Availability of Appropriations: Amount

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A. Introduction

The two preceding chapters have discussed the purposes for which appropriated funds may be used and the time limits within which they may be obligated and expended. This chapter will discuss the third major concept of the "legal availability" of appropriations—restrictions relating to amount. It is not enough to know what you can spend appropriated funds for and when you can spend them. You also must know how much you have available for a particular object.

In this respect, the legal restrictions on government expenditures are different from those governing your spending as a private individual. For example, as an individual, you can buy a house and finance it with a mortgage that may run for 25 or 30 years. Since you do not have enough money to cover your full legal obligation under the mortgage, you sign the mortgage papers on the assumption that you will continue to have an income adequate to cover the mortgage. If your income diminishes substantially or, heaven forbid, disappears, and you are unable to make the payments, you lose the house. A government agency cannot operate this way. The main reason why is the Antideficiency Act, discussed in section C of this chapter.

Under the Constitution, Congress makes the laws and provides the money to implement them; the executive branch carries out the laws with the money Congress provides. Under this system, Congress has the "final word" as to how much money can be spent by a given agency or on a given program. Congress may give the executive branch considerable discretion concerning how to implement the laws and hence how to obligate and expend funds appropriated, but it is ultimately up to Congress to determine how much the executive branch can spend. In applying these concepts to the day-to-day operations of the federal government, it should be readily apparent that restrictions on purpose, time, and amount are very closely related. Again, the Antideficiency Act is one of the primary "enforcement devices." Its importance is underscored by the fact that it is the only one of the fiscal statutes to include both civil and criminal penalties for violation.

To ensure that the Antideficiency Act's prohibition against overobligating or overspending an appropriation remains meaningful, agencies must be restricted to the appropriations Congress provides. The rule prohibiting the unauthorized "augmentation" of appropriations, covered in section E of this chapter, is thus a crucial complement to the Antideficiency Act.

While Congress retains, as it must, ultimate control over how much an agency can spend, it does not attempt to control the disposition of every dollar. We began our general discussion of administrative discretion in Chapter 3 by quoting Justice Holmes' statement that "some play must be allowed to the joints if the machine is to work."[1] This is fully applicable to the expenditure of appropriated funds. An agency's discretion under a lump-sum appropriation is discussed in section F of this chapter.

B. Types of Appropriation Language

Congress has been making appropriations since the beginning of the Republic. In earlier times when the federal government was much smaller and federal programs were (or at least seemed) much simpler, very specific line-item appropriations were more common.[2] In recent decades, however, as the federal budget has grown in both size and complexity, a lump-sum approach has become a virtual necessity.[3] For example, an appropriation act for an establishment the size of the Defense Department structured solely on a line-item basis would rival the telephone directory in bulk.

Over the course of this time, certain forms of appropriation language have become standard. This section will point out the more commonly used language with respect to amount.

1. Lump-Sum Appropriations

A *lump-sum appropriation* is one that is made to cover a number of specific programs, projects, or items. (The number may be as small as two.) In contrast, a *line-item appropriation* is available only for the specific object described.

[1] *Tyson & Brother United Theater Ticket Offices v. Banton*, 273 U.S. 418 (1927) (Holmes, J., dissenting).

[2] For fiscal year 1905, for example, Congress appropriated to the Department of Justice a specific line item of $3,000 for stationery. Legislative, Executive and Judicial Appropriations Act, 1905, ch. 716, 33 Stat. 85, 134 (Mar. 18, 1904). For fiscal year 2005, Congress appropriated to the Department of Justice a lump-sum appropriation of $124,100,000 for administrative expenses. Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 2005, Pub. L. No. 108-447, div. B, title I, 118 Stat. 2809, 2853 (Dec. 8, 2004).

[3] As a result of appropriation account consolidation over the years, 200 accounts now cover 90 percent of all federal expenditures. Allen Schick, *The Federal Budget: Politics, Policy, and Process*, 229 (2000).

Lump-sum appropriations come in many forms. Many smaller agencies receive only a single appropriation, usually termed "Salaries and Expenses" or "Operating Expenses." All of the agency's operations must be funded from this single appropriation. Cabinet-level departments and larger agencies receive several appropriations, often based on broad object categories such as "operations and maintenance" or "research and development." For purposes of this discussion, a lump-sum appropriation is simply one that is available for more than one specific object.

The amount of a lump-sum appropriation is not derived through guesswork. It is the result of a lengthy budget and appropriation process. The agency first submits its appropriation request to Congress through the Office of Management and Budget, supported by detailed budget justifications. Congress then reviews the request and enacts an appropriation which may be more, less, or the same as the amount requested. Variations from the amount requested are usually explained in the appropriation act's legislative history, most often in committee reports.[4]

All of this leads logically to a question which can be phrased in various ways: How much flexibility does an agency have in spending a lump-sum appropriation? Is it legally bound by its original budget estimate or by expressions of intent in legislative history? How is the agency's legitimate need for administrative flexibility balanced against the constitutional role of the Congress as controller of the public purse?

