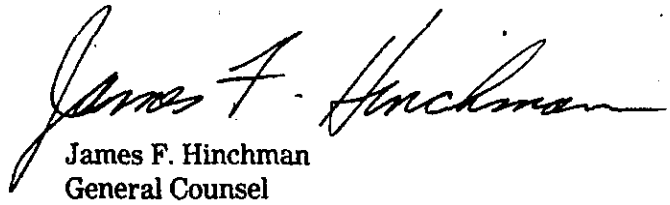
The material in this publication is, of course, subject to change by statute or through the decision-making process. In addition, it is manifestly impossible to cover every aspect of this broad field. We make no claim to have included every relevant decision, and we may admit, albeit grudgingly, that errors and omissions are probably inevitable. Principles should therefore be used as a general guide and starting point, and not as a substitute for legal research. As errors, omissions, and new material are discovered, they will be addressed in revisions or supplements, which we plan to issue periodically.

It is also important to emphasize that we have tried to focus our attention on issues and principles of governmentwide application. In various instances, there may be agency-specific legislation which provides authority or restrictions somewhat different from the general rule. While we have noted many of these 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 necessarily mean that they do not exist.

We are publishing our second edition in looseleaf format. It will consist of four volumes. Users should retain their copies of the first

edition since it will not be completely superseded until publication of Volume IV of this second edition.

We express our appreciation to the many persons in all branches of the federal government, as well as nonfederal readers, who have called or written to offer comments and suggestions. Our primary goal now, as it was in 1982, is to present a document that will be useful. To this end, we continue to welcome any comments or suggestions for improvement.



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"Nothing in this world is palled in such impenetrable obscurity as a U.S. Treasury Comptroller's understanding."

Mark Twain

The Complete Travel Books of Mark Twain

Abbreviations

APA	Administrative Procedure Act
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	General Accounting 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

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Chapter 1

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. 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). 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 which 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 which 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 governed 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 which the appropriation funds; general statutory provisions which allow or prohibit certain uses of appropriated funds; and general rules which 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.

Although this publication attempts to incorporate all 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.

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.[1] The power derives from specific provisions of the Constitution of the United States. First, Article I, section 8 empowers the 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 . . . ."

The Appropriations Clause has been described as "the most important single curb in the Constitution on Presidential power."[2] 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). 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 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. Citing both Cincinnati Soap and Reeside, the Court recently reiterated that any exercise of power by a government agency "is limited

[1]While the phrase itself is well-known, there has been relatively little literature describing and analyzing the substantive aspects of the power. One recent treatment is Stith, Congress' Power of the Purse, 97 Yale L.J. 1343 (1988).

[2]Edward S. Corwin, The Constitution and What It Means Today 134 (H.W. Chase & C.R. Ducat 14th ed. 1978).

by a valid reservation of congressional control over funds in the Treasury." Office of Personnel Management v. Richmond, ___ U.S. ___, 110 S. Ct. 2465, 2472 (1990).[3]

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. 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., 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.

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 to defer further consideration of the merits of the program. The Supreme Court recognized the validity of this application of the appropriation power in United States v. Dickerson, 310 U.S. 554 (1940).

As some authorities have pointed out, there are limitations on the congressional spending power. Courts have listed four restrictions:

[3]Numerous similar statements exist. See, e.g., Knote v. United States, 95 U.S. 149, 154 (1877); Doe v. Mathews, 420 F. Supp. 865, 870-71 (D.N.J. 1976); Hart's Case, 16 Ct. Cl. 459, 484 (1880), aff'd, Hart v. United States, 118 U.S. 62 (1886).

an exercise of the spending power must be in pursuit of the general welfare; conditions imposed on the use of federal funds must be reasonably related to the articulated goal; the intent of Congress to impose conditions must be authoritative and unambiguous; and the action in question must not be prohibited by an independent constitutional bar. South Dakota v. Dole, 483 U.S. 203, 207-08 (1987); Nevada v. Skinner, 884 F.2d 445, 447 (9th Cir. 1989), cert. denied, 110 S. Ct. 1112. However, the Skinner court conceded that discussion of these restrictions comes more from commentators than from the courts themselves. Id. at 447 n.2.

The only cases we have found in which courts invalidated funding restrictions as exceeding the congressional spending power did so on the grounds 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 a more recent 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). The district court recognized that Congress has the power to condition funding on the enactment of certain legislation by the states. E.g., North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532, 535-36 (E.D.N.C. 1977), aff'd mem., 435 U.S. 962. The difference was that the provision in question would have barred use of all funds provided for the District for 1989 and, as both the district court and the court of appeals noted, was thus clearly coercive. 705 F. Supp. at 609; 886 F.2d at 409.[4]

Unless and until the courts provide further definition, 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,"[5] and can implement

[4]As of the date of this publication, the Clarke litigation may not be over. See Clarke v. United States, 898 F.2d 162 (D.C. Cir. 1990) (period for seeking Supreme Court review tolled pending en banc reconsideration of government motions).

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

policy objectives by imposing conditions on the receipt or use of the money.

The Constitution does not provide detailed instruction 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: the annual budget and appropriations process and 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).

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.[6] 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.[7] 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."[8]

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 two centuries. Nevertheless, when viewed as a whole, they form a logical pattern. We may regard them as pieces of a puzzle which fit together to form the larger picture of how Congress exercises its control of the purse. Some of the key statutory directives in this scheme, each of which is discussed elsewhere in this publication, are:

[6]19 Annals of Cong. 347 (1809) (remarks of Senator Hillhouse).

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

[8]Id. at 57.

- 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).
- 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 need" 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.[9] 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 v. United States, 16 Ct. Cl. at 484 ("[a]uditing and accounting are but parts of a scheme for payment . . . .").

The Constitution mentions appropriations in only one other place. Article I, section 8, clause 12 provides that the 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." The two-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, November 9, 1973; 40 Op. Att'y Gen. 555 (1948); 25 Op.

[9]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.

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 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 [10]

The first general appropriation act, passed by Congress in 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

[10]For a more detailed review, see Louis Fisher, The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices, 29 Cath. U.L. Rev. 51, 53-59 (1979).

Ways and Means 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-19th century, a move was begun to restrict appropriation acts to only those expenditures which 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.[11]

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 (June 10, 1921), 42 Stat. 20.

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 authorized 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

[11]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 FY 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").

took steps to strengthen its jurisdiction over fiscal matters, including the establishment of the General Accounting Office.[12]

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. A major round of reforms came about with the Congressional Budget and Impoundment Control Act of 1974.[13] This statute made several major changes in the budget and appropriations process. For example:

- It established a detailed calendar governing the various stages of the 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.
- Prompted by the growth of "backdoor spending," 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,[14] 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)). The Gramm-Rudman procedures received a major overhaul with the Budget Enforcement Act of

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

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

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

1990.[15] The law establishes maximum deficit amounts for each fiscal year through FY 1995, subject to adjustment, and sets monetary caps on several broad spending categories. In grossly oversimplified terms, if spending bills cause a cap to be exceeded, the law provides mechanisms for making appropriate spending reductions (called "sequestrations" of budget authority). Sequestrations may occur at several points during a fiscal year.

2. GAO's Role in the Process

As the budget and appropriations process has evolved over the course of the 20th century, GAO's role with respect to it has also evolved. Title III of the Budget and Accounting Act of 1921, GAO's basic enabling statute, created two very different roles for the Comptroller General and his 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 is to settle all claims by and against the government,[16] and to settle the accounts of the United States government.[17] Another of these functions is the issuance of legal decisions, discussed separately in Section E below.

In addition, the Comptroller General was directed to investigate the receipt, disbursement, and application of public funds, reporting the results to Congress;[18] and to make investigations and reports upon the request of either House of the Congress or of any congressional committee with jurisdiction over revenue, appropriations, or expenditures.[19] He is also directed to supply such information, if requested, to the President.[20] 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

[15]Title XIII of the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508 (November 5, 1990), 104 Stat. 1388-573. The law requires the Comptroller General to report to the Congress and the President, 45 days after the end of a legislative session, on the extent to which the President and the Office of Management and Budget have complied with the statutory requirements.

[16]Budget and Accounting Act § 305, 42 Stat. at 24, 31 U.S.C. § 3702(a).

[17]31 U.S.C. § 3526(a), also derived from § 305 of the Budget and Accounting Act.

[18]Budget and Accounting Act §§ 312(a) and (c), 42 Stat. at 25-26, 31 U.S.C. §§ 712(1), 719(c).

[19]Budget and Accounting Act § 312(b), 42 Stat. at 26, 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.

[20]31 U.S.C. § 719(f), derived from Budget and Accounting Act § 312(e), 42 Stat. at 26.

agencies with reports to the cognizant congressional committees,[21] have played a large part in preparing the Congress to consider the merits of the President's annual budget submission.

The Accounting and Auditing Act of 1950[22] authorized the Comptroller General to audit the financial transactions of each executive, legislative, and judicial agency;[23] and to prescribe, in consultation with the President and the Secretary of the Treasury, accounting principles, standards, and requirements for the executive agencies suitable to their needs.[24]

The Legislative Reorganization Act of 1970 expanded the scope of GAO's audit activities to include program evaluations as well as financial audits.[25]

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.[26] It gives GAO a variety of functions relating to the obtaining, studying, and reporting to Congress of fiscal, budget, and program information.[27] Finally, it gives the Comptroller General the responsibility to

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

[22]Budget and Accounting Procedures Act of 1950, Pub. L. No. 81-784, Title I, Part II, 64 Stat. 832, 834 (1950).

[23]Id. § 117(a), 64 Stat. at 837, 31 U.S.C. § 3523(a).

[24]Id. § 112(a), 64 Stat. at 835, 31 U.S.C. § 3511(a).

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

[26]31 U.S.C. §§ 1112(c) and (d), derived from Pub. L. No. 93-344, § 801(a), 88 Stat. at 327.

[27]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 Managing the Cost of Government: Proposals for Reforming Federal Budgeting Practices, GAO/AFMD-90-1 (October 1989). A study of the budget deficit is The Budget Deficit: Outlook, Implications, and Choices, GAO/OCG-90-5 (September 1990).

monitor, and report to Congress on, all proposed impoundments of budget authority by the executive branch.[28]

The Federal Managers' Financial Integrity Act of 1982[29] is a very brief law but one with 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, 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. GAO monitors, and issues governmentwide reports on, the implementation of the Financial Integrity Act. See, for example, Financial Integrity Act: Inadequate Controls Result in Ineffective Federal Programs and Billions in Losses, GAO/AFMD-90-10 (November 1989).

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
- Budget execution and control
- Audit and review
- The "afterlife"—unexpended balances

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 the Congress. The primary participants in the process at this stage are the agencies and individual organizational units, who review current operations, program objectives, and future plans, and the

[28]Pub. L. No. 93-344, §§ 1014(b), 1015, 88 Stat. at 335, 336, 2 U.S.C. §§ 685(b), 686.

[29]Pub. L. No. 97-255, 96 Stat. 814 (1982), codified at 31 U.S.C. §§ 3512(c) and (d) (redesignated by section 301(a) of the Chief Financial Officers Act of 1990).

Office of Management and Budget (OMB),[30] 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 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. 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 President's budget request. A comprehensive listing is contained in GAO's report Budget Issues: The President's Budget Submission, GAO/AFMD-90-35 (October 1989). Specific instructions and policy guidance are contained in OMB Circular No. A-11, entitled Preparation and Submission of Budget Estimates.

2. Congressional Action

a. Summary of Congressional Process

In exercising the broad discretion granted by the Constitution, the Congress can approve funding levels contained in the President's budget, 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[31] was the General Appropriation Act, 1951, 64 Stat. 595. Since that time, appropriations have generally

[30]OMB was established by Part 1 of Reorganization Plan No. 2 of 1970 (84 Stat. 2085), which 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 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.

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

been made in a series of regular appropriation acts plus one or more supplemental appropriation acts. Most regular appropriation acts are organized on the basis of 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 Transportation and related agencies
- Department of the Treasury, Postal Service, and general government
- 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
- Rural development, Department of Agriculture, 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 §§ 632–656. Key steps in that timetable are summarized below.[32]

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

[32]References on the process are Senate Committee on the Budget, Gramm-Rudman-Hollings and the Congressional Budget Process, S. Prt. No. 99-119, 99th Cong., 1st Sess. (1985), and Library of Congress, Congressional Research Service, Manual on the Federal Budget Process, No. 87-286 GOV (March 31, 1987). Both are useful although outdated in some respects in light of the Budget Enforcement Act of 1990.

1974 Budget Act had been the first Monday after January 3. While this was changed by section 13112(a)(4) of the Omnibus Budget Reconciliation Act of 1990, the conference report on the 1990 legislation stresses the expectation that the President continue to comply with the January deadline, and that the "increased flexibility be used very rarely to meet only the most pressing exigencies." H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess. 1171 (1990).

February 15. The Congressional Budget Office submits to the House and Senate Budget Committees its annual report required by 2 U.S.C. § 602(f). The report contains the CBO's analysis of fiscal policy and budget priorities.

Within 6 weeks after President submits 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 by section 13112(a)(5) of the Omnibus Budget Reconciliation Act of 1990, 104 Stat. 1388–608. 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 outlays by 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 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.

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/or House of Representatives. For example, Rule XXI(2), Rules of the House of Representatives, prohibits appropriations for objects not previously authorized by law. A similar but more limited prohibition exists in Rule XVI, Standing Rules of the Senate. Other examples are the prohibition against including general legislation in appropriation acts[33] (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 XXVIII). The applicability of Senate and House

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

rules is exclusively within the province of the particular House and a matter on which the Comptroller General will generally not render an opinion. E.g., B-173832, August 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 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 non-complying bill to a "point of order." A point of order is a procedural objection raised by a Member alleging a departure from a rule or statute governing the conduct of business. 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 measures may be considered under special resolutions waiving points of order. 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 non-compliance.

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 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. 57 Comp. Gen. 34 (1977); 34 Comp. Gen. 278 (1954); B-173832, August 1, 1975; B-123469, April 14, 1955; B-87612, July 26, 1949.

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. §§ 1511–16. 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 which allows them to incur obligations within the scope and terms of the delegation.[34] These concepts will be discussed further in Chapter 6. Further detail on the budget execution phase may also be found in OMB Circular No. A-34, Instructions on Budget Execution.

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 (November 15, 1990), 104 Stat. 2838. The "CFO" Act also enacted a new 31 U.S.C. Chapter 9, which establishes a Chief Financial Officer in the cabinet departments and several other executive branch agencies, to work with 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 precludes the obligation or expenditure of budget authority

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

provided by Congress. GAO, Glossary of Terms Used in the Federal Budget Process, PAD-81-27, at 63 (1981).[35] 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 action—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.[36] 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.[37]

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 which 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.

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

[36]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. GAO/OGC-90-4 (B-237297.3, March 6, 1990). Deferrals for policy reasons are not authorized. Id.

[37]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. Congress may, of course, enact legislation disapproving a deferral and requiring that the deferred funds be made available for obligation.

The Impoundment Control Act requires the Comptroller General to monitor the performance of the executive branch in reporting proposed impoundments to the 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 the Congress, the Comptroller General so reports to the Congress. The Comptroller General also reports to the Congress on any special message transmitted by the executive branch which has incorrectly classified a deferral or a rescission. 2 U.S.C. § 686. 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 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 United States 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, August 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 GAO does not regard as 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. GAO/OGC-91-8 (B-241514.5, May 7, 1991); GAO/OGC-91-3 (B-241514.2, February 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. Delays resulting from the following factors may be programmatic, depending on the facts and circumstances involved: uncertainty as to the amount of budget authority that will ultimately be available for the program (B-203057, September 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, September 3, 1987); compliance with congressional committee directives (B-221412, February 12, 1986); delay in receiving a contract proposal requested from contemplated sole source awardee (B-115398, February 6, 1978); historically low loan application level (B-115398, September 28, 1976); late receipt of complete loan applications (B-195437.3, February 5, 1988); delay in awarding grants pending issuance of necessary regulations (B-171630, May 10, 1976); administrative determination of allowability and accuracy of claims for grant payments (B-115398, October 16, 1975). A programmatic delay may become a reportable deferral if the programmatic basis ceases to exist.

4. Audit and Review

a. Basic Responsibilities

Every federal department or agency has the initial and fundamental responsibility to assure 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. Assuring 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), added new 31 U.S.C. § 3515 and 3521(e)–(h), which provide for the preparation and audit of financial statements for those agencies required to establish Chief Financial Officers. In addition, GAO regularly

audits federal programs under its various authorities previously summarized.

b. GAO Recommendations

GAO's principal function is to examine the financial, management, and program activities of federal agencies, and to evaluate the efficiency, effectiveness, and economy of agency operations. GAO's reports to the Congress contain both objective findings and recommendations for improvement. Recommendations may be addressed to the Congress itself (for changes in legislation) or to agency heads (for action which the agency is authorized to take under existing law).

Under section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 720, whenever GAO issues a report which contains recommendations to the head of any federal agency, the agency must submit a written statement of the actions taken with respect to the recommendations (1) to the Senate Committee on Governmental Affairs and the House Committee on Government Operations not later than sixty days after the date of the report, and (2) to the Senate and House Appropriations Committees in connection with the agency's first request for appropriations submitted more than sixty days after the date of the report. As GAO pointed out in a letter to a private inquirer (B-207783, April 1, 1983), 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, 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 United States government, including wholly owned but not mixed-ownership government corporations, or the District of Columbia government. 31 U.S.C. § 720(a); B-114831-O.M., July 28, 1975.

Although formal recommendations within the scope of 31 U.S.C. § 720 are most commonly made in audit reports, they are occasionally made in Comptroller General decisions as well. See, e.g., 59 Comp. Gen. 1 (1979); 58 Comp. Gen. 350 (1979); 53 Comp. Gen. 547 (1974). Decisions may also include suggestions which are not intended to invoke the formal response requirements of 31 U.S.C. § 720. When section 720 is intended to apply, it will be explicitly cited.

5. The "Afterlife"—Unexpended Balances

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. 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, the 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. These officials have traditionally been called the "accounting officers" of the government.[38]

a. Accounting Officers Prior to 1894

Throughout most of the 19th century, the accounting officers 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.

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.)

[38]Decisions, especially the earlier ones, frequently refer to the "accounting officers of the government." While this language has fallen into disuse in recent decades, its purpose was to distinguish those matters within the jurisdiction of the Comptroller General and the General Accounting Office from those matters within the jurisdiction of the "law officers of the government," i.e., the Attorney General and the Department of Justice.

There are no published decisions of the First Comptroller prior to the term of William Lawrence (1880–1885). Lawrence published his decisions in a series of 6 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.[39]

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 1817–1869. 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.[40]

Thus, material available in permanent form from this period consists of Lawrence's 6 volumes, Bowler's single volume, and 4 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 (28 Stat. 162, 205), 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 which had been used before 1817.) The 6 auditors remained, with different titles, but their settlements no longer had to be automatically submitted to the Comptroller.

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

[39]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).

[40]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 of primarily historical interest.

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.[41] 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 6 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 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. These, logically, are known as "advance decisions."

Decisions are also provided to disbursing and certifying officers who request review of a settlement of their accounts, and to individual claimants who request review or reconsideration by the

[41]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.

Comptroller General of settlements made by an agency disallowing their claims in whole or in part. In addition, the Comptroller General may, in his discretion, render decisions or legal opinions to other individuals or organizations, both within and outside the government.

A decision is binding on the executive branch[42] and on the Comptroller General himself,[43] but is not binding on a private party who, if dissatisfied, retains whatever recourse to the courts he would otherwise have had. There is no legal requirement for the private party to come to GAO, under the doctrine of exhaustion of administrative remedies, before seeking judicial resolution.

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.

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, December 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."

[42]See United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 4 n.2 (1927); St. Louis, Brownsville & Mexico Ry. 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 Mfg. Co. v. Globe Indemnity Co., 66 F.2d 302, 303 (3d Cir. 1933); United States ex rel. Brookfield Construction Co. v. Stewart, 234 F. Supp. 94, 99–100 (D.D.C. 1964); Pettit v. United States, 488 F.2d 1026, 1031 (Ct. Cl. 1973); 54 Comp. Gen. 921 (1975); 45 Comp. Gen. 335, 337 (1965). An exception is decisions on bid protests under the Competition in Contracting Act, 31 U.S.C. §§ 3551–56, which by law have been designated as advisory only. See Ameron, Inc. v. Corps of Engineers, 809 F.2d 979 (3d Cir. 1986).

[43]31 U.S.C. § 3526(b).

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. E.g., 55 Comp. Gen. 652 (1976); 53 Comp. Gen. 429 (1973); 53 Comp. Gen. 71 (1973); 52 Comp. Gen. 83 (1972).

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) presents new information not considered in the earlier decisio hile the Comptroller General gives precedential weight to prior cisions,[44] a decision may be modified or overruled by a subsequent decision. In overruling its decisions, 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).

The more significant decisions or those with wide applicability are published annually in hardbound volumes entitled Decisions of the Comptroller General. Because GAO is limited by statute to one published volume each year,[45] most decisions are unpublished. They are, however, readily available to other government agencies and to the public. There is no legal distinction between a published decision and an unpublished decision. 28 Comp. Gen. 69 (1948). Major points in a decision are summarized in one or more digests, which now appear as headnotes preceding both published and unpublished decisions.[46]

[44]It is a general principle of administrative law that an agency rendering administrative decisions should follow its own decisions or give a reasoned explanation for departure. See, e.g., Doubleday Broadcasting Co. v. FCC, 655 F.2d 417, 422-23 (D.C. Cir. 1981).

[45]44 U.S.C. § 1311. This statute originated in 1882 (22 Stat. 391), shortly after First Comptroller Lawrence started publishing his decisions.

[46]While the digest is thus an integral part of a legal decision, it should be noted that language in a headnote or digest is only a paraphrase or summary, and cannot be relied upon in preference to the text of the decision itself. 56 Comp. Gen. 275 (1977).

Informal opinions expressed by GAO officers or employees are meant to be helpful but 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. Note on Citations

Published decisions of the Comptroller General—those printed in the annual Decisions of the Comptroller General volumes—are cited by volume, page number on which the decision begins, and the year. Example: 31 Comp. Gen. 350 (1952). Unpublished decisions are cited by file number and date, for example, B-193282, December 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.[47] Decisions selected for publication but for which page numbers have not yet been assigned are cited as follows: 69 Comp. Gen. ___(B-123456, April 1, 1990).

Since GAO developed its decision format in 1974, decisions, both published and unpublished, include a " Matter of" caption. Especially where the caption is the name of an individual or business entity, it is sometimes included as part of the citation. Example: Lynne Gweeney, 65 Comp. Gen. 760 (1986). We have chosen not to do so in this publication.

c. 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.

In the first category are 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. § 211(a)). See 56

[47]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 are volumes maintained by GAO primarily for internal purposes, containing the written product 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.

Comp. Gen. 587, 591 (1977); B-226599.2, November 3, 1988 (non-decision letter).

In addition, GAO has traditionally declined to render decisions in a number of areas which 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 (18 U.S.C.) since this is within the jurisdiction of the Justice Department and the courts.[48] 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.[49]

Other examples of areas where GAO has declined to render decisions are antitrust law;[50] political activities of federal employees under the Hatch Act;[51] and determinations as to what is or is not taxable under the Internal Revenue Code.[52]

Apart from preparing litigation reports if requested by the Justice Department, GAO will generally not render an opinion on an issue which is the subject of current litigation, especially if the Comptroller General finds the matter unduly speculative, except on stipulation of the parties or unless the court expresses an interest in receiving GAO's opinion.[53] Particular circumstances may dictate an

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

[49]An example here is 18 U.S.C. § 1913, the anti-lobbying statute.

[50]59 Comp. Gen. 761 (1980); 50 Comp. Gen. 648 (1971); 21 Comp. Gen. 56, 57 (1941); B-218279/B-218290, March 13, 1985; B-190983, December 21, 1979; B-194584, August 9, 1979.

[51]B-165548, January 3, 1969.

[52]B-147153, November 21, 1961; B-173783.127, February 7, 1975 (non-decision letter). See also 26 U.S.C. § 6406.

[53]58 Comp. Gen. 282, 286 (1979); B-240908, September 11, 1990; B-218900, July 9, 1986; B-217954, July 30, 1985; B-203737, July 14, 1981; B-179473, March 5, 1974; A-36314, April 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 Claims Court may issue a "call" upon GAO (or any other agency) for comments on a particular issue or for other information.

exception. E.g., 67 Comp. Gen. 553 (1988), where GAO was essentially elaborating on a prior decision on an appropriations issue which had not been addressed by the court and where the agency had informed the court that it had requested GAO's opinion. GAO's policy with respect to issues which are the subject of agency administrative proceedings is generally similar to its litigation policy. 4 C.F.R. § 22.8. See also B-231838, January 4, 1989 (declining to render an opinion on the propriety of an attorney's fee award being considered by the Equal Employment Opportunity Commission).

Another long-standing GAO policy concerns the constitutionality of acts of Congress. As an agent of the Congress, GAO has always considered it inappropriate to question the constitutionality of duly enacted statutes. In other words, GAO presumes the constitutionality of all federal laws unless or until the courts say otherwise.[54] GAO will, however, express its opinion, upon the request of a Member or committee of Congress, on the constitutionality of a bill prior to enactment. E.g., B-228805, September 28, 1987.

d. Research Aids

For anyone without ready access to the research facilities in GAO's main building in Washington, D.C., researching GAO decisions has never been particularly easy, especially in view of the large proportion of unpublished material. In recent years, some of the computerized legal research systems (e.g., Juris, Lexis, Westlaw) have started including some GAO materials. In addition, GAO's procurement decisions are published commercially, and some of the commercial "newsletter" services, especially in the areas of contracts and grants, include summaries of relevant GAO issuances. This publication, we hope, will also make the job easier.

In addition to this publication, GAO's Office of General Counsel publishes several other items dealing with areas in which the Office has developed special expertise. These publications include:

- Civilian Personnel Law Manual
  Title I – Compensation
  Title II – Leave

[54]B-215863, July 26, 1984; B-210922.1, June 27, 1983; B-114578, November 9, 1973; B-157984, November 26, 1965; B-124985, August 17, 1955; A-23385, June 28, 1928. Except for matters perceived as involving conflicts between the prerogatives of the executive and legislative branches, the Attorney General has expressed a similar policy. 39 Op. Att'y Gen. 11 (1937).

Title III – Travel
Title IV – Relocation

- Military Personnel Law Manual
- Bid Protests at GAO: A Descriptive Guide (4th ed. 1991) (no case citations but a useful summary together with full text of GAO's bid protest regulations).

GAO also furnishes a telephone research service for government agencies and members of the public at no charge. While this service does not provide callers with legal analysis, it can provide the following types of information:

- whether an issue has been considered by GAO. (This is limited to GAO's legal decisions and opinions. It does not include audit reports.)
- citations to decisions of the Comptroller General involving a particular issue.
- whether a decision of the Comptroller General has been modified, overruled, or cited in subsequent decisions.

The telephone research service may be reached on (202) 275–5028. Copies of decisions for which a file number and date are known may be obtained, free of charge, by calling (202) 275–6241.

In addition to the annual Decisions of the Comptroller General volumes, GAO's Office of General Counsel publishes other reference material, which includes:

- Monthly "advance sheet" pamphlets of decisions (full text) to be included in the next hardbound volume.
- Monthly pamphlets entitled Digests of Decisions of the Comptroller General of the United States. Prior to October 1989, these pamphlets, under a slightly different name, included digests only of unpublished decisions. Now they include digests of published decisions as well.
- Index Digest volumes covering the published decisions. These hardbound volumes are now published at 5–year intervals. The most recent, the tenth in the series, covers the period October 1, 1981 through September 30, 1986.

In addition to these current materials, there is also a hardbound index volume, published in 1931, covering the 27 Comptroller of the Treasury volumes and the first 8 volumes of GAO decisions, and

a hardbound computer-generated scope line index volume, published in 1968 in cooperation with the Department of the Air Force, covering volumes 1–46 of the Comptroller General's decisions (with a 1970 supplement).

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, published and unpublished. 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—As noted above, GAO prepares many legal opinions at the request of congressional committees or individual Members of Congress. Congressional opinions are prepared in letter rather than decision format, but if signed by the Comptroller General or his delegate, they have the same weight and effect. The citation form is identical to that for decisions, and some are now published in the annual Decisions of the Comptroller General volumes. 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 generally 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. 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-1970's, the same file numbering system was used as in decisions ("B-numbers"). Now, the designation for an audit report consists of the initials of the issuing division, the fiscal year, and the report number, although a "B-number" is also assigned. Reports are numbered sequentially within each fiscal year. Thus, the first report issued by the General Government Division for FY 1990 would be designated "GAO/GGD-90-1." Certain types of reports are further designated by a letter suffix attached to the report number (e.g., BR for briefing report, FS for fact sheet). The names of audit divisions are subject to change over time as reorganizations occur, so the initials in a particular citation may not correspond to an existing audit division at any given time.

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(h), 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.). GAO reports may be obtained by calling (202) 275–6241.

In addition to the reports themselves, GAO publishes a number of pamphlets and other documents relating to its audit function. References to any of these will be fully described in the text where they occur.

(4) Non-decision letters — These are letters, signed by some subordinate official, 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." It is distributed automatically to all federal agencies on GAO's distribution list. 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 which 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.

(6) General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies—This large looseleaf volume is the official medium through which the Comptroller General issues 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. It consists of eight titles (U.S. General Accounting Office; Accounting; Audit; Claims; Transportation; Pay, Leave, and Allowances; Fiscal Procedures; Records Management). The titles are revised and updated individually from time to time. In areas of mutual coverage, the Policy and Procedures Manual (particularly titles 4 and 7) is an important complement to Principles of Federal Appropriations Law.

(7) A Glossary of Terms Used in the Federal Budget Process, PAD-81-27 (3d ed., March 1981)—This is a booklet containing standard definitions of fiscal and budgetary terms developed by GAO in cooperation with the Treasury Department, Office of Management and Budget, and Congressional Budget Office, as required by 31 U.S.C. § 1112(c). 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 issuances of the General Accounting Office, 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, primarily the Department of Justice, although our research in these areas has not been exhaustive. 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.

Opinions 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 42 volumes. They are published at irregular intervals.

The second series consists of selected opinions by the Justice Department's Office of Legal Counsel, which prepares and issues legal opinions under delegation from the Attorney General. Commencing in 1977, volumes 1–6 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. ___, 4A Op. Off. Legal Counsel 16

(1980). In addition, we have, in consultation with that office, cited a number of OLC opinions issued subsequent to the most recent published volume, some of which may eventually be selected for publication.

A Treasury Department publication cited a number of times is the Treasury Financial Manual, Volume I (formerly known as the Treasury Fiscal Requirements Manual). This, also issued in looseleaf 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 resort 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, 97th Cong., 2d Sess. 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., Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 227 (1957); United States v. Thompson, 319 F.2d 665, 669 (2d Cir. 1963).

Part of the recodification is the repeal of the various source statutes. Thus, the "popular names" of the various pre-1982 laws found in Title 31 no longer exist. To illustrate, section 1 of Pub. L.

No. 88-558, 78 Stat. 767, provided that the act may be cited as the "Military Personnel and Civilian Employees' Claims Act of 1964." Prior to the recodification, Pub. L. No. 88-558 was found in Title 31 at §§ 240–243. The recodification redesignated it as 31 U.S.C. § 3721 (96 Stat. 973), and repealed Pub. L. No. 88-558 (Pub. L. No. 97-258, § 5(b), 96 Stat. 1068, 1080). Therefore, since Pub. L. No. 88-558, including section 1, has been repealed, there is, in a strict technical sense, no longer a "Military Personnel and Civilian Employees' Claims Act of 1964"; there is only a "31 U.S.C. § 3721." Having said this, however, we have continued to use many of the old popular names because they have become so familiar throughout the government that to stop using them would cause more confusion than it is worth. Also, they continue to be listed in the Popular Names index in the United States Code.

Chapter 2

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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 which 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, PAD-81-27 (3d ed., March 1981) [hereinafter Glossary]. Unless otherwise noted, the terminology used throughout this publication is based on the Glossary. 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 which 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 obligations which will result in immediate or future outlays of government funds. The statutory definition, effective beginning with fiscal year 1992, is:

"The term 'budget authority' means the authority provided by Federal law to incur financial obligations, as follows:

"(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)]." [1]

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.[2] Thus, funds paid out of the United States Treasury must be accounted for by charging them to an appropriation provided by or derived from an act of Congress.

The term "appropriation" may be defined as:

"An authorization by an act of Congress that permits Federal agencies to incur obligations and to make payments out of the Treasury for specified purposes."[3]

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

[2]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.

[3]Glossary at 42; Andrus v. Sierra Club, 442 U.S. 347, 359 n.18 (1979). See also 31 U.S.C. §§ 701(2) and 1101(2). The term "authorization" as used in this definition must be distinguished from an "authorization of appropriations" as described in Section C.1.

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 Association 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 usually 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.

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 Chapter 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.

b. Contract Authority

Contract authority is a form of budget authority which permits contracts or other obligations to be entered into in advance of an appropriation or in excess of amounts otherwise available in a revolving fund. Glossary at 42. It is to be distinguished from the inherent authority to enter into contracts possessed by every government agency but which is dependent upon 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 B-228732, February 18, 1988; National Association of Regional Councils v. Costle, 564 F.2d 583, 586 (D.C. Cir. 1977); OMB Circular No. A-11, § 14.1(a) (1990); OMB Circular No. A-34, § 21.1 (1985).

Contract authority may be provided in appropriation acts (e.g., B-174839, March 20, 1984) or, more commonly, in other types of legislation (e.g., B-228732, February 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 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 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; National Association of Regional Councils v. Costle, 564 F.2d 583, 587-88 (D.C. Cir. 1977). This period of availability refers to the time period during which the contracts must be entered into, as distinguished from the duration of the contracts themselves, which is governed by the terms of the legislation granting the authority.

As noted above, appropriations generally constitute budget authority. However, an appropriation to liquidate contract authority is an important exception. Since contract authority itself constitutes new budget authority, an appropriation to liquidate that authority is not counted as new budget authority. This treatment is necessary to avoid counting the amounts twice. B-171630, August 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, February 18, 1988; B-226887, September 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, April 5, 1983.

c. Borrowing Authority

"Borrowing authority" is statutory authority (in a substantive or appropriation act) that permits a federal agency to incur obligations and to liquidate those obligations out of borrowed moneys.[4] 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-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 limited to the extent or amounts provided in appropriation acts. 2 U.S.C. § 651(a). More recently, GAO has recommended that borrowing authority be provided only to those accounts which can generate enough revenue in the form of collections from nonfederal sources to repay their debt. Budget Issues: Agency Authority to Borrow Should be Granted More Selectively, GAO/AFMD-89-4 (September 1989).[5]

[4]Glossary at 42; OMB Circular No. A-11, § 14.1(a) (1990).

[5]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 AFMD-89-4 at 17, 20.

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, April 9, 1984.[6]

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 which 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 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."[7]

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.[8]

[6]These and other examples are noted in GAO's report, Budget Treatment of Monetary Credits, GAO/AFMD-85-21 (April 8, 1985).

[7]See Farm Payments: Cost and Other Information on USDA's Commodity Certificates, GAO/RCED-87-117BR (March 26, 1987).

[8]See Glossary at 46–49; OMB Circular No. A-11, § 14.1(d) (1990).

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.

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.

Second is offsetting receipts. Offsetting receipts are offsetting collections which are deposited in a receipt account.[9] For budgetary purposes, these amounts are deducted from budget authority by function or subfunction and by agency.[10]

The Balanced Budget and Emergency Deficit Control Act of 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 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

[9]This usually means a general fund receipt account (miscellaneous receipts), but also includes amounts deposited in special or trust fund accounts. An example of offsetting receipts deposited in a special receipt account is discussed in B-199216, July 21, 1980.

[10]H.R. Conf. Rep. No. 433, 99th Cong., 1st Sess. 102 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 988, 1020. This is the conference report on the Balanced Budget and Emergency Deficit Control Act of 1985.

an agency to forgo certain collections) is treated as positive budget authority.[11]

f. Loan and Loan Guarantee Authority

A loan guarantee is an agreement, authorized by statute, by which the United States pledges to pay part or all of the loan principal and interest to a lender or holder of a security in the event of default by a third-party borrower.[12] 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 which may not be recorded as obligations until the contingency occurs. See 64 Comp. Gen. 282, 289 (1985) and 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.

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).[13] 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 appropriation acts. 2 U.S.C. § 652(a).[14]

The second stage was the Federal Credit Reform Act of 1990,[15] effective starting with fiscal year 1992. Under this legislation, the

[11]This was the intent of the 1985 legislation, as reflected in the conference report (supra note 10), although it had not been expressed in the legislation itself.

[12]Glossary at 64; OMB Circular No. A-11, § 33.2(b) (1990).

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

[14]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, March 10, 1989.

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

"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 non-budgetary "financing accounts."