The answer to these questions is one of the most important principles of appropriations law. The rule, simply stated, is this: Restrictions on a lump-sum appropriation contained in the agency's budget request or in legislative history are not legally binding on the department or agency unless they are carried into (specified in) the appropriation act itself, or unless some other statute restricts the agency's spending flexibility. This is an application of the fundamental principle of statutory construction that legislative history is not law and carries no legal significance unless "anchored in the text of

[4] *See* Chapter 1, section D. See also GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: September 2005), Appendixes I and II, for an overview of the budget and appropriations process.

the statute." *Shannon v. United States*, 512 U.S. 573, 583 (1994).[5] Of course, the agency cannot exceed the total amount of the lump-sum appropriation, and its spending must not violate other applicable statutoryrestrictions.[6] The rule applies equally whether the legislative history is mere acquiescence in the agency's budget request or an affirmative expression of intent.

The rule recognizes the agency's need for flexibility to meet changing or unforeseen circumstances, yet preserves congressional control in several ways. First, the rule merely says that the restrictions are not *legally binding*. The practical wisdom of making the expenditure is an entirely separate question. An agency that disregards the wishes of its oversight or appropriations committees will most likely be called upon to answer for its digressions before those committees next year. An agency that fails to "keep faith" with the Congress may find its next appropriation reduced or limited by line-item restrictions. As Professor Schick put it:

> "What gives the appropriations reports special force is not their legal status but the fact that the next appropriations cycle is always less than one year away. An agency that willfully violates report language risks retribution the next time it asks for money. It may find this year's report language relocated to the next appropriations act, thereby giving it even less leeway than it had before. Or it may find the next time that the appropriations committees' guidance is more detailed and onerous or that its appropriation has been cut."[7]

That Congress is fully aware of these dynamics is evidenced by the following statement from a 1973 House Appropriations Committee report:

[5] See Chapter 2, section D.6 for a general discussion of the uses and limits of legislative history.

[6] For example, agencies and their employees are, of course, legally bound by apportionments and subdivisions of lump-sum appropriations. *See* 31 U.S.C. §§ 1517–1519. See also sections C.4 and C.5 of this chapter for a discussion of these requirements.

[7] Allen Schick, *The Federal Budget: Politics, Policy, and Process*, 238 (2000). *See also* John C. Roberts, *Are Congressional Committees Constitutional?: Radical Textualism, Separation of Powers, and the Enactment Process*, 52 Case Western Reserve L. Rev. 489, 563–64 (2001).

> "In a strictly legal sense, the Department of Defense could utilize the funds appropriated for whatever programs were included under the individual appropriation accounts, but the relationship with the Congress demands that the detailed justifications which are presented in support of budget requests be followed. To do otherwise would cause Congress to lose confidence in the requests made and probably result in reduced appropriations or line item appropriation bills."[8]

Justice Souter made the same point, writing for the Court in *Lincoln v. Vigil*, 508 U.S. 182 (1993):

> "Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes (though not, as we have seen, just in the legislative history). And, of course, we hardly need to note that an agency's decision to ignore congressional expectations may expose it to grave political consequences."

Id. at 193 (citations omitted).

Second, restrictions on an agency's spending flexibility exist through the operation of other laws. For example, a "Salaries and Expenses" appropriation may be a large lump sum, but much of it is in fact nondiscretionary because the salaries and benefits (*e.g.*, health insurance and retirement contributions) of agency employees constitute mandatory expenditures once fixed in accordance with the parameters established by law.[9] Third, reprogramming arrangements with the various committees provide another safeguard against abuse.[10]

Finally, Congress always holds the ultimate trump card. It has the power to make any restriction legally binding simply by including it in the

[8] Report of the House Committee on Appropriations on the 1974 Defense Department appropriation bill, H.R. Rep. No. 93-662, at 16 (1973).

[9] Louis Fisher, *Presidential Spending Power*, 72 (1975).

[10] See Chapter 2, section B.3.b for an overview of reprogramming concepts and practices, and Schick, *supra*, at 247–250.

appropriation act.[11] Thus, the treatment of lump-sum appropriations may be regarded as yet another example of the efforts of our legal and political systems to balance the conflicting objectives of executive flexibility and congressional control.[12]

Two common examples of devices Congress uses when it wants to restrict an agency's spending flexibility are line-item appropriations and earmarks. Congress uses other tools as well. The following are just two examples taken from the Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11 (Feb. 20, 2003), the omnibus appropriation act for fiscal year 2003. The first is an example of a notice requirement:

> "[F]unds made available under this heading [Salaries and Expenses, Department of Housing and Urban Development] shall only be allocated in the manner specified in the report accompanying this Act unless the Committees on Appropriations . . . are notified of any changes in an operating plan or reprogramming. . ."