The 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 GAO report, Budget Issues: Budgetary Treatment of Federal Credit Programs, GAO/AFMD-89-42 (April 1989), which includes a 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 non-appropriation forms of budget authority described above (e.g., contract authority, borrowing authority, authority to forgo 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. 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[16] and the other a detailed inventory.[17]

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 such authority, the United States is obligated to make such payments to persons or governments who meet the requirements established by such law."[18]

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.[19] The following classifications, although phrased in terms of appropriations, apply equally to the broader concept of budget authority.

a. Classification Based on Duration [20]

(1) One-year appropriation: an appropriation which 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.

[16]Budget Issues: The Use of Spending Authority and Permanent Appropriations is Widespread, GAO/AFMD-87-44 (July 1987).

[17]Budget Issues: Inventory of Accounts with Spending Authority and Permanent Appropriations, 1987, GAO/AFMD-87-44A (July 1987).

[18]2 U.S.C. §§ 622(9), 651(c)(2)(C); Glossary at 57.

[19]Supplemental and deficiency appropriations: Chapter 6, Section D; lump-sum and line-item appropriations: Chapter 6, Section F; continuing resolutions: Chapter 8.

[20]Glossary at 43; OMB Circular No. A-11, § 14.1(a) (1990).

(2) Multiple-year appropriation: an appropriation which is available for obligation for a definite period of time in excess of one fiscal year.

(3) No-year appropriation: an appropriation which 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 [21]

(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 [22]

(1) Current appropriation: an appropriation made by the 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.[23] Legislation authorizing an agency to retain and use offsetting receipts tends to be permanent; if so, it is a form of permanent appropriation.

d. Classification Based on Availability for New Obligations

(1) Unexpired appropriation: an appropriation which is available for incurring and recording new obligations.

(2) Expired appropriation: an appropriation which is no longer available to incur new obligations, although it may still be available

[21]Glossary at 43; OMB Circular No. A-11, § 14.1(a)(1990).

[22]Glossary at 44.

[23]This is similar to a no-year appropriation except that a no-year appropriation will be closed if it remains inactive for two consecutive fiscal years. 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, while "no-year appropriation" is used more to describe appropriations found in appropriation acts.

for the recording and/or payment (liquidation) of obligations properly incurred before the period of availability expired.

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 Treasury).

e. Reappropriation

The term "reappropriation" means congressional action to continue the obligational availability, whether for the same or different purposes, of all or part of the unobligated portion of budget authority which has expired or would otherwise expire. Reappropriations are counted as new budget authority in the first year for which the availability is extended.[24]

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 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

[24]Glossary at 44; OMB Circular No. A-11, § 14.2(f) (1990). See also 31 U.S.C. § 1301(b) (reappropriation for different purpose is to be accounted for as a new appropriation).

appropriations . . . ." However, there are situations in which statutes other than regular appropriation acts may be construed as making appropriations.

Under the above rule, 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 (as opposed to a mere authorization), 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 which 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, April 13, 1978, concerning section 11 of the Federal Fire Prevention and Control Act of 1974, which authorizes the Secretary of the Treasury to reimburse local fire departments or districts for costs incurred in fighting fires on federal 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 which 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, January 7, 1944.[25] 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

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

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, August 7, 1979. (Congress subsequently made the necessary appropriation in Pub. L. No. 96-126, 93 Stat. 954, 966 (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 the Congress. The reasoning 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. Once the money is in the Treasury, it can be withdrawn only if Congress appropriates it.[26] Therefore, the authority for an agency to obligate or expend collections without further congressional action amounts to a continuing 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. This principle has been applied to revolving funds and various special deposit funds.

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, August 26, 1988 (licensing revenues received by the Commission on the Bicentennial); B-204078.2, May 6, 1988

[26]U.S. Constitution, art. I, § 9, cl. 7, discussed in Chapter 1, Section B.

(Panama Canal Revolving Fund); B-197118, January 14, 1980 (National Defense Stockpile Transaction Fund); 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 which by their terms apply to "appropriated funds" or exemptions which 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:

- Various funds held to constitute appropriated funds for purposes of GAO's bid protest jurisdiction:[27] 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. v. Wirtz, 359 F.2d 206 (D.C. Cir. 1965), cert. denied, 384 U.S. 971 (Armed Services Procurement Act applicable to military commissary purchases); B-217281-O.M., March 27, 1985 (federal procurement regulations applicable to Pension Benefit Guaranty Corporation revolving funds).
- 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, January 8, 1979, modified and affirmed by B-193573, December 19, 1979; B-217578, October 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 United States Treasury, consists of "appropriated funds."

[27]GAO regulations exempt nonappropriated fund procurements. 4 C.F.R. § 21.3(m)(8).

- User fees collected under Tobacco Inspection Act are appropriated funds and as such are subject to restrictions on payment of employee health benefits. 63 Comp. Gen. 285 (1984).
- 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, September 22, 1978; B-67175, July 16, 1947.

In each of the special fund cases cited above, the authority to make payments from the fund involved was clear from the governing legislation. However, it was not necessary to address whether the legislation also satisfied 31 U.S.C. § 1301(d), because that statute has long been construed as referring to the general fund of the Treasury and not to money authorized to be deposited in the Treasury as a "special fund." 13 Comp. Dec. 700 (1907); 13 Comp. Dec. 219 (1906). See also 59 Comp. Gen. 215, 217 (1980).

Finally, the cases cited above generally involve statutes which specify the fund to which the collections are to be deposited. This is not essential, however. A statute which 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 (1980) (42 U.S.C. § 5419); 13 Comp. Dec. 700 (1907); B-226520, April 3, 1987 (non-decision letter) (26 U.S.C. § 7475).

2. Specific vs. 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. 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.[28] 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 United States 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).
- 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).
- 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

[28]A few are 64 Comp. Gen. 138 (1984); 36 Comp. Gen. 526 (1957); 17 Comp. Gen. 974 (1938); 5 Comp. Gen. 399 (1925).

"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.

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-152722, August 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 non-appropriation 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, September 2, 1971.

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.

b. Two Appropriations Available for Same Purpose

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 either of two appropriations may reasonably be construed as available for expenditures not specifically mentioned under either appropriation, the determination of the agency as to which of the two appropriations to use will not be questioned.

However, once the election has been made, the continued use of the appropriation selected to the exclusion of any other for the same purpose is required, in the absence of changes in the appropriation acts. 68 Comp. Gen. 337 (1989); 23 Comp. Gen. 827 (1944); 10 Comp. Gen. 440 (1931); 5 Comp. Gen. 479 (1926); 15 Comp. Dec. 101 (1908); 5 Op. Off. Legal Counsel 391 (1981).

In 59 Comp. Gen. 518 (1980), the Environmental Protection Agency received separate lump-sum appropriations for "Research and Development" and "Abatement and Control." A contract entered into in 1975 could arguably have been charged to either appropriation, but EPA had elected to charge it to Research and Development. Applying the above rule, the Comptroller General concluded that a 1979 modification to the contract had to be charged to Research and Development funds, and that the Abatement and Control appropriation could not be used.

Thus, in this type of situation (two appropriations, both arguably available, neither of which specifies the object in question), the agency may make an initial election as to which appropriation to use. However, once it has made that election and has in fact used the selected appropriation, it cannot thereafter, because of insufficient funds in the selected appropriation or for other reasons, change its election and use the other appropriation.

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 from one place to another 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. Glossary at 80. For example, if an agency receives one appropriation for Operations and Maintenance and another for Capital Expenditures, a shifting of funds from either 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,[29] (2) transfers from one account to another within the same agency,[30] and (3) transfers to an interagency or intraagency working fund.[31] In each instance, statutory authority is required. An agency's erroneous characterization of a proposed transfer as a "reprogramming" is irrelevant. See B-202362, March 24, 1981.

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). 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. 1284, 89th Cong., 2d Sess. (1966), reprinted at 1966 U.S. Code Cong. & Admin. News 2340.

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."

[29]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, January 9, 1985 (transfer from Japan-United States Friendship Commission to Department of Education to partially fund study of Japanese education).

[30]65 Comp. Gen. 881 (1986); 33 Comp. Gen. 216 (1953); 33 Comp. Gen. 214 (1953); 17 Comp. Dec. 7 (1910); B-206668, March 15, 1982; B-178205, April 13, 1976; B-164912-O.M., December 21, 1977.

[31]26 Comp. Gen. 545, 548 (1947); 19 Comp. Gen. 774 (1940); 6 Comp. Gen. 748 (1927); 4 Comp. Gen. 703 (1925).

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 violation as well. E.g., B-222009-O.M., March 3, 1986.

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-167637, October 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% of the "donor" appropriation, and the receiving appropriation may not be augmented by more than 7% except in extraordinary emergencies. Cases construing this provision include 33 Comp. Gen. 214 (1953); B-218812, January 23, 1987; B-123498, April 11, 1955; and B-218812-O.M., July 30, 1985.

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., August 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, September 26, 1986; B-217093, January 9, 1985; B-182398, March 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 and 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., 6 Op. Off. Legal Counsel 520 (1982), in which the Justice Department 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."

A number of GAO decisions, several predating the enactment of 31 U.S.C. § 1532, have made essentially the same points—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.[32]

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),

[32]E.g., 31 Comp. Gen. 109, 114-15 (1951); 28 Comp. Gen. 365 (1948); 26 Comp. Gen. 545, 548 (1947); 18 Comp. Gen. 489 (1938); 17 Comp. Gen. 900 (1938); 17 Comp. Gen. 73 (1937); 16 Comp. Gen. 545 (1936); B-167034-O.M., January 20, 1970.

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 appropriations has been found authorized where necessary to implement a particular statute. In B-195775, September 10, 1979, the Comptroller General approved the transfer of portions of unit appropriations to an agency-wide 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 which would alter the purposes for which funds were appropriated is an impermissible transfer unless authorized by statute. E.g., B-209790-O.M., March 12, 1985.

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 administrative allocations within a lump-sum appropriation since the allocations are not legally binding.[33] 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

[33]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.

"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, August 17, 1978.

b. Reprogramming

A few years ago, the Deputy Secretary of Defense made the following statement:

> "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."[34]

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.[35] 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, pre-dates that time.[36]

The authority to reprogram is implicit in an agency's responsibility to manage its funds; no statutory authority is necessary. See, e.g., 4B Op. Off. Legal Counsel 701 (1980), discussing the Attorney General's authority to reprogram to avoid deficiencies; B-196854.3, March 19, 1984 (Congress is "implicitly conferring the authority to reprogram" by enacting lump-sum appropriations). Indeed, reprogramming is usually a non-statutory arrangement. This means that there is no general statutory provision either authorizing or prohibiting it, and it has evolved largely in the form of informal (i.e., non-statutory) agreements between various agencies and their

[34]Remarks Prepared for Delivery by The Honorable William H. Taft IV, Deputy Secretary of Defense, before the House Armed Services Committee Concerning Reprogramming Action Within the Department of Defense, September 30, 1985 (unprinted).

[35]Glossary at 74; B-164912-O.M., December 21, 1977.

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

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. 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 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.[37] In view of the nature of its activities and appropriation structure, the Defense Department has the most detailed and sophisticated procedures.[38]

In some cases, Congress has attempted to regulate reprogramming by statute, and of course any applicable statutory provisions control. B-164912-O.M., December 21, 1977. For example, a provision frequently found in Defense Department appropriation acts prohibits the use of funds to prepare or present a reprogramming request to the Appropriations Committees "where the item for

[37]GAO reports in this area include Economic Assistance: Ways to Reduce the Reprogramming Notification Burden and Improve Congressional Oversight, GAO/NSIAD-89-202 (September 1989) (foreign assistance reprogramming); Budget Reprogramming: Opportunities to Improve DOD's Reprogramming Process, GAO/NSIAD-89-138 (July 1989); Budget Reprogramming: Department of Defense Process for Reprogramming Funds, GAO/NSIAD-86-164BR (July 1986).

[38]See Reprogramming of Appropriated Funds, Department of Defense Directive No. 7250.5 (1980); Implementation of Reprogramming of Appropriated Funds, Department of Defense Instruction No. 7250.10 (1980).

which reprogramming is requested has been denied by the Congress."[39] The Comptroller General has construed this provision as prohibiting a reprogramming request which 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 GAO report entitled Legality of the Navy's Expenditures for Project Sanguine During Fiscal Year 1974, LCD-75-315 (January 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). In other words, all funding shifts are not necessarily "reprogrammings." 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 which has the effect of restoring funds deleted in the legislative process has been held not legally objectionable. B-195269, October 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 non-statutory, 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 Chadha decision, 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, March 19, 1984.

[39]E.g., Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, § 9015, 103 Stat. 1112, 1132 (1989).

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 non-binding, 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 . . .").[40] Provisions of this type are no less effective merely because they are contained in appropriation acts. It is settled that Congress can enact general or permanent legislation in appropriation acts. E.g., 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; NLRB v. Thompson Products, Inc., 141 F.2d 794, 797 (9th Cir. 1944); 41 Op. Att'y Gen. 274, 276 (1956). General provisions may be phrased in the form of restrictions or positive authority.

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, i.e., 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.

[40]In recent decades, general provisions of government-wide applicability—the "this or any other act" provisions—have, for the most part, been consolidated in the annual Treasury, Postal Service, and General Government appropriation acts. E.g., Pub. L. No. 101-136, Title VI, 103 Stat. 783, 816 (1989) (fiscal year 1990).

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, such as "hereafter," 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' 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 will usually be construed as permanent. For specific examples, see Cella v. United States, 208 F.2d at 790; 70 Comp. Gen. ___ (B-242142, March 22, 1991); 26 Comp. Gen. 354, 357 (1946); 2 Comp. Gen. 535 (1923); 11 Comp. Dec. 800 (1905); B-108245, March 19, 1952; B-100983, February 8, 1951; B-76782, June 10, 1948. The precise location of the word "hereafter" may be important. It 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, September 16, 1987.

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. 588, 589 (1986); 36 Comp. Gen. 434, 436 (1956); B-209583, January 18, 1983. Using a specific date rather than a general reference to the date of enactment produces the same result. B-57539, May 3, 1946. "Henceforth" will also do the job. B-209583, January 18, 1983. So will specific references to future fiscal years. B-208354, August 10, 1982.

In 24 Comp. Gen. 436 (1944), the words "at any time" were viewed 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. 65 Comp. Gen. 588 (1986); B-230110, April 11, 1988; B-228838, September 16, 1987; B-145492, September 21, 1976.[41] See also A-88073, August 19, 1937 ("this or any other appropriation"). Similarly, the words "notwithstanding any other provision of law" are not words of futurity. B-208705, September 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, April 11, 1988.

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 (1986); 32 Comp. Gen. 11 (1952); 20 Comp. Gen. 322 (1940); 10 Comp. Gen. 120 (1930); 5 Comp. Gen. 810 (1926); 3 Comp. Gen. 319 (1923); B-209583, January 18, 1983; B-208705, September 14, 1982; 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); United States v. International Business Machines Corp., 892 F.2d 1006, 1009 (Fed. Cir. 1989); NLRB v. Thompson Products, Inc., 141 F.2d 794, 798 (9th Cir. 1944); City of Hialeah v. United States Housing Authority, 340 F. Supp. 885 (S.D. Fla. 1971).

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

[41]One early case found the words "or any other act" sufficient words of futurity. 26 Comp. Dec. 1066 (1920). A later decision, B-37032, October 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.

intended by Congress to be permanent. 32 Comp. Gen. 11 (1952); 10 Comp. Gen. 120 (1930); A-89279, October 26, 1937; 41 Op. Att'y Gen. 274, 279-80 (1956). 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. 434, 436 (1956). This factor is of limited usefulness, since the failure to repeat in subsequent appropriation acts a provision which 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, August 19, 1937. Thus, if the provision does not contain words of futurity, repetition or non-repetition lead to the same result—that the provision is not permanent. If the provision does contain words of futurity, non-repetition indicates permanence but repetition, although it suggests non-permanence, 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 (1956); 24 Comp. Gen. 436 (1944). 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 65 Comp. Gen. 588 (1986); B-209583, January 18, 1983; B-208705, September 14, 1982; B-108245, March 19, 1952; B-57539, May 3, 1946; Cella v. United States, 208 F.2d at 790 n.1; NLRB v. Thompson Products, 141 F.2d at 798. In B-192973, October 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.

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, February 1, 1984. See also 62 Comp. Gen. 54, 56 (1982); 26 Comp. Gen. 354, 357 (1946); 32 Comp. Gen. 11 (1952); B-37032, October 5, 1943; A-88073, August 19, 1937. 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, September 14, 1982.

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 (1956); 24 Comp. Gen. 436 (1944). 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 (1982); B-200923, October 1, 1982. These decisions dealt with a general provision designed to prohibit cost-of-living pay increases for federal judges except as specifically authorized by Congress. The provision appeared in a 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. 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 one day, clearly not the legislative intent. See also 65 Comp. Gen. 588, 590 (1986); B-214058, February 1, 1984.

In sum, the six additional factors mentioned above are all relevant as 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 non-occurrence 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.

C. Relationship of Appropriations to Other Types of Legislation

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 which 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 the Congress actually appropriating the funds. 35 Comp. Gen. 306 (1955); 27 Comp. Dec. 923 (1921).[42]

Like the organic legislation, authorization legislation is considered and reported by the committees with legislative jurisdiction over the particular 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. The existence of a statute (organic legislation) imposing substantive functions upon an agency which require funding for their performance is itself sufficient authorization for the necessary appropriations. B-173832, July 16, 1976; B-173832, August 1, 1975; B-111810, March 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 authorizations"). 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.

[42]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.

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 the 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."[43]

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

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

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 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-220682, February 21, 1986; B-204874, July 28, 1982; B-125404, August 31, 1956; B-151157, June 27, 1963. 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, 296 U.S. 497, 503 (1936); 68 Comp. Gen. 19, 22-23 (1988); 64 Comp. Gen. 143, 145 (1984); 58 Comp. Gen. 687, 691-92 (1979); 53 Comp. Gen. 853, 856 (1974); 34 Comp. Gen. 170, 172-73 (1954); 21 Comp. Gen. 319, 322-23 (1941); B-236057, May 9, 1990. 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.

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; 53 Comp. Gen. at 856; B-208593.6, December 22, 1988.

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:

> "The statutes are thus in conflict, the earlier permitting and the later prohibiting. 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, February 2, 1989; B-226389, November 14, 1988; B-214172, July 10, 1984, aff'd upon reconsideration, 64 Comp. Gen. 282 (1985).

The fourth principle we state in two parts:

(a) 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. 1979), cert. denied, 441 U.S. 952; Friends of the

Earth v. Armstrong, 485 F.2d 1 (10th Cir. 1973), cert. denied, 414 U.S. 1171; Eisenberg v. Corning, 179 F.2d 275 (D.C. Cir. 1949); 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 1, Section B. It may well be that the device is "unusual and frowned upon." Preterm, 591 F.2d at 131. It also may well be that the appropriation act will be narrowly construed when it is in apparent conflict with authorizing legislation. Donovan v. Carolina Stalite Co., 734 F.2d 1547, 1558 (D.C. Cir. 1984). Maybe—although we express no independent judgment—it is even "universally recognized as exceedingly bad legislative practice." Tayloe, 171 F.2d at 344. 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.

(b) 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. 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.

These, then, are the "guiding principles" which 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, April 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 which 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.[44] Similarly, it was held in B-148736, September 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 unpublished decision, B-214172, July 10, 1984. Authorizing legislation for the Small Business Administration 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, 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, i.e., not to appropriate any funds. United States v. Dickerson, 310 U.S. 554 (1940).

A more recent 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

[44]The decision also held that obligations in excess of the amount included in the appropriation would violate the Antideficiency Act. Since the appropriation in question was a lump-sum appropriation which did not mention the bridge construction item, this portion of the decision is no longer valid. See Chapter 6, Section F.

years, and provided an apportionment formula. 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.

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 non-vested 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 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 non-vested 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.

(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, February 21, 1986 ("an earmark in an authorization act must be followed where a lump sum is appropriated pursuant to the authorization"); B-207343, August 18, 1982; B-193282, December 21, 1978. See also B-131935, March 17, 1986. This result applies even though following the earmark will drastically reduce the amount of funds available for non-earmarked 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 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, April 1, 1942 ("[W]hatever 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, August 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, February 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, can 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, expand the period of availability beyond that specified in the authorization, but it must do so explicitly. The action must be explicit because of (1) the rule against repeals by implication, (2) the presumption that every appropriation in an annual appropriation act is a one-year appropriation, and (3) the prohibition in 31 U.S.C. § 1301(c) against construing an appropriation to be permanent or available continuously unless the appropriation act expressly so states.

Thus, an appropriation of funds "to remain available until expended" (no-year) was found controlling over a provision in the

authorizing legislation which authorized appropriations on a two-year basis. B-182101, October 16, 1974. See also B-149372/ B-158195, April 29, 1969 (two-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 six months after expiration of term of office).

A 1982 decision, 61 Comp. Gen. 532, included an additional complication. An authorization act had authorized funds to be appropriated for a particular project "for fiscal year 1978." The FY 1978 funds for that project were included in a larger lump sum appropriated "as authorized by law, to remain available until expended." GAO reconciled the two statutes by finding the appropriation to be a no-year appropriation, except to the extent the related authorization specified a lesser period of availability. Thus, funds for the project in question from the lump-sum appropriation were available for obligation only during fiscal year 1978.

Clearly, Congress can also reduce the period of availability from that specified in the authorization act. Indeed, express language in the appropriation itself is not needed to reduce the period of availability to the fiscal year covered by the appropriation act.

In the first group of cases to consider this issue, the crucial test 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 satisfy 31 U.S.C. § 1301(c) and to overcome the presumption of fiscal year availability derived from the enacting clause. 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, April 5, 1965; B-127518, May 10, 1956; B-37398, October 26, 1943. The reference had to be specific; the phrase "as authorized by law" was not enough. B-127518, May 10, 1956.

The House Committee on Appropriations considered the issue in connection with the 1964 foreign aid appropriations bill. In its report on that bill, the Committee first described 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. 1040, 88th Cong., 1st Sess. 55 (1963). The Committee then noted a situation in the 1963 appropriation which 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 a 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 which 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. As a result of these developments, the rule was changed. 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). 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. Id. at 859. See also 58 Comp. Gen. 321 (1979) and B-207792, August 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 (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 FY 1978, however, the appropriation act was changed and the funds were made available for two fiscal years. 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 two-year period would expire and could not be reapportioned. B-151087, September 15, 1981; B-151087, February 17, 1982.

For purposes of the rule of 50 Comp. Gen. 857 and its progeny, it makes no difference whether the authorization is in an annual appropriations authorization 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 (1979), 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. Similarly, in Dabney v. Reagan, No. 82 Civ. 2231-CSH (S.D.N.Y. March 21, 1985), 1985 WL 443, 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, February 21, 1986, and B-193282, December 21, 1978—the appropriation act had been

enacted prior to the authorization, a factor which 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 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, December 21, 1978, amplified by B-193282, January 25, 1979. This is the same result that would have been reached if the normal sequence had been followed.

Similarly, in B-226389, November 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 the placing of 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, February 2, 1989.

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, October 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 FY 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 three 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 three 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). 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, September 28, 1948), seven 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 the Congress itself which 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, May 6, 1988.

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, September 1, 1988; B-79243, September 28, 1948.

Legislative history may also help. In B-207186, February 10, 1989, for example, authorizing legislation extended the life of the Solar 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.

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 which 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." D.C. Federation of Civic Associations 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. 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.

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 (3d Cir. 1976). Nevertheless, while the doctrine may not be favored, it does exist. We turn now to some specific situations in which the doctrine 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 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. 1984), appeal dismissed, 469 U.S. 806; EEOC v. Allstate Ins. Co., 570 F. Supp. 1224 (S.D. Miss. 1983), appeal dismissed, 467 U.S. 1232. Congress resolved any doubt by enacting legislation in 1984 to expressly ratify all prior reorganization plans implemented pursuant to any reorganization statute.[45]

Another group of cases has refused to find ratification by appropriation for proposed construction projects funded under lump-sum appropriations where the effect would be either to expand the

[45]Pub. L. No. 98-532, 98 Stat. 2705 (1984), 5 U.S.C. § 906 note.

scope of a prior congressional authorization or to supply an authorization required by statute but not obtained. Libby Rod and 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 and Santa Fe Ry. 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 had asserted the authority to construct power plants. TVA's position was based on an interpretation of its enabling legislation which 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. TVA, 606 F.2d 143 (6th Cir. 1979), cert. denied, 445 U.S. 942.
- 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 nothing prohibited it. Atchison, Topeka and Santa Fe Ry. Co. v. Summerfield, 229 F.2d 777 (D.C. Cir. 1955), cert. denied, 351 U.S. 926.
- 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).

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; EEOC v. Martin Industries, 581 F. Supp. at 1033-37; Muller Optical Co. v. EEOC, 574 F. Supp. at 954.

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). 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. Under the provisions of that Act, the Secretary of the Interior declared the "snail darter," a three-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 which 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.[46] In other words, the doctrine of ratification by appropriation we discussed in the preceding section does not apply, at least when the

[46]Less than four 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 (1978).

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 non-compliance 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. 1974), cert. denied, 423 U.S. 830; D.C. Federation of Civic Associations v. Airis, 391 F.2d 478 (D.C. Cir. 1968); and 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, December 22, 1988; B-213771, July 10, 1984; B-204874, July 28, 1982; and B-193307, February 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 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.

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 which 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, August 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, March 17, 1986; B-137063, March 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.

There are limits on how far this principle can be taken, depending on the particular circumstances. One illustration is B-207186, February 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.

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 and 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 [47]

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.[48]

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.

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 Associations, 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. When this does not suffice, there is an established body of principles, centering primarily on the use of legislative history, to aid in the effort.

[47]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 (4th ed. 1984). The distinction, as Sutherland points out, has little practical value. We, as does Sutherland, use the terms interchangeably.

[48]"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).

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 whole.[49] 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. For this reason, the use of legislative history to determine congressional intent has come under increased criticism. To say this, however, is by no means to denigrate the process. Applying the complex maze of rules and "canons of construction," imperfect as the process may be, serves the essential purpose of providing a common basis for problem-solving.

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.[50] 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 decisionmaker. Second, the law should be reasonably predictable. A lawyer's advice that a proposed action is or is not permissible amounts to 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.

2. The "Plain Meaning" Rule

"The Court's task is to construe not English but congressional English." Commissioner v. Acker, 361 U.S. 87, 95 (1959) (Frankfurter, J., dissenting).

By far the most important rule of statutory construction is this: You start with the language of the statute. Mallard v. United States District Court, 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:

[49]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."

[50]"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).

"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 . . . ."

Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845). A somewhat better-known statement is from United States v. American Trucking Associations, 310 U.S. at 543:

"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. This is the so-called "plain meaning" rule. If the meaning is "plain," you apply that meaning and that's the end of the inquiry. E.g., Mallard v. District Court, 490 U.S. 296; United States v. Ron Pair Enterprises, Inc., 489 U.S. 235, 241 (1989); Aloha Airlines, Inc. v. Director of Taxation, 464 U.S. 7, 12 (1983); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 570 (1982); TVA v. Hill, 437 U.S. 153, 184 n.29 (1978); Ex parte Collett, 337 U.S. 55, 61 (1949); Caminetti v. United States, 242 U.S. 470, 485, 490 (1917); 56 Comp. Gen. 943 (1977); B-230656, April 4, 1988. In Mallard, for example, the Supreme Court held that a court may not require an unwilling attorney to represent an indigent litigant under a statute providing that a court "may request an attorney to represent" indigents in civil cases. "Request" simply does not mean "require."

One common-sense 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). As a perusal of any dictionary will show, words often have more than one meaning.[51] The "plain meaning" will be the ordinary, everyday meaning rather than some obscure usage. 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.

[51] "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 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 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, 242 U.S. at 490 (legislative history "may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation").

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 and 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 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'" [footnotes omitted].

United States v. American Trucking Associations, Inc., 310 U.S. 534, 543-44 (1940), quoted in, for example, Train v. Colorado Public Interest Research Group, 426 U.S. 1, 10 (1976).

Thus, it is generally accepted that the literal language of a statute will not be followed if it would 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 wilfully 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."[52] See also "Errors in Statutes" later in this chapter.

In cases subsequent to 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); TVA v. Hill, 437 U.S. 153, 187 n.33 (1978) (citing Crooks v. Harrelson with approval).

The 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.

3. Use of Legislative History

a. Uses and Limitations

The term "legislative history" refers to the body of congressionally-generated written documents relating to a bill from the time of introduction to the time of enactment. Legislative history is always relevant in the sense that it is never "wrong" to look at it. Thus, most cases purporting to apply the plain meaning rule also review legislative history—TVA v. Hill being one good example—if for no other reason than to establish that nothing in that history contradicts the court's view of what the plain meaning is.

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

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 (2d Cir. 1945); B-181142, August 5, 1974 (GAO recommended 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 from the statutory language to using it to rewrite the statute. 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). To pursue this thought with our "science" example, if a statute authorizing grants for scientific research explicitly defined the term as meaning the physical and biological sciences, grants for research in economics or sociology would not be authorized, notwithstanding any legislative history to the contrary. Or, to take an illustration in a lighter vein, suppose Congress enacted a law to "regulate the feeding of garbage to swine."[53] One might legitimately ask precisely what Congress intended to include in the term "garbage." If the statute did not include a definition, the legislative history might provide guidance.[54] On the other hand, if someone asked whether the law applied to farm animals other than swine (assuming anyone would consider feeding garbage to other farm animals), the answer would clearly be no, unless specified in the statute itself. One term is inherently ambiguous; the other is plain on its face.

[53]Yes, it exists. It's the Swine Health Protection Act, Pub. L. No. 96-468, 94 Stat. 2229 (1980), 7 U.S.C. §§ 3801-3813.

[54]In this case, the statute does define the term. See 7 U.S.C. § 3802(2).

b. Components and Their Relative Weight

Legislative history falls 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., Squillacote v. United States, 739 F.2d 1208, 1218 (7th Cir. 1984); B-142011, April 30, 1971. 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, and thus is the only legislative history document that can be said to reflect the will of both Houses. Commissioner v. Acker, 361 U.S. 87, 94 (1959) (Frankfurter, J., dissenting).

Next in sequence are the reports of the legislative committees which 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., Duplex Printing Press Co. v. Deering, 254 U.S. 443, 474 (1921); United States v. St. Paul, Minneapolis & Manitoba Ry. 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-33911/B-62187, July 15, 1948.

Committee reports, as with all legislative history, must be used with caution. The following two passages reflect recent criticism of excessive reliance on committee reports. The first is from the opinion of the Court of Claims in Hart v. United States, 585 F.2d at 1033, quoted in Conlon v. United States, 8 Cl. Ct. 30, 33 (1985):

"We note that with the swiftly growing use of the staff system by Congress, many congressional documents may be generated that are not really considered fully by each or perhaps by any legislator. Thus, committee reports and

the like are perhaps less trustworthy sources of congressional intent than they used to be, and less than the actual wording of the legislation, which one would hope received more thorough consideration prior to enactment. If there is inadvertent error either in the statute or in the committee report, the offender is more likely to be the latter, surely."

The second is an excerpt from a colloquy between Senators Armstrong and Dole which took place on July 19, 1982:

"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."[55]

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.

(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

[55]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).

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 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). 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.

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, 472 U.S. 159, 169-70 (1985); Preterm, Inc. v. Dukakis, 591 F.2d 121, 128 (1st Cir. 1979), cert. denied, 441 U.S. 952. 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 Ry. 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; National Labor Relations Board v. Thompson Products, Inc., 141 F.2d 794, 798 (9th Cir. 1944). The Supreme Court's statement in St. Paul Ry. 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.[56]

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). 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 Dept. 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, for example, 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).

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

[56]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).

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 is 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 Ins. 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 (2d Cir. 1935).

There is one significant exception. Testimony by the government agency which 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 reason is that 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).

This rule applies regardless of the identity of the speaker (sponsor, committee, committee chairman, etc.) and regardless of the form of the statement (report, floor statement, letter, affidavit, etc.). 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). GAO naturally follows the same principle. E.g., 54 Comp. Gen. 819, 822 (1975).

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.

4. Some Other Principles

Many other principles or "canons" of construction exist to aid in the interpretation of statutes. Again, they are guidelines rather than rigid rules, and their application depends on their relationship to the totality of available evidence. We note here a few useful points.

a. Title

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 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.

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."

b. Punctuation

Punctuation may be taken into consideration when no better evidence exists, although punctuation or the lack of it should never be the controlling factor. 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, January 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.

c. Effect of Omission

In the course of researching legislative history, you occasionally find a provision especially pertinent to your inquiry that was in the original version of a bill but was deleted later in the legislative process, or was proposed in a floor amendment but not adopted. It is tempting to draw inferences from the omission. For example, if an amendment is proposed to exempt a particular situation but is rejected, it might seem that Congress obviously did not want the exemption.

However, unless the legislative history explains the reason for the omission or deletion or the reason is indisputably clear from the

context, drawing conclusions is little more than speculation. 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 simply inconclusive. Fox v. Standard Oil Co., 294 U.S. 87, 96 (1935); Southern Packaging and 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).

d. Similar Words in Same Statute

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. 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 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, however closely related, 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).

5. Retroactivity of Statutes

The traditional rule has been that statutes and amendments to statutes are construed to apply prospectively only (that is, from their date of enactment or other effective date if one is specified). Under this traditional rule, statutes are not construed to apply retroactively unless a retroactive construction is required by express language or by necessary implication or unless it is demonstrated that this is what Congress clearly intended. 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, November 27, 1981; B-191190, February 13, 1980; B-162208, August 28, 1967. This has also been the traditional rule of the courts. E.g., Greene v. United States, 376 U.S. 149 (1964).

A measure of confusion arose with the Supreme Court's decision in Bradley v. Richmond School Board, 416 U.S. 696 (1974). In that case, the Court held that when a law changes subsequent to a judgment of a lower court, whether the change is constitutional, statutory, judicial, or administrative, an appellate court must apply the new law, i.e., 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. Relevant factors in making the "manifest injustice" determination are "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." Id. at 717. Whether Bradley was intended to replace the traditional rule, or whether it was merely a limited exception applicable to post-judgment changes for cases on appeal, was not clear. What did become clear was that, to the extent Bradley superseded the traditional rule, what had once been a fairly simple question had become a very complicated one. See, e.g., 64 Comp. Gen. 493 (1985), concluding that Bradley does not require retroactive application of the administrative offset provisions of the Debt Collection Act of 1982.

Subsequent action by the Supreme Court suggests that Bradley may be the exception rather than the rule. In a 1988 decision, the Court said:

> "Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result. E.g., Greene v. United States, 376 U.S. 149, 160 . . . ."

Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988).

More recently, the Court has acknowledged, but did not resolve, the "apparent tension" between Bradley and Bowen. Kaiser Aluminum & Chemical Corp. v. Bonjorno, ___ U.S. ___, 110 S. Ct. 1570, 1577 (1990). The Court of Appeals for the Federal Circuit has been more blunt, viewing the "tension" as an "irreconcilable conflict," and choosing to follow the Bowen rule. Sargisson v. United States, 913 F.2d 918, 922-23 (Fed. Cir. 1990). See also Mai v. United States, 22 Cl. Ct. 664, 667-68 (1991).

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 which 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, April 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, September 26, 1980.

6. Errors in Statutes

a. Clerical or Typographical 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.

In one situation, a supplemental appropriation act made an appropriation 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-158642-0.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).

In another case, a statute authorized the Department of Agriculture to purchase "section 12" of a certain township for inclusion in a national forest. However, section 12 was already included within

the national forest, and it was clear from the legislative history that the "section 12" was a printing error and the statute should have read "section 13." The Comptroller General concluded that the clear intent should be given effect, and that the Department was authorized to purchase section 13. B-127507, December 10, 1962.

More recently, Congress authorized awards for cost savings disclosures, and added the new provisions to the existing Government Employees Incentive Awards Act. The new authority was to terminate on September 30, 1984, but the sunset provision erroneously used the word "title" instead of "subchapter." Read literally, the entire Incentive Awards Act would have terminated at the end of FY 1984, a result that was clearly not intended. GAO concluded that the statute could be construed as if the correct word had been used. 64 Comp. Gen. 221 (1985). The mistake was corrected when Congress later extended the sunset date.

Courts have followed the same approach in correcting obvious printing or typographical errors. See 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); Pressman v. State Tax Commission, 204 Md. 78, 102 A.2d 821 (1954); Johnson v. United States Gypsum Co., 217 Ark. 264, 229 S.W.2d 671 (1950); Baca v. Board of Commissioners, 10 N.M. 438, 62 P. 979 (1900).

b. 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).

In recent years, Congress has on occasion authorized the Clerk of the House to make certain corrections in the printed enrollment of appropriation bills. E.g., Pub. L. No. 100-454, § 2(a)(2), 102 Stat. 1914 (1988) (FY 1989 appropriation bills). However, the authority is limited to spelling, punctuation, and stylistic corrections and does not extend to altering amounts.

7. Statutory Time Deadlines

Statutes may contain a variety of time deadlines directed at government agencies. Some, statutes of limitations being the prime example, are usually mandatory. Miss a statute of limitations and, with very few exceptions, you've lost the right to file the claim or commence the lawsuit. Other time deadlines may be either mandatory or "directory." If a time deadline on an agency action is directory only, missing the deadline will not deprive the agency of the authority to take the action.

The general rule followed in most circuits is:

> "[a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision."

St. Regis Mohawk Tribe v. Brock, 769 F.2d 37, 41 (2d Cir. 1985), cert. denied, 476 U.S. 1140, quoting Fort Worth Nat'l Corp. v. FSLIC, 469 F.2d 47, 58 (5th Cir. 1972).[57]

The St. Regis case concerned a provision in the Comprehensive Employment and Training Act which required the Secretary of Labor to investigate complaints alleging improprieties and to issue a final determination not later than 120 days after receiving the complaint. The issue was whether failure to meet the 120-day deadline barred the government from attempting to recover misused funds. Applying the above rule, the court held that it did not.

The issue was litigated in other circuits. The circuits split, St. Regis representing the majority view. One of the minority cases went to the Supreme Court which, in Brock v. Pierce County, 476 U.S. 253

[57]St. Regis cites several additional cases for the proposition.

(1986), agreed with the St. Regis result. While the Supreme Court treated favorably the rule espoused in St. Regis, it stopped short of expressly adopting it. The Court first noted that "[t]his Court has never expressly adopted the Circuit precedent [the St. Regis rule] upon which the Secretary relies. However, our decisions supply at least the underpinnings of those precedents." Id. at 259-60. The Court then cautioned, however, that "[w]e need not, and do not, hold that a statutory deadline for agency action can never bar later action unless that consequence is stated explicitly in the statute." Id. at 262 n.9. Noting that treating the deadline as mandatory would prejudice important public rights (the right of the taxpayers to guard against misuse of public funds), the Court held that the mere use of the word "shall" in the statute did not make it mandatory. Id. at 261-62.

Thus, while the St. Regis rule remains a reasonably reliable guideline, its precise parameters await future development. At a minimum, it would seem, the statutory deadline must be cast in mandatory terms. Failure to specify a consequence of missing the deadline will be relevant, but perhaps can be overcome by persuasive legislative history indicating a contrary intent. Another relevant factor is the nature of the rights or interests involved, public or private, and the extent to which they will be affected by the mandatory/directory determination.

One context in which statutory deadlines are more likely to be found directory is the termination of temporary public commissions. In Ralpho v. Bell, 569 F.2d 607 (D.C. Cir. 1977), for example, the court held that a statutory time limit on the existence of the Micronesian Claims Commission was directory and did not preclude further consideration of claims which had been denied on allegedly improper grounds.

A temporary commission is frequently required to submit a report as its final official act. The enabling statute often provides a deadline for submitting the report, with the commission to go out of existence a specified time period after submitting the report. GAO has found these deadlines to be directory only, concluding that a commission which fails to submit its final report on time is authorized to continue in existence, the termination period being measured from the actual submission of the report. B-225832.6, July 8, 1987; B-211021, May 3, 1984. As the 1984 decision points out, the

commission does not thereby acquire permanent existence; Congress retains control through oversight and the appropriations process.

As noted, a relevant factor in assessing the effect of a statutory deadline is the nature and effect of any rights or interests affected. In some circumstances, missing a deadline may provide the basis for challenging agency action in denying benefits that would have been available had the agency acted in a more timely fashion. Thus, one court held that the Environmental Protection Agency was required, to the extent of available budget authority, to fund certain water quality grant applications submitted after the end of the fiscal year where the delay was attributable to the agency's failure to issue guidelines within the statutorily-prescribed time period. National Association of Regional Councils v. Costle, 564 F.2d 583 (D.C. Cir. 1977). In determining the effect of a statutory time limit, "a court should consider the purpose and design of the entire statutory program of which it is a part." Id. at 591. The same result would probably not apply under the Stewart B. McKinney Homeless Assistance Act since the legislation provided for the use of guidelines under prior programs during the interim period until new guidelines were issued. Delay in issuing the McKinney guidelines would thus not have the same effect as in Costle. B-229004-O.M., February 18, 1988.

In sum, a statutory time deadline on agency action will generally be regarded as directory rather than mandatory where the statute does not specify a consequence of non-compliance. It may be found mandatory, however, if there is persuasive legislative history indicating that intent, or if significant rights or interests would be prejudiced by failing to enforce the deadline.

Chapter 3

Agency Regulations and Administrative Discretion

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Agency Regulations and Administrative Discretion

This chapter deals with certain topics in administrative law which, 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 "cross-cutting" 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 two 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 his or her agency. 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); 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). Regulations in this category may include such things as conflicts of interest, employee travel, or delegations to organizational components.

In addition, when Congress enacts a new program statute, it typically does not prescribe every detail of its implementation but leaves it to the administering agency to do so by regulation.[2] 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.

[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. . . ."

[2] 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 statutory vs. administrative terminology may be convenient shorthand in some contexts, its significance has been largely superseded by the Administrative Procedure Act. Courts today occasionally use the term "administrative regulations" in the broader sense of agency regulations in general. E.g., Rodway v. United States Dep't of Agriculture, 514 F.2d 809, 814 (D.C. Cir. 1975).

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 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 found in Title 5 of the United States Code, primarily sections 551–559 (administrative provisions) 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 any 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

[3]For an excellent summary of the APA together with a useful bibliography, see Administrative Conference of the United States, Federal Administrative Procedure Sourcebook (1985). The Sourcebook is also 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 Univ. Hosp., 488 U.S. 204, 218 (1988) (Justice Scalia, concurring).

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] 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).

Publication of a document in the Federal Register constitutes legal notice of its contents. 44 U.S.C. § 1507; Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947); 63 Comp. Gen. 293 (1984).

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. United States Dep't 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. 1977), cert. denied, 434 U.S. 829; 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 (2d Cir. 1977). The preamble does not, however, have to

[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).

address every item included in the comments. Id.; Automotive Parts, 407 F.2d at 338.

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 it clear that it is in fact contemporaneous and not a "post hoc rationalization." Action on Smoking and 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 the same purpose with respect to a regulation as legislative history does with respect to a statute.[5]

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. Chapter 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).

[5]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).

The Court of Appeals for the District of Columbia Circuit, in Home Box Office, Inc. v. FCC, 567 F.2d at 35-36, has 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 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. . . ."

Against this backdrop, 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 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.

Prior to legislation enacted on November 29, 1990, proposed regulations were usually drafted by agency staff, based on the agency's own expertise. Nothing prohibited agencies from consulting with interested parties at this preliminary stage, but, with few exceptions, it was rarely done. The few agencies which did experiment with "negotiated rulemaking" found that it reduced the potential for court challenges to the final regulations. Congress provided a uniform statutory framework by enacting the Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (1990), which added a new 5 U.S.C. §§ 581–590. 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, and use of the procedure does not entitle the regulation to any greater deference than it would otherwise receive. (The background information in the first part of this paragraph is taken from the report of the House Judiciary Committee, H.R. Rep. No. 461, 101st Cong., 2d Sess. 7-9 (1990).)

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, said one court, "will be narrowly construed and only reluctantly countenanced." New Jersey Dep't of Environmental Protection v. EPA, 626 F.2d 1038, 1045 (D.C. Cir. 1980). 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 personnel or to public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a)(2). Several agencies, primarily in response to a recommendation by the Administrative Conference of the United States, have published in the Federal Register a statement committing themselves to follow APA procedures in these matters. To the extent an agency has done this, it has voluntarily waived the benefit of the exemption and must follow the APA. E.g., 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. United States Dep't of Agriculture, 514 F.2d 809 (D.C. Cir. 1975); Herron v. Heckler, 576 F. Supp. 218 (N.D. Cal. 1983); Ngou v. Schweiker, 535 F. Supp. 1214 (D.D.C. 1982); B-202568,

September 11, 1981. If an agency has not waived its exemption with respect to the specified matters, it need not follow the APA.[6] 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).

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, for example, Guardian Federal Savings and Loan Ass'n v. FSLIC, 589 F.2d 658 (D.C. Cir. 1978); Joseph v. United States Civil Service Commission, 554 F.2d 1140 (D.C. Cir. 1977); Detroit Edison Co. v. EPA, 496 F.2d 244 (6th Cir. 1974). As these cases demonstrate, the agency's own characterization of a regulation as interpretative is not controlling.[7]

A regulation which is subject to 5 U.S.C. § 553 but which is issued in violation of the required procedures (including a non-existent or inadequate preamble) stands an excellent chance of being invalidated. If the regulation is one the agency is required to issue, the courts will typically declare the regulation invalid, or "void" (e.g., W.C. v. Bowen, 807 F.2d 1502 (9th Cir. 1987)), or 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 non-compliance.[8] If the regulation is authorized but not required, it will still be invalidated but the

[6]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 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).

[7]As should be apparent, the traditional classification of regulations as "statutory" or "administrative" is of little help in assessing the applicability of the APA. Most "administrative regulations" (regulations issued under the authority of 5 U.S.C. § 301) will be exempt from the APA not because somebody calls them "administrative," but because they will be matters "relating to agency management or personnel" or "rules of agency organization, procedure, or practice." Substantive or legislative regulations will generally be "statutory," but so will most regulations relating to grants or loans, as well as many interpretative regulations.

[8]E.g., Tabor v. Board of Actuaries, 566 F.2d at 712; Rodway v. Dep't of Agriculture, 514 F.2d at 817; Detroit Edison Co. v. EPA, 496 F.2d at 249. Occasionally, although this appears to be a minority position, a court may be willing to entertain further explanation from the agency in the form of affidavits or testimony. E.g., National Nutritional Foods Ass'n v. Weinberger, 512 F.2d 688 (2d Cir. 1975).

agency will usually have the discretion to repromulgate under the correct procedures.[9]

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 and Loan Ass'n v. FSLIC, 589 F.2d at 666; Herron v. Heckler, 576 F. Supp. at 230; Saint Francis Memorial Hospital v. Weinberger, 413 F. Supp. 323, 327 (N.D. Cal. 1976).

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.

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, 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."

To take an example of particular relevance to this publication, an agency may not expend public funds or incur a liability to do so on the basis of a regulation, unless the regulation is implementing authority given 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); Illinois

[9]E.g., United States v. Garner, 767 F.2d 104, 123 (5th Cir. 1985); Joseph v. Civil Service Commission, 554 F.2d at 1157.

Central Railroad Co. v. United States, 52 Ct. Cl. 53 (1917). See also B-201054, April 27, 1981, discussed below. In other words, the authority to obligate or expend public funds cannot be created by regulation; the basic authority must be conferred by Congress.

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 formula, the administering agency could not amend its regulations to relieve states of liability for overexpenditures or to raise the ceiling. B-178564, July 19, 1977, affirmed in 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, April 27, 1981. See also B-118653, July 15, 1969.

See also Harris v. Lynn, 555 F.2d 1357 (8th Cir. 1977) (agency cannot extend benefits by regulation to class of persons not included within 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); 62 Comp. Gen. 116 (1983); 56 Comp. Gen. 943 (1977); B-201706, March 17, 1981.

3. "Force and Effect of Law"

A very long line of decisions holds that "statutory regulations" which are otherwise valid (that is, which are 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).

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 view of developments in the law in recent years, stating the principle in terms of "statutory regulations" has become somewhat oversimplified.

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 which must be met:

- The regulation must be a "substantive" or "legislative" regulation affecting individual rights or obligations. Regulations which are interpretative only generally will not qualify.[10]
- 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. (This test is discussed further under "Agency Administrative Interpretations" later in this chapter.)
- 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.[11]

A regulation which 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.

[10]This of course is the same distinction discussed earlier with respect to the applicability of informal rulemaking procedures under the 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 vs. 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 Comm'n, 554 F.2d 1140, 1153 n.24 (D.C. Cir. 1977). Professor Kenneth Culp Davis, in his Administrative Law Treatise, vol. 2, § 7:9 (2d ed. 1979), also suggests that the term "substantive" in this context should be discontinued in favor of "legislative." Whichever term is used, the terminology can be misleading, as pointed out in Production Tool Corp. v. Employment and Training Admin., 688 F.2d 1161, 1166 (7th Cir. 1982).

[11]See, for example, B-226499, April 1, 1987, holding that an unpublished notice purporting to amend a published regulation did not have the force and effect of law.

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 1140, 1153 (D.C. Cir. 1977)); it is "as binding on the courts as any statute enacted by Congress" (Production Tool Corp. v. Employment and Training Admin., 688 F.2d 1161, 1165 (7th Cir. 1982)).

This is strong language. It cautions a reviewing court (or reviewing administrative agency) not to substitute its own judgment for that of the 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); Guardian Federal Savings and Loan Ass'n v. FSLIC, 589 F.2d 658, 664-65 (D.C. Cir. 1978); Joseph v. Civil Service Commission, 554 F.2d at 1154 n.26. 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 Ins. Co., 463 U.S. 29, 43 (1983).

Thus, rather than saying "statutory regulations have the force and effect of law," it is more accurate to say that "substantive or legislative regulations, issued pursuant to a grant of statutory authority and in compliance with the APA or other procedural statute as and to the extent applicable, have the force and effect of law." Such a regulation, as the numerous GAO decisions have pointed out, should be uniform in application, is binding on the government as well as any private parties affected, and, at least as a general proposition, cannot be waived on an ad hoc basis.

For cases applying the Chrysler standards in determining that various regulations do or do not have the force and effect of law, see 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. The question of whether an agency must follow its own regulations is somewhat broader than the question of waiver. However, we have chosen to treat them together because the answer, to the extent an answer can be said to exist at the present time, is basically the same.

A regulation with the "force and effect of law" is clearly binding on the agency. See also Section C.3 below. If the courts meant what they said about such regulations being treated essentially the same as statutes, then the agency should not be able to waive the regulation any more than it could waive the statute. 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).[12]

Even here, however, there may be room for some slight measure of discretion, at least with respect to certain types of regulation. For example, in American Farm Lines v. Black Ball Freight Service, 397 U.S. 532 (1970), the Court held that the Interstate Commerce Commission could deviate from a provision in what was at least a "statutory," if not a "legislative" regulation, stating 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" (id. at 538-39).

The real problems arise when one enters the realm of regulations which do not have the force and effect of law. These may include regulations which were published in the Federal Register under APA procedures but which are classified as interpretative, as well as a

[12]Of course, the government has "prosecutorial discretion" in enforcing violations, and may select one case or a few cases to make its point. 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.

variety of unpublished agency documents, including internal publications such as manuals, handbooks, etc. There is a growing body of case law on whether regulations in this category are binding on the issuing agency. At the present time, the best answer we can give is that some are while others are not.

In some of the cases, the issue is stated as whether the given item constitutes a "regulation." E.g., Fairington Apartments of Lafayette v. United States, 7 Cl. Ct. 647 (1985). The thing to remember is that, in this specific context, the answer to that question determines only whether the item is binding on the agency in that case. It does not necessarily follow that an item found to be a "regulation" should have been published under APA procedures or that it has the force and effect of law. These are separate (although related) questions which, as discussed above, have their own tests and standards.

Early (and some not so early) GAO and Comptroller of the Treasury decisions viewed the waiver question as flowing essentially from the old statutory vs. administrative distinction. Thus, it has often been held that statutory regulations may not be waived. E.g., 60 Comp. Gen. 15, 26 (1980); 57 Comp. Gen. 662 (1978); 10 Comp. Gen. 242 (1930); B-233946.2, December 14, 1989; B-208610, September 1, 1983. See also the cases cited in the first paragraph under "Force and Effect of Law" above. Correspondingly, several decisions hold that "administrative regulations" can be waived. E.g., 4 Comp. Gen. 767 (1925); 1 Comp. Gen. 13 (1921); 26 Comp. Dec. 99 (1919); 21 Comp. Dec. 482 (1915). As a result of Supreme Court decisions in the 1950's, GAO modified its position somewhat in 51 Comp. Gen. 30 (1971), noting cautiously that the former distinctions "are no longer regarded as applicable in all respects" (whatever that means). Id. at 32.

The Supreme Court has also yet to articulate a clear standard. For example, in Morton v. Ruiz, 415 U.S. 199 (1974), the Court held the Bureau of Indian Affairs bound by a provision in an internal BIA manual which stated that directives relating to the public are published in the Federal Register in accordance with the APA. Based on this, the Court held ineffective another provision in the BIA manual, not published in the Federal Register, restricting eligibility for general assistance benefits. "Where," the Court said, "the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures." Id. at 235. Yet in Schweiker v. Hansen,

450 U.S. 785 (1981), the Court found a Social Security Administration claims manual not binding on the agency, in a case where an individual's eligibility for benefits was at stake.[13]

Without undertaking an extensive analysis, the best that can be said is that, at least where a purported waiver or deviation would be adverse to individuals, some non-legislative regulations may now be as binding on the agency as legislative regulations. Morton v. Ruiz; 51 Comp. Gen. 30 (1971). See also Massachusetts Department of Correction v. Law Enforcement Assistance Administration, 605 F.2d 21, 26 (1st Cir. 1979); B-184068, August 22, 1975. However, other types of non-legislative regulations, particularly where the regulations are for the primary benefit of the agency and failure to follow them would not adversely affect private parties, remain open to waiver. E.g., 60 Comp. Gen. 208, 210 (1981) (Urban Mass Transportation Administration internal guideline on evidence of grantee financial capability).

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 Department of Health, Education, and Welfare 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.

What seems clear is that a "form over substance" approach will be rejected, and what an agency chooses to call its regulation is largely immaterial. As stated in one GAO decision:

"That the Bureau's policy and procedure memoranda were never intended as 'regulations' is of no particular import since whether or not they are such must be determined by their operative nature." 43 Comp. Gen. 31, 34 (1963).

[13]"[T]here is no doubt that Connelly failed to follow the Claims Manual in neglecting to recommend that respondent file a written application and in neglecting to advise her of the advantages of a written application. But the Claims Manual is not a regulation. It has no legal force, and it does not bind the SSA." 450 U.S. at 789.

In assessing the binding nature of a non-legislative 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). The issuing agency's intent is also an important factor. 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). Intent is ascertained by examining "the provision's language, its context, and any available extrinsic evidence." Doe v. Hampton, 566 F.2d 265, 281 (D.C. Cir. 1977).

Factors which 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 non-binding), 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 v. Cathedral Bluffs, 796 F.2d at 538-39.

For further reading on this interesting and apparently still evolving topic, see:

- Peter Raven-Hansen, Regulatory Estoppel: When Agencies Break Their Own 'Laws,' 64 Tex. L. Rev. 1 (1985).
- Note, Violations by Agencies of Their Own Regulations, 87 Harv. L. Rev. 629 (1974).

5. Amendment of Regulations

While waiver of regulations can be problematic, 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 common-sense proposition is reflected in the APA's definition of rulemaking as "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, March 24, 1986; B-202568, September 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. Consumer Energy Council of America v. Federal Energy Regulatory Commission, 673 F.2d 425, 446 (D.C. Cir. 1982); Detroit Edison Co. v. EPA, 496 F.2d 244 (6th Cir. 1974); B-221779, March 24, 1986.

If a regulation is subject to the APA's informal rulemaking requirements, an unpublished agency document which purports to amend that regulation is invalid and does not bind the government. Fiorentino v. United States, 607 F.2d 963, 968 (Ct. Cl. 1979), cert. denied, 444 U.S. 1083; 65 Comp. Gen. 439 (1986); B-226499, April 1, 1987.

It is possible to have a regulation subject to 5 U.S.C. § 553, with an amendment to that regulation which 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, September 11, 1981; 5 Op. Off. Legal Counsel 104 (1981). Although we have found no cases, logic would suggest that the converse is also possible—an amendment to an interpretative regulation which rises to the level of a substantive or legislative rule.

If a parent regulation is exempt from compliance with the APA but the agency has, without generally 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 Univ. Medical Center v. Heckler, 758 F.2d 1052 (5th Cir. 1985); Malek-Marzban v. Immigration and Naturalization Service, 653 F.2d 113 (4th Cir. 1981); Washington Hospital Center v. Heckler, 581 F. Supp. 195 (D.D.C. 1984).

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 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 plan. 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.

It is generally accepted that Congress can make its laws retroactive in either the primary or the secondary sense if retroactive application serves a rational legislative purpose, subject of course to constitutional limitations (such as due process and the impairment of contracts). See id. at 223; Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 729–30 (1984); Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15–17 (1976). The same standard does not, however, apply to agency regulations.

There is no blanket prohibition on secondary retroactivity in agency regulations. The standard of review is the "arbitrary or capricious" standard of the APA. See Bowen, 488 U.S. at 220. 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.

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,[14] or certain interpretative rules.[15]

Does the APA prohibit retroactive rulemaking? Thus far, the Supreme Court has not directly addressed the question. The court of appeals decision affirmed by the Supreme Court in Bowen held that it does. Georgetown University Hospital v. Bowen, 821 F.2d 750 (D.C. Cir. 1987). The Supreme Court's majority opinion did not discuss the APA, although Justice Scalia's concurring opinion expressly endorsed the circuit court's views.

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., 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 and 447 U.S. 922; NLRB v. Majestic Weaving Co., 355 F.2d 854 (2d 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

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 which should not be lightly

[14]E.g., Iowa Power and Light Co. v. Burlington Northern, Inc., 647 F.2d 796, 812 (8th Cir. 1981), cert. denied, 455 U.S. 907.

[15]E.g., Caterpillar Tractor Co. v. United States, 589 F.2d 1040, 1043 (Ct. Cl. 1978) (first regulation promulgated under a statute).

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.[16]

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."

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. The agency's position 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.

When the agency's interpretation is in the form of an interpretative regulation, manual, handbook, etc.— anything short of a regulation with the force and effect of law—the standard of review is somewhat lessened, and it is here that the question of deference really comes into play. It is clear that a reviewing body "is not required to give effect to an interpretative regulation." Batterton v. Francis, 432 U.S. 416, 425 n.9 (1977). Yet, as the Court also instructed in Udall v. Tallman, there is an entitlement to deference.

Deference in this context is not some fixed concept, but is variable, depending on the interplay of several factors. The Supreme Court explained the approach as follows in Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944):

[16]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. GAO's policy for audit reports is, at a minimum, to discuss the draft report with agency officials at an "exit conference." Depending on the results of the conference, written comments may or may not be requested, although GAO prefers to obtain written comments, especially when the report deals with sensitive or controversial issues. The final report will then reflect the comments received and identify significant changes resulting from them. See generally 31 U.S.C. § 718. For a legal decision, the agency's position on the legal issue(s) involved is solicited before a draft is ever written. For obvious reasons, draft legal decisions are not submitted for comment.

"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."

The basic premise that an agency interpretation is entitled to some largely undefined degree of deference is now settled. See, for example, in addition to the Tallman and Skidmore cases cited above, 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 above-quoted passage from Skidmore as the "most comprehensive statement of the role of interpretative rulings"); West Coast Construction Co. v. Oceano Sanitary District, 311 F. Supp. 378, 383 (N.D. Cal. 1970).[17]

As noted above, 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. Chrysler Corp., 441 U.S. at 315; Batterton, 432 U.S. at 425 n.9. To take a somewhat self-serving example, we like to think that GAO's expertise in appropriations matters merits a certain respect. E.g., International Union, UAW v. Donovan, 746 F.2d 855, 861 (D.C. Cir. 1984), cert. denied, 474 U.S. 825; City of Los Angeles v. Adams, 556 F.2d 40, 51 (D.C. Cir. 1977).
- The duration and consistency of the interpretation. United States v. Clark, 454 U.S. 555, 565 (1982); Chrysler Corp., 441 U.S. at 315; Batterton, 432 U.S. at 425 n.9; Skidmore, 323 U.S. at 140; Theodus v. McLaughlin, 852 F.2d 1380, 1387 (D.C. Cir. 1988); Oceano, 311 F. Supp. at 383. While consistency may not always be a virtue, inconsistency will not help your case in court. E.g., Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421, 446 n.30 (1987); Rowan Cos. v. United States, 452 U.S. 247, 258-63 (1981); General Electric Co. v. Gilbert, 429 U.S. at 143.

[17]The rule is hardly a new one. It has consistently been espoused by the Supreme Court for well over a century and a half. Some of the early cases are: United States v. Philbrick, 120 U.S. 52, 59 (1886); 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 v. Darby, 25 U.S. (12 Wheat.) 206, 210 (1827).

- The soundness and thoroughness of reasoning underlying the position. Skidmore, 323 U.S. at 140.
- Evidence (or lack thereof) of congressional awareness of, and acquiescence in, the administrative position. United States v. American Trucking Ass'ns, 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); 41 Op. Att'y Gen. 57 (1950); B-114829-O.M., July 17, 1974.

For illustrations of how GAO has applied the deference principle in decisions, see:

- 49 Comp. Gen. 510 (1970) (Department of Agriculture regulations under Meat Inspection Act).
- 48 Comp. Gen. 5 (1968) (Veterans Administration interpretation of statutory educational assistance allowance).
- 42 Comp. Gen. 467, 477 (1963) (long-standing Navy application of Buy American Act).
- B-205365, June 3, 1985 (Department of Energy's statement on duration of Residential Conservation Service program).
- B-211558, February 13, 1984 (statement of Federal Emergency Management Agency on eligibility for certain Disaster Relief Act assistance).
- A-51604, August 25, 1981, affirming A-51604, February 19, 1980 (Department of Agriculture regulations on administrative cost reimbursement under the Food Stamp Act).
- B-160573, June 6, 1967, affirming B-160573, January 17, 1967 (Office of Emergency Planning interpretation of coverage under the Federal Disaster Act).

The deference principle does not apply to an agency's litigating position unless that position is also expressed in the regulations, rulings, or administrative practice of the agency. Bowen v. Georgetown University Hospital, 488 U.S. at 212. It also does not apply to an agency's interpretation of a statute which is not part of its program or enabling legislation. United States Dep't of Justice v. Federal Labor Relations Authority, 709 F.2d 724, 729 n.21 (D.C. Cir. 1983); Library of Congress v. Federal Labor Relations Authority, 699 F.2d 1280, 1286 n.29 (D.C. Cir. 1983).

As noted above, a regulation with the "force and effect of law" merits the highest degree of deference. In this connection, it is necessary to elaborate somewhat on the second Chrysler test—that

the regulation be issued pursuant to a statutory grant of 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, the Court gives as an example the proxy rules of the Securities and Exchange Commission. 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." 441 U.S. at 308.

A sampling of case law suggests that the "force and effect of law" is more likely to be found where the delegation is explicit. For example, 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 are accorded less deference than regulations issued under one of the more specific provisions. United States v. Vogel Fertilizer Co., 455 U.S. 16, 24 (1982); Rowan Cos. v. United States, 452 U.S. 247, 252-53 (1981); McDonald v. Commissioner, 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 v. United States, 20 Cl. Ct. 674, 679 n.8 (1990).

Some other illustrative cases are:

- Horner v. Jeffrey, 823 F.2d 1521 (Fed. Cir. 1987) (provision of Federal Personnel Manual found to be interpretive only, because statute did not expressly authorize Office of Personnel Management to define term "military service").
- Fmali Herb, Inc. v. Heckler, 715 F.2d 1385, 1387 (9th Cir. 1983) (Food and Drug Administration regulation defining term "common use in food" held interpretive because FDA was not "instructed by statute" to define the term).

- St. Mary's Hospital, Inc. v. Harris, 604 F.2d 407 (5th Cir. 1979) (regulation issued under statute prohibiting disclosure of certain data "except as the Secretary . . . may by regulations prescribe" found to meet second Chrysler test).
- Intermountain Forest Industry Ass'n v. Lyng, 683 F. Supp. 1330, 1340-41 (D. Wyo. 1988) (second Chrysler test satisfied in case of published Forest Service timber management regulations where statutory delegation was not explicit, but this did not extend to plans developed under the regulations).

The question of deference to agency interpretations received considerable attention from the Supreme Court in the 1980's. Perhaps the most important case, one which we have not previously mentioned, is Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), a decision involving regulations of the Environmental Protection Agency under the Clean Air Act. The Court formulated its approach 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. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. [This presumably refers to regulations with the "force and effect of law," although the Chevron Court did not use that language.] 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.

Three years later, in Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987), the Court revisited the issue. The majority opinion arguably removes statutory construction from the scope of the deference concept, and indicates that deference is required only when an agency is applying a standard to a particular set of facts. Id. at 446-48. In a separate opinion concurring in the judgment only, Justice Scalia sharply criticized the majority opinion for misapplying Chevron and for doing so gratuitously. Id. at 453-55.

The lower courts wasted little time in finding Cardoza-Fonseca to have effectively modified Chevron, rejecting deference on "pure questions of statutory construction." E.g., Union of Concerned Scientists v. Nuclear Regulatory Commission, 824 F.2d 108 (D.C. Cir. 1987); Adams House Health Care v. Heckler, 817 F.2d 587 (9th Cir. 1987); International Union, UAW v. Brock, 816 F.2d 761 (D.C. Cir. 1987).

Before the ink on these decisions was dry, the Supreme Court spoke again in still another 1987 decision, NLRB v. United Food and Commercial Workers Union, 484 U.S. 112. The majority opinion indicates that, even under Cardoza-Fonseca, the two-step approach of Chevron continues to apply to a "pure question of statutory construction." 484 U.S. at 123. Justice Scalia wrote another concurring opinion, this time joined by three other Justices including the Chief Justice, applauding the return to Chevron and explicitly calling the three 1987 court of appeals cases cited above wrong. 484 U.S. at 133-34. A court of appeals case following this "latest" reading of Cardoza-Fonseca is Theodus v. McLaughlin, 852 F.2d 1380 (D.C. Cir. 1988). See also B-232482, June 4, 1990 (applying Chevron).

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've outlined inevitable. The proliferation and complexity of case law perhaps lends credence to Professor Davis' 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."[18]

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." 380 U.S. at 16.

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 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."[19]

A good illustration of how all of this can work is found in B-222666, January 11, 1988. The Defense Security Assistance Agency (DSAA) is responsible for issuing instructions and procedures for Foreign Military Sales transactions. These appear in the Security Assistance Management Manual (SAMM). 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

[18]2 Administrative Law Treatise § 7:13 (2d ed. 1979).

[19]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.

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 also Immigration and Naturalization Service v. Stanisic, 395 U.S. 62, 72 (1969); San Luis Obispo Mothers for Peace v. NRC, 789 F.2d 26 (D.C. Cir. 1986); 63 Comp. Gen. 154 (1984); 57 Comp. Gen. 347 (1978); 56 Comp. Gen. 160 (1976); B-202568, September 11, 1981.

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., Murphy v. United States, 22 Cl. Ct. 147, 154 (1990).

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).

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. 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 discussion 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.

Under the Administrative Procedure Act, action which 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.

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.

1. 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 does not mean 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 35 Comp. Gen. 615, 618 (1956); 4 Comp. Gen. 19, 20 (1924); 7 Comp. Dec. 31 (1900); 5 Comp. Dec. 151 (1898); B-130288, February 27, 1957; B-49169, May 5, 1945; A-24916, November 5, 1928.

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, January 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.)

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."[20] 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. 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 17, government corporations frequently have a broader range of discretion than non-corporate 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.

[20]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).

E.g., D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231, 1265 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (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).

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).

2. 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. The principle has evolved, and now appears firmly established, 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. Rives, 267 U.S. 175 (1925). That case involved section 5 of the Dent Act, 40 Stat. 1274, 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 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., February 9, 1988, citing and applying these cases.

Another case involved a provision of the Farm and Rural Development Act which 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 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).

3. 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, 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 in the premises, 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."

More recently, the Comptroller General concluded in 67 Comp. Gen. 471 (1988) that the Farmers Home Administration had broad statutory authority to terminate the accrual of interest on the guaranteed portion of defaulted loans, but that it had restricted that discretion by certain provisions in its own regulations.

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); Sargisson v. United States, 913 F.2d 918, 921 (Fed. Cir. 1990); California Human Development Corp. v. Brock, 762 F.2d 1044 (D.C. Cir. 1985); Griffin v. Harris, 571 F.2d 767 (3d Cir. 1978); McCarthy v. United States, 7 Cl. Ct. 390 (1985).

4. 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.[21]

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:

> "[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."

[21] 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 obligation. The recipient would remain legally entitled to the balance.

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. 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 Dubrow v. Small Business Administration, 345 F. Supp. 4 (C.D. Cal. 1972), noted above in our discussion of failure to exercise discretion. The SBA was administering a program of low interest loans under the Disaster Relief Act following an earthquake in Los Angeles County. During the last few months of the period SBA established for filing applications, the number of applications increased drastically, to the point where it became apparent that continuing to approve claims in the same ratio as past claims would far exceed available funds. Unable to obtain additional funding from Congress, SBA changed its guidelines to require a more stringent showing of need and a reasonable ability to repay. The court held that SBA had not acted arbitrarily nor abused its discretion.

An illustration from the Comptroller General's decisions is B-202568, September 11, 1981. Due to a severe drought in the summer of 1980, the Small Business Administration 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 Department of the Interior 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. Interior 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 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 which 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.[22] 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, September 1, 1977; B-177806, February 24, 1978 (non-decision 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 Los Angeles v. Adams, 556 F.2d 40, 49-50 (D.C. Cir. 1977), and McCarey v. McNamara, 390 F.2d 601 (3d Cir. 1968).

[22]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 which 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.

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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 most 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 (2 Stat. 535) and is one of the cornerstones of congressional control over the federal purse. Since money cannot be paid from the Treasury except under an appropriation (U.S. Const. art. I, § 9, cl. 7), and since 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. One early 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, April 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 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, August 15, 1960. See also 39 Comp. Gen. 388 (1959).

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 which 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-97772, May 18, 1951; B-104135, August 2, 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 GAO report entitled Improper Accounting for Costs of Architect of the Capitol Projects, PLRD-81-4 (April 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. If the receiving appropriation is exceeded, the Antideficiency Act is also violated.

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.

[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.

In addition, several other chapters of this publication are related to purpose availability, for example, Chapter 14 on the payment of judgments. Thus, the concept of purpose must always be kept in mind when analyzing an appropriations problem.

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 or grant 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). Similarly, a grant of funds for unspecified purposes would be improper. 55 Comp. Gen. 1059, 1062 (1976).

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, August 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.[3] While the appropriation is specific in the sense that it is limited to PILT payments and associated 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. 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

[2]E.g., Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1990, Pub. L. No. 101-144, 103 Stat. 839, 855 (1989).

[3]E.g., Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, 103 Stat. 701, 702 (1989) ("For expenses necessary to implement the Act of October 20, 1976 . . ., $105,000,000, of which not to exceed $400,000 shall be available for administrative expenses").

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). Other examples are interest payments under the Prompt Payment Act and administrative settlements under $2,500 under the Federal Tort Claims Act.

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 held not available for topographical surveys in Puerto Rico. 5 Comp. Dec. 493 (1899). Similarly, an appropriation to install an electrical generating plant in the custom-house 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). 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).

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 United States 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), February 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 due to the fact that 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 which 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, December 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.

c. Effect of Budget Estimates

The relationship of an appropriation to the agency's budget request is another important factor in determining purpose availability. If a budget submission requests a specific amount of money for a specific purpose, and Congress makes a specific line-item appropriation for that purpose, the purpose aspects of the appropriation are relatively clear and simple. The appropriation is legally available only for the specific object described.

The trend in recent decades, however, has favored the enactment of lump-sum appropriations, which are stated in terms of broad object categories such as "salaries and expenses," "operations and maintenance," or "research and development." In analyzing the relationship of a lump-sum appropriation to its corresponding budget request from the perspective of purpose availability, there are two basic rules.

First, where an amount to be expended for a specific purpose which is not otherwise prohibited is included in a budget estimate, the appropriation is legally available for the expenditure even though the appropriation act does not make specific reference to it. 35 Comp. Gen. 306, 308 (1955); 28 Comp. Gen. 296, 298 (1948); 26 Comp. Gen. 545, 547 (1947); 23 Comp. Dec. 547 (1917); B-125935,

[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.

February 7, 1956; B-125404, September 16, 1955; B-51630, September 11, 1945; B-27425, August 7, 1942; A-22070, March 30, 1928.

For example, in preparing its budget request for a Salaries and Expenses appropriation, an agency will typically include such items as employee salaries, travel, training, incentive awards, contributions to health insurance and retirement, etc. An ensuing lump-sum appropriation in the simple form "for salaries and expenses, $X" will be legally available for all of the items specified.

A corollary to this rule is that the lack of a specific budget request for an item does not preclude an agency from making an expenditure for that item from a lump-sum appropriation which is otherwise available for items of that type. E.g., B-149163, June 27, 1962. See also 20 Comp. Gen. 631 (1941); B-198234, March 25, 1981.[5] Suppose in our previous example the agency neglected to budget for incentive awards for FY 1990. Since incentive awards are an authorized category of expenditure under a Salaries and Expenses appropriation and do not require specific appropriation language, the agency's 1990 S&E appropriation would be legally available for incentive awards, notwithstanding the absence of a budget estimate, provided the agency had enough discretionary money left in the account.