117 Stat. 499. The second is a proviso that incorporates by reference instructions found in a conference report:

> "*Provided*, That notwithstanding any other provision of law, the Office of Economic Adjustment . . . is authorized to make grants using funds made available under the heading 'Operation and Maintenance, Defense-Wide' in accordance

[11] This assumes, of course, that Congress is acting within its constitutional authority. See Chapter 1, section B for a general discussion of Congress's constitutional authority to appropriate and the limits on that authority. *Legal Services Corp. v. Velasquez*, 531 U.S. 533 (2001), provides an example of restrictive appropriation language that was declared unconstitutional.

[12] The effort has not always been free from controversy. One senator, concerned with what he felt was excessive flexibility in a 1935 appropriation, tried to make his point by suggesting the following:

> "Section 1. Congress hereby appropriates $4,880,000,000 to the President of the United States to use as he pleases.
>
> "Section 2. Anybody who does not like it is fined $1,000."

79 Cong. Rec. 2014 (1935) (remarks of Sen. Arthur Vandenberg), quoted in Fisher, *supra*, at 62–63.

> with the guidance provided in the Joint Explanatory Statement of the Committee of Conference for the Conference Report to accompany H.R. 5010 . . . and these projects shall hereafter be considered to be authorized by law."

117 Stat. 533.

The 1983 appropriation act for the Department of Housing and Urban Development contained a restriction incorporating by reference budget estimates that the Administration had provided:

> "Where appropriations in titles I and II of this Act are expendable for travel expenses and no specific limitation has been placed thereon, the expenditures for such travel expenses may not exceed the amounts set forth therefor in the budget estimates submitted for the appropriations . . . ."[13]

A provision prohibiting the use of a construction appropriation to start any new project for which an estimate was not included in the President's budget submission is discussed in 34 Comp. Gen. 278 (1954).

Also, the availability of a lump-sum appropriation may be restricted by provisions appearing in statutes other than appropriation acts, such as authorization acts.[14] For example, if an agency receives a line-item authorization and a lump-sum appropriation pursuant to the authorization, the line-item restrictions and earmarks in the authorization act will apply just as if they appeared in the appropriation act itself. The topic is discussed in more detail in Chapter 2, section C.

a. Effect of Budget Estimates

Perhaps the easiest case is the effect of the agency's own budget estimate. The rule here was stated in 17 Comp. Gen. 147, 150 (1937) as follows:

[13] Pub. L. No. 97-272, § 401, 96 Stat. 1160, 1178 (Sept. 30, 1982).

[14] A recent example is section 1004(d) of the Bob Stump National Defense Authorization Act for Fiscal Year 2003, Pub. L. No. 107-314, 116 Stat. 2458, 2629–30 (Dec. 2, 2002), which imposes conditions on the Department's spending for financial system improvements.

> "The amounts of individual items in the estimates presented to the Congress on the basis of which a lump-sum appropriation is enacted are not binding on administrative officers unless carried into the appropriation act itself."

See also Thompson v. Cherokee Nation of Oklahoma, 334 F.3d 1075, 1085–86 (Fed. Cir. 2003), *aff'd sub nom.*, 543 U.S. ____, 125 S. Ct. 1172 (2005); B-63539, June 6, 1947; B-55277, Jan. 23, 1946; B-35335, July, 17, 1943; B-48120-O.M., Oct. 21, 1948. This is essentially the same rule as applied to allocations of amounts in congressional committee reports and other specifications in the legislative history concerning the use of lump-sum appropriations, which, as discussed later in this section, likewise have no legally binding effect unless tied to the appropriation language itself.

It follows that the lack of a specific budget request will not preclude an expenditure from a lump-sum appropriation which is otherwise legally available for the item in question. *E.g.*, B-278968, May 28, 1998; 72 Comp. Gen. 317, 319 (1993); 71 Comp. Gen. 411, 413 (1992).[15] To illustrate, the Administrative Office of the U.S. Courts asked for a supplemental appropriation of $11,000 in 1962 for necessary salaries and expenses of the Judicial Conference in revising and improving the federal rules of practice and procedure. The House of Representatives did not allow the increase but the Senate included the full amount. The bill went to conference but the conference was delayed and the agency needed the money. The Administrative Office then asked whether it could take the $11,000 out of its regular 1962 appropriation even though it had not specifically included this item in its 1962 budget request. Citing 17 Comp. Gen. 147, and noting that the study of the federal rules was a continuing statutory function of the Judicial Conference, the Comptroller General concluded as follows:

> "[I]n the absence of a specific limitation or prohibition in the appropriation under consideration as to the amount which may be expended for revising and improving the Federal Rules of practice and procedure, you would not be legally bound by your budget estimates or absence thereof.
>
> "If the Congress desires to restrict the availability of a particular appropriation to the several items and amounts

[15] On the other hand, inclusion of a budget estimate for a particular purpose can strengthen the case that the appropriation *is* available for that purpose. *See* B-285066.2, Aug. 9, 2000.

> thereof submitted in the budget estimates, such control may be effected by limiting such items in the appropriation act itself. Or, by a general provision of law, the availability of appropriations could be limited to the items and the amounts contained in the budget estimates. In the absence of such limitations an agency's lump-sum appropriation is legally available to carry out the functions of the agency."