The second basic rule is as follows: The inclusion of an item in departmental budget estimates for an expenditure which is otherwise prohibited by law, and the subsequent appropriation of funds without specific reference to the item, do not constitute authority for the proposed expenditure or make the appropriation available for that purpose. 26 Comp. Gen. 545, 547 (1947); 6 Comp. Gen. 573 (1927); B-76841, August 23, 1948. See also 18 Comp. Gen. 533 (1938). Burying an item prohibited by law in budget justifications and then claiming that Congress must have intended to include that item because it was there in black and white in the budget materials and Congress did not object, is not enough. An appropriation would be available for an otherwise prohibited item only if it makes specific reference to the item. Congress can, in effect, "waive" a statutory prohibition, but it must do so explicitly. As the discussion

[5]These two cases do not explicitly state that there was no budget request for the item in question, although it is apparent from the context.

of repeal by implication in Chapter 2 points out, mention of the prohibited item in a lump-sum appropriation's legislative history is similarly insufficient to authorize the expenditure.

Finally, there is a middle-ground in limited circumstances. If an item is questionable but not clearly prohibited, and legislative history indicates that Congress intended to include that item in a lump-sum appropriation, GAO will regard the appropriation as available for the expenditure. E.g., A-30714, March 1, 1930. See also "Ratification by Appropriation" in Chapter 2.

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 which 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 perform additional duties imposed on it by the later-enacted Public Utility Holding Company Act of 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, and to provide reimbursable support costs for the Endangered Species

Committee and Review Board created by the Endangered Species Act Amendments of 1978. Both statutes were enacted after Interior'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-211306, June 6, 1983; B-153694, October 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, was transferred to a similar but new program by the Trade Act of 1974. 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 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 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 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, 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, even though actual acquisitions could not be made until funding was provided in appropriation acts. B-211306, June 6, 1983. See also B-153694, October 23, 1964; B-153694, September 2, 1964.

4. Termination of Program

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, 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 which directed that the programs be carried out during the fiscal years covered by the authorization. The United States 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, August 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, August 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 PHS hospital system. B-156510, February 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. Two subsequent opinions reached the same conclusion, supported further by a provision in a 1978 supplemental appropriation act which specifically earmarked funds for the reactor. B-164105, March 10, 1978; B-164105, December 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 which provided for termination in the event of insufficient funds to permit effective continuation. 63 Comp. Gen. 75 (1983).

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 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).

(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.

For an expenditure to be justified under the necessary expense theory, three tests must be met:

(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-230304, March 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.

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 litter bags for use in a national forest. 50 Comp. Gen. 534 (1971). However, operating appropriations of the Equal Employment Opportunity Commission are not available to pay to the Internal Revenue Service taxes due on judgment proceeds recovered by the 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).

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. The standard GAO uses in evaluating purpose availability is summarized in the following passage from B-223608, December 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), affirmed upon reconsideration in A-60467, June 24, 1936.

Two decisions involving the Bonneville Power Administration 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, September 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, January 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, March 8, 1977. See also 27 Comp. Gen. 516 (1948); 26 Comp. Dec. 780, 783 (1920); B-56866, April 22, 1946.

Cases involving fairs and expositions provide further illustration. For the most part, when Congress desires federal participation in fairs or expositions, it has authorized it by specific legislation. See, e.g., B-160493, January 16, 1967, discussing legislation which authorized federal participation in HemisFair 1968 in San Antonio. For another example, U.S. 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. 16 Comp. Gen. 53 (1936); 10 Comp. Gen. 282 (1930); 7 Comp. Gen. 357 (1927); 4 Comp. Gen. 457 (1924).[6] Authority to disseminate information will generally provide adequate justification. E.g., 7 Comp. Gen. 357; 4 Comp. Gen. 457.

[6]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.

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 Development 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, December 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, Department of the 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, December 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, December 30, 1936. See also A-82570/B-120739, August 21, 1957.[7]

[7]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, February 6, 1945 (burial of three dead bulls); B-37205, October 19, 1943 (mule fell off cable swing bridge); A-92649, April 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). We're still looking for cases on fish.

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 in an appropriation act can be used to overcome a statutory prohibition. E.g., 38 Comp. Gen. 758 (1959); 4 Comp. Gen. 1063 (1925). In the two cited decisions, 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.

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 which 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 air mail 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 had become unsafe and overcrowded. Congress enacted legislation to authorize and fund the construction of a new building for the Department. 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 the Department 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 prohibits the rental of space in the District of Columbia except under an appropriation specifically available for that purpose, and the Department had no such appropriation. On the grounds that any other result would be absurd, the Comptroller of the Treasury held that the Department 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 the Department 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. 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 a more recent 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, March 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." Although an "S&E" appropriation may contain earmarks, it for the most part 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 which 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 United States 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).

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). See GAO's Personnel Law Manuals for extensive coverage of travel entitlements.

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., Review of White House and Executive Agency Expenditures for Selected Travel, Entertainment, and Personnel Costs, AFMD-81-36 (March 6, 1981); Review of the Propriety of White House and Executive Agency Expenditures for Selected Travel, Entertainment, and Personnel Costs, FGMSD-81-13 (October 20, 1980).

Finally, there are situations in which expenses of congressional travel may be chargeable 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, April 17, 1984; B-129650, January 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, November 27, 1981.

c. Postage Expenses

Agencies are required to reimburse the Postal Service for mail sent by or to them as penalty mail. 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 which 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).

While agencies are not required by the statute to allocate penalty mail costs among using components on a pro rata basis, the Office of Management and Budget could require it for accounting and budgetary reasons. B-117401, February 13, 1957.

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 appropriation to buy books on military leaders to help it decide what people and events to memorialize. 27 Comp. Gen. 746 (1948).[8]

[8]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 in 1898 (30 Stat. 316) and repealed in 1946.

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 Foundation's Salaries and Expenses 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, February 7, 1985.

In B-171856, March 3, 1971, the Interior Department was permitted to purchase newspapers to send to a number of Eskimo 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 voluntarism.

e. Miscellaneous Items Incident to the Federal Workplace

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); B-155667, January 21, 1965; B-154456, August 11, 1964; B-119740, July 29, 1954. This does not, however, extend to giving T-shirts to Combined Federal Campaign contributors. 70 Comp. Gen. ___ (B-240001, February 8, 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 which 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 could be used to procure credit bureau reports if administratively determined to be necessary in connection with investigating applicants for employment with the IRS. B-117975, December 29, 1953.

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). 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. Certain officials, specified in 18 U.S.C. § 3056(a), are entitled to Secret Service protection. 54 Comp. Gen. 624 (1975), as 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, March 16, 1936, in which 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, September 24, 1941.

Fees for the notarization of documents are properly payable from appropriated funds where no government notary is available. B-33846, April 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, September 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 which have generated considerable activity over the years and which require 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, 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, October 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 19th 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 therefor," 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). Of course, Congress is always free to legislate exceptions whether it has specifically reserved that prerogative to itself or not. Thus, an "unless otherwise authorized by law" clause largely restates what the law would be even without that language.

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, 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 non-federally sponsored meetings. See, e.g., B-140912, November 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 United States 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), affirmed by 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, August 1, 1958), and later, as will be seen below, enacted general legislation which 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, 49 Stat. 19 (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, 72 Stat. 327. 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 non-government 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 Training Act, GAO had strictly construed grants of statutory authority for attendance at meetings as excluding meetings concerning general problems such as management which 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 Training Act. If attendance cannot be authorized under either of the Training Act 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, February 8, 1980; 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 which 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, September 25, 1953; B-87691, August 2, 1949; B-80621, October 8, 1948; B-77404, June 29, 1948; B-77613, June 23, 1948; B-13888, December 10, 1940.[9]

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, February 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.

In B-159059, June 28, 1966, an Interior Department employee had been accepted to attend an energy seminar. The seminar announcement provided a cut-off 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 cut-off date. GAO found that the sponsor's acceptance of the employee's application, which had

[9]All of these cases also involve the pre-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.

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 snow storm prevented him from leaving Washington. (By Washington standards, this could have been two 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, September 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 Section C.5.

(4) Rental of space in District of Columbia

Originally enacted in 1877 (19 Stat. 370), 40 U.S.C. § 34 provides:

"No contract shall be made for the rent of any building, or part of any building, to be used for the purposes of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and this clause shall be regarded as notice to all contractors or lessors of any such building or any part of 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), modifying and affirming B-159633, September 10, 1974; 49 Comp. Gen. 305 (1969).[10] 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.

(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."

[10]49 Comp. Gen. 305 was one of the decisions listed as overruled in 54 Comp. Gen. 1055. However, the overruling action was later recognized to be erroneous and 49 Comp. Gen. 305 was reinstated in 56 Comp. Gen. 572, 574.

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-1940's and was enacted as permanent legislation by section 605 of the Department of Defense Appropriation Act for 1954, 67 Stat. 349.

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 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 in 1962 recognized this distinction and reworded the statute to its present form so as to 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, August 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. Non-Government 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 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.

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, November 6, 1945; B-27441, August 25, 1942; and A-66869, January 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 could not pay transportation and lodging expenses of state officials attending a National Solid Waste Management Association Convention. B-166506, July 15, 1975, affirmed in 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 non-federal 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 non-government minority group leaders. B-176806-O.M., September 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.

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.[11] See 34 Comp. Gen. 321 (1955); 24 Comp. Gen. 86 (1944); 17 Comp. Gen. 838 (1938); 16 Comp. Gen. 839 (1937); B-117137, September 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 which (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

[11] 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.

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, March 27, 1991.

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 the Environmental Protection Agency could hold a solid waste management convention as a legitimate means of implementing its 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). Cf. 45 Comp. Gen. 333 (1965); B-147552, November 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 non-federal, 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 non-federal 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 non-government persons at a seminar, it could permit the seminar to be held at the United States 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 (60 Stat. 608). 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, April 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 newly-enacted 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, October 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, 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 (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, September 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, November 1, 1979, "[i]t 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, November 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 (1976) and reiterated in B-193644, July 2, 1979. As noted above, 55 Comp. Gen. 750 affirmed B-166506, July 15, 1975, holding that 31 U.S.C. § 1345 prohibited the Environmental Protection Agency 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.

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, but only if that individual is legitimately performing a direct service for the government such as making a presentation or advising in an area of expertise. However, it 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.

(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 largely lose their identity as federal funds and are no longer subject to many of the restrictions applicable to the direct expenditure of appropriations. 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, February 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).

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. 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. 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, January 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, April 14, 1977. Similarly non-reimbursable 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 which 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 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, January 10, 1979. In another case, the Small Business Administration 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, April 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 which 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, 41st Cong., 2d Sess., ch. 150, 16 Stat. 162.

To assure 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 Revised Statutes §§ 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.[12] 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 experts or consultants under 5 U.S.C. § 3109 is authorized. For example, in B-192406, October 12,

[12]Many early decisions will be found dealing with Revised Statutes §§ 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 which have since become obsolete. However, decisions under R.S. §§ 189 and 365 remain valid to the extent they concern the elements of those statutes which survived into 5 U.S.C. § 3106. E.g., 32 Comp. Gen. 118 (1952).

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, February 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) (U.S. Advisory Commission on Public Diplomacy could hire law firm to provide legal analysis of its authority and independence); B-210518, January 18, 1984 (Environmental Protection Agency could retain private counsel to provide independent analysis of issues relating to congressional contempt citation of Administrator); B-133381, July 22, 1977; B-141529, July 15, 1963.

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, January 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.

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). 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., 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 Department of Justice. 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 Executive Order No. 6166, § 5 (1933). These provisions establish the Justice Department as the government's litigator,[13] which for the most part means representation by Justice Department attorneys. 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.[14] This statutory and regulatory scheme is designed to encourage employees to vigorously carry out their

[13]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). In addition, an 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.

[14]For cases where the Federal Tort Claims Act is the exclusive remedy, see 28 C.F.R. Part 15.

duties by assuring them of an adequate defense at no cost if they should be sued in the course of executing their responsibilities.

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. Falkowski v. Equal Employment Opportunity Commission, 783 F.2d 252 (D.C. Cir. 1986), cert. denied, 478 U.S. 1014. The Attorney General may take into consideration "how blameworthy or litigation-prone the employee seeking representation may be." Id. 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., B-22494, January 10, 1942. For example, the Justice Department will not provide representation if the employee is the target of a criminal investigation, 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 2 Op. Off. Legal Counsel 66 (1978); 56 Comp. Gen. 615, 621-624 (1977);[15] B-150136/B-130441, May 19, 1978; B-130441, May 8, 1978; B-130441, April 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

[15]56 Comp. Gen. 615 dealt with civil actions against employees under section 7217 of the Internal Revenue Code for improper disclosure of tax returns. Section 7217 has since been repealed, and the remedy is now a suit for damages against the United States under 26 U.S.C. § 7431.

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. 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. 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 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.

In 55 Comp. Gen. 408 (1975), the United States Attorney had agreed to defend a former Small Business Administration 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.

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 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 Justice reached its decision, the employee retained private counsel and was successful in having the suit dismissed. Subsequently, Justice 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 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, August 12, 1976.

A related situation is where an employee incurs legal fees defending against a fine. In the section of this chapter on Fines and Penalties, a distinction is drawn between an action which 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 non-reimbursable. 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, February 27, 1979 (non-decision letter).

Questions over reimbursement of legal fees also arise in a number of non-judicial contexts. In B-193712, May 24, 1979, GAO concluded that the Central Intelligence Agency 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'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 GAO report, Postal Service: Board of Governors' Contract for Legal Services, GAO/GGD-87-12 (February 1987) (questioning propriety of payment of legal fees of Board member incident to congressional investigation of pre-nomination 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 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, April 5, 1979. See also B-192784, January 10, 1979.

In another case, however, 58 Comp. Gen. 613 (1979), the Securities and Exchange Commission 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. 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 B-212487, April 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 on 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). 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.

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, February 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 (1976).

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. 37, 38 (1987):

"[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, 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 which 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 defendants' official duties, it could reimburse the award from its Salaries and Expenses appropriation.

Finally, the concept of using agency appropriations for legal fees when Justice Department representation is unavailable has arisen in one context that is unrelated to suits against government employees. Under 25 U.S.C. § 175, the United States 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).

d. 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, are governed by 42 U.S.C. § 2000e-5(k), which authorizes courts to award reasonable attorney's fees to non-federal 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 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.

GAO was initially inclined towards the view expressed in the Noble decision. See B-167015, April 7, 1978. However, GAO reconsidered its position and subsequently announced that it would not object to the issuance of regulations by the Equal Employment Opportunity Commission to include the awarding of attorney's fees at the administrative level. B-193144, November 3, 1978; B-167015, September 12, 1978; B-167015, May 16, 1978 (all non-decision 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. 64 Comp. Gen. 349, 354 (1985); B-199291, June 19, 1981.

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).

Title VII is not the only statute prohibiting discrimination in federal employment. Discrimination on the basis of 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.[16]

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, September 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 Act. See 29 C.F.R. § 1613.271(d).

The situation may become more complicated where an employee alleges discrimination on more than one grounds. In 69 Comp. Gen. 469 (1990), an agency settled a complaint in which the employee

[16]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.

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 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, August 9, 1978 (unfair labor practice proceeding); B-184200, April 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).

Second, it added an attorney's fee provision to the Back Pay Act, 5 U.S.C. § 5596. Now, if an employee, on the basis of a timely appeal or an administrative determination, including grievance or unfair labor practice proceedings, is found by "appropriate authority"[17] to have suffered a loss or reduction of pay as a result of an "unjustified or unwarranted personnel action," the employee is entitled to

[17]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.

recover reasonable attorney's fees in addition to back pay. Id. § 5596(b). See generally B-231813, August 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. Part 550, Subpart 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 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 (1983).

GAO will not review decisions awarding or declining to award, nor consider claims for, fees under 5 U.S.C. § 7701. 63 Comp. Gen. 170, 174 (1984); 61 Comp. Gen. 578 (1982); 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. § 550.806(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 (1982).

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, and the Board'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.

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, August 20, 1979.

- Employee obtained continuance in divorce proceedings. Continuance was necessitated by temporary duty assignment. B-197950, September 30, 1980.
- Former employee successfully prosecuted administrative patent interference action against National Aeronautics and Space Administration. B-193272, August 21, 1981.
- Fees incurred incident to prosecution of claim for relocation expenses. 68 Comp. Gen. 456 (1989); B-186763, March 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, September 29, 1981. (Legal fees within customary range of charges are reimbursable. See cases cited in B-200207.)
- Administrative grievance proceeding involving neither an appeal to the Merit Systems Protection Board nor a reduction or denial of pay or allowances. 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.

e. Criminal Justice Act

The Criminal Justice Act, 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 Act 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 Act. 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 Criminal Justice Act 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 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 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 Criminal Justice Act. 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. 1546, 91st Cong., 2d Sess. 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 Criminal Justice Act 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 Criminal Justice Act 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 (Public Law 93-412), 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 Criminal Justice Act 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, 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).

An attorney appointed and paid under the Criminal Justice Act 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 pre-dated the 1970 amendments to the Criminal Justice Act 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 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 Criminal Justice Act 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).

f. 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. §§ 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.[18] (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." § 504(a)(1). The meaning of "prevailing party" is to be determined by reference to case law under other fee-shifting statutes.[19] Of course before you can be a "prevailing party" you must first be a "party," and the law prescribes financial and other eligibility criteria. § 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

[18]S. Rep. No. 253, 96th Cong., 1st Sess. 17 (1979) (report of the Senate Judiciary Committee).

[19]S. Rep. No. 253, supra note 18, at 7; H.R. Rep. No. 1418, 96th Cong., 2d Sess. 11 (1980) (report of House Judiciary Committee).

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." § 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." § 504(a)(1).[20] 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. § 504(b)(1)(E). A party who "unreasonably protracts" the proceedings risks reduction of the award. Id.; § 504(a)(3).

The award includes "fees and other expenses." "Fees" means a reasonable attorney's fee, generally capped at $75 per hour unless the agency determines by regulation that cost of living increases or other special factors justify a higher rate.[21] "Other expenses" include such items as expert witness expenses and the necessary cost of studies, analyses, engineering reports, etc. § 504(b)(1)(A).

Agencies are required to establish, by regulation, uniform procedures for administering the statute, in consultation with the Administrative Conference of the United States (ACUS). § 504(c)(1). ACUS has published a set of non-binding model rules, found at 1 C.F.R. Part 315. In addition, the supplementary information statement to these rules, found at 51 Fed. Reg. 16659 (May 6, 1986), contains much useful information. The requirement to consult with ACUS will be met by simply notifying ACUS of the publication of proposed regulations, or by sending ACUS a prepublication draft for review and comment. Id.

[20]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).

[21]Pierce v. Underwood, supra note 20, 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.

Payment of awards under 5 U.S.C. § 504 is addressed in § 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."[22]

As with judicial awards under 28 U.S.C. § 2412(d), § 504 awards are payable from agency operating appropriations with no need for specific, line-item, or "earmarked" appropriations.[23]

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.

Section 504 permits fee awards to intervenors who otherwise meet the statutory criteria. 62 Comp. Gen. at 693. As noted in that decision, the 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 and 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. Some mention of EAJA in this context is necessary, if only to point out that the law is not entirely settled. The Court of Appeals for the Federal Circuit has held that 5 U.S.C. § 504 does not authorize the 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 because the

[22]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.

[23]Authorities for this proposition are cited in Chapter 14 in our discussion of the judicial portion of EAJA, which has an identical payment provision.

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 (3d Cir. 1985), reached a contrary result.

Prior to Gavette, the Board 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 Board 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).

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 which did not meet the standard of an "adversary adjudication." (This being the case, it was irrelevant whether or not the grievance involved selection or tenure.)

Where a Board 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. 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 Board or to a court reviewing a Board action, all is not necessarily lost to the fee applicant because EAJA is not exclusive in these situations. The Board and the courts both may award fees under the Back Pay Act in appropriate cases, and the Board additionally has 5 U.S.C. § 7701. Thus, for example, Hoska, while finding EAJA inapplicable, awarded fees under the Back Pay Act.

g. 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, August 25, 1980; B-192910, April 11, 1979. The question arose again upon enactment of the Equal Access to Justice Act in 1980. However, since a bid protest at GAO is not an adversary adjudication governed by the Administrative Procedure Act, EAJA was equally unavailing. 63 Comp. Gen. 541 (1984); 62 Comp. Gen. 86 (1982); B-211105.2, January 19, 1984.

Fee-shifting authority came with enactment of the Competition in Contracting Act of 1984.[24] Now, upon determining that a solicitation or contract award violates a statute or regulation, the Comptroller General "may declare an appropriate interested party to be entitled to" bid and proposal preparation costs and the costs of filing and pursuing the protest, including reasonable attorney's fees. The costs and fees are payable from the contracting agency's procurement appropriations. 31 U.S.C. § 3554(c).

GAO's approach under 31 U.S.C. § 3554(c) is to determine the entitlement and leave it to the protester and agency to negotiate the appropriate amount. If the parties cannot agree, GAO will determine the amount. 4 C.F.R. §§ 21.6(d) and (e). Sample cases involving awards under section 3554(c) are 67 Comp. Gen. 442 (1988) and 67 Comp. Gen. 131 (1987).

GAO's bid protest authority is not exclusive. A protester may seek resolution with the contracting agency, or may go directly to court in lieu of filing a protest with GAO, or may seek judicial review of a GAO decision. 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 Corporation of America v. United States, 5 Cl. Ct. 28 (1984).

Another portion of the Competition in Contracting Act amended the so-called Brooks Act, 40 U.S.C. § 759, to authorize the General Services Administration Board of Contract Appeals to hear protests

[24]Title VII of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1175 (1984).

involving automatic data processing procurements. Upon finding that the contracting agency has violated a statute, regulation, or delegation of procurement authority, the GSBCA may award the costs of filing and pursuing the protest, including reasonable attorney's fees, and bid and proposal preparation costs. The awards are payable, at least in the first instance, from the permanent judgment appropriation, 31 U.S.C. § 1304. 40 U.S.C. § 759(f)(5). Questions have arisen as to whether the payments must be reimbursed from the contracting agency's appropriations, but there has thus far been no definitive determination. E.g., United States v. Julie Research Laboratories, Inc., 881 F.2d 1067 (Fed. Cir. 1989) (question viewed as an "intra-government dispute" not presenting a justiciable controversy).

The Brooks Act fee provision does not authorize contracting agencies to pay attorney's fees as part of an agency settlement of a protest (i.e., where there is no order from the GSBCA based on one of the violations specified in the statute), nor does it authorize contracting agencies to make monetary settlements of any type solely to avoid operational delays by "buying off" the protester (a practice which has been termed "Fedmail"). See GAO report, ADP Bid Protests: Better Disclosure and Accountability of Settlements Needed, GAO/GGD-90-13 (March 1990), at 31.

(2) Contract disputes

Under the original (1980) version of the Equal Access to Justice Act, 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. 1983), cert. denied, 464 U.S. 826.

The 1985 EAJA amendments legislatively overturned Fidelity to the extent it held 5 U.S.C. § 504 inapplicable to boards of contract appeals. 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 officer's decision directly to 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.)

h. 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 non-industry "public interest" representatives.

The Comptroller General has had frequent occasion to consider 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 1970's. In 1970, the Federal Trade Commission 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, February 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), 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, February 19, 1976, applied equally to nine agencies under the Subcommittee's 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.

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 advisory 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, April 5, 1977.
- Federal Communications Commission: B-139703, September 22, 1976.
- Food and Drug Administration: 56 Comp. Gen. 111 (1976).
- Nuclear Regulatory Commission: 59 Comp. Gen. 228 (1980).
- Economic Regulatory Administration (a component of the Department of Energy): B-192213-O.M., August 29, 1978; letter report EMD-78-111, October 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, May 10, 1976; B-92288, February 19, 1976. Congress has acted in several instances, authorizing intervenor funding in some cases and prohibiting it in others.

For example, the Federal Trade Commission was given specific authority to fund intervenor participation in 1975 by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. § 57a(h). Under this legislation, payments for legal services may not exceed the costs actually incurred, even though the participant uses "house counsel" whose rate of pay is lower than prevailing rates. 57 Comp. Gen. 610 (1978). Similarly, 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).

Restrictions in appropriation acts have prohibited intervenor funding programs for several agencies. For example, a provision in the Nuclear Regulatory Commission's 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, December 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 and 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. 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.[25]

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 transportation agencies later "graduated" to a general provision in the statute.[26]

One court has disagreed with the GAO decisions. Greene County Planning Board v. Federal Power Commission, 559 F.2d 1227 (2d Cir. 1976), cert. denied, 434 U.S. 1086.[27] 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 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. 559 F.2d at 1238.

[25]H.R. Rep. No. 610, 96th Cong., 1st Sess. 9, 14 (1979) (on H.R. 4440, 1980 appropriations bill for Department of Transportation and related agencies).

[26]E.g., Department of Transportation and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-164, § 306, 103 Stat. 1069, 1092 (1989).

[27]The Greene County litigation produced several published decisions: 455 F.2d 412 (2d Cir. 1972), 490 F.2d 256 (2d Cir. 1973), 528 F.2d 38 (2d Cir. 1975), and the decision cited in the text, known as "Greene County IV."

Subsequently, both GAO and the Justice Department's Office of Legal Counsel took the position that Greene County IV applied only to the former Federal Power Commission, and not to other federal agencies or even to the agencies which succeeded to the FPC's responsibilities. 59 Comp. Gen. 228 (1980); 2 Op. Off. Legal Counsel 60 (1978). In addition, the United States 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 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 more recent decisions have 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 (1976). 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, February 19, 1976.

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 (1976); B-139703, September 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, April 27, 1973 (non-decision 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, February 19, 1976.

A summary and discussion of intervenor funding through early 1981 may be found in a GAO report entitled Review of Programs for Reimbursement for Public Participation in Federal Rulemaking Proceedings, PAD-81-30 (March 4, 1981). See also "Payment of Intervenors' Expenses in Agency Regulatory Proceedings" by Rollee H. Efros, in Cases in Accountability: The Work of the GAO, Erasmus H. Kloman ed. (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, and are covered in GAO's Civilian and Military Personnel Law Manuals. However, they may also be viewed as restrictions on the "purpose availability" of appropriations. We treat two compensation-related topics in this chapter—the restriction 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 forfeiture statutes are permanent provisions found in the United States Code; while not phrased in terms of appropriation restrictions, the effect is the same.

a. 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 United States 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."[28] A recurring general provision in the Defense Department appropriation act exempts Defense Department personnel from the alien restriction.[29]

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 amount to permanent indefinite appropriations. 50 Comp. Gen. 323 (1970). It also applies to working capital funds supported by appropriations. B-161976, August 10, 1967.[30]

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, December 16, 1977; B-110831, August 4, 1952. Others are 42 U.S.C. § 2473(c)(10)

[28]For example, the 1990 provision is found in Pub. L. No. 101-136, § 603, 103 Stat. 783, 816 (1989).

[29]The 1990 provision is Pub. L. No. 101-165, § 9003, 103 Stat. 1112, 1129 (1989)

[30]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 DOD exemption is irrelevant. The decision is cited here merely for the proposition noted in the text.

(National Aeronautics and Space Administration, permanent legislation); 2 U.S.C. § 169 (Library of Congress, derived from annual appropriation acts); 22 U.S.C. § 1474(1) (limited permanent authority for United States Information Agency); and 22 U.S.C. § 2672 (limited permanent authority for 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, March 6, 1957.

In addition to the agency-wide 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 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, April 1, 1959.

Specific country exceptions. The statute typically exempts nationals of certain specified countries. The countries specified in any given appropriation act change from time to time according to the political climate. The exception usually includes the Philippines and the Baltic countries (Lithuania, Latvia, and Estonia). B-134230, November 18, 1957. 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 non-exempt 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, March 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, February 14, 1952; B-107579, February 14, 1952.

GAO will, however, venture an assertion in the more obvious cases. Thus, Canada meets the test. B-133877, October 16, 1957; B-188852, July 19, 1977. So does Japan. B-113780, March 4, 1953. Russia was allied with the United States during World War II but no longer is, or at least wasn't in 1955. 35 Comp. Gen. 216 (1955). The Republic of China was allied with the United States during World War II. B-178882, May 7, 1974. The Republic of China (Taiwan) still is. B-161976, August 10, 1967. Romania probably is not, or at least was not as of B-119760, April 27, 1954. 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, April 27, 1954. The exemption was apparently prompted by a concern for a very limited class—"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 non-citizen nationals and not to non-national aliens. Yuen v. Internal Revenue Service, 497 F. Supp. 1023 (S.D.N.Y. 1980), aff'd, 649 F.2d 163 (2d 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.

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-178882, August 29, 1973; B-188852, July 19, 1977. The distinction proved confusing and GAO has moved away from it. The current rule is stated in 58 Comp. Gen. 734 (1979). For further information on de facto employees and their specific entitlements, see GAO's Civilian Personnel Law Manual.

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, December 16, 1977. The Yuen litigation cited earlier specifically upheld the restriction against a charge of violation of the Equal Protection clause.

b. 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 employee's survivors or beneficiaries. The offenses which 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 which 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 which, 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 (68 Stat. 1142).

Hiss applied for his pension in 1967 and the (then) Civil Service Commission denied the application based on 5 U.S.C. § 8312. Hiss 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), affirmed by B-115505, December 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.[31]

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 (75 Stat. 640) 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, September 15, 1965 (conspiracy to embezzle government funds); B-155558, November 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, and this

[31]See, e.g., 41 Comp. Gen. 114 (1961); 40 Comp. Gen. 364 (1960); 40 Comp. Gen. 176 (1960).

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 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 U.S. 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);[32] or knowingly falsifying certain national security-related aspects of a federal or District of Columbia employment application (5 U.S.C. § 8315).

[32]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., 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 taxpayer's 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."

(1) Application of the rule

As a general proposition, the rule applies to all federal departments and agencies operating with appropriated funds. For example, it has been held applicable to the Alaska Railroad. B-124195-0.M., August 8, 1977.

The question in B-170938, October 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 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 non-profit corporation and is not an agency or establishment of the United States 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 which 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, November 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, April 16, 1959 (Lincoln Sesquicentennial Commission); B-138925, April 15, 1959 (Civil War Centennial Commission); B-129102, October 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),[33] overruled on other grounds by 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 which 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 which, 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).[34]

In a 1941 decision (B-20085, September 10, 1941), the Coordinator of Inter-American Affairs asked whether authorized entertainment could include 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"). In addition to the obvious reason that food is a personal expense and government salaries are presumed adequate to enable employees to

[33]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).

[34]The Comptroller's comments should not be confused with the rule that alcoholic beverages are not reimbursable as subsistence expenses. B-164366, March 31, 1981; B-164366, August 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.

eat regularly,[35] 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-140912, November 24, 1959.

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 is not a "necessary expense" in the context of appropriations availability. See also 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.[36] 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 for anyone else, including government employees not in official travel status.

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, March 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

[35]"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).

[36]5 U.S.C. § 5702 (civilian employees); 37 U.S.C. § 404 (military personnel). We do no more here than note the existence of the authority. The entitlements of government employees while on official travel or temporary duty are covered in GAO's Personnel Law Manuals. Brief mention should be made, however, of the rule that snacks and refreshments which are not part of a regular meal are not necessary subsistence expenses and hence not reimbursable. B-185826, May 28, 1976; B-167820, October 7, 1969.

example is 65 Comp. Gen. 738 (1986) (refreshments at awards ceremonies), discussed later in this section. 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 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.[37]

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) three meals a day even if he had not been required to work the 24-hour shift.

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.[38]

Similarly, the general rule was applied in the following situations:

- Federal mediators required to conduct mediation sessions after regular hours. B-169235, April 6, 1970; B-141142, December 15, 1959.
- District of Columbia police officers involved in clean-up work after a fire in a municipal building. B-118638.104, February 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, January 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).

[37]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.

[38]This and several other cases cited in the text also involve the "voluntary creditor" rule, discussed in Chapter 12.

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 "Assistance to private lobbying groups" later in this section, and B-229069.2, August 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 non-proliferation 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.
- Written materials prepared and disseminated by the Small Business Administration, none of which included grass roots lobbying, designed to support an administration proposal to transfer the SBA to the Commerce Department. B-223098/B-223098.2, October 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., November 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. Nuclear Test Lobbying: DOE Regulations for Contractors Need Reevaluation, GAO/RCED-88-25BR (October 1987).

Numerous additional examples may be found in our discussion of "pending legislation" appropriation restrictions later in this section.

room for several days on a surveillance assignment. See also 16 Comp. Gen. 158 (1936) and 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, August 12, 1981; B-188985, August 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),[39] or that the federal government in Washington was shut down (68 Comp. Gen. 46).[40]

Naturally, statutory authority will overcome the prohibition. Thus, where the Veterans Administration 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. 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.

(2) 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.

[39]A supervisor has no authority to do so. As noted in B-226403, such an erroneous exercise of authority does not bind the government.

[40]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.

For meetings sponsored by non-government 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-66978, August 25, 1947. The same is true for an evening social event where the cost is a mandatory non-separable 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-160579, April 26, 1978; B-166560, February 3, 1970. Absent such a showing, the government may not pay for the meals. B-154912, August 26, 1964; B-152924, December 18, 1963; B-95413, June 7, 1950; B-88258, September 19, 1949. As an examination of the cited cases will reveal, these rules apply regardless of whether the conference takes place within the employee's 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, August 9, 1979; B-186820, February 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, October 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).

For the most part, the above rules will not apply to agency-sponsored meetings. Attendance at agency-sponsored meetings and conferences will generally be subject to the prohibition on furnishing

free food to employees at their official duty stations. Thus, the cost of meals and coffee breaks could not be provided for government officials attending a one-day conference on implementation of the Speedy Trial Act. B-188078, May 5, 1977. Similarly, meals could not be provided at a conference of field examiners of the National Credit Union Administration. B-180806, August 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, January 23, 1970; and meals at monthly luncheon meetings for officials of law enforcement agencies, B-198882, March 25, 1981. See also 47 Comp. Gen. 657 (1968); B-45702, November 22, 1944.

In B-137999, December 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, February 12, 1975. See also B-195045, February 8, 1980.

In B-187150, October 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.

This is not to say that the rules for meals at non-government meetings and conferences will never apply to government-sponsored meetings at the employee's duty station. 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 for three 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, April 26, 1978, and B-166560, February 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.[41]

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 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

[41]This is a relatively rare instance of the Comptroller General's issuing a formal decision to a GAO requester. Although it doesn't happen often, it will be done when the situation warrants it.

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.

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 which is incident to a meeting, not a meeting which is incident to a meal. 65 Comp. Gen. at 510; 64 Comp. Gen. at 408.

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. Noting that this result is consistent with the legislative history of 5 U.S.C. § 4110 as summarized in prior decisions,[42] 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. 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 awards were to be presented.

[42]E.g., 46 Comp. Gen. 135, 136-37 (1966); B-140912, November 24, 1959.

B-195045, February 8, 1980.[43] 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 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.

Before we depart the topic, 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., 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, December 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.

[43]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.

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.

(3) Government Employees Training Act

Under the Government Employees Training Act, an agency may pay, or reimburse an employee for, necessary expenses incident to an authorized training program. 5 U.S.C. § 4109. The Comptroller General has held that the government can provide meals under this authority if the agency determines that the providing of meals is necessary to achieve the objectives of the training program. 48 Comp. Gen. 185 (1968); 39 Comp. Gen. 119 (1959); B-193955, September 14, 1979. The government may also furnish meals to non-government 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, September 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 Government Employees Training Act. Therefore, the cost of meals could not be paid. See also 68 Comp. Gen. 606 (1989); B-208527, September 20, 1983; B-187150, October 14, 1976; B-140912, November 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.

(4) Award ceremonies

General operating appropriations may be used to provide refreshments at award ceremonies under the Government Employees Incentive Awards Act. 65 Comp. Gen. 738 (1986). This result, as noted in the decision, is consistent with guidance from the Office of Personnel Management contained in the Federal Personnel Manual.

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, November 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, October 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).

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.

(5) Cafeterias and lunch facilities

The government has no general responsibility to provide luncheon facilities for its employees. 10 Comp. Gen. 140 (1930).[44] 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, March 21, 1985; B-169141, November 17, 1970; B-169141, March 23, 1970. See also B-204214, January 8, 1982 (temporarily providing paper napkins in new government cafeteria) and GAO report entitled Benefits GSA Provides by Operating Cafeterias in Washington, D.C., Federal Buildings, LCD-78-316 (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, August 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

[44]By way of contrast, it has long been conceded that drinking water is a necessity. See 22 Comp. Dec. 31 (1915) and 21 Comp. Dec. 739 (1915).

Commission where there was no government cafeteria on the premises.

- B-210433, April 15, 1983: purchase of microwave oven by Navy facility to replace non-working 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.

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, February 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 Trap's 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 Director's 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, February 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 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, August 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.[45] Second, 58 Comp. Gen. 202 found the purchase of commercial insurance on art objects improper. Id. at 207. This portion also remains valid.

The decision at 60 Comp. Gen. 303 was expanded in B-199387, March 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.)

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, 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

[45]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.

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 Non-Government Personnel

Just as the entertainment of government personnel is generally unauthorized, the entertainment of non-government 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, October 8, 1925. A limited exception was recognized in B-22307, December 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, November 19, 1975. Other examples are 26 Comp. Gen. 281, cited above, and B-138081, January 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 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 non-government 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.[46]

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, January 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.

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, August 9, 1976. A statute authorized reimbursement of necessary expenses incurred by

[46]Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 988, 1012 (1989).

recruiters, and applicable regulations permitted the reimbursement to include small amounts spent for occasional lunches, snacks, or non-alcoholic 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 Railroader's Festival at the Golden Spike National Historic Site, which included musical entertainment by a band specializing in railroad and 19th 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, January 11, 1988. However, an "open house" with refreshments and a visit by Santa Claus had "too indirect and conjectural a bearing" on the Park Service's mission and was therefore unauthorized. Id.

No discussion of entertainment would be complete without B-182357, December 9, 1975. The Foreign Assistance Act of 1961, as amended, 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 12 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 in recent years—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, October 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 Administrator's 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 sports or recreational events since this is not the performance of public business. E.g., 42 Comp.

Gen. 233 (1962). 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, August 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, February 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, November 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 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, September 16, 1976.

In recent decades, the role of certain "employee welfare" activities in employee morale and productivity has been increasingly recognized. 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. The authority originated in general provisions contained in annual appropriation acts, and was made permanent in 1983.[47]

The civilian agencies generally do not have comparable statutory authority, 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 non-remote 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.

A good illustration of this evolution is the treatment of programmed "incentive music" (sometimes called "Muzak"[48] 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, November 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

[47]Department of Defense Appropriation Act, 1984, Pub. L. No. 98-212, § 735, 97 Stat. 1421, 1444 (1983) ("Appropriations for the current fiscal year and hereafter for operation and maintenance of the active forces shall be available for . . . welfare and recreation").

[48]The name is derived from the MUZAK Company, one of the providers.

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

Like the cultural awareness programs previously discussed, child care is another example of evolution in the law to accommodate a changing society. Not too many decades ago, questions of using appropriated funds to provide child care services for government employees would not have received serious consideration. The typical government employee (male) simply did not need them because his spouse stayed home to take care of the kids. In fact, comprehensive child care legislation was vetoed as recently as 1971.[49]

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

[49]Veto of Economic Opportunity Amendments of 1971 [S. 2007, 92d Cong.], 7 Weekly Comp. Pres. Doc. 1634 (December 11, 1971). The legislation included child care for federal employees. The veto message did express support for child care for welfare recipients and the working poor.

inevitable result is a heightened awareness of the need for child care.[50]

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, December 8, 1981 (non-decision letter), reiterating the general conclusion of the 1976 memorandum. As it turned out, GAO did not establish a day care center until after the enactment of 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. In 57 Comp. Gen. 357 (1978), the Comptroller

[50]Some GAO reports on child care in the federal sector are: Child Care: Employer Assistance for Private Sector and Federal Employees, GAO/GGD-86-38 (February 11, 1986); Military Child Care Programs: Progress Made, More Needed, GAO/FPCD-82-30 (June 1, 1982); Child Care: Availability for Civilian Dependents at Selected DOD Installations, GAO/HRD-88-115 (September 15, 1988).

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 40 U.S.C. § 490b, 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, telephone service (including installation of lines and equipment . . .), and security systems . . . ." Id. § 490b(b)(3).[51] The space and services may be provided with or without charge.

The Comptroller General's first opportunity to construe 40 U.S.C. § 490b 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 the Air Force v. Federal Labor Relations Authority, 775 F.2d 727 (6th Cir. 1985). The FLRA directed the Air Force to incorporate the award in its collective bargaining agreement,[52] and the Air Force in turn asked GAO whether, under 40 U.S.C. § 490b, it had authority to use its appropriations to 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.

[51]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).

[52]The fact that day care is involved cannot be determined from either opinion, both of which discuss procedural issues.

The decision also concluded that any reimbursements received from a child care center (which, as noted, are optional under 40 U.S.C. § 490b) must be deposited in the Treasury as miscellaneous receipts.

In 70 Comp. Gen. ___ (B-239708, January 31, 1991), GAO concluded that 40 U.S.C. § 490b does 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 is 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 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 (1989).

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 which 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, December 21, 1944. Restrictions of this nature have become increasingly uncommon.

Entertainment appropriations may take various forms. Some agencies have their own well-established structures which 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" which 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."[53] 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); and meals for certain embassy officials at Rotary Club meetings in Tanzania, if approved by the local Chief of Mission, B-232165, June 14, 1989. A GAO fact sheet reviewing expenditures at selected overseas posts is Representational Funds: State Department Expenditures at Selected Posts, GAO/NSIAD-87-73FS (February 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." When so provided in an appropriation, the official may spend the funds "for any purpose he determines to be proper." Annual Operation and Maintenance appropriations include amounts for "emergencies and extraordinary expenses."[54] Although the title is not particularly revealing, it has long been understood that official representation expenses are charged to this account. See Internal Controls: Defense's Use of Emergency and Extraordinary Funds, GAO/AFMD-86-44 (June 4, 1986); DOD Use of Official Representation Funds to Entertain Foreign Dignitaries, GAO/ID-83-7 (December 29, 1982); 69 Comp. Gen. 197 (1990) (reception for newly assigned commander at U.S. Army School of the Americas); B-221257-O.M., February 6, 1986.

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, September 10, 1941. Far more commonly, however,

[53]E.g., Pub. L. No. 101-162, 103 Stat. 988, 1007 (1989) (FY 1990).

[54]E.g., Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, 103 Stat. 1112, 1115 (Army, Navy), 1116 (Air Force, Defense Agencies) (1989).

the term used in the appropriation is "official reception and representation." 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 reception and representation." Absent a definition, we found it instructive to review agency justifications to see what sort of authority Congress thought it was conferring. The term seems to have originated—or at least became more widespread—in the early 1960's. 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.[55]

The Department of Agriculture 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 which are directly related to accomplishing the Department's work. Such official courtesies benefit the government, and the Secretary and Under Secretary 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."[56] Similarly, the Department of the Interior 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 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."[57]

[55]Department of Agriculture and Related Agencies Appropriation Act, 1963, Pub. L. No. 87-879, 76 Stat. 1203, 1212 (1962); Department of the Interior and Related Agencies Appropriation Act, 1963, Pub. L. No. 87-578, 76 Stat. 335, 345 (1962).

[56]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).

[57]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).

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 provides further evidence that, absent some indication to 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 FY 1960 appropriation act, but it was limited to certain foreign visitors.[58] The language was changed to "official reception and representation" in HEW's FY 1964 appropriation.[59] 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.[60]

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 non-government 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 non-government 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 non-government persons. E.g., B-84184, March 17, 1949.

An agency has wide discretion in the use of its R&R appropriation. 61 Comp. Gen. 260, 266 (1982); B-212634, October 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:

[58]Pub. L. No. 86-158, § 209, 73 Stat. 339, 355 (1959).

[59]Pub. L. No. 88-136, § 905, 77 Stat. 224, 246 (1963).

[60]H.R. Conf. Rep. No. 774, 88th Cong., 1st Sess. 11 (1963).

- Christmas 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), affirmed upon reconsideration, B-206173, August 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, October 12, 1983.
- Luncheon incident to "graduation ceremony" for Latin American students being trained by the Bureau of Labor Statistics. B-84184, March 17, 1949.
- Entertainment of British war workers visiting various American cities as guests of the British Ministry of Information. B-46169, August 18, 1945.[61]

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. 65 Comp. Gen. 738, 741 n.5.

As discussed later in our section on personal expenses, appropriated funds are not available for business or calling cards. However, R&R appropriations are available for business cards for employees whose jobs include representation. B-223678, June 5, 1989. Business cards, as the decision states, are a legitimate and accepted representation device.[62]

A case relied on in B-223678 was B-122515, February 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

[61]The decision modified the result of an earlier decision, B-46169, December 21, 1944, based on a change in the relevant appropriation language. The 1944 decision contains a fuller statement of the facts.

[62]A possible impediment to implementation of this decision is the prohibition in the Government Printing and Binding Regulations on the printing or engraving of business cards. The decision advised the agency to consult the Joint Committee on Printing before spending the money.

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.

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.

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), affirmed upon reconsideration, B-206173, August 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.[63]

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, November 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 mph. The speedometer at the time read a mere 73 mph. 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.

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 was ordered by the court to answer certain questions. Based

[63]For other cases involving motor vehicle violations, see 57 Comp. Gen. 270 (1978); B-147420, April 18, 1968; B-168096-O.M., August 31, 1976; B-147420, July 27, 1977 (non-decision letter); B-173783.188, March 24, 1976 (non-decision letter).

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.[64]

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, November 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.

Reimbursement was denied, however, in B-186680, October 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

[64]The decision further held that a contempt fine, even though imposed by court order, is not a judgment against the United States and may not be paid from the permanent judgment appropriation, 31 U.S.C. § 1304.

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, January 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). A more recent case discussing similar issues in the context of a leased vehicle is 70 Comp. Gen. ___ (B-239511, December 31, 1990).

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).

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., Ohio v. United States Department of Energy, 904 F.2d 1058 (6th Cir. 1990).

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, September 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.

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. It follows that the government may not contract for firefighting services which it would be legally entitled to receive in any event,[65] nor may it reimburse a political subdivision for the

[65]In addition to the cases cited in the text, see B-131932, March 13, 1958; B-125617, April 11, 1956; B-126228, January 6, 1956; B-105602, December 17, 1951; B-40387-O.M., June 24, 1946.

additional costs incurred in fighting a federal fire.[66] 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 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, discussed later in this section. The present discussion concerns the availability of appropriations apart from that limited authority.

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, April 3, 1970.

In 53 Comp. Gen. 410 (1973), GAO denied a claim by the St. Louis Community Fire Protection District 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 which 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 held, 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.

[66]In addition to the cases cited in the text, see B-167709, September 9, 1969; B-153911, December 6, 1968; B-147731, January 22, 1962.

§§ 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-126228, January 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, April 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, March 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, December 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.[67]

[67]For more on the distinction between a tax and a service charge, see "Other Municipal Services" later in this section, and Section C.15.

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 services 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, February 8, 1968; B-123294, May 2, 1955. However, there is no authority to pay for fire services rendered without a pre-existing 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., October 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, September 9, 1969; B-147731, December 28, 1961; B-6400, August 28, 1940.[68] 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

[68]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 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; California v. United States, 307 F.2d 941 (9th Cir. 1962), cert. denied, 372 U.S. 941; B-163089, October 19, 1970.

becomes obsolete, undesirable, or uneconomical. B-129013, September 20, 1956; B-126228, January 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 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, September 20, 1956. Cf. B-192641, May 2, 1979 (non-decision letter) (questioning a redistricting to exclude federal property which 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, 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).[69] 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 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, April 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. Part 151.

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 15 U.S.C. § 2210. 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, October 27, 1977. However, the United States may pay on a quantum meruit basis for police services over and above the ordinary level, where

[69]The function was transferred to FEMA from the Commerce Department by Reorganization Plan No. 3 of 1978.

the city is not required to provide such extraordinary services and where the same charge would be imposed on non-federal users in like circumstances. Examples are: extra police for special events such as football games at the Coast Guard Academy (49 Comp. Gen. at 287); special police details at Bicentennial ceremonies (B-187733, October 27, 1977).

The same principles have been applied to emergency ambulance services required to be furnished by a municipality. 49 Comp. Gen. 284. 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, April 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. See 31 Comp. Gen. 405 (1952) (assessment for water/sewer services levied on city-wide 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-168024, December 13, 1973; B-105117, March 16, 1953.

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. 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 service. 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-230691, May 12, 1988 (Tennessee); B-239608, December 14, 1990 (non-decision 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 non-liability: 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, September 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, i.e., the applicability or non-applicability to the government depending on the "legal incidence" of the tax, applies as well to 9-1-1 charges. Thus, in B-238410, September 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—i.e., 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 six years. The answer would presumably be different if the agency were about to vacate, but the decision does not purport to address precisely where the line should be drawn.

8. Gifts and Awards

a. Gifts

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 Christmas 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 Christmas 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 the result is that items in the nature of gifts can rarely be justified. 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, were the justification 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 and the impossibility of drawing a rational line.

In 53 Comp. Gen. 770 (1974), a certifying officer for the Small Business Administration asked GAO to rule on the propriety of an expenditure for decorative ashtrays which 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 the 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 the SBA. Thus, there was no necessity that ashtrays be given away. The ashtrays were properly designated as personal gifts.

Similarly, 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 Agriculture's 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, August 29, 1979, the Comptroller General held that an expenditure of appropriated funds for the cost of jackets and sweaters as Christmas 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 which 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. ___ (B-240001, February 8, 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, February 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, October 22, 1979.
- "Sun Day" buttons procured by the General Services Administration and given out to members of the public to show GSA's support of certain energy policies. B-192423, August 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, December 5, 1963; B-151668, June 12, 1963 (same case).

As a number of the preceding cases point out (e.g., B- 151668, December 5, 1963), while the agency's administrative determination of necessity is given considerable weight, it is not controlling.

Some expenditures which resemble personal gifts have been approved because they were found necessary to carry out the purposes of the agency's appropriation. For example, in B-193769, January 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 Department of the Interior'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, December 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 United States 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.

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, December 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, August 9, 1971.

(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).

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, April 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, August 1, 1931 (monument at Harrodsburg, Kentucky, as first permanent settlement west of the Allegheny Mountains); A-35929, April 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, August 22, 1984. See also B-230062, December 22, 1988.

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, October 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, January 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, December 19, 1988.[70] 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.)

[70]Merchandise in that case was distributed to more than 80% of the work force at one project.

Several statutes now authorize the making of awards in various contexts. Perhaps the most important is the Government Employees Incentive Awards Act, enacted in 1954[71] and now found at 5 U.S.C. §§ 4501-4507. The Act authorizes an agency to pay a cash award to an employee who "by his 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 paperwork" or performs a special act or service in the public interest related to his or her official employment. The agency may also incur "necessary expenses" in connection with an incentive award. 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. OPM's regulations are found in 5 C.F.R. Parts 451 and 540, and Chapter 451 of the Federal Personnel Manual. A provision added in 1990, 5 U.S.C. § 4505a, authorizes cash awards for employees with fully successful performance ratings.[72]

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 Administrative Office of the United States Courts[73] and the United States Sentencing Commission. Id.[74] 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

[71]68 Stat. 1112. This was an expansion of similar but more limited authority enacted in 1946 (60 Stat. 809). GAO reviewed the Act's effectiveness in its report Federal Workforce: Federal Suggestion Programs Could Be Enhanced, GAO/GGD-89-71 (August 1989). Certain supervisory and management officials are excluded from the Incentive Awards Act, but are covered by virtually identical provisions in 5 U.S.C. § 5407.

[72]Section 207 of the Federal Employees Pay Comparability Act of 1990 (FEPCA), section 529 of the FY 1991 Treasury-Postal Service-General Government appropriation act, Pub. L. No. 101-509 (November 5, 1990), 104 Stat. 1389, 1457. The authority is effective only to the extent provided for in advance in appropriation acts. FEPCA § 301, 104 Stat. 1461.

[73]B-170804, February 2, 1971 (Administrative Office could make award to a judicial branch employee, not directly covered by the Act, for exemplary work on a special assignment on behalf of the Administrative Office).

[74]The Sentencing Commission had not been covered prior to a 1988 amendment to the statute. See 66 Comp. Gen. 650 (1987).

on a suggestion resulting in monetary savings, the savings must be to government rather than non-government funds. 36 Comp. Gen. 822 (1957). Applying this principle, GAO found that a suggestion for changes in 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, March 15, 1991. See also 70 Comp. Gen. ___ (B-236040, October 9, 1990).

An interesting situation occurred in B-192334, September 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 to participate in award ceremonies. These expenses are not chargeable against the statutory award ceiling (currently $10,000). 32 Comp. Gen. 134 (1952). The agency may also pay travel expenses for the recipient's spouse. 69 Comp. Gen. 38 (1989), overruling 54 Comp. Gen. 1054 (1975). In response to 69 Comp. Gen. 38, OPM issued FPM Letter 451-7 (July 25, 1990), extending the concept to "any individual related by blood or affinity." 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 is handicapped 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 non-federal organization. 40 Comp. Gen. 706 (1961). However, in limited situations where an award from a non-federal organization is closely related to the recipient's official duties, it may be possible to pay certain related expenses on other grounds. See 55 Comp. Gen. 1332 (1976).

In a case previously discussed in our section on entertainment, the Comptroller General held that the "necessary expense" language of the Incentive Awards Act may include refreshments at an agency's awards ceremony. 65 Comp. Gen. 738 (1986). See also B-167835, November 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. ___ (B-236040, October 9, 1990).

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 non-government 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, August 27, 1980); telephones of nominal value (67 Comp. Gen. 349 (1988)); and $50 jackets bearing agency insignia (B-243025, May 2, 1991). Administrative leave can also be awarded if and to the extent authorized in OPM's implementing regulations. 5 U.S.C. § 4502(e)(2).[75] See also B-208766, December 7, 1982. Awards of merchandise to be selected from catalogues, however, are not authorized. B-223608, December 19, 1988 (citing OPM regulations). Whether the award is monetary or non-monetary, the act or service prompting it must be related to official employment. 70 Comp. Gen. ___ (B-240001, February 8, 1991) (Incentive Awards Act does not authorize giving T-shirts to Combined Federal Campaign contributors).

[75]Added by FEPCA, supra note 72, § 201, 104 Stat. at 1455.

The Act does not authorize cash awards based merely on length of service or upon retirement. However, honorary non-cash 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).

The making of an award—and therefore the refusal to make an award—under the Government Employees Incentive Awards Act is discretionary. Rosano v. United States, 9 Cl. Ct. 137, 144-45 (1985). As such, it is reviewable only for abuse of discretion. E.g., Shaller v. United States, 202 Ct. Cl. 571 (1973), cert. denied, 414 U.S. 1092. 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, April 3, 1981, affirmed 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., August 3, 1987 (GAO appropriations not available for cash awards to contract security guards); B-176600-O.M., August 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. 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. §§ 4511–4514: 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.[76] The legislation was scheduled to expire on September 30, 1990. Even if it is not renewed, as the Office of Personnel Management pointed out in connection with an earlier sunset (FPM Letter 451-5, November 21, 1984), similar awards can be processed under the Incentive Awards Act.

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

[76]Federal Workforce: Low Activity in Awards Program for Cost Savings Disclosures, GAO/GGD-88-22 (December 1987); Executive Agencies' Employee Cash Awards Program for Disclosure of Fraud, Waste, or Mismanagement, GAO/GGD-84-74 (May 8, 1984).

Monongahela River, the strikers sighted them and began firing on them. The strikers were heavily armed, and even had a cannon on the river bank. 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 strike-breakers 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 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, 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 1970's, 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, February 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 (1971); 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 (1946). 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 set-aside program since the contract is a prime contract vis-a-vis SBA even though it may be a subcontract vis-a-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, March 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, September 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, March 17, 1975; B-176307, March 21, 1973; B-177137, February 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, November 21, 1967; B-160538, November 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 (1976), affirmed on reconsideration, 56 Comp. Gen. 225 (1977). 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, October 14, 1976, affirmed on reconsideration, B-186347/B-185495, March 7, 1977.

By the 1970's, 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. The issue in that case was whether the Act applied to a credit reporting company. The Comptroller General, in B-139965, January 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 vs. 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." If a given organization were found to offer quasi-military armed forces for hire—an event which 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, January 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. Also, the government frequently pays for insurance indirectly through contracts, grants, and leases. E.g., B-72120, January 14, 1948 (lease). A comprehensive treatment may be found in a report of the Comptroller General entitled Survey of the Application of the Government's Policy on Self-Insurance, B-168106, June 14, 1972. Another useful report, although more limited in scope, is Extending the Government's Policy of Self-Insurance in Certain Instances Could Result in Great Savings, PSAD-75-105 (August 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 rule and its evolution are summarized in B-158766, February 3, 1977.

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 "self-insurance rule" dates back to the 19th 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 which 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." Id. 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 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, February 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 (1940). 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, 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.

Another type of insurance which may not be paid for from appropriated funds is flight insurance. If a federal employee travelling 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 non-reimbursable 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.

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).

There are also non-statutory exceptions where the underlying policy considerations do not apply. The standards for exception were summarized in B-151876, April 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.

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, October 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 contractor's risk to the government.

Exceptions may be based on the funding arrangement of a particular agency or program. For example, the rule prohibiting the purchase of insurance does not apply to the Panama Canal Commission because the Commission operates 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, are 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). In contrast, 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, January 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., February 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, Congress in 1975 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, April 19, 1977 (non-decision 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, December 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 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, January 19, 1982. For additional exceptions, see 59 Comp. Gen. 369 (1980) and B-197583, January 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 corporation's 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 Board's authority to cover losses by assessments against member banks made 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 contractor's 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 lessor's) 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 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 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.

In B-127343, December 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 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 the driver training was a necessary part of a given patient's medical rehabilitation, and 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 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 which 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.

Collision damage waiver coverage on commercial rental vehicles is discussed in the section entitled "Damage to Commercial Rental Vehicles" in Chapter 12.

A summary of the self-insurance rules as they relate to the operation of motor vehicles on official business may be found in General Services Administration Bulletin FPMR G-176, August 9, 1988.

(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), affirmed 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. 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).

(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.[77] 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 U.S. Code are available for guidance. B-236022, January 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 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.

[77]GAO had recommended the legislation. See report entitled Review of Bonding Program for Employees of the Federal Government, B-8201 (March 29, 1962); B-8201/B-59149, January 18, 1972.

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.[78]

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 "grass roots" 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 decisionmakers 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."[79]

Nevertheless, because of the obvious potential for abuse, there are legal restrictions on lobbying. This section will explore some of

[78]Actually, the term can be traced back at least to 17th c[illegible]ry England. 17 Encyclopedia Americana 633 (1978).

[79]General Interim Report of the House Select Committee on Lobbying Activities, H.R. Rep. No. 3138, 81st Cong., 2d Sess. 1 (1950).

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: criminal statutes and provisions in appropriation acts.

b. Criminal Statutes

Criminal sanctions are provided by 18 U.S.C. § 1913, originally enacted in 1919:

> "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, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business."

The statute goes on to provide penalties for violation: a $500 fine or a year in jail or both, plus removal from federal employment.

The context in which section 1913 was enacted is reflected in the following passage from the floor debate on the original 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.]" [80]

[80] 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).

Since 18 U.S.C. § 1913 is a criminal statute, its enforcement is the responsibility of the Department of Justice and the courts. Therefore, GAO will not "decide" whether a given action constitutes a violation. GAO will, however, determine whether appropriated funds were used in a given instance, and refer matters to the Justice Department in appropriate cases. E.g., B-192658, September 1, 1978; B-164497(5), March 10, 1977. Generally, GAO will refer matters to the Justice Department if asked to do so by a Member of Congress or where available information provides reasonable cause to suspect that a violation may have occurred. B-145883, April 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. However, GAO can take no action unless the Justice Department or the courts first determine that there has been a violation. B-164497(5), March 10, 1977.

Consistent with the legislative history noted above, the Justice Department construes section 1913 as applying primarily to indirect or "grass roots" lobbying, and not to direct communications between executive branch officials and Congress. 5 Op. Off. Legal Counsel 180 (1981); 2 Op. Off. Legal Counsel 160 (1978); 2 Op. Off. Legal Counsel 30 (1978).[81]

In evaluating particular fact situations to determine possible violations of section 1913, GAO applies the Justice Department's interpretation of that statute. Thus, GAO found that referral to Justice 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 grass roots lobbying which 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

[81]For a commentary favoring a broader interpretation, see Richard L. Engstrom and Thomas G. Walker, Statutory Restraints on Administrative Lobbying—"Legal Fiction", 19 Journal of Public Law 89 (1970).

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 "Assistance to private lobbying groups" later in this section, and B-229069.2, August 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 non-proliferation 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.
- Written materials prepared and disseminated by the Small Business Administration, none of which included grass roots lobbying, designed to support an administration proposal to transfer the SBA to the Commerce Department. B-223098/B-223098.2, October 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., November 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. Nuclear Test Lobbying: DOE Regulations for Contractors Need Reevaluation, GAO/RCED-88-25BR (October 1987).

Numerous additional examples may be found in our discussion of "pending legislation" appropriation restrictions later in this section.

GAO found the following situations sufficiently questionable to warrant referral to Justice:[82]

- 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, November 17, 1983.
- Campaign by Air Force and Defense Department to use contractors' lobbyists and subcontractor network to lobby Congress in support of C-5B aircraft procurement. Improper Lobbying Activities by the Department of Defense on the Proposed Procurement of the C-5B Aircraft, GAO/AFMD-82-123 (September 29, 1982).

Of course, GAO's opinion that section 1913 has been violated—or, for that matter, an independent conclusion by the Justice Department that a violation has occurred—does not necessarily mean that a prosecution will follow. The Attorney General has what is known as "prosecutorial discretion." A great many factors, including the amount of public funds involved, may legitimately influence the prosecutorial decision. Justice states that there were no prosecutions under section 1913 as of early 1978. 2 Op. Off. Legal Counsel 30, 31 (1978). To our knowledge, this has not changed.

Judicial activity under 18 U.S.C. § 1913 has thus far been limited to the issue of whether the statute creates a private right of action. The answer is 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 Corporation, 535 F. Supp. 818 (S.D. Iowa 1982);[83] American Trucking Associations, Inc. v. Department of Transportation, 492 F. Supp. 566 (D.D.C. 1980). The availability of injunctive relief to a private litigant may be inferred from American Public Gas Association v. Federal Energy Administration, 408 F. Supp.

[82]A few earlier 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 improper payment); B-76695, June 8, 1948. GAO today would merely refer the cases to the Justice Department.

[83]The Grassley court also noted that section 1913 applies only to federal departments or agencies and their officers or employees. It would not, according to the court, apply to the Legal Services Corporation or its grantees. 535 F. Supp. at 826 n.6.

640 (D.D.C. 1976), but in view of the Campbell litigation, Public Gas must be regarded as modified to the extent it purports to recognize a private right of action under section 1913.

One other statute with penal sanctions deserves brief mention—the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261–270. Enacted in 1946, it requires the registration of certain persons and organizations engaged in lobbying as defined in the Act. Its constitutionality was upheld in United States v. Harriss, 347 U.S. 612 (1954). While this statute encompasses direct lobbying, it does not apply to the legislative activities of government agencies. B-129874, August 15, 1978; B-164497(5), March 10, 1977.

c. Appropriation Act Restrictions: Publicity and Propaganda

(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."[84]

When the Select Committee referred to the "proper exercise" of the congressional power to appropriate funds, it of course had in mind

[84]House Select Committee on Lobbying Activities, Report and Recommendations on Federal Lobbying Act, H.R. Rep. No. 3239, 81st Cong., 2d Sess. 36 (1951).

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.

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. Approximately half of the regular annual appropriation acts include some version. As of 1990, there is no governmentwide "publicity or propaganda" statute. Thus, some agencies will be subject to one version, other agencies to a different version, and still others to none at all. Nevertheless, it is possible to draw some generalizations.

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."[85]

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

[85]E.g., Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1990, Pub. L. No. 101-162, § 601, 103 Stat. 988, 1031 (1989).

present touchy issues of personal and administrative integrity. But of the basic obligation there can be little doubt."[86]

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); Arrington v. Taylor, 380 F. Supp. 1348, 1364 (M.D.N.C. 1974).[87]

Yet on the other hand, the statute has to mean something. As the court said in National Association for Community Development v. Hodgson in reference to 18 U.S.C. § 1913, "Obviously, Congress intended to remedy some problem or further some cause, otherwise they would not have bothered enacting the statute." 356 F. Supp. 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 . . . ."[88]

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 override the agency's determination only 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.

[86]H.R. Rep. No. 3138, supra note 79, at 53.

[87]Further useful discussion may be found in cases dealing with different but conceptually related issues such as United States v. Frame, 885 F.2d 1119 (3d Cir. 1989), and Block v. Meese, 793 F.2d 1303 (D.C. Cir. 1986).

[88]The Role of Lobbying in Representative Self-Government, Hearings before the House Select Committee on Lobbying Activities, 81st Cong., 2d Sess., pt. 1, at 158 (1950).

First, it must be determined, by examining the relevant appropriation act, whether the agency in question is subject to a "publicity or propaganda" restriction. If it is, then the version contained in the agency's appropriation act will determine the category or categories of potential violations. The existence and precise terms of the restriction can change over time, so it is always necessary to check the appropriation act for the year in which the questioned obligation or expenditure was made.

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 which 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 variation limits the restriction to activities "within the United States."[88]

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.

[88]E.g., Treasury, Postal Service and General Government Appropriations Act, 1990, Pub. L. No. 101-136, § 512, 103 Stat. 783, 813 (1989).

Thus, 31 Comp. Gen. 311 established the important proposition that the statute does not prohibit an agency's legitimate informational activities. See also B-223098/B-223098.2, October 10, 1986; B-177704, February 7, 1973. 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 "pending legislation" version 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-212069, October 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 neither case were the documents designed to glorify the issuing agency or official.

GAO did find a violation in B-136762, August 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 multi-media 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, December 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 which included the hiring of a "publicity expert." B-222758, June 25, 1986.

(3) Covert propaganda

Another type of activity which 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 prepared "suggested editorials" and distributed them to newspapers. The editorials urged support of an administration proposal to merge the 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, October 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 nongovernment 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, September 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, June 10, 1988, the Federal Trade Commission prepared a variety of materials critical of the Postal Service's "monopoly" on letter class mail, for distribution at a National Press Club breakfast which 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) 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. The few cases in which violations have been found have involved a version of the publicity and propaganda statute tied in specifically to attempting to influence pending legislation. However, the activity in question would presumably also constitute a violation of the broader "publicity or propaganda not authorized by Congress" version.

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 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 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 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, September 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-192746-O.M., March 7, 1979, and GAO report entitled The Maritime Administration and the National Maritime Council—Was Their Relationship Appropriate, CED-79-91, May 18, 1979.

In B-133332, March 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 benefit 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 non-controversial and the Foundation had an independent legal existence. Thus, since no lobbying took place at the benefit, and since any lobbying by "Save the Tallgrass" or by the exhibit's creator could not be imputed to the Foundation nor to the Smithsonian, GAO concluded that the Smithsonian had not used its appropriations for any improper indirect lobbying.

(5) Pending legislation: overview

The version of the publicity and propaganda law which the Comptroller General has had the most frequent occasion to apply is narrower than the "publicity or propaganda not authorized by Congress" version previously discussed; it addresses only one type of publicity or propaganda—that designed to influence pending legislation.

For over 30 years, from the early 1950's to fiscal year 1984, the following provision was enacted every year:

"No part of any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency, shall be used for publicity or propaganda purposes designed to support or defeat legislation pending before Congress."[90]

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. It also applied expressly to government corporations, even those which did not receive direct appropriations. See, e.g., B-164497(5), March 10, 1977 (United States Railway Association); B-114823, December 23, 1974 (Export-Import Bank).

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). As of 1990, there is no governmentwide "pending legislation" provision. However, it continues to appear in individual appropriation acts in various forms. For example, a sampling of 1990 appropriation acts reveals the following versions:

"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."[91]

"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."[92]

'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 . . . ."[93]

"No part of any appropriation contained in this Act shall be used, other than for normal and recognized executive-legislative relationships, for publicity or

[90]E.g., Treasury, Postal Service, and General Government Appropriations Act, 1980, Pub. L. No. 96-74, § 607(a), 93 Stat. 559, 575 (1979).

[91]Department of Defense Appropriations Act, 1990, Pub. L. No. 101-165, § 9026, 103 Stat. 1112, 1135 (1989).

[92]District of Columbia Appropriations Act, 1990, Pub. L. No. 101-168, § 116, 103 Stat. 1267, 1278 (1989).

[93]Department of the Interior and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-121, § 304, 103 Stat. 701, 741 (1989).

propaganda purposes, for the preparation, distribution, or use of any kit, pamphlet, booklet, publication, radio, television, or film presentation designed to support or defeat legislation pending before the Congress, except in presentation to the Congress itself."[94]

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 which 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.

The Comptroller General has construed the "pending legislation" provisions as applying primarily to indirect or "grass roots" 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. This is essentially the same interpretation the Justice Department has given to the previously-discussed criminal statute, 18 U.S.C. § 1913.

The extent to which GAO will investigate an alleged lobbying violation depends in large measure on the amount of money involved. As a minimum, GAO will review materials submitted to it and will solicit the written justification of the agency in any case. The extent to which GAO will investigate beyond that depends on the potential amounts involved balanced against the likelihood of uncovering impropriety. See B-142983, September 18, 1962.

The court cases cited previously in our discussion of 18 U.S.C. § 1913 for the proposition that the criminal statute does not create a private cause of action also discuss, and reach the same conclusion with respect to, the appropriation act provision.

[94]Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-166, § 509, 103 Stat. 1159, 1190 (1989).

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 "grass roots" lobbying be enacted into permanent law. No Strong Indication That Restrictions on Executive Branch Lobbying Should Be Expanded, GAO/GGD-84-46 (March 20, 1984). See also B-206391/B-217896, October 30, 1985; B-206391, July 2, 1982. (Both of these are comments on proposed legislation which was not enacted.)

Before proceeding to the specific cases, certain threshold concerns should be noted. Most of the pre-1985 cases were decided under the governmentwide ("this or any other act") restriction. The cases are included to illustrate types of conduct that have been found either legitimate or questionable. The particular agencies involved may or may not still be subject to an anti-lobbying restriction. In addition, different versions of the statute could produce different results. It would also seem logical that the broader "publicity or propaganda not authorized by Congress" version should cover the specific type of publicity or propaganda designed to influence pending legislation, an application that was unnecessary while the "this or any other act" provision existed.[95]

In any event, the cases are relevant in evaluating the types of conduct that are more likely to raise questions under 18 U.S.C. § 1913, with one distinction. The criminal statute by its terms prohibits certain actions even before a bill is introduced; the appropriation act restrictions, unless specified to the contrary, require "pending legislation." Of course, this would include appropriation acts.

Finally, unless a particular provision specifically includes lobbying at the state level, the legislation must be pending before the United States Congress, not a state legislature. E.g., B-193545, March 13, 1979; B-193545, January 25, 1979.

(6) Cases involving "grass roots" 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

[95]Thus far, GAO has not applied the "publicity or propaganda not authorized by Congress" provision to "pending legislation" lobbying. See 66 Comp. Gen. 707 (1987); B-229257, June 10, 1988; B-223098/B-223098.2, October 10, 1986; B-217896, July 25, 1985. However, none of these cases involved forms of "grass roots" lobbying which GAO would have found improper.

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 which 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, April 30, 1973.

Administration budget battles with Congress produced another violation in B-178648, September 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, nevertheless found several that violated the law. Examples of the violations are as follows:

(1)"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."

(2)"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:

(3)"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.

(4)"All those unneeded new bills headed for the President's 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.

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 which 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, November 3, 1981.

Two more recent cases in which violations were found are B-212235, November 17, 1983, and Improper Lobbying Activities by the Department of Defense on the Proposed Procurement of the C-5B Aircraft, GAO/AFMD-82-123 (September 29, 1982), both of which are summarized in our previous discussion of 18 U.S.C. § 1913.

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., March 7, 1979.

There is one case in which GAO found conduct short of the traditional form of "grass roots" lobbying to constitute a violation, but its precedent value is unclear. The 1979 Interior Department appropriation act (Pub. L. No. 95-465, § 304) included a provision very similar to the 1990 anti-lobbying provision quoted earlier.[96] In 59 Comp. Gen. 115 (1979), GAO reasoned that section 304 must be read as covering certain activities which would have been permissible under the standard "this or any other act" provision then in effect, otherwise there would have been no purpose in enacting section 304. Accordingly, GAO found section 304 violated by a mass mailing by the National Endowment for the Arts of an information package supporting the Livable Cities 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. Since the result in 59 Comp. Gen. 115 was based on the parallel existence of the "this or any other act" statute, it is unclear whether the same result would be reached in the absence of that statute. In any event, the Interior Department provision, as with similar provisions, applies to appeals to the public rather than direct communication with legislators. Id. See also report entitled Alleged Unauthorized Use of Appropriated Moneys by Interior Employees, CED-80-128 (August 13, 1980).

(7) Pending legislation: cases in which no violation was found

As indicated above, GAO has consistently taken the position that the anti-lobbying 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 publicity and propaganda 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).