B-149163, June 27, 1962. *See also* 20 Comp. Gen. 631 (1941); B-198234, Mar. 25, 1981; B-69238, Sept. 23, 1948. The same principle would apply where the budget request was for an amount less than the amount appropriated, or for zero. 2 Comp. Gen. 517 (1923); B-126975, Feb. 12, 1958.

b. Restrictions in Legislative History

Often issues are raised when there are changes to or restrictions on a lump-sum appropriation imposed during the legislative process but not in the legislation itself. The "leading case" in this area is 55 Comp. Gen. 307 (1975), the so-called "*LTV* case." The Department of the Navy had selected the McDonnell Douglas Corporation to develop a new fighter aircraft. LTV Aerospace Corporation protested the selection, arguing that the aircraft McDonnell Douglas proposed violated the 1975 Defense Department Appropriation Act. The appropriation in question was a lump-sum appropriation of slightly over $3 billion under the heading "Research, Development, Test, and Evaluation, Navy." This appropriation covered a large number of projects, including the fighter aircraft in question. The conference report on the appropriation act had stated that $20 million was being provided for a Navy combat fighter, but that "[a]daptation of the selected Air Force Air Combat Fighter to be capable of carrier operations is the prerequisite for use of the funds provided." The Navy conceded that the McDonnell Douglas aircraft was not a derivative of the Air Force fighter and that its selection was not in accord with the instructions in the conference report. The issue, therefore, was whether the conference report was legally binding on the Navy. In other words, did the Navy act illegally by not choosing to follow the conference report?

The ensuing decision is GAO's most comprehensive statement on the legal availability of lump-sum appropriations. Pertinent excerpts are set forth below:

> "[C]ongress has recognized that in most instances it is desirable to maintain executive flexibility to shift around funds within a particular lump-sum appropriation account so that agencies can make necessary adjustments for

'unforeseen developments, changing requirements, . . . and legislation enacted subsequent to appropriations.' [Citation omitted.] This is not to say that Congress does not expect that funds will be spent in accordance with budget estimates or in accordance with restrictions detailed in Committee reports. However, in order to preserve spending flexibility, it may choose not to impose these particular restrictions as a matter of law, but rather to leave it to the agencies to 'keep faith' with the Congress. . . .

"On the other hand, when Congress does not intend to permit agency flexibility, but intends to impose a legally binding restriction on an agency's use of funds, it does so by means of explicit statutory language. . . .

"Accordingly, it is our view that when Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on Federal agencies. . . .

"We further point out that Congress itself has often recognized the reprogramming flexibility of executive agencies, and we think it is at least implicit in such [recognition] that Congress is well aware that agencies are not legally bound to follow what is expressed in Committee reports when those expressions are not explicitly carried over into the statutory language. . . .

"We think it follows from the above discussion that, as 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. . . .

"As observed above, this does not mean agencies are free to ignore clearly expressed legislative history applicable to the

> use of appropriated funds. They ignore such expressions of intent at the peril of strained relations with the Congress. The Executive branch . . . has a practical duty to abide by such expressions. This duty, however, must be understood to fall short of a statutory requirement giving rise to a legal infraction where there is a failure to carry out that duty."

55 Comp. Gen. at 318, 319, 321, 325. Accordingly, GAO concluded that Navy's award did not violate the appropriation act and the contract therefore was not illegal.

The same volume of the Decisions of the Comptroller General contains another often-cited case, 55 Comp. Gen. 812 (1976), the *Newport News* case. This case also involved the Navy. This time, Navy wanted to exercise a contract option for construction of a nuclear powered guided missile frigate, designated DLGN 41. The contractor, Newport News Shipbuilding and Dry Dock Company, argued that exercising the contract option would violate the Antideficiency Act by obligating more money than Navy had in its appropriation.

The appropriation in question, the "Naval Vessels" appropriation, provided a lump sum for vessels, much of which was earmarked, including an earmark for DLGN: "For Naval vessels: for the Navy, $3,156,400,000, of which sum $244,300,000 shall be used only for the DLGN nuclear powered guided missile frigate program; . . ." The committee reports on the appropriation act and the related authorization act indicated that, out of the $244 million appropriated, $152 million was for construction of the DLGN 41 and the remaining $92 million was for long lead time activity on the DLGN 42. Clearly, if the $152 million specified in the committee reports for the DLGN 41 was legally binding, obligations resulting from exercise of the contract option would exceed the available appropriation.

The Comptroller General applied the "*LTV* principle" and held that the $152 million was not a legally binding limit on obligations for the DLGN 41. As a matter of law, the entire $244 million was legally available for the DLGN 41 because the appropriation act did not include any restriction. Therefore, in evaluating potential violations of the Antideficiency Act, the relevant appropriation amount is the total amount of the lump-sum appropriation minus sums already obligated, not the lower figure derived

from the legislative history.[16] As the decision recognized, Congress could have imposed a legally binding limit by the very simple device of appropriating a specific amount only for the DLGN 41, appropriating a specific amount only for the DLGN 42, or by incorporating the committee reports in the appropriation language.