[96]Supra note 93.

- Visits to Members of Congress by National War College students as part of a seminar on the legislative process. B-209584, January 11, 1983.
- Director of the Office of Management and Budget sent a letter to all Members of the House of Representatives urging opposition to a disapproval resolution on a Presidential Reorganization Plan. B-192658, September 1, 1978.

See also B-200250, November 18, 1980 (agency sent position paper to Members of Congress opposing particular piece of pending legislation); B-164497(5), March 10, 1977 (entertainment in form of dinners for Members of Congress); B-114823, December 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, November 4, 1969 (cruises with Members of Congress on Presidential yacht, paid for from entertainment appropriation); B-145883, October 10, 1967 (unsolicited letter to Members of Congress from agency head urging support for continuation of agency programs); B-93353, September 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, August 21, 1985; Nuclear Test Lobbying: DOE Regulations for Contractors Need Reevaluation, GAO/RCED-88-25BR (October 9, 1987). In addition, there may be legislation applicable to contractor lobbying.[97]

Also as indicated above, an agency will not violate the anti-lobbying statute by disseminating material to the public which is essentially expository in nature. Even if the material is promotional, there is no violation, at least of the anti-lobbying statute, as long as it is not clearly designed to induce members of the public to contact their elected representatives. Again, several cases will illustrate.

[97]One of the previously-cited "pending legislation" statutes—the Labor-HHS 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.

For example, the Department of Transportation set up displays on U.S. Capitol grounds of passenger cars equipped with passive restraint systems (airbags). DOT 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. While, 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 DOT urged members of the public to contact their elected representatives. Thus, since it was not illegal for DOT to advocate the use of airbags or to communicate with Congress directly, there was no violation. B-139052, April 29, 1980. The apparent intent alone is not enough; it must be translated into action.

Similarly, the statute was not violated by the following actions:

- Speech by Secretary of the Air Force urging defense contractors to direct their advertising towards 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, January 22, 1985.
- Bumper stickers purchased by 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, August 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, December 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, January 26, 1972.

See also B-147578, November 8, 1962 (White House Regional Conferences); B-150038, November 2, 1962 (Department of Agriculture press release); B-148206, March 20, 1962 (radio and television announcements by Commerce Department supporting foreign trade legislation).

Generally speaking, funds appropriated to carry out a particular program would not be available for political purposes, i.e., for a propaganda effort designed to aid a political party or candidate. See B-147578, November 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, October 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, November 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 purposes 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 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., September 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 GAO report entitled Evaluation of the Publication and Distribution of "Shedding Light on Facts About Nuclear Energy," EMD-76-12 (September 30, 1976).

In a later report, GAO reviewed a number of publications related to the Clinch River Breeder Reactor 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. GAO report entitled Problems with Publications Related to the Clinch River Breeder Reactor Project, EMD-77-74 (January 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.

In some instances, Congress has dealt with the problem by legislation. For example, legislation enacted late in 1989, known as the Byrd Amendment, imposes limited governmentwide restrictions.

Section 319 of the 1990 Interior Department appropriation act, Pub. L. No. 101-121, 103 Stat. 701, 750 (1989), is a piece of permanent legislation to be codified at 31 U.S.C. § 1352. Subsection (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 (e)(1)(C) stresses that the new section 1352 should not be construed as permitting any expenditure prohibited by any other provision of law. Thus, the new law supplements other anti-lobbying statutes; it does not supersede them.

Subsection (b)(7) of 31 U.S.C. § 1352 directs the Office of Management and Budget to issue guidance for agency implementation. OMB published "interim final guidance" on December 20, 1989 (54 Fed. Reg. 52306), supplemented on June 15, 1990 (55 Fed. Reg. 24540). An "interim final rule" for grants was issued jointly by OMB and 28 grantor agencies as a common rule on February 26, 1990 (55 Fed. Reg. 6736). For contracts, interim rules amending the Federal Acquisition Regulations were published on January 30, 1990 (55 Fed. Reg. 3190).

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).[98] For a general discussion of these provisions, see B-129874-O.M., October 30, 1978. See also B-202569, April 27, 1981.

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, March 5, 1981.

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 "grass roots" lobbying either by the Corporation itself or by its grantees.

In the third case, the Managing Attorney of a Legal Services Corporation 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 "grass roots" lobbying. B-202787, December 29, 1981.[99]

[98]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.

[99]Government lobbying has a tendency to adjust to changes in the political climate. A 1988 case, B-231210, June 7, 1988, found the Corporation lobbying to reduce its appropriations.

More recently, GAO found the statute 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 which 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 Corporation's enabling legislation, appropriation acts providing funds for the Corporation have included a version of the "publicity and propaganda" restriction, known as the "Moorhead Amendment," which prohibits 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 Moorhead Amendment makes it clear that the exception for the proper representation of eligible clients does not extend to grass roots lobbying. See 60 Comp. Gen. 423 (1981); B-163762, November 24, 1980.[100]

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 contained a variety of the "publicity and propaganda" 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

[100]The Moorhead Amendment has not always been obvious. For example, the Corporation's 1988 appropriation barred the use of funds "for any purpose prohibited or limited by or contrary to any of the provisions of Public Law 99-180." Pub. L. No. 100-202, 101 Stat. 1329, 1329-33. Public Law 99-180 was the Corporation's 1986 appropriation act and contained the Moorhead Amendment (99 Stat. 1162).

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 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 grass roots 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. GAO report entitled Improper Use of Federal Student Aid Funds for Lobbying Activities, GAO/HRD-82-108 (August 13, 1982).

The question of lobbying with grant funds becomes more difficult when the situation is not covered by the new 31 U.S.C. § 1352 and applicable appropriation act restrictions do not expressly cover grantees. Until late in 1981, whether "publicity and propaganda" provisions 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 the "publicity and propaganda" provisions and was decided under 18 U.S.C. § 1913. While, as noted earlier, GAO would today be more circumspect in drawing conclusions under the criminal statute,[101] the concept of applying the prohibition to grantee expenditures would arguably be the same under the appropriation act restrictions. In a 1977 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, November 11, 1977 (non-decision 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, August 15, 1978.

[101]In fact, 18 U.S.C. § 1913 is now regarded as applicable only to officers and employees of the federal government and not to contractors or grant recipients. See B-214455, October 24, 1984 (citing a May 24, 1983 letter to GAO from the Justice Department's Criminal Division).

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, November 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, 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.

In our preceding discussion of lobbying by government agencies, we noted that publicity and propaganda statutes are usually limited to lobbying the United States Congress and do not apply to lobbying at the state level unless expressly so provided. The same principle applies with respect to lobbying with grant funds. B-214455, October 24, 1984; B-206466, September 13, 1982.

e. Government Employees Training Act

A restriction on the use of appropriated funds in connection with lobbying, although not by government officials, is contained in the Government Employees Training Act. The law prohibits the training of government employees (and hence the expenditure of appropriated funds to support such training) "by, in, or through a non-Government facility a substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation." 5 U.S.C. § 4107(b)(1).

As of 1990, there have been no Comptroller General decisions applying this provision. However, the statute contains a similarly-worded restriction on subversive activities—5 U.S.C. § 4107(a)(1)—and decisions under that restriction are relevant in construing the

identical language in the lobbying restriction. Thus, the term "non-Government facility" applies to individuals contracting with or employed by the government to provide training as well as to organizations. 38 Comp. Gen. 857 (1959). However, where an organization is conducting the training, the term does not apply to individual employees of that organization where there is no contractual relationship between those employees and either the government or the government employees receiving the training. Id. See also B-182398, October 24, 1979 (non-decision letter). A test of whether an organization violates the subversive activities prohibition is to determine if it is included in the Attorney General's subversive organization list. See 51 Comp. Gen. 199 (1971); 38 Comp. Gen. 857 (1959). An analog for the lobbying restriction would be to determine if the organization has registered under the Federal Regulation of Lobbying Act.

f. 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 which 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.

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 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, January 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, August 6, 1963 (use of motion picture by United States Information Agency); B-15278, May 15, 1942 (photographs); A-82749, January 7, 1937 (radio broadcasts).

However, 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. Similarly, the Bureau of Printing and Engraving 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).

g. 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 (1986 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."

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 non-government publications which 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 is 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 is 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. Turn on one channel and "Smokey Bear" is pleading with you not to ignite the national forests. Flip to another channel and a feathered character named "Woodsy Owl" admonishes against pollution.[102] Try still another and someone may be telling you to observe the speed limit or join a carpool or collect postage stamps or write for a catalogue of available government publications. A brief description of some of the methods the government uses to advertise may be found in a GAO report entitled Federal Energy Administration's Contract with the

[102]Should anyone have any doubt, both of these characters are recognized (and protected) by act of Congress. See 16 U.S.C. § 580p. Mess with Smokey or Woodsy and you can go to jail. 18 U.S.C. §§ 711 and 711a.

Advertising Council, Inc., for a Public Relations Campaign on the Need to Save Energy, PSAD-77-151 (August 31, 1977).

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 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. E.g., B-229732, December 22, 1988 (Department of Housing and Urban Development had no authority to incur promotional expenses at a trade show in the Soviet Union the purpose of which 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, April 16, 1979 (non-decision letter). Similarly, the United States Postal Service has statutory authority to advertise its philatelic services to encourage stamp collecting. B-114874.30, March 3, 1976 (non-decision 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, August 31, 1951. Another example is B-184648, December 3, 1975.

Activities of the United States Mint furnish additional illustrations. While the Postal Service has long been in the business of promoting the sale of its products to collectors (see, e.g., B-119784, May 18, 1954), the Mint is a relative newcomer. Several statutes in recent years have authorized the Mint to produce and market various commemorative coins. Sales proceeds are applied first to recover production costs, with the balance going to the Treasury or other specified source. In B-206273, September 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, but declined to expand the scope of legitimate promotional activities to include the printing of business cards for sales representatives.

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 GAO report entitled Getting A Better Understanding of the Metric System—Implications If Adopted by the United States, CED-78-128, October 20, 1978, and letters B-140399, June 19, 1979, and B-140399, May 29, 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[103]

[103]There is no mention of the 1913 statute before the 1930's. A small group of cases then arose. In addition to A-61553, cited in the text, see B-26689, May 4, 1943; A-93988, April 19, 1938; A-82332, December 15, 1936; A-57297, September 11, 1934. Another stretch of silence followed and the statute did not arise again until B-181254, February 28, 1975.

identified three problem areas, summarized in B-181254, February 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."[104]

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 1930's and early 1940's to amending the statute to cure this problem, but the legislation was not enacted. See B-181254, February 28, 1975; B-26689, May 4, 1943; A-82332, December 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, December 15, 1936. See also B-181254, February 28, 1975. In this

[104]Hearings, supra note 88, at 156.

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 1970's with any substantial discussion of 5 U.S.C. § 3107, GAO considered a mass media campaign by the Federal Energy Administration, 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, February 28, 1975; B-139965, April 16, 1979 (non-decision letter). In both cases GAO stressed its view that the statute is not intended to interfere with the dissemination of information which an agency is required or authorized by statute to disseminate, or with promotional activities authorized by law.

The only case in the 1980's 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 is not affected by any incidental benefits that may accrue to individual employees.[105]

In 24 Comp. Gen. 814 (1945), the Veterans Administration 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 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 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).[106]

In another 1973 decision, the Comptroller General held that the Department of Justice 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.

[105]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.

[106]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."

The 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 administratively determined to be necessary. 52 Comp. Gen. 495 (1973). To the same effect is B-205768, March 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 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.

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, February 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 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, membership expense is improper. Thus, in 32 Comp. Gen. 15 (1), the cost of membership fees for the New York Ordnance Dis t 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, March 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, March 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. B-221569, June 2, 1986. What is being purchased is a "membership," and the "membership" is received upon payment.

The evolution of the statutory law on membership fees produced a somewhat anomalous result in some of the early cases. 5 U.S.C. § 5946 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 vs. 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, February 5, 1930. Two provisions of the Government Employees Training Act, 5 U.S.C.

§§ 4109 and 4110, now permit attendance at meetings 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.

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.

Another example is B-223447, October 10, 1986, approving certain individual memberships for U.S. Army Corps of Engineers employees 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

A number of cases have dealt with the expenses of admission to the bar and related items for attorneys employed by the government.

The question first came up in 22 Comp. Gen. 460 (1942), when the Federal Trade Commission asked if it could reimburse one if 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, March 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, September 9, 1981, concerning mandatory dues for continued membership in the North Carolina bar; and still again in B-204215, December 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, October 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.)

13. Personal Expenses and Furnishings

Items which 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 non-statutory. The remainder of this section explores several categories of personal expenses.

a. 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.) As far as the government is concerned, they are inherently personal in nature. Therefore, they are

considered a personal expense and not payable from appropriated funds without specific statutory authority.

The rule is long-standing and has been applied in a number of decisions. In 20 Comp. Dec. 248 (1913), the Comptroller of the Treasury considered the argument that has been presented in every case—that the cards are used for official business purposes. Be that as it may, business or calling cards are more a matter of personal convenience than necessity. Therefore, the Comptroller advised the State Department that their cost is a personal expense and not chargeable to public funds.[107] The decision also pointed out a practical basis for the rule: If the cards were permitted for certain officials, it would be impossible to draw a fair and enforceable line.

The rule was reiterated in 41 Comp. Gen 529 (1962), in which the purchase of business cards from appropriated funds was held improper for Department of Agriculture officials at overseas posts.

In a more recent case, the Comptroller General applied the prohibition to deny reimbursement to an employee of the National Highway Traffic Safety Administration who had purchased business cards at his own expense. B-195036, July 11, 1979. More recently still, GAO advised the Forest Service that appropriated funds were not available to buy "identification cards" for use by a public affairs officer. The cards were the same as traditional business cards and were to be used for the same purposes. 68 Comp. Gen. 467 (1989). See also B-149151, July 20, 1962, in which the cards were called "cards of introduction." Devising a new name for the same thing does not make a difference. For other cases holding business cards to be personal expenses and therefore unauthorized, see 68 Comp. Gen. 583 (1989); 12 Comp. Gen. 565 (1933); 12 Comp. Dec. 661 (1906); 10 Comp. Dec. 506 (1904); B-131611, February 15, 1968; B-131611, May 24, 1957. The fact that the cost is to be charged to a revolving fund rather than a "direct" appropriation is immaterial. B-234603, August 11, 1989.

The rule is also reflected in the Government Printing & Binding Regulations, section 20 (1986 reprint):

[107] "[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 chided. 20 Comp. Dec. at 250.

"Printing or engraving of calling or greeting cards is considered to be personal rather than official and shall not be done at Government expense."

A variation occurred 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.

For the application of these rules to Members of Congress, see B-198419, November 25, 1980, and B-198419, July 8, 1980.

There is one significant exception. Reception and representation (or comparable forms of "entertainment") appropriations may be used to purchase business cards for employees whose jobs include representation. B-223678, June 5, 1989 (noting that business cards are a "legitimate and accepted" representation device); 68 Comp. Gen. 467, 468 n.1 (1989).

Finally, "name tags" to be worn on the person are not the same as business cards and may be provided from appropriated funds. 69 Comp. Gen. 82 (1989). 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).

b. 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.[108]

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, April 8, 1952 (X-rays for Weather Bureau personnel being assigned to Alaska, presumably necessitated by a high incidence of tuberculosis among Eskimos).

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) preemployment 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).

[108]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).

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-198804, December 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.[109]

Physical fitness programs may qualify as preventive health programs under 5 U.S.C. § 7901 to the extent permissible under applicable regulations such as OMB 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.

[109]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.

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., March 6, 1985 (discussing GAO's own authority to establish a fitness program); B-216852, December 17, 1984 (non-decision letter).

Subsequent to 64 Comp. Gen. 835, the Office of Personnel Management revised its regulations to include physical fitness programs and facilities as 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. ___ (B-240371, January 18, 1991).

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, November 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 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"[110] and might make it more difficult to find qualified people to do the work.[111] 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:

[110]The morale of the poisoned workers wouldn't be particularly enhanced either.

[111]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.

- 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 performed by private physicians.

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.

(2) Purchase of health-related items [112]

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 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-case 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

[112]See also "Wearing Apparel," Section C.13.h, for related cases.

of official business from the government's standpoint. Therefore, the items could not be provided from appropriated funds.

In B-166411, September 3, 1975, an employee who, as a result of a back injury, needed a bedboard while travelling could not be reimbursed beyond the normal per diem. The bedboard was a personal expense. Similarly, gratuities for wheelchair services while travelling were held non-reimbursable in B-151701, July 3, 1963.

A different type of situation arose in B-215640, January 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 non-powered 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. More recently, 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" in accordance with regulations implementing the Rehabilitation Act of 1973, again on condition that the wheelchair remain the property of the government. B-240271, October 15, 1990.

In B-188710, September 23, 1977, training funds were held available to procure the taping and brailling of training materials and to provide related services such as interpreters for the deaf and readers for the blind. The decision pointed out that these items would be personal expenses if used in connection with regular duties in that each employee is presumptively qualified to perform the official duties of his or her position. However, in view of the policy in the Rehabilitation Act of providing equal opportunity for handicapped employees, the expenditures were held proper in the limited context of training under the Government Employees Training Act. In contrast, expenses for personal attendants to provide handicapped employees attending training with required personal care (such as help in dressing, bathing, getting in and out of bed) were held not to be proper expenditures from training funds because they are not directly related to training. B-188710, March 23, 1978. (For non-training situations, the employment of reading assistants for blind employees and interpreting assistants for deaf employees is now covered by 5 U.S.C. § 3102.)

Health-related items may also be authorized as "special protective equipment" under 5 U.S.C. § 7903, discussed later under "Wearing Apparel." 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); 42 Comp. Gen. 626 (1963).

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, 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).

The 1980's saw a veritable flood of cases involving the purchase of air purifiers ("smokeeaters") as the campaign against smoking became a fashionable "cause celebre." The rules, distilled from several decisions,[113] 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.

c. 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.

[113]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.

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, April 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, September 14, 1960 (oil painting of agency head for "historical purposes" and public display); B-121909, December 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. 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.[114] 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

[114]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., Christmas) decorations has since been modified. See 67 Comp. Gen. 87 (1987), discussed in Section C.13.f.

for plant maintenance contracts. The Comptroller General construed this provision to apply to office space to which particular federal employees were actually assigned. The provision's legislative history suggested that it was not intended to apply to outdoor plants or to plants in common areas which were not the assigned work space of any particular employee or group of employees. 59 Comp. Gen. 428 (1980).

d. Personal Qualification Expenses

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 (1890) ("[I]t is the duty of persons receiving appointments from the government . . . to qualify themselves for the office"). One example of this rule, bar membership expenses for attorneys, has already been covered in the section on membership fees.

Another commonly encountered example is a license to operate a motor vehicle. A driver's license is considered a personal expense incident to qualifying for the position for which employed. 21 Comp. Gen. 769, 772 (1942); 6 Comp. Gen. 432 (1926); 23 Comp. Dec. 386 (1917). An exception was recognized in B-115463, September 18, 1953, for Army civilian employees on temporary duty of at least six months' duration in foreign countries, where the employees did not already possess driver's 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-87138-O.M., July 19, 1949 (Virgin Islands).

The rule has also been applied in the following situations:

- License to practice medicine. 49 Comp. Gen. 450 (1970); 46 Comp. Gen. 695 (1967).

- License for pesticide applicators. B-235727, February 28, 1990; B-186512, January 17, 1977.
- License to operate motion picture projection equipment. 31 Comp. Gen. 81 (1951).
- License to operate a gasoline pump. 3 Comp. Gen. 663 (1924).

Several of the decisions note that licenses of this nature amount to taxes and should not be imposed on federal employees performing federal functions. Whether a particular item does or does not amount to a tax, the result is the same: An employee who pays cannot be reimbursed.

It is not uncommon for agencies to have some of their employees commissioned as notaries public. By statute, an employee whose job includes serving as a notary public may be reimbursed 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).

e. 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, September 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 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, February 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 non-reimbursable 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. 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, January 29, 1953. Similar types of justification were found sufficient in B-175434, April 11, 1972; B-113026, January 19, 1953; and B-15278, May 15, 1942. However, inadequate justification was found in B-149493, December 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, October 22, 1979.

f. 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 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) and 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, February 25, 1977 (non-decision 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, January 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.

g. Traditional Ceremonies

Expenditures which 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. 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, August 26, 1940 (cost of printing programs and invitations to cornerstone ceremony); A-88307, August 21, 1937 (recording of presidential speech and group photograph at cornerstone ceremony); B-107165-O.M., April 3, 1952 (cost of dedication ceremony).

In 56 Comp. Gen. 81 (1976), the rationale of the above 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.

The "traditional ceremony" concept has also been applied to a vessel "christening" ceremony at a Navy Yard (A-74436, May 19, 1936), and a Uniformed Services University of the Health Sciences annual graduation ceremony (B-211700, March 16, 1984).

The precise scope of the "traditional ceremony" concept still needs some clarification. One early Comptroller of the Treasury decision, 7 Comp. Dec. 31 (1900), not overruled or modified as of 1990, disallowed expenses for printing, decorations, music, and refreshments at opening exercises for new buildings at the Ellis Island immigrant station. If a building opening is to be distinguished from a cornerstone ceremony, then the decision may still be valid. If not, then the holding as it relates to printing, and probably decorations, has been implicitly superseded by the later cases. Whether music and refreshments are permissible has yet to be discussed.

h. 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, that 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 Elizabeths 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 statutory provisions which 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]."

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, January 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 which the employee must furnish. B-193104, January 9, 1979; B-122484, February 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).[115]

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).

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 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, section 529 of the FY 1991 Treasury-Postal Service-General Government appropriation act, Pub. L. No. 101–509 (November 5, 1990), 104 Stat. 1389, 1456. 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 which 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

[115]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, April 25, 1988 (non-decision 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.

Health Review Commission. B-199492, September 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 which 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 which 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, December 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, December 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, cited above. 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, there are three statutes under which purchase of wearing apparel may be authorized—5 U.S.C. § 7903 (special clothing for hazardous occupations), 5 U.S.C. § 5901 (uniform allowances), and OSHA (protective clothing). A decision summarizing all three is 63 Comp. Gen. 245 (1984). If none of these applies, then the rule of 3 Comp. Gen. 433 continues to govern.

An 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).

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.

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, December 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).

i. 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 which 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. 49 Comp. Gen. 476 (1979); B-168946, February 26, 1970; B-155372-O.M., November 6, 1964. If severely disabled employees are forced to pay parking costs higher than those paid by non-disabled employees working at the same facility,[116] the agency can subsidize the difference. 63 Comp. Gen. 270 (1984).

As several of the cases cited in the preceding paragraph discuss, agencies must generally obtain parking accommodations through the General Services Administration under the Federal Property and Administrative Services Act unless they have independent statutory authority or a delegation from GSA. 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. GSA Temp. Reg. No. D-73, § 101-17.201-2 (1989). 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 1991 Treasury-Postal Service-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.

[116]For example, the disabled employee may have to park closer to the facility at higher rates.

101–509, § 629, 104 Stat. 1478 (1990). Thus, an agency may 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 the prohibition in 5 U.S.C. § 5536. Id.; B-243677/ B-243674, May 13, 1991. The legislation has a sunset date of December 31, 1993.

(2) Miscellaneous employee expenses

Personal expense questions may occur in contexts which 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, September 25, 1978. (Had the government contracted directly with the lodge, the result might have been different. See section entitled "Cancelled Hotel Reservations" in Chapter 12.)

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 travelled an average of 26 weeks a year. The Comptroller General applied the test set forth in 3 Comp. Gen. 433, 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, February 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, November 16, 1989.

A new situation for the federal government is "flexiplace"—permitting an employee to work at home. An agency may compensate an employee for work done at home in limited circumstances. However, 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.

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. 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.[117]

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.

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, April 29, 1971. See also 5 Comp. Dec. 118 (1898). The ruling was extended in B-172259, August 2,

[117]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); 18 U.S.C. § 3059 (information leading to arrest of person charged with violation of criminal laws of United States or District of Columbia); 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).

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 which authorized the obtaining of confidential information incident to enforcement of the act. B-117628, January 21, 1954.

The rule was also applied in B-106230, November 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 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); Thomas v. United States, 22 Cl. Ct. 749 (1991); B-131689, June 7, 1957; B-10761, June 29, 1940; B-5768, September 16, 1939; A-96942, August 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).

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, January 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 B-137762.32 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, August 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 Department's 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. Wilson v. United States, 135 F.2d 1005 (3d Cir. 1943); Tyson v. United States, 32 F. Supp. 135 (Ct. Cl. 1940); Rickard v. United States, 11 Cl. Ct. 874 (1987); B-217636, March 4, 1985 (non-decision 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. 1969); Tyson, 32 F. Supp. at 136.

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, 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 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, 135 F.2d 1005 (3d Cir. 1943).

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 regulations qualifies for the reward since the statutory language is not limited to federal agencies. B-146223, November 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, February 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., January 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.[118]

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., February 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, April 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 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

[118]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).

not available to offer or pay rewards for the recovery of lost property.

In B-79173, October 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 four months after it disappeared. The Comptroller General said no, because the passengers could all be presumed dead after four 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, 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). 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 IRS reward. Another example is 28 C.F.R. Part 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, discussed above 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, April 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., December 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, April 1, 1931; A-17808, March 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, March 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 non-government 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 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

It has long been held that the doctrine of sovereign immunity and the Supremacy Clause of the Constitution (Art. VI, cl. 2) combine to prohibit the states from taxing the federal government or its activities. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). This early interpretation was aimed essentially at the preservation of the federal system. Chief Justice Marshall penned his famous dictum in McCulloch that "the power to tax is the power to destroy." 17 U.S. at 431.

Since Justice Marshall's time, federal activities 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. County of Allegheny, 322 U.S. 174, 176 (1944)).

In the simplest situation, federal tax immunity applies to attempts to directly tax the property or activities of a federal department or agency. More difficult problems arise when the entity being taxed is not a "traditional" federal agency. The test enunciated by the Supreme Court is whether the entity is "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." United States v. New Mexico, 455 U.S. 720, 735 (1982). The most common situation calling for the application of this test, the taxation of government contractors, will be discussed later.

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 same result would apply to purchases by a contractor under a contract with a grantee financed from federal grant funds (B-177215, November 30, 1972), and to state or local taxation of the income of a grantee's employees (14 Comp. Gen. 869 (1935)). The reason is that the funds, once paid over to the grantee, lose their identity as federal funds and are no longer subject to many of the restrictions on the direct expenditure of appropriations. Appropriations for National Guard operations, however, are not grants to the states and the government's immunity from taxation therefore applies. 42 Comp. Gen. 631 (1963).

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, January 27, 1982 (non-decision letter).

In 46 Comp. Gen. 363 (1966), the Comptroller General considered a program under which 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.

Evidence of tax-exempt status may take various forms, depending on the circumstances. For example, use of a government credit card or purchase order identifies the purchaser as an agency or instrumentality of the United States. 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 normally established by use of a "tax exemption certificate." This is a printed form (Standard Form 1094) and 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.

Consistent with the guidance in 48 C.F.R. § 29.302(b), the GAO Policy and Procedures Manual for Guidance of Federal Agencies (title 7, Appendix 4, Section E (1990)), advocates cost-effectiveness in the use of the certificates. This does not mean that small taxes should automatically be paid without attempting to assert the government's immunity. What it means is that taxes in small amounts should be paid regardless of the government's entitlement to immunity where no other evidence is at hand and where a tax exemption certificate would otherwise be required to take advantage of the immunity. The use of blanket exemption certificates and multiple exemption certificates is discussed in 41 Comp. Gen. 560 (1962).

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-O.M., February 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 the geographical boundaries of a state. In addition, 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.

b. Tax on Business Transactions to Which the Federal Government Is a Party

(1) General principles [119]

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 on where the legal incidence of the tax falls. This concept was enunciated by the Supreme Court in Alabama v. King and Boozer, 314 U.S. 1 (1941). 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 to the government, and the constitutionally impermissible burden which occurs 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 seller and the seller alone is obligated to pay, the government may reimburse the seller for his total cost including tax. But if the buyer is in any way legally responsible for the payment of the tax, the federal government as a buyer cannot be required to pay.

A few years earlier, the Court had applied the same distinction in sustaining a state gross receipts tax imposed on a government contractor. James v. Dravo Contracting Co., 302 U.S. 134 (1937).

[119]Two points must be emphasized at the outset. First, there are dozens of cases in this area and it is impossible to treat them all here. The cases included have been selected to illustrate the more important principles and the kinds of problems that arise. Second, mention of a particular state in the following discussion is designed primarily to illustrate a type of tax and is not presented as a definitive statement of the law of that state. State laws and their judicial interpretations may change from time to time. Thus, while a cited decision may still reflect the law of that state, there is no guarantee of this and other decisions involving that state may exist which are not cited.

The rule that the government may pay a valid "vendor tax" even if it ends up bearing the ultimate economic burden, but is constitutionally immune from a "vendee tax," has been recognized and applied in numerous decisions of the Comptroller General. 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). Where a state tax applies to rentals as well as purchases, the rule will apply to rentals also. See 49 Comp. Gen. 204 (1969); B-168593, January 13, 1971; B-170899, November 16, 1970. 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-225123, May 1, 1987 (non-decision letter).

In determining whether the legal incidence of a particular tax is on the vendor or the vendee, GAO will follow judicial precedent where available. If there are no federal judicial decisions on point, the determination of the highest court of the state in question will be controlling. 21 Comp. Gen. 843 (1942); B-211093, May 10, 1983; B-172025, March 30, 1971.

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, under the Vermont tax on gasoline distributors which was required by law to be passed along to dealers and which dealers in turn were required to collect from consumers, the consumer was legally obligated to pay the tax. This tax collection mechanism constituted a vendee tax, and where the government was the vendee, it was constitutionally immune. Subsequently, the Comptroller General advised a certifying officer that, based on 57 Comp. Gen. 59, he could not properly certify vouchers covering the Vermont fuel tax. B-190293, September 22, 1978. 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 government's immunity no longer applied. 63 Comp. Gen. 49 (1983). It is immaterial that, as a practical matter, the tax will be reflected in the retail price of the fuel. While the economic incidence might still fall on the purchaser, the legal incidence no longer did.

Another example of a vendee tax was the California state gasoline tax, which the dealer was required to collect from a consumer

"insofar as possible." 55 Comp. Gen. 1358 (1976). That finding was predicated in part on the Supreme Court's determination in Diamond National Corp. v. State Board of Equalization, 425 U.S. 268 (1976), that the California sales tax, which had an identically worded requirement, was imposed on the vendee.

In 55 Comp. Gen. 1358, GAO also considered gasoline taxes in Pennsylvania, New Mexico, and Hawaii. 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 government could pay, as a part of the purchase price, the amount of tax on the retailer who was required by statute to assume that tax as a cost of doing business.

The New Mexico gasoline tax 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. 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 government was authorized to pay the full retail price including whatever amount was attributable to the tax.[120]

In a 1963 case, 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).

[120]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.

Even if a tax is a valid vendor tax, a state may not apply it discriminatorily to the United States and not to other buyers. See, e.g., B-156561, June 22, 1965.

Thus the immunity of the United States from taxation depends on whether the government is itself being taxed, in which case the seller of goods is merely a collection agent for the state. Similarly, an agency relationship between the United States and a contractor whereby the contractor is acting solely as the government's purchasing agent and title to goods purchased never vests in the contractor, has been held to create a situation where constitutional immunity from tax can be invoked. See Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954); B 177215, November 30, 1972. However, the "contractor as agent" concept is a very limited one. See United States v. New Mexico, 455 U.S. 720, 742 (1982).

A type of "vendor tax" which 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, October 6, 1967. Similar taxes have been held to be payable in the states of Arizona (27 Comp. Gen. 767 (1948) and B-167150, February 17, 1970), Hawaii (49 Comp. Gen. 204 (1969) and 37 Comp. Gen. 772 (1958)), New Mexico (B-147615, December 14, 1961), and South Dakota (B-211093, 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 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 government, or purchased for use in performing the contract. For the most part, the taxes will be upheld. The most comprehensive recent discussion by the 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 such as the Kern-Limerick case noted above. 455 U.S. at 742. In New Mexico, 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 which had been placed in a special bank account. Id. at 725–26.[121]

In imposing taxes on government contractors, a state may not discriminate against the federal government 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 (1960); City of Detroit v. Murray Corp., 355 U.S. 489, 495 (1958); United States v. City of Manassas, 830 F.2d 530 (4th Cir. 1987), aff'd mem., 485 U.S. 1017 (1988).

The Federal Acquisition Regulation provisions on state and local taxes are found in 48 C.F.R. Subpart 29.3, and the prescribed contract clauses at 48 C.F.R. § 52.229. 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. The purpose of this language is to shift to the contractor the burden of determining which taxes apply, the theory being that the contractor is in a better position than the contracting agency to know this. B-220977, January 15, 1986; B-209430, January 25, 1983. Under this clause, the government cannot be required to pay any additional amount for tax. B-162667, December 19, 1967; B-134347, March 1, 1966. Unless otherwise specified in the contract, this applies even to taxes which are first imposed while the contract is in existence. B-160129, December 7, 1966. In such circumstances it is not relevant that the tax involved has been found to be a valid

[121]Some additional Supreme Court cases sustaining the imposition of state taxes on government contractors in various contexts are 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 and Boozer, 314 U.S. 1 (1941); James v. Dravo Contracting Co., 302 U.S. 134 (1937). There are others. Dravo is regarded as starting the current trend. New Mexico, 455 U.S. at 731-32.

vendor tax from which the United States is not immune; there can be no liability unless the contract agrees to reimburse taxes. 45 Comp. Gen. 192 (1965); 23 Comp. Gen. 957 (1944); B-148311-O.M., April 20, 1962.

A contract can include a contingency clause for after-imposed state and local taxes. Failure to include such a clause is regarded as the contractor's business decision, in which event the government will not be liable for any additional taxes. Midcon of New Mexico, Inc., ASBCA No. 37249, 90-1 BCA ¶ 22,621 (1990).

Other contract language, of course, may dictate different results. A contract for the "actual costs" would justify reimbursement to a contractor of back taxes and interest assessed against him when a court found that the contractor was not exempt on a constitutional basis. B-147316-O.M., January 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 and Boozer, cited above. 35 Comp. Gen. 378 (1955). Likewise, a contract to pay 50 percent of any new tax imposed by a state would include a business privilege tax assessed against a corporate contractor. B-152325, December 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, October 20, 1976; B-180071, February 25, 1974; B-169959, August 3, 1970; B-159064, May 11, 1966; and B-153472, December 2, 1965. The underlying legal concept is unjust enrichment resulting from mutual mistake, the theory being that a party, in this case the government, 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 BCA ¶ 21,294 (1988) (distinguishing 64 Comp. Gen. 718).

If a contractor entitled under the contract to be reimbursed for state taxes pays a state tax which 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.

(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 which the 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 vendor and vendee taxes—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 to which the power has been delegated. 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., 27 Comp. Gen. 580 (1948).

For example, state sales taxes which qualify as vendor taxes and which have been factored into the utility rates through the applicable rate-setting process are payable by the government. 45 Comp. Gen. 192 (1965); B-134602, December 26, 1957; B-123206, June 30,

1955. The same result applies with respect to a vendor sales tax on the utility which is billed separately to the agency. B-211093, May 10, 1983.

Business privilege or gross receipts taxes are frequently imposed on public utilities. When this is done by law and the utility company is permitted to treat the tax as an operating expense and incorporate the amount of tax into its basic billing rate, a constitutionally permissible vendor tax is created. B-144504, June 9, 1967; B-148667, May 15, 1962. This is true even where the pass-through is required by a state utility regulatory body, as long as the tax itself, based on the statute that established it, qualifies as a "vendor tax." The Comptroller General applied this principle in 61 Comp. Gen. 257 (1982), concluding that Veterans Administration Medical Centers were liable for that portion of their electric bills attributable to a rate increase reflecting the Alabama public utility license tax. The Justice Department considered the same situation and reached the same result. 6 Op. Off. Legal Counsel 273 (1982).

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-171756, February 22, 1971; B-144504, June 30, 1970; B-225123, May 1, 1987 (non-decision letter).[122] 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, December 31, 1969. 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, April 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 as not a tax at all, but merely part of the

[122]Another type of "tax" appearing on utility bills is a charge for 9-1-1 emergency service, discussed in Section C.7.c of this chapter.

authorized rate, and therefore properly payable by federal users. 67 Comp. Gen. 220 (1988); B-189149, September 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 (1923); Van Brocklin v. Tennessee, 117 U.S. 151 (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 (1958)), and on the "possessory interest" of Forest Service employees living in government-owned housing (United States v. County of Fresno, 429 U.S. 452 (1977)).[123]

For loss of income due to the presence of large federal holdings of real property within a particular district or state, Congress may compensate local taxing authorities by means of payments in lieu of taxes. See B-149803, May 15, 1972. The rationale is that Congress chooses specifically to compensate a local taxing authority for the hardship which the exemption of federal lands from property tax works on the local government's activities.[124] Payments may also be made pursuant to specific legislation setting up a new federal enclave. See B-145801, September 20, 1961.

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. Such assessments are typically made for

[123]A tax lien which 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). 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-46548, January 26, 1945; B-41677, May 8, 1944; B-28443, December 9, 1943; B-21817, February 12, 1942.

[124]The most important statute in this area is the Payments in Lieu of Taxes Act, 31 U.S.C. §§ 6901-6907, which authorizes the Secretary of the Interior to make payments, pursuant to statutory criteria, to units of local government 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, October 2, 1984; B-214267, August 28, 1984.

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). As such, the decisions have uniformly held that the United States may not be required to pay. E.g., National Railroad Passenger Corp. v. Pennsylvania Public Utility Commission, 665 F. Supp. 402 (E.D. Pa. 1987);[125] United States v. Harford County, 572 F. Supp. 239 (D. Md. 1983); 27 Comp. Gen. 20 (1947); 18 Comp. Gen. 562 (1938); B-226503, September 24, 1987; B-184146, August 20, 1975; B-160936, March 13, 1967; B-155274, October 7, 1964; B-150207, November 8, 1962. Any assessment which is related to a fixed dollar amount multiplied by the number of front feet of the government's property, or computed on a square footage basis, is not payable on the grounds that it is a tax. E.g., Harford County; B-168287, February 12, 1970; B-159084, May 11, 1966; B-178517-O.M., April 22, 1974.

It makes no difference whether the land on which the improvements are to be made is federally-owned or state-owned. B-157435, October 6, 1965. See also 32 Comp. Gen. 296 (1952). Also, the determination of whether a particular assessment can be paid does not depend on the taxing authority's characterization of the payment. Thus, payment has been denied where the assessment was termed a "benefit assessment" (B-168287, November 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 such, 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. United States v. Harford County; 49 Comp. Gen. 72 (1969); 18 Comp. Gen. 562 (1938); B-226503, September 24, 1987; B-168287, November 9, 1970.

[125]The cited case deals with Amtrak. Whether Amtrak should be regarded as an instrumentality of the United States for purposes of tax immunity was not necessary to decide, however, as Amtrak's enabling legislation specifically provides for tax immunity. 665 F. Supp. at 411; 45 U.S.C. § 546b.

The method of computation is the primary means of determining whether the charge represents the fair value of services received. Thus, in order to be paid on a quantum meruit basis, the claimant must show how it arrived at the amount claimed. An unsupported statement that the sum represents the fair and reasonable value of the services rendered is not sufficient. 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, November 27, 1972; B-168287-O.M., July 28, 1972; B-168287-0.M., March 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-168287-0.M., July 28, 1972. In any event, the quantum meruit payment cannot exceed the amount of the statutory assessment. B-168287-0.M., May 15, 1973.

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, November 27, 1972. However, in B-179618, November 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. 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). Similarly, one-time connection fees for hooking up federal facilities, whether new construction or improvements, to local sewer systems 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 is another way of saying that a "service charge" for services rendered is not a tax. E.g., 49 Comp. Gen. 72 (1969). However, this has no relevance to services which the governmental unit is required by law to provide, such as police or firefighting services. (Section C.7, this chapter.)

Where a local government finances major improvements, such as sewers, by means of issuing revenue bonds, and levies a surcharge on its service charge to liquidate the bonded indebtedness, a federal user of the sewer service 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., March 19, 1974.

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, in which case the government's liability is determined by application of traditional concepts of contract and property law, subject of course to any applicable federal statutory provisions. For example, in B-210361, August 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 States became contractually bound by accepting the deed with notice of the covenant.

The principles we have discussed in the context of real property apply equally 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 government's immunity in the context of 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 government-owned vehicles today would have government plates.)

A final type of property-related state tax we may briefly mention is the so-called "death tax." 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. 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 on donations to the government, which includes citations to the leading cases.)

There may be situations, although they should be uncommon, in which 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 in which the federal government sometimes pays a state or local tax is by way of reimbursement to a federal employee who incurred the tax during the performance of official business or other activities which qualify for reimbursement. 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 which was attributable to New Mexico gross receipts tax, a valid vendor tax. B-130520, November 30, 1970. See also 36 Comp. Gen. 681 (1957) (state gasoline tax); B-203151, September 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).[126]

To the extent a parking meter fee may be held to be a tax under the above rule, it can be imposed neither against the government nor 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. If the employee is using a privately-owned vehicle on official business, 5 U.S.C. § 5704 expressly authorizes reimbursement of parking fees. 41 Comp. Gen. 328 (1961).

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 government-owned or privately-owned vehicle. 44 Comp. Gen. 578 (1965).

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

[126]46 Comp. Gen. 624 overruled several earlier decisions and modified several others. The text attempts to reflect those elements of the modified decisions which remain valid.

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

A frequent occurrence is the addition of a tax to the price of lodging secured by government employees travelling on official business. When a federal employee rents a room directly from the proprietor, the employee becomes personally liable for the amount of the rental, including tax. The government is not a party to the transaction and the tax is therefore not viewed as a tax on the government. Accordingly, the employee must pay the tax and cannot assert the government's immunity from local taxes. The fact that the government may reimburse the full rental price as part of the employee's travel expenses does not transform the tax into a tax on the government. 55 Comp. Gen. 1278 (1976); B-172621-O.M., August 10, 1976. If local law exempts federal employees from the tax, the employees should use tax exemption certificates to claim the exemption. See B-172621, April 4, 1973 (non-decision letter).

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, the government is entitled to assert its immunity from local taxes. 55 Comp. Gen. 1278 (1976). The Justice Department reached the same result in 5 Op. Off. Legal Counsel 348 (1981), holding 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.[127]

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, April 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 were exceeded, however, the remainder of the expense would be personal, including the extra amounts for tax. 41 Comp. Gen. 719 (1962).

(3) Tolls

As anyone who drives in certain areas of the United States well knows, state authorities frequently charge tolls for the use of state-owned highways, bridges, or tunnels. 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). Thus, tolls do not raise questions of federal tax immunity and 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(b); 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. Such purchase does not violate the statutory prohibition on advance payments. 36 Comp. Gen. 829 (1957). 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-

[127]The Justice Department opinion 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.

trip basis, not to exceed the cost of the annual permit. 34 Comp. Gen. 556 (1955).

Some of the early decisions state that a toll may 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 which 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, an employee is supposed to know which items have received federal aid. Be that as it may, it would seem prudent to apply the concept of 52 Comp. Gen. 83, discussed above under parking taxes, in conjunction with the reimbursement authority of 5 U.S.C. § 5704.

(4) State and local income taxes

Payment of state and local income taxes is basically the responsibility of the individual employee. 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. 27 Comp. Gen. 372 (1948). The requisite statutory authority now exists. For the District of Columbia and any other state, city, or county which 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

This is essentially a type of property tax. An example is the California tax on "possessory interests" in improvements on tax-exempt land. The Supreme Court upheld the validity of the tax in a suit brought by 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 falls upon the employees and not the United States. United States v. County of Fresno, 429 U.S. 452 (1977). See also B-191232, June 20, 1978.

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, October 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, as a prerequisite to being able to work or practice in that jurisdiction. Federal employees may or may not be exempted. Apart from the question of a state's authority to impose such fees on federal employees performing federal functions, even if the fee is valid, it is considered a personal expense and not reimbursable from appropriated funds. For further discussion and case citations, see Sections C.13.d (Personal Qualification Expenses) and C.12.b (Membership Fees—Attorneys) of this chapter. As in the case of state and local income taxes, state or local withholding requirements for employment taxes do not apply to the federal government absent statutory authority. 28 Comp. Gen. 101 (1948). Statutory authority now exists in 5 U.S.C. § 5520 where withholding is provided by city or county ordinance.

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, August 5, 1973; B-100300, March 12, 1965. 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, August 6, 1964; B-154113, June 24, 1964; B-150228, August 5, 1963. With the enactment of the Debt Collection Act of 1982, the question of using offset against state or local governments has become much more controversial and is explored more fully in Chapter 13. Also, as discussed in Chapter 10, setoff against advances under a federal grant program may be improper in some instances.

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 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. The fact that state law may permit 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, January 30, 1964. See also 27 Comp. Gen. 179 (1947).

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 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-100300, June 28, 1965; B-154778, August 6, 1964.

If a refund mechanism is available, this would be 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 government will be adequately protected, setoff may be deferred pending the filing of a formal claim with the appropriate state agency. B-151095, January 2, 1964. However, if the state refuses a refund to which the United States is entitled, setoff is again, to the extent legally available, the proper remedy. 39 Comp. Gen. 816 (1960); B-162005, April 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, November 16, 1970. See also 50 Comp. Gen. 343 (1970).

16. Telephone Services

a. Telephone Service to Private Residences

(1) The statutory prohibition

A problem which existed during the early years of the 20th 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 telephone. 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."

The decisions are fond of saying that the statute has, for the most part, 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). Thus, except for long-distance calls properly certified as necessary (discussed later), the rule is that charges for residential telephones (installation, connection, monthly equipment rental, and basic service charges) may not be paid from appropriated funds. As we will see, however, there are some exceptions.

(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 which 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). Similarly, the authority to retain rentals from certain defense housing projects and to use the funds for maintenance of the housing units makes them appropriated funds and therefore subject to 31 U.S.C. § 1348(a)(1). 21 Comp. Gen. 239 (1941).

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 operating the railroad. The Comptroller 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, February 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, September 8, 1950; A-99355, January 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.

198, 199 (1912). Following this approach, 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 (1955), 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, October 25, 1990.

(4) Application of the general rule

A large number of decisions has 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.

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, January 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 (1980). 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, February 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

To say that the statute is strictly applied is not to suggest that there are no 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(c), 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. 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 which are also used for the conduct of official business. 26 Comp. Gen. 668 (1947); B-130288, February 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). Cf. 68 Comp. Gen. 502 (1989).

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 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. 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" 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 which 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, 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" which is little more than a matter of convenience is not enough to overcome the prohibition. For example, in A-99355, January 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, September 8, 1950.[128]

Relying largely on B-128144, 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, 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:

- 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 employees' personal phones could not be used with the IRS equipment. B-220148, June 6, 1986.
- 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).

[128]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 telephones in the homes of certain high level Nuclear Regulatory Commission officials to assure 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, January 23, 1987.

Some of the cases noted earlier in which the prohibition was applied, such as 59 Comp. Gen. 723, 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 non-occupancy. 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 cancelled during periods of non-occupancy.

b. Long-Distance Calls

(1) Residential telephones

"Appropriations of an agency are available to pay charges for a long-distance call if required for official business and the voucher to pay for the call is sworn to by the head of the agency. Appropriations of an executive agency are

available only if the head of the agency also certifies that the call is necessary in the interest of the Government." 31 U.S.C. § 1348(b).

Note that the statute requires two different things. As a practical matter, the requirement that the voucher be "sworn to" by the agency head is met by the normal certification of the payment voucher by an authorized certifying officer. However, the official business certification prescribed in the second sentence, further described under "Government telephones" below, is a separate requirement.

In any event, the import of section 1348(b) is that, if properly certified as necessary, a long-distance call made from an employee's personal telephone can be paid by the employing agency. Presumably, although we have found no cases, the same principle would apply to a call made from a public pay phone and billed to the employee, or to a call made from any other residential phone.

Calls billed on a message unit basis are regarded as local calls. B-75124, May 10, 1948; A-13067, April 30, 1940; A-13067, June 17, 1939. Thus, multi-message unit charges are not reimbursable even if incurred on official business. This is true regardless of whether the calls are dialed directly or placed through an operator. 35 Comp. Gen. 615 (1956); B-126760, August 21, 1972.

Normally, the original itemized bill from the telephone company is required in order to obtain reimbursement. However, in one case where the agency lost the original invoice and the telephone company was unable to furnish a copy of the original itemized bill, a letter from the telephone company indicating the exact amount representing long-distance toll charges was held acceptable as the best evidence obtainable. 32 Comp. Gen. 432 (1953).

In B-149048, July 18, 1962, GAO evaluated a proposed Department of Justice regulation which would have required Federal Marshals to pay the cost of long-distance telephone calls from their homes to their offices on evenings and weekends. The Department felt that a marshal's choice not to live in the city of his headquarters was a matter of personal convenience and therefore the cost of communication should be a personal expense. Since there was no requirement for marshals to live near their work site, and since statutory authority existed to reimburse long-distance calls necessary for

official business, GAO recommended against the proposed regulation.

(2) Government telephones

The provisions of 31 U.S.C. § 1348(b), quoted above, apply to government as well as residential telephones. The official business certification requirement is particularly significant in the context of government telephones. An employee who wants reimbursement for a long-distance call placed from his or her home must present the bill to the agency and establish that the call was necessary for official business. Certification should thus be a simple matter, at least in most cases. Long-distance calls are routine occurrences on government telephones, however, and for the most part the agency cannot determine from the bill itself which calls are business and which are personal.

The cost of a call is a factor to be considered in determining whether the call was necessary. B-149048, July 18, 1962. The administrative approval of a travel voucher, including long-distance telephone calls, will satisfy 31 U.S.C. § 1348(b) and separate certification is not required. 56 Comp. Gen. 28 (1976). A certifying officer will not be liable for improperly certified long-distance calls as long as the "official business certification" was made by the agency head or an agency official to whom the authority has been specifically delegated. Id.

The certification can be a simple statement such as:

"Pursuant to 31 U.S.C. § 1348(b), I certify that the use of the telephone for the official long-distance calls listed herein was necessary in the interest of the government." (Adapted from 18 Comp. Gen. 1017 (1939).)

Agencies should maintain documentation of the officials authorized to make the certification. GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title 7, Appendix IV (1990). Statements, such as that in 18 Comp. Gen. 1017, that copies of the documentation should be submitted to GAO are obsolete and should be disregarded.

As noted above, calls billed on a message unit basis are regarded as local calls. Therefore, message unit calls do not have to be certified

under 31 U.S.C. § 1348(b). See cases cited under "Residential telephones" above. In addition, calls made using the Federal Telecommunications System (FTS) do not have to be certified since the flat rate charge to agencies under FTS is a rental payment for the lease of the lines rather than a payment for long-distance tolls within the meaning of 31 U.S.C. § 1348(b). 43 Comp. Gen. 163 (1963).[129]

In 57 Comp. Gen. 321 (1978), the Internal Revenue Service asked how to apply the certification requirement to its Hartford, Connecticut office, where the telephone company did not use a message unit system but rather listed and billed all calls separately as toll calls. The Comptroller General pointed out that all calls billed as long-distance calls must be certified under 31 U.S.C. § 1348(b). However, certification for "short haul" toll calls may be based on statistical sampling. The sampling procedure must include a large enough number of calls to assure probable accuracy. The decision contains further guidelines on establishing an adequate statistical sampling system.

A few years later, GAO took the logical next step, determined that there was no reason to distinguish between "short haul" and other toll calls for statistical sampling purposes, and advised that the official business certification requirement of 31 U.S.C. § 1348(b) could generally be satisfied through an appropriate statistical sampling system. 63 Comp. Gen. 241 (1984).

What do you do if the volume of calls is not large enough to make statistical sampling feasible? GAO addressed this question in 65 Comp. Gen. 19 (1985). In that case, the Nuclear Regulatory Commission proposed to base certification on an annually-adjusted percentage estimate reflecting past experience. The NRC would pay this percentage immediately to minimize Prompt Payment Act penalties, pending completion of internal verification. GAO approved the proposal, but cautioned that the person making the certification must have reasonable assurance that the verification process provides a high degree of accuracy.

[129]If an agency withdraws from the FTS system, the General Services Administration is authorized to charge that agency with direct costs associated with the termination, and is not required to assess those costs among remaining users. 69 Comp. Gen. 65 (1989). This authority was not affected by the 1987 amendment to 40 U.S.C. § 757 which merged the former Federal Telecommunications Fund into the newly established Information Technology Fund. 70 Comp. Gen. ___ (B-231044.3, February 6, 1991) (Army and Air Force Exchange Service); 70 Comp. Gen. ___ (B-231044.2, February 6, 1991) (Tennessee Valley Authority); B-238181, January 9, 1991 (National Trust for Historic Preservation).

The 1985 decision emphasized the distinction between a certifying officer's certification of a payment voucher and the "administrative certification" required by 31 U.S.C. § 1348(b), which is not a certification for payment even if it appears on the payment voucher, and reiterated the point made in 56 Comp. Gen. 29 that a certifying officer may rely on the "official business certification" without risking personal liability for improper payments. 65 Comp. Gen. at 20-21.

Several cases have dealt with the government's liability to a telephone company for calls placed in violation of 31 U.S.C. § 1348(b). A contract for telephone services must be viewed as having been made subject to 31 U.S.C. § 1348(b), and no authority exists to waive the statutory requirements. Thus, where the agency cannot make the required certification, it cannot pay that portion of the bill unless it first collects from the individual(s) responsible for the unauthorized calls. B-172155, August 13, 1971; B-165102, September 10, 1968; B-164699, July 8, 1968; B-90487, November 29, 1949; B-36190, August 12, 1943.

To illustrate, in B-172155, August 13, 1971, an airman had applied for telephone service in a barracks and was assigned a special billing identification number. Another airman used the telephone and special billing number without permission and made several unauthorized long-distance calls. Since the statute amounts to a legislative limitation on an agency's contracting authority, the Air Force could not use appropriated funds to pay the telephone company for the unauthorized calls.

Questions also arise under 31 U.S.C. § 1348 concerning telephone installation and use charges incident to travel, temporary duty, or relocation. See, e.g., 68 Comp. Gen. 307 (1989) (government may pay installation and reinstallation charges where employee is required to temporarily vacate government-furnished residence through government action over which employee has no control); 56 Comp. Gen. 767 (1977) (same result with respect to relocation of mobile home required by government); 44 Comp. Gen. 595 (1965); B-196549, January 31, 1980. Further coverage of these areas may be found in GAO's Personnel Law Manuals.

c. Telephones in Automobiles

If having your own personal telephone in your home was the status symbol of the early 1900's, car phones appear well on their way to becoming the status symbol of the 1990's. There is at the present

time very little case law in this area, and no government-wide statutory guidance.

In a 1988 case, B-229406, December 9, 1988, an agency official used his own funds to purchase a cellular telephone and have it installed in his personal automobile. GAO considered the relevance of both 31 U.S.C. § 1348(a) and § 1348(b). With respect to § 1348(a), the simple fact is 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 local business calls as long as there were adequate safeguards to prevent abuse. The safeguards existed in this case because all local calls were individually itemized on a monthly basis. The agency could also reimburse necessary long-distance calls provided it makes the certification required by section 1348(b). 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.

With respect to the purchase price of the phone itself, the decision found the agency's appropriations unavailable. However, it was clear in that case that the official intended the phone to be his own property. What about purchase and installation of a car phone that is to remain the property of the government? An early decision held that appropriated funds were not available to install radio equipment in a private automobile even though the equipment was to remain government-owned. 15 Comp. Gen. 260 (1935). Whether this decision can withstand B-229406 is open to question. It is certainly possible to argue that the rationale of the cases recognizing exceptions in the case of residences, where there is a statutory prohibition, should apply as well to automobiles, where there is no comparable statutory prohibition. Under this approach, the answer would depend on the administrative justification and the existence of adequate safeguards. In any event, these issues must await future resolution.

GAO has also considered the purchase of cellular telephones for use by Members of the Senate and concluded that the expenditure is authorized from the Senate's contingent fund. B-227763, September 17, 1987; B-186877, August 12, 1976. The 1976 opinion took a negative view of the question from the policy perspective, however, 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.

Availability of Appropriations: Time

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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 "uses" of appropriations are obligations and expenditures. An obligation is a binding commitment against an appropriation which will require an expenditure at some later time. An expenditure is the actual disbursement of funds. This chapter will discuss 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 for obligation only during the period for which it is made, but remains available beyond that period, within limits, for expenditures to liquidate properly made 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" for obligation beyond their expiration date by judicial decree. 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.

Annual appropriations (also called fiscal year or one-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. Thus, fiscal year 1991 begins on October 1, 1990, and ends on September 30, 1991. Routine activities of the federal government are, for the most part, financed by annual appropriations.

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, 19XX." 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:

"(c) 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 the following general provision:

"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 may not be extended beyond the fiscal year for which it is made absent express indication in the appropriation act itself. See 58 Comp. Gen. 321 (1979); B-118638, November 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 exempted from it in the appropriation act. 37 Comp. Gen. 246, 248 (1957).

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 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 obligation and are said to have "expired" for obligational purposes. This rule—that time-limited budget authority

[1]See, for example, the following fiscal year 1990 appropriation acts: Pub. L. No. 101-101, § 501, 103 Stat. 641, 666 (energy/water development); Pub. L. No. 101-121, § 305, 103 Stat. 701, 742 (Interior); Pub. L. No. 101-136, § 504, 103 Stat. 783, 812 (Treasury/General Government); Pub. L. No. 101-144, § 504, 103 Stat. 839, 869 (Housing and Urban Development/Veterans Affairs); Pub. L. No. 101-161, § 609, 103 Stat. 951, 982 (Agriculture); Pub. L. No. 101-162, § 602, 103 Stat. 988, 1031 (State/Justice/Commerce); Pub. L. No. 101-163, § 302, 103 Stat. 1041, 1063 (legislative branch); Pub. L. No. 101-164, § 307, 103 Stat. 1069, 1092 (Transportation); Pub. L. No. 101-165, § 9005, 103 Stat. 1112, 1129 (Defense); Pub. L. No. 101-166, § 508, 103 Stat. 1159, 1190 (Labor/Health and Human Services); Pub. L. No. 101-167, § 517, 103 Stat. 1195, 1220 (foreign operations); Pub. L. No. 101-168, § 108, 103 Stat. 1267, 1276 (District of Columbia government).

ceases to be available for obligation after the last day of the specified time period—has been termed an "elementary principle" of federal fiscal law. West Virginia Association of Community Health Centers, Inc. v. Heckler, 734 F.2d 1570, 1576 (D.C. Cir. 1984); Population Institute v. McPherson, 797 F.2d 1062, 1071 (D.C. Cir. 1986). See also 18 Comp. Gen. 969, 971 (1939). Annual appropriations remain available for an additional five fiscal years beyond expiration, however, to 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. at 1676 (1990). The principles summarized in this paragraph are discussed 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 for this was 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]

[2]Department of the Interior and Related Agencies Appropriation Act, 1980, Pub. L. No. 96-126, 93 Stat. 954, 978 (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 (1980).

Appropriations available for obligation for less than a full fiscal year are, however, uncommon.

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 1990 appropriation act includes an appropriation which specifies that it shall remain available until September 30, 1991, it is a 2-year appropriation. As a more specific illustration, the Navy's "Shipbuilding and Conversion" appropriation, found in the annual Defense Department appropriation acts, is typically a 5-year appropriation.[3]

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.

A no-year appropriation is available for obligation without fiscal year limitation. In order for an appropriation to be 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). However, other language will suffice as long as its meaning is unmistakable, such as "without fiscal year limitation." See 57 Comp. Gen. 865, 869 (1978).

The rules relating to no-year appropriations are simple. Apart from one important restriction (31 U.S.C. § 1555, discussed later in connection with the closing of accounts), all statutory time limits as to when the funds may be obligated and expended are removed, and the funds remain available for their original purposes until expended. 43 Comp. Gen. 657 (1964); 40 Comp. Gen. 694 (1961). Thus, there has been little occasion for the Comptroller General to render decisions on the availability of no-year appropriations, at least from the time perspective.

A small group of decisions involves the effect of subsequent congressional action on the availability of a prior year's 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

[3]E.g., Pub. L. No. 101-165, 103 Stat. 1112, 1121 (1989) (FY 1990).

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 (1961). See also B-200519, November 28, 1980.

In another case, a no-year appropriation for the National Capital Park and Planning Commission included a monetary ceiling on non-contract 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 which 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.

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, January 3, 1984; B-200519, November 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 two 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 two-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.

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 GAO report entitled No-Year Appropriations in the Department of Agriculture, PAD-78-74 (September 19, 1978).

3. Permissible Actions 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, 31 U.S.C. § 1341(a), which prohibits obligations or expenditures in advance of appropriations. By virtue of this law, certainly no obligations may be incurred before the appropriation act is enacted, unless specifically authorized by law.

If the appropriation act is enacted 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); B-20670, October 18, 1941; A-19524, August 26, 1927; B-213141-O.M., March 29, 1984; 11 Comp. Dec. 186 (1904); 4 Lawrence, First Comp. Dec. 132 (1883). The contract is not regarded as an obligation in violation of the Antideficiency Act since, even though the time period covered by the appropriation to be charged has not yet started, the appropriation has already been enacted into law.

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 which clearly by its terms requires immediate action. E.g., 1 Comp. Dec. 329 (1895). However, the general rule remains that (a) expenditures prior to the beginning of the fiscal year(s) covered by the appropriation are unauthorized; and (b) obligations prior to the start of the fiscal year are permissible only if the relevant appropriation act has already been enacted and only where actual disbursements are deferred until after the start of the new fiscal year.

The Comptroller General has also held that the awarding of a "conditional contract" prior to the enactment of the relevant appropriation act does not violate statutory funding restrictions. A "conditional contract" must expressly provide that the government's liability is contingent upon the future availability of appropriations. Under this arrangement, performance cannot begin prior to the date of enactment of the appropriation, although it may begin after the enactment of the appropriation but before the start of the fiscal year. The contract must also provide that the government is under no obligation to make any contract payments until the start of the fiscal year. 39 Comp. Gen. 776 (1960); 39 Comp. Gen. 340 (1959); 21 Comp. Gen. 864 (1942); B-171798(1), August 18, 1971, at 11–12.

B. The Bona Fide Needs Rule

1. The Concept

One of the fundamental principles of appropriations law is the so-called bona fide needs rule: 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., 68 Comp. Gen. 170, 171 (1989); 58 Comp. Gen. 471, 473 (1979); 54 Comp. Gen. 962, 966 (1975); 33 Comp. Gen. 57, 61 (1953); B-183184, May 30, 1975.

Bona fide need questions arise in many forms. An agency may wish to enter into or modify a contract or make some other obligation or expenditure, the question being which fiscal year to charge. The question may be whether an obligation previously recorded was a proper charge against that fiscal year's appropriation. An agency may have taken certain actions which 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, proposed or made, recorded or unrecorded, voluntarily incurred or imposed by operation of law, bears a sufficient relationship to the legitimate needs of the period of obligational availability of the appropriation charged or sought to be charged.

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), 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 (1957). Additional statutory support for the rule may be 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 need 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. 44 Comp. Gen. 399, 401 (1965); 37 Comp. Gen. 155, 159 (1957).

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 which 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.

What about the needs of a prior year? The rules here are not quite so simple. There are situations in which current appropriations may (and even must) be used to satisfy unmet needs arising in a prior year, and situations in which current appropriations are not available for that purpose. Prior years' needs are covered in Section B.3.

Bona fide need questions also frequently involve transactions which 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., 35 Comp. Gen. 692 (1956); 33 Comp. Gen. 57, 61 (1953); 20 Comp. Gen. 436 (1941); 16 Comp. Gen. 37 (1936); 21 Comp. Dec. 822 (1915). More detailed discussion of the rule and its rationale is contained in 4 Comp. Dec. 553 (1898) and 37 Comp. Gen. 155 (1957).

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., 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 actual procurement contracts with suppliers, including the exact price, were not negotiated and executed 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 entitled Legal Aspects of Funding Department of the Army Procurements by Capt. Dale Gallimore, 67 Mil. L. Rev. 85 (1975).

The bona fide needs rule applies to multiple-year as well as fiscal-year appropriations. 68 Comp. Gen. 170 (1989); 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 two-year appropriation every year. For FY 1989, it receives an appropriation available through FY 1990; for FY 1990, it receives an appropriation available through FY 1991, and so on. It is possible to apply the bona fide needs rule to require that the FY 1990 appropriation be used only for needs arising in FY 1990, although obligation may occur any time prior to the end of FY 1991. The Comptroller General specifically rejected this approach in 68 Comp. Gen. 170, holding that the Defense Logistics Agency

could use its FY 1987 2-year Research and Development appropriation for a need arising in FY 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).

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. As most appropriations are 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.[4] Determining the year to which a need relates is not always easy. Some illustrative cases are listed below:

- Rent on property leased by National Park Service from National Park Foundation could be paid in advance, but lease could not cross fiscal year lines. Proposal was for 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 period of October 1 through April 30 since rent for these months constituted a need of the following fiscal year. B-207215, March 1, 1983.
- Envelopes ordered near the end of one fiscal year, which were delivered in and were intended for use in the following fiscal year, could be charged only to appropriations for the latter year. 5 Comp. Dec. 486 (1899). (Maintaining an inventory level was not a factor in this case.)
- 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).
- Department of Housing and Urban Development recorded certain obligations for public housing subsidies on estimated basis. At end of fiscal year, obligations were found to be in excess of actual needs. It was held improper to send excess funds to state agency's operating reserve to offset subsidy for following year, since this amounted to using the funds for the needs of a subsequent year.

[4]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 (e.g., B.4, B.5, B.8).

Proper course of action was to deobligate the excess. 64 Comp. Gen. 410 (1985).

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. While there can be no doubt that this happens, the issue is far from one-sided.

The legal issue was stated very simply in an early decision of the Comptroller of the Treasury:

"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 three days before the end of FY 1921, with the gasoline to be delivered in monthly installments in FY 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, 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. See also 4 Comp. Dec. 553 (1898) (cement ordered late in one fiscal year to be delivered several months into the following fiscal year).[5]

[5]"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.

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. Federal Year-End Spending: Symptom of a Larger Problem, PAD-81-18 (October 23, 1980), pp. 7–9.[6]

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 fourth quarter surges due to cyclical or seasonal fund requirements. If, for example, you are administering a fire suppression program, you should expect a fourth quarter surge because the fourth quarter of the federal fiscal year is the major fire season in many states. 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 awarded cooperative agreements to certain Small Business Development Centers on

[6]Other GAO reports in this area are: Federal Year-End Spending Patterns for Fiscal Years 1982, 1983, and 1984, GAO/AFMD-85-75 (November 4, 1985); Limitations on Fiscal Year 1981 Fourth Quarter Obligations in Certain Agencies, GAO/PAD-82-43 (July 16, 1982); Government Agencies Need Effective Planning to Curb Unnecessary Year-End Spending, PSAD-80-67 (July 28, 1980).

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 need 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, November 29, 1988.

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 two-month period or quarter of the fiscal year. For example, the Defense Department's 1990 appropriation contained a provision limiting obligations during the last two months of the fiscal year to not more than 20 percent of the total fiscal-year appropriations.[7] 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.[8] 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 which arose in a prior year. 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 year's funds. "An unfulfilled need of one period may well be carried forward to the next as a continuing need with the next period's appropriation being available for funding." B-197274, September 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.

[7]Pub. L. No. 101-165, § 9007, 103 Stat. 1112, 1130 (1989).

[8]E.g., B-198666, June 29, 1981; B-198666, May 20, 1980.

An illustration is B-207433, September 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 to charge the obligation for the additional quantity, if the Army still wished to procure them, to current year's appropriations. The fact that the need arose in a prior year was immaterial. The decision, at pages 4–5, offered the following explanation:

"The essence of the [bona fide needs] rule is simply that an appropriation may be validly obligated only to meet a legitimate need existing during the period of availability. Under this concept, payments are chargeable to the year in which the obligation took place, even though not actually disbursed until a later year, as long as the need existed when the funds were obligated. . . .

"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 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 FY 1986, the U.S. Geological Survey ordered certain microcomputer equipment, to be delivered in early FY 1987, charging the purchase to FY 1986 funds. The equipment was delivered and accepted, but was stolen before reaching the ordering office. The decision held that a reorder, placed in FY 1987, had to be charged to FY 1987 funds. As with the thermal viewers in B-207433, the fact that the need for the equipment arose in 1986 was immaterial.

In another case, cost overruns caused the Army to delete certain items from a FY 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., February 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 year's appropriation, the agency must seek a supplemental or deficiency appropriation and must further consider the possibility that the Antideficiency Act 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 FY 1904 appropriations, and the exhaustion of the 1904 appropriation did not permit use of 1905 funds. 11 Comp. Dec. 454 (1905). (The contract constituted a valid obligation against the 1904 appropriation.) See also 21 Comp. Dec. 822 (1915).

Similarly, an obligation occurs under 5 U.S.C. § 504, the administrative portion of the Equal Access to Justice Act, when the agency renders its decision approving a fee application. The obligation is against funds current as of the time of the award. If funds are not currently available to satisfy the award, the agency may not use the following year's appropriation. 62 Comp. Gen. 692, 698-700 (1983).

In B-226801, March 2, 1988, GAO considered various entitlement programs administered by the Department of Veterans Affairs. Under these programs, the obligation arises when the 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 the 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.[9]

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, March 9, 1979 (fiscal-year refugee assistance appropriation not available to pay for services performed in prior year); B-14331, January 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., January 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, September 16, 1975 (postage charges under 39 U.S.C. § 3206).

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, but the issue exists regardless of when in the fiscal year the contract is made. This section will explore the topic in more general terms.

[9]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 (1989).

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 and the Federal Power Commission 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., August 11, 1972.

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 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. 628, 630 (1959).

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 which 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).

If deliveries are scheduled only for a subsequent fiscal year, or if contract timing effectively precludes delivery until the following

fiscal year, it will be presumed that 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) (circular letter); 1 Comp. Gen. 115 (1921); 27 Comp. Dec. 640 (1921).

In 44 Comp. Gen. 695 (1965), where an agency had requisitioned the printing of sales promotion material near the end of a fiscal year, the Comptroller General determined that the material did not meet a bona fide need of the fiscal year in which the order was placed. Because the items were especially created for a particular purpose and required a lengthy period for creation, the printing requisitions could not be viewed as "replacement of stock" and did not lawfully obligate the current annual appropriation. Further, since the manuscript copy did not accompany the original order and was not furnished to the Government Printing Office until seven months after the end of the fiscal year, the printing could not have fulfilled a need of the fiscal year in which the requisition was issued.

As suggested in 44 Comp. Gen. 695, 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. This being the case, scheduling delivery for the following year would seem irrelevant. "Stock" in this context refers to "readily available common-use standard items." Id. at 697. See also 32 Comp. Gen. 436 (1953). 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, December 18, 1957.

A 1935 decision, A-60589, July 12, 1935, concerned a "requirements contract" for supplies in which no definite quantity was required to be purchased and under which no legal obligation would be imposed on the government until an order was placed, other than the requirement not to purchase the items elsewhere. The decision held that such a contract could extend into the following fiscal year, i.e., could cross fiscal year lines, as long as the

contract term was not for more than one year.[10] However, in 42 Comp. Gen. 272 (1962), the type of requirements contract involved in A-60589 was distinguished from a three-year "requirements" contract for equipment and services to maintain an Air Force base at Wake Island, to be funded from an annual appropriation of the first contract year, on the grounds that, under the Wake Island contract, the need for the equipment and services was certain to arise as long as the base remained open. The Wake Island contract was held to violate not only the bona fide needs rule but the Antideficiency Act as well.

Both decisions—42 Comp. Gen. 272 and A-60589—were discussed several years later in 48 Comp. Gen. 497 (1969), in which the Comptroller General stated:

"For the reasons stated in 42 Comp. Gen. 272, we are not convinced that the decision of July 12, 1935, A-60589, permitting requirements contracts under fiscal year appropriations to cover 1-year periods extending beyond the end of the fiscal year is technically correct. Since that practice, however, has been followed for over 30 years apparently in reliance upon the July 12, 1935, decision, no objection will be made to its continuance." Id. at 500.

If, however, a variable quantity contract does not include the requirement not to purchase the items elsewhere and does not guarantee a minimum purchase, then there is really no "contract" and obligations arise only as orders are actually placed. A given payment must be charged to the fiscal year in which the order creating the obligation was definitely placed. See 60 Comp. Gen. 219 (1981).

5. Services Rendered Beyond the Fiscal Year

Services are generally viewed as chargeable to the appropriation current at the time the services are rendered. E.g., 38 Comp. Gen. 316 (1958) (salaries of government employees). However, a need may arise in one fiscal year for services which, 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,

[10]A-60589 was also based in part on 41 U.S.C. § 13, which prohibits the making of contracts for "stationery or other supplies" for terms in excess of one year. See, e.g., 37 Comp. Gen. 155, 159 (1957), stating that "[w]hen a continuing supply of materials is needed over a period of time, the contract term may not exceed one year, and only the needs of the first fiscal year may be considered a bona fide need of the year in which the contract is made." Most agencies are now exempt from 41 U.S.C. § 13. See 63 Comp. Gen. 129, 135 (1983).

or to charge funds current at the time the services are rendered, depends upon whether the services are "severable" or "entire."

"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 which 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 appears to be 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 upon the 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 also 65 Comp. Gen. 741 (1986) (contract for study and final report on psychological problems among Vietnam veterans); 10 Comp. Dec. 284 (1903).