This decision illustrates another important point: The terms "lump-sum" and "line-item" are relative concepts. The $244 million appropriation in the *Newport News* case could be viewed as a line-item appropriation in relation to the broader "Shipbuilding and Conversion" category, but it was also a lump-sum appropriation in relation to the two specific vessels included. This factual distinction does not affect the applicable legal principle. As the decision explained:

> "Contractor urges that *LTV* is inapplicable here since *LTV* involved a lump-sum appropriation whereas the DLGN appropriation is a more specific 'line item' appropriation. While we recognize the factual distinction drawn by Contractor, we nevertheless believe that the principles set forth in *LTV* are equally applicable and controlling here. . . . [I]mplicit in our holding in *LTV* and in the other authorities cited is the view that dollar amounts in appropriation acts are to be interpreted differently from statutory words in general. This view, in our opinion, pertains whether the dollar amount is a lump-sum appropriation available for a large number of items, as in *LTV*, or, as here, a more specific appropriation available for only two items."

55 Comp. Gen. at 821–22.

A precursor of *LTV* and *Newport News* provides another interesting illustration. In 1974, controversy and funding uncertainties surrounded the Navy's "Project Sanguine," a communications system for sending command and control messages to submerged submarines from a single transmitting location in the United States. The Navy had requested $16.6 million for Project Sanguine for Fiscal Year 1974. The House deleted the request; the Senate restored it; the conference committee compromised and approved

[16] Of course, all this meant was that there would be no Antideficiency Act violation at the time the option was exercised. The decision recognized that subsequent actions could still produce a violation. 55 Comp. Gen. at 826.

$8.3 million. The Sanguine funds were included in a $2.6 billion lump-sum Research and Development appropriation. Navy spent more than $11 million for Project Sanguine in Fiscal Year 1974. The question was whether Navy violated the Antideficiency Act by spending more than the $8.3 million provided in the conference report. GAO found that it did not, because the conference committee's action was not specified in the appropriation act and was therefore not legally binding. Significantly, the appropriation act did include a proviso prohibiting use of the funds for "full scale development" of Project Sanguine (not involved in the $11 million expenditure), illustrating that Congress knows perfectly well how to impose a legally binding restriction when it desires to do so. GAO, *Legality of the Navy's Expenditures for Project Sanguine During Fiscal Year 1974*, LCD-75-315 (Washington, D.C.: Jan. 20, 1975). *See also* B-168482-O.M., Aug. 15, 1974.

Similarly, the Department of Health, Education, and Welfare received a $12 billion lump-sum appropriation for public assistance in 1975. Committee reports indicated that $9.2 million of this amount was being provided for research and development activities of the Social and Rehabilitation Service. Since this earmarking of the $9.2 million was not carried into the appropriation act itself, it did not constitute a statutory limit on the amount available for the program. B-164031.3, Apr. 16, 1975.

GAO has applied the rule of the *LTV* and *Newport News* decisions in a number of additional cases and reports, several of which involve variations on the basic theme.[17] One variation involves something of a reverse *LTV* theme when agencies attempt to invoke legislative history to supply a legal basis for their action that is absent from the relevant statutory language. In B-278121, Nov. 7, 1997, the Library of Congress took the position that appropriation language earmarking $9,619,000 for a particular purpose, to remain available until expended, did not require the entire amount to be used exclusively for that purpose. Rather, the Library maintained, the figure constituted merely a "cap" or upper limit on the amount available for

[17] *See* B-285725, Sept. 29, 2000; B-278968, May 28, 1998; B-278121, Nov. 7, 1997; B-277241, Oct. 21, 1997; B-271845, Aug. 23, 1996; 71 Comp. Gen. 411, 413 (1992); 64 Comp. Gen. 359 (1985); 59 Comp. Gen. 228 (1980);B-258000, Aug. 31, 1994; B-248284, Sept. 1, 1992; B-247853.2, July 20, 1992; B-231711, Mar. 28, 1989; B-222853, Sept. 29, 1987; B-204449, Nov. 18, 1981; B-204270, Oct. 13, 1981; B-202992, May 15, 1981; B-157356, Aug. 17, 1978; B-159993, Sept. 1, 1977; B-163922, Oct. 3, 1975; GAO, *Internal Controls: Funding of International Defense Research and Development Projects*, GAO/NSIAD-91-27 (Washington, D.C.: Oct. 30, 1990).

the stated purpose. The Library pointed to the way in which the conference committee described the figures relative to this appropriation as implicitly supporting its position. GAO rejected the Library's interpretation of the statutory language and, in particular, its reliance on implications from the legislative history:

> "Because the language of the law is clear, we have no basis to resort to assumptions or inferences drawn from inexplicit statements contained in the conference report. When the Congress appropriates lump-sum amounts without statutorily restricting what can be done with these funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on federal agencies. 55 Comp. Gen. 307, 319 (1975). Implicit within this holding is the more basic proposition that an existing statutory provision cannot be superseded or repealed by statements, explanations, recommendations, or tables contained in committee reports or in other legislative history. *Id. In other words, if explanations or other comments in committee reports do not create any legally binding restrictions on an agency's discretionary authority to spend a lump-sum appropriation as it chooses, such comments certainly cannot supersede an existing statutory provision that establishes a legally binding amount that the agency may dispose of as an available appropriation.*"

B-278121, at 2 (emphasis supplied).

Similarly, the Comptroller General flatly rejected the notion that otherwise illegal agency actions could be ratified and thereby validated when the agency notified congressional committees of the actions and the committees expressed no objection. *See* B-285725, Sept. 29, 2000; B-248284, Sept. 1, 1992. The decision in B-285725 observed:

> "[N]othing we reviewed clearly communicates to the Congress that the District [of Columbia] was requesting that Congress ratify or otherwise validate an unauthorized disbursement made by the District in excess of an available appropriation let alone that the Congress enact legislation

> that expressly or impliedly authorizes the otherwise unauthorized action. While legislative history may be useful to clarify an ambiguity in legislative language, one may not refer to the legislative history to write into the law that which is not there. 55 Comp. Gen. 307, 325 (1975). The District would have us write into the language of the law something that is not even mentioned in the relevant committee reports."

The treatment of lump-sum appropriations as described above has been considered by the courts as well as GAO, and they reached the same result.[18] The United States Court of Appeals for the District of Columbia Circuit noted that lump-sum appropriations have a "well understood meaning" and stated the rule as follows:

> "A lump-sum appropriation leaves it to the recipient agency (as a matter of law, at least) to distribute the funds among some or all of the permissible objects as it sees fit."

International Union v. Donovan, 746 F.2d 855, 861 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 825 (1985). The court in that case refused to impose a "reasonable distribution" requirement on the exercise of the agency's discretion, and found that discretion unreviewable. *Id.* at 862–63. *See also McCarey v. McNamara*, 390 F.2d 601 (3rd Cir. 1968); *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 547 n.6 (Ct. Cl. 1980).

One court, at odds with the weight of authority, concluded that an agency was required by 31 U.S.C. § 1301(a) (purpose statute) to spend money in accordance with an earmark appearing only in legislative history. *Blue Ocean Preservation Society v. Watkins*, 767 F. Supp. 1518 (D. Haw. 1991).

The Supreme Court's 1993 decision in *Lincoln v. Vigil*, 508 U.S. 182, put to rest any lingering uncertainty that might have existed on this point. Writing for a unanimous Court, Justice Souter quoted the rule stated in the *LTV*

[18] The Justice Department's Office of Legal Counsel also reached the same conclusion. *See, e.g.*, Memorandum for the General Counsel, United States Marshals Service, *USMS Obligation to Take Steps To Avoid Anticipated Appropriations Deficiency*, OLC Opinion, May 11, 1999; 16 Op. Off. Legal Counsel 77 (1992); 4B Op. Off. Legal Counsel 702 (1980); 4B Op. Off. Legal Counsel 674 (1980).

decision and described it as "a fundamental principle of appropriations law." *Id.* at 192. Specifically, the Court held that reprogrammings under lump-sum appropriations fall within the Administrative Procedure Act's exemption for actions "committed to agency discretion" (5 U.S.C. § 701(a)(2)) and, therefore, are not subject to judicial review. The Court said that the Administrative Procedure Act "makes clear that 'review is not to be had' in these rare circumstances where the relevant statute 'is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion.'" *Lincoln*, 508 U.S. at 191.

Lincoln concerned a decision by the Indian Health Service to discontinue a health program that had exclusively assisted Indian children in the southwestern United States and to channel the funds into a nationwide program for similar purposes. While the program had been funded for some years under a lump-sum appropriation, it was never mentioned in the language of the appropriation acts. The Court stated in this regard:

> "The allocation of funds from a lump-sum appropriation is . . . traditionally regarded as committed to agency discretion. After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way.
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> * * * * *
>
> "[A]n agency's allocation of funds from a lump-sum appropriation requires a complicated balancing of a number of factors which are peculiarly within its expertise: whether its resources are best spent on one program or another; whether it is likely to succeed in fulfilling its statutory mandate; whether a particular program best fits the agency's overall policies; and, indeed, whether the agency has enough resources to fund a program at all. . . . [T]he agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Of course, an agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes (though not, as we have seen, just in the legislative history). And, of course,

> we hardly need to note that an agency's decision to ignore congressional expectations may expose it to grave political consequences. But as long as the agency allocates funds from a lump-sum appropriation to meet permissible statutory objectives, [5 U.S.C.] § 701(a)(2) gives the courts no leave to intrude."