However, where the services are continuing and recurring in nature, the contract is severable and 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). 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), modified by B-125444, February 16, 1956 (gardening and window cleaning services). Service contracts which are "severable" may not cross fiscal year lines unless authorized by statute. 58 Comp. Gen. 321, 324 (1979); B-192518, August 9, 1979; B-133001, March 9, 1979; B-187881, October 3, 1977.

Another factor identified in some of the decisions is whether the 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-187881, October 3, 1977 (overseas school teachers with employment contracts); B-174226, March 13, 1972 (performance on an evaluation team). Legal services have been viewed as either personal or nonpersonal, depending on the nature of the work to be done. B-122596, February 18, 1955; B-122228, December 23, 1954.

The distinction appears to have derived from the distinction between services performed under an employer-employee relationship (personal) and those performed under an independent contractor relationship (nonpersonal). 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 appointed under Criminal Justice Act chargeable to appropriations current at time of appointment); B-224702, August 5, 1987 (contract for legal support services held severable since it consisted primarily of clerical tasks and required no final report or end product).

Research may also be severable or nonseverable, depending on the particular facts. See B-235678, July 30, 1990. A contract for cancer research services viewed as an "entire job" was found nonseverable in B-141839-O.M., May 2, 1960. In 64 Comp. Gen. 359 (1985), biomedical research grants awarded by the National Institutes of Health were held severable because they represented continuous, ongoing work and did not contemplate a required outcome or end product.

A 1981 decision applied the above principles to agreements made by the Small Business Administration 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 each fiscal year could be charged 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, person makes 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, August 3, 1989; B-213141-O.M., March 29, 1984. In 70 Comp. Gen. ___ (B-238940, February 25, 1991), training which began on the first day of FY 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).

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). Level-of-effort contracts may be severable or nonseverable. The 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.

As a final thought, there is a fairly simple test which 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 which 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 one 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. 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 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.

The rule in its traditional form 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, April 7, 1967; B-105555, September 26, 1951; A-22134, April 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). Accordingly, the replacement contract seeks only to meet the pre-existing and continuing need.

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).

- 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. 591, 593 (1981). 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 (1976)). It has, however, been expanded. Thus, 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.[11] 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 appropriation's availability. No problem, the decision noted, since the original contract met these requirements. Id. at 241.

More recently, a contract for flooring repairs was awarded in FY 1975 obligating FY 1975 funds, conditioned upon a determination from the Small Business Administration that the contractor qualified as a small business. The 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

[11] A 1981 case, 60 Comp. Gen. 591, drew a distinction based on whether the awarding of the replacement contract preceded or followed the conversion, suggesting that the original obligation was extinguished in the latter situation, 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. Especially in view of later decisions, the distinction would not appear relevant. See 68 Comp. Gen. 158 (1988).

funds obligated for the contract in FY 1975 could be used to resolicit in FY 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 reducing 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. To avert this possibility, the Navy agreed to a contract modification which, 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 two ships deleted by the modification were available post-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 two 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, October 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, September 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 which presumably overruled it. See also B-173244(2), August 10, 1972; B-158261, March 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 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 shouldn't 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. ___ (B-238548, February 5, 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.

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 which does not increase the contract price remains an obligation of the year in which the contract was executed. B-68707, August 19, 1947. If the modification results in an increase in contract price and the appropriation charged with the original contract has expired for obligation purposes, 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, September 16, 1983.

In the case of a contract for services which are severable, 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 Section B.5. 61 Comp. Gen. 184 (1981), aff'd upon reconsideration, B-202222, August 2, 1983; B-224702, August 5, 1987. 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 FY 1980. The modification called for work to be performed in FY 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 FY 1980. The modification amounted to a separate contract and could be charged only to FY 1981 funds, notwithstanding that it purported to modify a contract properly chargeable to FY 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.

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 "antecedent liability"—that is, whether it 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, September 24, 1926; B-146285-O.M., September 28, 1976.[12] See also B-197344, August 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 pre-existing 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):

"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 from time to time covering such changes. However, the fact remains that the obligations and liabilities of the

[12]Similarly, costs incurred under a termination for convenience are chargeable to the appropriation originally obligated for the contract. B-203074, August 6, 1981.

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 over-obligating 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, September 11, 1978. It is also true, however, that estimated liabilities of this type require constant review to insure that appropriations do not remain encumbered in excess of the amounts which 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. Thus, within-scope modifications can result in significant cost escalation with minimal congressional oversight.

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 contractor was not legally bound to do under original contract, amounted to 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 which 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 which 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 account has been closed (generally five fiscal years after the expiration of obligational availability), questions of antecedent liability or relation back are no longer relevant since account balances upon closing cease to be available for any purpose and only current funds may be used, up to specified limits, for such obligations. 31 U.S.C. §§ 1552 and 1553, as amended by Pub. L. No. 101-510, § 1405(a), 104 Stat. 1485, 1676 (1990).

For contract changes which would require the contractor to perform additional work, as opposed to increases under an escalation clause or to pay claims, the use of expired fixed-year appropriations is subject to two approval requirements. If a proposed contract change chargeable to an expired account would cause a cumulative increase of more than $4 million during a fiscal year for contract changes for the relevant program, project, or activity, the obligation must be approved by the agency head or by an official within the agency head's immediate office to whom the authority has been delegated. If the cumulative increase would exceed $25 million, the agency head must report the proposed obligation to the relevant authorizing committees and the appropriations committees of the Senate and House of Representatives, and must defer making the obligation for 30 days after submitting the report. 31 U.S.C. § 1553(c), as amended by Pub. L. No. 101-510, § 1405(a), 104 Stat. at 1677 (1990).

8. Multi-Year Contracts

Any discussion of multi-year 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 "multi-year 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 multi-year contract, as we will use the term in this discussion, is a contract covering the

requirements of more than one fiscal year.[13] A contract for the needs of the current year, even though performance may extend over several years, is not a "multi-year contract." Thus, a contract to construct a ship which will take 3 years to complete is not a multi-year contract; a contract to begin constructing one ship a year for the next 3 years is.

Multi-year contracting, like most things in life, has advantages and disadvantages. Some of the potential benefits are:[14]

- Multi-year contracting can reduce costs by permitting the contractor to amortize nonrecurring "start up" costs over the life of the contract. Without multi-year authority, the contractor may insist on recovering these costs under the one-year contract (since there is no guarantee of getting future contracts), thus resulting in increased unit prices.
- Multi-year contracting may enhance quality by reducing the uncertainty of continued government business and enabling the contractor to maintain a stable work force.
- Multi-year 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. Multi-year contracting authority also has potential disadvantages:[15]

- Competition may decrease because there will be fewer opportunities to bid.
- A contractor who is able to amortize start-up costs in a multi-year contract has, in effect, a government-funded competitive price advantage over new contractors in subsequent solicitations. This could evolve into a sole-source posture.

[13]This is essentially the same as the definition in the Federal Acquisition Regulation, "contracts covering more than 1-year's but not in excess of 5-year's [sic] requirements, unless otherwise authorized by statute." 48 C.F.R. § 17.101.

[14]S. Rep. No. 98-417, 98th Cong., 2d Sess. 4-8 (1984). This is a report by the Senate Committee on Governmental Affairs on a bill (S. 2300) designed to extend limited multi-year contracting authority to civilian agencies. The legislation was not enacted.

[15]H.R. Rep. No. 97-71, Part 3, 97th Cong., 1st Sess. 21 (1981) (report of the House Committee on Government Operations on the 1982 Defense Department authorization bill).

- Being locked into a contract for several years is not always desirable, particularly where the alternative is to incur cancellation charges which could offset initial savings.

An agency may use multi-year contracting only (1) if it has no-year funds or multiple-year funds covering the entire term of the contract, or (2) under specific statutory authority. 67 Comp. Gen. 190, 192 (1988); B-171277, April 2, 1971 (multi-year contract permissible under no-year trust fund); Federal Acquisition Regulation (FAR), 48 C.F.R. § 17.102-1(a). To restate this, an agency may enter into a multi-year 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. Thus far, Congress has seen fit to grant this authority sparingly.

If neither of the above situations applies, a multi-year contract violates several statutory funding restrictions, including the Antideficiency Act and the bona fide need statute (31 U.S.C. § 1502(a)). 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). Multi-year commitments were found illegal in various contexts in each of these cases, although each case does not necessarily discuss each funding statute. See also FAR, 48 C.F.R. § 17.102-1(a).

In 42 Comp. Gen. 272, for example, the Air Force had awarded a three-year contract for aircraft maintenance, troop billeting, and base management services on Wake Island. The Air Force contended that no funds were obligated under 31 U.S.C. § 1501 until requisitions were issued, thereby exempting the contract from the statutory funding restrictions. However, the Comptroller General refused to adopt this characterization of the contract as, in effect, a requirements 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 to close the base would eliminate the requirements. Consequently, the contract was found to be an unauthorized multi-year contract.

If an agency is contracting with fiscal year appropriations and does not have multi-year 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); 67 Comp. Gen. 190 (1988); 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, November 10, 1949. Thus, in 42 Comp. Gen. 272, 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 multi-year authority from Congress. Id. at 278.

Statutory authority for multi-year contracting with annual funds does exist in certain situations. For example, the military departments are authorized by 10 U.S.C. §§ 2306(g) and (h) to enter into multi-year contracts for periods of not more than five years if certain administrative determinations are made. Subsection (g), enacted in response to the Wake Island decision (see 67 Comp. Gen. 190, 193 (1988)), applies to such things as installation maintenance and support, maintenance or modification of aircraft and other complex military equipment, specialized training, and base services. Subsection (h) extends the concept to the acquisition of weapon systems and associated items and services. 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. §§ 2306(g)(3), (h)(5). Subsection (g) is also available to the Coast Guard and the National Aeronautics and Space Administration. 10 U.S.C. § 2303(a).

A multi-year contract entered into under authority of 10 U.S.C. § 2306 is binding on both parties for the full term of the contract unless terminated as provided in the statute. Beta Systems, Inc. v. United States, 838 F.2d 1179, 1183 n.2 (Fed. Cir. 1988); Beta Systems v. United States, 16 Cl. Ct. 219, 228 (1989).

A contract under section 2306 must relate to the bona fide needs of the contract period. The statute does not authorize the advance

procurement of materials not needed during the 5-year term of the contract. 64 Comp. Gen. 163 (1984); B-215825-O.M., November 7, 1984. Cf. 35 Comp. Gen. 220 (1955).

Another example of statutory authority for multi-year contracting is 40 U.S.C. § 481(a)(3), which authorizes contracts for public utility services for periods not exceeding ten 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, 222-23 (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. 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 need have sufficient budget authority only to obligate the first year's costs. 62 Comp. Gen. at 572; 44 Comp. Gen. 683, 687-88 (1965).

In contrast, if an agency does not have specific multi-year contracting authority but is using a multi-year contract solely under authority of a multiple-year or no-year appropriation, it has been held that the full contract amount must be obligated. B-195260, July 11, 1979. However, GAO approved the incremental funding of a multi-year contract using no-year funds in 43 Comp. Gen. 657 (1964). Under the scheme involved in that case, 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 Navy Industrial Fund); 51 Comp. Gen. 598, 604 (1972) (same); 48 Comp. Gen. 497, 502 (1960) (either obligational approach acceptable under revolving fund).[16] (As we will see later, this type of arrangement under a fiscal-year appropriation presents problems.)

Other examples of specific multi-year authority are 40 U.S.C. § 490(h), which authorizes the General Services Administration to enter into leases for periods of up to 20 years; 40 U.S.C. § 757(c),

[16]While 43 Comp. Gen. 657 had used the somewhat cryptic term "commitment," the three subsequent decisions require the actual obligation of the cancellation costs.

which authorizes GSA to use the Information Technology Fund for contracts of up to five years for information technology hardware, software, or services; and 10 U.S.C. § 2828(d), under which the military departments may lease family housing units in foreign countries for periods of up to 10 years, to be paid from annual appropriations.

Multi-year arrangements may be permissible without specific statutory authority if they are structured in such a way as not to violate the Antideficiency Act or the bona fide needs rule. An example was discussed in 63 Comp. Gen. 129 (1983). The General Services Administration proposed using 3-year "Multiple Award Schedule" 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 that time.[17]

Also, contracts which 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 multi-year leases or contracts for the operation of concessions on federal property).

In a one-year contract with renewal options, the contractor can never be sure whether the renewal options will be exercised, thereby enabling the contractor to amortize initial investment costs. To protect against this possibility, contractors occasionally seek to provide for 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:

[17]Although the MAS proposal was similar to the proposal considered in A-60589, July 12, 1935, discussed above in Section B.4, GSA had since been exempted from the one-year requirement of 41 U.S.C. § 13. See 63 Comp. Gen. at 135.

"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 upon the full life of the system in the event the government did not continue using the equipment. Accordingly, he 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, 56 Comp. Gen. 505 (1977). See also 56 Comp. Gen. 167 (1976); B-190659, October 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 multi-year contracting. The plan approved by the Comptroller General in 48 Comp. Gen. 497, 501-02 (1969) provided for a one-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 one-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."

GAO has recommended the enactment of legislation to authorize all federal agencies to engage in limited multi-year procurement. See GAO report Federal Agencies Should Be Given General Multiyear Contracting Authority for Supplies and Services, PSAD-78-54 (January 10, 1978). However, its use should be based on case-by-case assessments of the benefits and drawbacks noted previously. B-214545, August 7, 1985 (comments on proposed legislation).

9. Exceptions to the Bona Fide Needs Rule

Congress may, of course, grant exceptions from the bona fide needs requirement, either in general or for a particular agency or program, and may do so either in permanent legislation or in appropriation acts.

An example 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.

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 non-performance—"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-180713, April 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 non-statutory, some of which are of major importance.

The advance payment statute permits exceptions, which may be found in appropriation acts or in "other law." Examples of specific exemptions are: 10 U.S.C. § 2396, 31 U.S.C. §§ 3324(b)(2) and (d), 19

U.S.C. §§ 2076–2078 and 2080. Numerous other statutory exemptions exist in various contexts. A major exception, discussed in Section C.2, permits advance and progress payments under procurement contracts in certain situations.

Another major exception exists in the case of grants. Since many grants by their nature anticipate payment in advance, it has been held that 31 U.S.C. § 3324 does not preclude advance funding in authorized grant relationships. 60 Comp. Gen. 208 (1981); 59 Comp. Gen. 424 (1980); 41 Comp. Gen. 394 (1961). There are, however, limitations on the advance funding of grants. For example, the grantee must establish or demonstrate the willingness and ability to establish procedures to minimize the time elapsing between the advance of funds and their disbursement by the grantee. These concepts are further explored in Chapter 10.

Advance payment problems may nevertheless arise in grant-related cases. Under the College Work-Study Program, a student is placed with an employer, which may be a federal agency. The student's salary is paid from two sources: 80 percent is paid by the college under a Department of Education grant, and the remaining 20 percent is paid by the employer. In one case, a proposal for the employing federal agency to pay 100 percent of the student's salary and to collect 80 percent from the college at a later date was found to violate 31 U.S.C. § 3324. B-159715, August 18, 1972. Several years later, a proposal for the agency/employer to advance its 20 percent share to the college which would in turn place the funds in an escrow account for payment to the student after the work was performed was similarly found to contravene 31 U.S.C. § 3324. 56 Comp. Gen. 567 (1977). In the latter decision, the Comptroller General rejected a suggestion that the proposed arrangement might be authorized by 41 U.S.C. § 255.

Payments to or on behalf of federal civilian employees and military personnel constitute another area in which exceptions exist. For example, section 303 of the Career Compensation Act of 1949, 37 U.S.C. § 404, authorizes advance payments of certain travel and transportation allowances to military personnel. The authority does not, however, extend to station housing allowances, 56 Comp. Gen. 180 (1976), nor does it authorize the advance payment of trailer allowances, 39 Comp. Gen. 659 (1960), or rental vehicle expenses, 54 Comp. Gen. 764 (1975). The advance payment statute has also been held to prohibit advances to a military member for the travel

of dependents incident to the member's release from active duty. 40 Comp. Gen. 77 (1960). Advances of travel and transportation allowances for federal civilian employees are authorized by 5 U.S.C. §§ 5705 and 5724(f).

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 (FEPCA), section 529 of the FY 1991 Treasury-Postal Service-General Government appropriation act, Pub. L. No. 101-509 (November 5, 1990), 104 Stat. 1389, 1449, added a new 5 U.S.C. § 5524a, authorizing agencies to make advance payments of up to two pay periods of basic pay to new employees.[18]

Advance payment of salary remains prohibited in situations not covered by the statutes noted above. 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, January 12, 1990 (non-decision letter). Similarly, the Nuclear Regulatory Commission can reschedule its commissioners' pay days that fall on weekends or holidays to the preceding work day, provided that payments made prior to the end of a pay period may not include salary applicable to days remaining in the pay period. B-237963, June 28, 1990.

Certain tuition payments may be paid 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

[18]The authority is effective only to the extent provided for in advance in appropriation acts. FEPCA § 301, 104 Stat. at 1461.

therefore be paid at the time of enrollment if required by the educational institution. 41 Comp. Gen. 626 (1962). See also B-70395, October 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 are also provided in the Government Employees Training Act, 5 U.S.C. § 4109, and in 10 U.S.C. § 2396(a)(3) for the Defense Department. (Military personnel are not covered by the Training Act.)

Exceptions to the advance payment prohibition may appear in appropriation acts as well as permanent legislation. An exception in an appropriation act will, of course, be limited to the appropriation(s) in the act to which it applies, unless it can be construed as permanent legislation. Also, the bona fide needs rule would apply. In one case, a FY 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 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 FY 1955 and could not operate to extend the period of availability of the appropriation, i.e., could not be used to pay for portions of the program extending into FY 1956. 34 Comp. Gen. 432 (1955).[19] 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).

[19]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 non-severable.

2. Government Procurement Contracts

a. Contract Financing

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.

Generally speaking, the government's preference is that the contractor be able to perform using private financing, i.e., the contractor's own resources or financing obtained in the private market. FAR, 48 C.F.R. § 32.106. However, the need for government assistance in various situations has long been recognized. In this context, it must be remembered that government contracting, while primarily intended to serve the government's needs, is also designed to foster a variety of social and economic objectives.

The extent to which various forms of what we now call "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 which had not been delivered. The Comptroller General held that the statute does not necessarily require withholding of payment under a contract until the entire subject has been completed and delivered to the government. The statute "was not intended to prevent a partial payment in any case in which the amount of such payment had actually been 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 upon 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).[20]

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).

Authority to make advance payments under certain contracts is now recognized by statute, and this is one of the major exceptions to 31 U.S.C. § 3324. The Federal Property and Administrative Services Act (41 U.S.C. § 255) and the Armed Services Procurement Act (10 U.S.C. § 2307) authorize advance, partial, progress or other payments, not to exceed the unpaid contract price, under contracts for property or services. Within their discretion, agencies may include in bid solicitations a provision limiting advance or progress payments to small business concerns. Under both statutes, advance

[20]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).

payments may be made only if (a) the agency head determines that advance payments are in the public interest, and (b) adequate security is provided. The authority under both of these statutes applies to both advertised and negotiated procurements. See B-158487, April 4, 1966.

Detailed guidance on the use of the authority granted by 41 U.S.C. § 255 and 10 U.S.C. § 2307 is contained in the Federal Acquisition Regulation. Advance payments are covered by 48 C.F.R. Subpart 32.4. Application for advance payments may be made, before or after the award of a contract, in accordance with the procedures set forth in the FAR, 48 C.F.R. § 32.408. Short of following these procedures, a bid conditioned upon the receipt of advance payments at variance with the terms of the solicitation may be rejected as nonresponsive. 57 Comp. Gen. 89 (1977); B-205088, October 28, 1981; B-197471.2, August 14, 1981.

"Adequate security" will normally include a lien in favor of the government, paramount to all other liens, covering property being acquired, balances in the bank account in which the advance payments are deposited, and property acquired by the contractor for performance of the contract. 41 U.S.C. § 255(c); 10 U.S.C. § 2307(c); 48 C.F.R. § 32.409-3(c). Other forms of security which may be required are outlined in the FAR.

Security requirements may vary to fit the circumstances of the particular case. 48 C.F.R. § 32.409-3(d). In B-214446, October 29, 1984, GAO considered a proposal to certify payment before the services were rendered. The check 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, April 27, 1966.

The advance payment authority of 41 U.S.C. § 255 and 10 U.S.C. § 2307 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).

Advance payments are also authorized under Public Law 85-804, 50 U.S.C. §§ 1431–35. 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, November 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.[21]

Progress payments based on costs incurred, as opposed to advance payments (see definitions at beginning of this section), are covered in the FAR at 48 C.F.R. Subpart 32.5.

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. §§ 32.501-1 and 52.232-16 (required contract clause for fixed-price 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. § 32.501-3.

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.

[21]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 two 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, August 22, 1979.

The nature of the government's interest under this title-vesting provision has produced disagreement among the courts. The majority view is that title means full, absolute title, which cannot be defeated by subsequent liens. In re American Pouch Foods, Inc., 30 Bankr. 1015 (N.D. Ill. 1983), aff'd, 769 F.2d 1190 (7th Cir. 1985), cert. denied, 475 U.S. 1082; In re Reynolds Manufacturing Co., 68 Bankr. 219 (Bankr. W.D. Penn. 1986); In re Denalco Corp., 51 Bankr. 77 (Bankr. N.D. Ill. 1985); In re Economy Cab and Tool Co., 47 Bankr. 708 (Bankr. D. Minn. 1985). The minority 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. Marine Midland Bank v. United States, 687 F.2d 395 (Ct. Cl. 1982), cert. denied, 460 U.S. 1037; Welco Industries, Inc. v. United States, 8 Cl. Ct. 303 (1985), aff'd mem., 790 F.2d 90 (Fed. Cir. 1986).[22] 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.

b. 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 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 41 U.S.C. § 255 and 10 U.S.C. § 2307 permitted more latitude in payment procedures. In view of this statutory authority, the Comptroller General, in B-158487, April 4, 1966, approved an advance payment procedure under which the General Services Administration would make payments on direct delivery vouchers prior to the receipt of "receiving reports" from the consignees. The

[22]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 Nat'l Bank of Geneva v. United States, 13 Cl. Ct. 385 (1987).

proposal was designed to effect savings to the government by enabling GSA to take advantage of prompt payment discounts.[25] GAO's approval was conditioned upon 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, March 20, 1968 (Defense Department) and B-155253, August 20, 1969 (Federal Aviation Administration), and reaffirmed them for GSA in 60 Comp. Gen. 602 (1981).

The Federal Acquisition Regulation provides for fast payment procedures in 48 C.F.R. Subpart 13.3. An agency may pay for supplies based on the contractor's submission of an invoice under, among others, the following conditions:

- 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),

[25]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, October 29, 1984; B-107826, July 29, 1954.

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 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).[24]

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. 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 pre-payment 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 General Services Administration 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).

[24]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.

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 FAR 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, March 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) and amended in 1961 (75 Stat. 211). 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.[25] 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), and 35-millimeter slides, 48 Comp. Gen. 784 (1969). 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, October 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.[26]

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" (88 Stat. 1731). This was condensed into the present version of 31 U.S.C. § 3324(d)(2) when Title 31 was recodified in 1982.

[25]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, September 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.

[26]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 supra note 25), and the holding in 35 Comp. Gen. 404 would now apply to any agency which can justify the need.

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 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, August 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, December 23, 1983).

The FAR 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). This exception, however, applies only where the state is furnishing noncommercial services reasonably available only from the state. 39 Comp. Gen. 285 (1959) (sewer service charge); B-118846, March 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-34946, June 9, 1943, and B-65821, May 29, 1947 (state court fees and other items of expense required to litigate in state courts in compliance with the requirements of state law); B-36099, August 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, March 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, December 12, 1989 (non-decision letter). Similarly, monthly charges under a utility service contract for cable television service to a Naval hospital may not be paid in advance. B-237789, December 10, 1990.

D. Disposition of Appropriation Balances

1. Terminology

Annual funds which remain unobligated at the end of the fiscal year for which they were appropriated are said to "expire" for obligational purposes.[27] In other words, they cease to be available for 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).[28]

The portion of an appropriation which has not actually been spent at the end of the fiscal year (or other definite period of availability) is called the "unexpended balance."[29] 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. § 1551(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. § 1551(a)(2). It represents that portion of the unexpended balance unencumbered by obligations recorded under 31 U.S.C. § 1501.

[27]The term "lapse" is also sometimes used in this context although there is a technical distinction. Traditionally, an appropriation was said to "lapse" when it ceased to be available to the spending agency to liquidate prior obligations.

[28]Throughout this section, except as otherwise specified, references to 31 U.S.C. §§ 1551 through 1557 reflect amendments made by Pub. L. No. 101-510, § 1405(a), 104 Stat. 1485, 1675 (1990).

[29]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.

Unexpended balances are both necessary and unavoidable. There are, however, potential adverse implications if those balances should become too large. GAO studied the area in a report entitled Budget Issues: Governmentwide Analysis of the Growth in Unexpended Balances, GAO/AFMD-86-24BR (January 17, 1986). GAO discovered a trend reflecting increased growth in unexpended balances during the first half of the 1980's. Since much of these balances represent actual or potential liabilities which will eventu have to be liquidated through future revenues or borrowing, GA cautioned that a high growth rate in unexpended balances could adversely affect deficit reduction efforts.

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, April 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 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 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 (63 Stat. 407), 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 two 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, September 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), upon the recommendation of the second Hoover Commission.[30] The most significant change 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-O.M., November 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.

With fiscal-year identity no longer a concern, there was no need to relate a payment from the "M" account to the specific balance which had been transferred from the particular year in which the

[30]Second Commission on Organization of the Executive Branch of the Government, created by Pub. L. No. 83-108, 67 Stat. 142 (1953).

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-O.M., 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 two-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 which arose but were not formally recorded prior to the appropriation's 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, October 17, 1989; B-232010, March 23, 1989; B-164031(3).150, September 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. Strategic Bombers: B-1B Program's Use of Expired Appropriations, GAO/NSIAD-89-209 (September 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 (November 5, 1990), 104 Stat. 1485, 1675. Section 1405 applies to both military and civilian agencies, and includes transition provisions to deal with 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. "M" accounts are to be phased out over a three-year period, with any remaining "M" account balances canceled on September 30, 1993.

3. Expired Appropriations and Closing of Accounts [31]

Section 1405(a) of Pub. L. No. 101-510 amended 31 U.S.C. §§ 1551–1557. Two of the key provisions are quoted below:

"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 one-year or multiple-year appropriation expires on the last day of its period of availability and is no longer available for new obligations, although unobligated balances no longer revert 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

[31]This section summarizes the provisions enacted in November 1990. Decisions and opinions cited in the text predating the 1990 legislation reflect principles which should still remain valid. Requirements and procedures under the 1990 law are set forth in OMB Circular No. A-34, Part XI (January 1991).

requirements, limitations on obligations, and reporting requirements remain applicable to the expired account.

During this five-year period, treatment of the balances is similar to the first two post-expiration fiscal years under the 1956 legislation. Obligated balances for any of those five years may be used to liquidate obligations properly chargeable to that fiscal year. The unobligated balance remains available to make legitimate obligation adjustments, i.e., to record previously unrecorded obligations and to make upward adjustments in previously underrecorded obligations.

The authority to use unobligated balances to make obligation adjustments is analogous to the restoration authority of the law prior to the 1990 revision, again with the exception that there is no longer a point at which balances merge and lose their fiscal-year identity. The authority is available only to satisfy an unrecorded or underrecorded obligation properly chargeable to the funds of that particular year, and cannot be used to satisfy an obligation properly chargeable to current appropriations (see 50 Comp. Gen. 863 (1971)), or to any other year of the five-year period. 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. See 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. See B-179708-O.M., July 10, 1975.

During the five-year period, the potential for an Antideficiency Act violation exists if identifiable obligations chargeable to one of those five years exceed the sum of the obligated balance for that year plus the amount available for adjustment from the unobligated balance for the same year. Should this happen, the excess can be liquidated only pursuant to a supplemental or deficiency appropriation or other congressional action. See B-179708-O.M., June 24, 1975 (applying same principle during first two post-expiration years under prior law).

At the end of the five-year period, the account is closed. Any remaining unexpended balances, both obligated and unobligated,

are canceled, returned to the general fund of the Treasury,[32] 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 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. The authority is limited, however. The cumulative total of old obligations payable from current appropriations under 31 U.S.C. § 1553(b)(1) may not exceed one percent of the current appropriation. 31 U.S.C. § 1553(b)(2). The authority to use current appropriations to pay obligations attributable to canceled balances may not be used to exceed the original appropriation.[33]

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 which by its nature requires disbursements beyond the five-year period. One form of exemption simply preserves the availability for disbursement of previously obligated funds. An example is discussed in B-243744, April 24, 1991 (concluding that the exemption does not create new budget authority). Another form is a provision applicable to certain Agency for International Development one-year appropriations which effectively converts them to no-year funds upon proper obligation (thereby permitting reobligation for authorized purposes should the funds be deobligated after the end of the

[32]We commonly talk about "returning" appropriation balances to the Treasury. In point of fact, for the most part, they never left 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 which, in the various ways discussed in the text, affects the government's legal authority to make obligations and expenditures.

[33]In view of this requirement, it will be necessary to maintain records of the balances returned to the Treasury upon cancellation beyond the end of the five-year period, and to adjust these balances as subsequently presented obligations are liquidated, as there is no other way to ensure that payments do not exceed the original appropriation.

fiscal year). Although not originally conceived as an exemption from the account closing requirement, the AID provision amounts to one because the account closing requirement applies only to fixed appropriations. Foreign Assistance: Funds Obligated Remain Unspent for Years, GAO/NSIAD-91-123 (April 1991), at 21.

To the extent of its applicability, the statutory scheme found at 31 U.S.C. §§ 1551–1557 provides the exclusive method for the payment of obligations chargeable to expired appropriations. See B-101860, December 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.)

The rules for certain legislative branch appropriations are a bit different. The provisions of 31 U.S.C. §§ 1551–1557 do not apply to appropriations to be disbursed by the Secretary of the Senate or the Clerk of the House of Representatives. 31 U.S.C. § 1551(c)(2). For these appropriations, unobligated balances more than two years' old cannot be used short of an act of Congress. Instead, obligations chargeable to appropriations which have been expired for more than two 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. § 102a. See B-213771.3, September 17, 1986.

4. 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 the appropriation was made have been fulfilled, and (b) no disbursement has been made against the appropriation for two consecutive fiscal years. Upon closing, any remaining balance in the account, obligated or unobligated, is canceled and is no longer available for obligation or expenditure for any purpose. The purpose of section 1555 is to permit the closing of inactive appropriations. 39 Comp. Gen. 244 (1959); B-182101, October 16, 1974.

This principle also applies to revenues earned by a government agency where Congress has authorized the agency to retain such

revenues without any fiscal year limitations. For example, in section 111(h) of the Energy Reorganization Act of 1974, 42 U.S.C. § 5821(h), Congress authorized the Department of Energy, when so specified in appropriation acts, to retain revenues from uranium enrichment services and use them to offset the costs of providing such services, the funds to remain available until expended. In light of 31 U.S.C. § 1555, however, the Department of Energy could not retain or set aside the revenues indefinitely. B-159687-O.M., October 25, 1979.

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 one-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).

5. Repayments and Deobligations

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 which 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, September 22, 1950, § 2, published at 30 Comp. Gen. 595, divides repayments into two subcategories, reimbursements (statutory authority for agency to retain receipts) and refunds (certain non-statutory situations such as recovery of overpayments and erroneous payments).

Reimbursements are considered a budgetary resource subject to apportionment by the Office of Management and Budget, whereas refunds are treated as reductions of expenditures and obligations. Reimbursements operate to augment the original amount appropriated by Congress. Refunds are reductions of, and must be directly related to, previous disbursements. See 30 Comp. Gen. 614 (1950).[34]

As a general proposition, where the appropriation to be credited has expired, reimbursements must be credited to the expired account and not to the current account. See "Augmentation of Appropriations" in Chapter 6 for case citations. A prominent example is the Economy Act, 31 U.S.C. § 1535. Where a transaction between government agencies is governed solely by the Economy Act, reimbursements for work, services, or other materials must be credited to the fiscal year appropriations which earned them, regardless of when the reimbursements are collected. If the appropriation which 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 which 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-O.M., January 15, 1980; B-179708-O.M., December 1, 1975. After closing, the reimbursement would have to go to miscellaneous receipts.

Excess obligations which are later deobligated are accounted for in the same manner as repayments. The difference, of course, is that the excess obligations are already in the expired account. Deobligated amounts which are not needed to liquidate recorded obligations should be accounted for under the "unobligated balance" portion of the expired account. See 52 Comp. Gen. 179 (1972).

If an agency deobligates funds after the expiration of the period of availability, the funds are not available for any new obligation. To avoid this result, Congress may, by statute, authorize an agency to reobligate any such deobligated sums. This is called deobligation-reobligation ("deob-reob") authority. The reobligation will usually be for the same general purpose as the original obligation, although the precise purposes will depend on the terms of the legislation. See

[34]The citation refers to an "Accounting Systems Memorandum," an obsolete form of GAO guidance. They used to be published as appendices in the annual "Comp. Gen." volumes. Although obsolete as GAO documents, they often, as in this case, contain useful background and explanatory discussion.

B-218762-O.M., September 18, 1985, for an illustration. Deobligation-reobligation authority is not necessary for no-year funds, and this is true even though Congress may have eliminated such authority with respect to certain fiscal year appropriations of the same agency. B-200519, November 28, 1980.

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 claimant's 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 book. 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"?[35]

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, December 29, 1975

[35]Burton v. Thornburgh, 541 F. Supp. 168, 174 (E.D. Pa. 1982).

(non-decision 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 1970's. 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); Bennett v. 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).

The concept has also been applied in non-impoundment 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.[36]

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 Association 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.[37] The court then reaffirmed the proposition that courts may "order that funds be held available beyond their statutory lapse date if equity so requires." 564 F.2d 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 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

[36]The court also noted that the district court could "obtain assistance from the Comptroller General's expertise in matters of expenditures, reductions by appropriations, and impoundments." 556 F.2d at 51.

[37]GAO had previously expressed the same view. 32 Comp. Gen. 29, 31 (1952), cited in Costle, 564 F.2d at 587 n.10.

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." 564 F.2d at 588-89.

Costle is also significant in that it explained and clarified several prior cases which had purported to establish a similar, and in one instance even broader, principle. Specifically:

- National Association 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. 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 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. 564 F.2d at 588. A similar case is Wilson v. Watt, 703 F.2d 395 (9th Cir. 1983) (reversing 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. 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." 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. 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 more recent cases. Connecticut v. Schweiker, 684 F.2d 979 (D.C. Cir. 1982), cert. denied, 459 U.S. 1207 (1983); International Union, UAW v. Donovan, 570 F. Supp. 210 (D.D.C. 1983); Burton v. Thornburgh, 541 F. Supp. 168 (E.D. Pa. 1982); Grueschow v. Harris, 492 F. Supp. 419 (D.S.D. 1980), 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 and 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 Association of Community Health Centers, Inc. v. Heckler, 734 F.2d 1570, 1577 (D.C. Cir. 1984). 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 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 disbursement of funds

already obligated where disbursement would have the effect of precluding effective relief and thereby rendering the case moot. Population Institute v. McPherson, 797 F.2d 1062 (D.C. Cir. 1986).[38] Similarly, the district court's injunction in Bennett v. Butz, quoted in 54 Comp. Gen. 962, included a provision mandating retention of the obligated balances until further order of the court.

In addition to the judicial authority noted above, 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."

The statute was enacted as part of a continuing resolution in 1973 (87 Stat. 134). 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 noted the statute, 444 F. Supp. at 94, but found it inapplicable because the funds in that case would have reverted to a revolving fund rather than the general fund of the Treasury. In Population Institute v. McPherson, 797 F.2d at 1081, and International Union v. Donovan, 570 F. Supp. at 220, 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 for reimbursement of expenditures under the Medicaid program. Based on Connecticut v. Schweiker, the court

[38]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, section entitled "Impoundment/Assistance Funds" for case citations.

concluded that the plaintiff was clearly entitled to be paid. The court then reviewed a provision of the Department's FY 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 FY 1981 funds. Although Missouri had not filed its lawsuit prior to the end of FY 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." 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. 579 F. Supp. 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 FY 1982 funds to pay the awards after the end of the fiscal year. GAO first found 31 U.S.C. § 1501(a)(6) inapplicable, and then concluded that, by virtue of 31 U.S.C. § 1502(b), the unobligated balance of FY 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 the 1990 revision of 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, the answer would appear to be yes. See 70 Comp. Gen. ___ (B-238615, February 4, 1991).

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) as follows:[39]

"(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 90 working 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).

[39]National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 813, 103 Stat. 1352, 1494 (1989). The provision applies governmentwide.

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