508 U.S. at 192–93 (citations and internal quotations omitted).

The Court noted that while the agency had repeatedly informed Congress about the program in question, "as we have explained, these representations do not translate through the medium of legislative history into legally binding obligations." *Id.* at 194. Subsequent judicial decisions have, of course, followed this approach. *E.g.*, *State of California v. United States*, 104 F.3d 1086, 1093–94 (9th Cir.), *cert. denied*, 522 U.S. 806 (1997); *State of New Jersey v. United States*, 91 F.3d 463, 470–71 (3rd Cir. 1996); *Vizenor v. Babbitt*, 927 F. Supp. 1193 (D. Minn. 1996); *Allred v. United States*, 33 Fed. Cl. 349 (1995). *But see Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996).[19]

While *Lincoln*, *LTV*, and related decisions clearly affirm that agencies have very broad *legal* discretion when allocating funds under lump-sum appropriations, an important caveat must be noted: Such discretion obviously does not extend to allowing an agency to avoid contractual or other legal obligations imposed upon it. In other words, the agency cannot reprogram funds otherwise available for payments under a contract and then claim (at least successfully) that its hands are tied from making the contract payments. The Supreme Court's recent decision in *Cherokee Nation of Oklahoma v. Leavitt*, 543 U.S. 631, 125 S. Ct. 1172 (2005), illustrates this point.

[19] In *Ramah*, Congress had capped the amount appropriated for contract support cost payments under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. §§ 450–450n, at less than the total amount all recipients would have received if paid their full allocations under the Act. The court rejected the government's argument (and the lower court's conclusion) that *Lincoln* precluded judicial review of the method the agency devised to distribute the reduced allocations. Distinguishing *Lincoln*, the court held that the Act provided sufficient law to apply in order to determine the legality of the agency's distribution method. Indeed, the court further held that the agency's distribution method violated the Act. The *Ramah* decision is discussed further in Chapter 2, section C.2, and Chapter 3, section C.5.

Cherokee Nation of Oklahoma v. Leavitt addressed the Indian Health Service's obligation to pay contract support costs under the Indian Self-Determination and Education Assistance Act, as amended, 25 U.S.C. §§ 450–450n.[20] The Act requires the Secretary of Health and Human Services,[21] at the request of Indian tribes, to enter into self-determination contracts whereby the tribes agree to administer programs and provide services that would otherwise be the responsibility of the federal government. *See generally* 25 U.S.C. § 450f. The federal government makes contract payments of not less than the amounts the government would have incurred in administering the programs directly, including, among other things, certain administrative contract support costs. *Id.* § 450j-1(a). With respect to contract funding, 25 U.S.C. § 450j-1(b) includes the following proviso:

> "Notwithstanding any other provision in this subchapter, the provision of funds under this subchapter is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this subchapter."

The *Cherokee Nation* litigation grew out of the government's refusal to pay the full support cost amounts claimed by the tribes under their contracts for certain fiscal years. The government maintained that appropriations for those fiscal years were insufficient to fund the full amounts. The Court disagreed. The Court noted that the self-determination contracts were no less legally binding than ordinary procurement contracts. *Cherokee Nation of Oklahoma v. Leavitt*, 125 S. Ct. at 1178–79. The contracts for the fiscal years in question were funded from lump-sum appropriations to the Indian Health Service that, the Court pointed out, far exceeded the total payments

[20] In *Cherokee Nation of Oklahoma v. Leavitt*, the Court disposed of three decisions from different appellate courts: *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075 (Fed. Cir. 2003), which the Court affirmed, as well as *Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054 (10th Cir. 2002), and *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Thompson*, 279 F.3d 660 (9th Cir. 2002), both of which the Court reversed. *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), discussed previously, is another decision on this subject.

[21] The Act also applies to the Secretary of the Interior and programs administered by that department. However, the *Cherokee Nation of Oklahoma v. Leavitt* case concerned self-determination contracts for the provision of services by the Department of Health and Human Services' Indian Health Service.

due under the contracts and contained no restrictions on the amounts of such payments. *Id.* at 1177. The Court then recited two basic propositions asserted by the tribes that, it noted, the government had conceded.

The first was the "fundamental principle of appropriations law" recognized in *Lincoln* that when Congress appropriates lump-sum amounts unaccompanied by restrictions, a clear inference arises that it does not intend to impose legally binding restrictions and committee reports and other legislative history do not establish legally binding requirements. *Cherokee Nation of Oklahoma v. Leavitt*, 125 S. Ct. at 1177. The second was that—

> "as long as Congress has appropriated sufficient legally unrestricted funds to pay the contracts at issue, the Government normally cannot back out of a promise to pay on grounds of 'insufficient appropriations,' even if the contract uses language such as 'subject to the availability of appropriations,' and even if an agency's total lump-sum appropriation is insufficient to pay *all* the contracts the agency has made."

Id. In support of this proposition, the Court cited *Ferris v. United States*, 27 Ct. Cl. 542 (1892), and *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539 (Ct. Cl. 1980). To the same effect, the Court quoted the following statement from the government's brief on the law applicable to ordinary procurement contracts:

> "[I]f the amount of an unrestricted appropriation is sufficient to fund the contract, the contractor is entitled to payment *even if the agency has allocated the funds to another purpose* or assumes other obligations that exhaust the funds."

Cherokee Nation of Oklahoma v. Leavitt, 125 S. Ct. at 1179–80 (emphasis supplied).

The Court rejected the government's contentions that the provisos in 25 U.S.C. § 450j-1(b), quoted previously, precluded full payment under the contracts. The Court observed that the first proviso making funding "subject to the availability of appropriations" is frequently used language that simply makes clear that contracts cannot become binding in advance of appropriations or otherwise without regard to the availability of

appropriations. *Cherokee Nation of Oklahoma v. Leavitt*, 125 S. Ct. at 1180–81. "Since Congress appropriated adequate funds here," said the Court, the first proviso, "if interpreted as ordinarily understood, would not help the Government." *Id.* at 1181. The Court concluded that the second proviso, stating that the government need not reduce funding benefiting other tribes in order to fund self-determination contracts was likewise unavailing to the government:

> "The Government argues that these other funds, though legally unrestricted (as far as the appropriations statutes' language is concerned) were nonetheless unavailable to pay 'contract support costs' because the Government had to use those funds to satisfy a critically important need, namely, to pay the costs of 'inherent federal functions,' such as the cost of running the Indian Health Service's central Washington office. This argument cannot help the Government, however, for it amounts to no more than a claim that the agency has allocated the funds to another purpose, albeit potentially a very important purpose. If an important alternative need for funds cannot rescue the Government from the binding effect of its promises where ordinary procurement contracts are at issue, it cannot rescue the Government here, for we can find nothing special in the statute's language or in the contracts.
>
> * * * * *
>
> "We recognize that agencies may sometimes find that they must spend unrestricted appropriated funds to satisfy needs they believe more important than fulfilling a contractual obligation. But the law normally expects the Government to avoid such situations, for example, by refraining from making less essential contractual commitments; or by asking Congress in advance to protect funds needed for more essential purposes with *statutory* earmarks; or by seeking added funding from Congress; or, if necessary, by using unrestricted funds for the more essential purpose while leaving the contractor free to pursue appropriate legal remedies arising because the Government broke its contractual promise. The Government, without denying that this is so as a general matter of procurement law, says

> nothing to convince us that a different legal rule should apply here."

Id. at 1180 (citations omitted; emphasis supplied).[22]

Finally, the Court declined to construe an appropriation act provision enacted in a subsequent fiscal year as creating a statutory cap on funding for the years covered by the litigation. This later-enacted provision stated in part:

> "Notwithstanding any other provision of law . . . amounts appropriated to or earmarked in committee reports for the Indian Health Service . . . [for] payments to tribes . . . for contract support costs . . . are the total amounts available for fiscal years 1994 through 1998 for such purposes."[23]

The Court acknowledged that it was reasonable to interpret the language as restricting payments for the prior years. However, it opted not to do so since such an interpretation would treat the language as retroactively repudiating a binding government contract and thereby raising constitutional concerns. *Cherokee Nation of Oklahoma v. Leavitt*, 125 S. Ct. at 1182. The Court also rejected the government's contention that the language simply clarified that the prior ambiguous appropriation language was not unrestricted, concluding that there was nothing ambiguous about the prior language. *Id.* Rather, the Court treated the later-enacted language as affecting only unobligated carryover balances from the prior year appropriations.

c. "Zero Funding" Under a Lump-Sum Appropriation

Does discretion under a lump-sum appropriation extend so far as to permit an agency to "zero fund" a particular program? Although there are few cases, the answer would appear, for the most part, to be yes, as long as the program is not mandatory and the agency uses the funds for other authorized purposes to avoid impoundment complications. *E.g.*, B-209680,

[22] The logical conclusion from the Court's finding that the Indian Self-Determination Act contracts are no different from ordinary procurement contracts is that the Indian Health Service, at the time it entered into the contracts, should have recorded an obligation against its appropriations for the full amount of the support costs to which the Tribes were entitled.

[23] Section 314 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, 112 Stat. 2681, 2681-288 (Oct. 21, 1998).

Feb. 24, 1983 (agency could properly decide not to fund a program where committee reports on appropriation stated that no funds were being provided for that program, although agency would have been equally free to fund the program under the lump-sum appropriation); B-167656, June 18, 1971 (agency has discretion to discontinue a function funded under a lump-sum appropriation to cope with a shortfall in appropriations); 4B Op. Off. Legal Counsel 701, 704 n.7 (1980) (same point).

The more difficult question is whether the answer is the same where there is no shortfall problem and where it is clear that Congress wants the program funded. In *International Union v. Donovan*, 746 F.2d 855, 861 (D.C. Cir. 1984), *cert. denied*, 474 U.S. 825 (1985), discussed previously, the court upheld an agency's decision to allocate no funds to a program otherwise authorized for funding under a lump-sum appropriation. Although there was in that case a "congressional realization, if not a congressional intent, that nothing would be expended" for the program in question, 746 F.2d at 859, it seems implicit from the court's discussion of applicable law that the answer would have been the same if legislative history had "directed" that the program be funded. The same result would seem to follow from 55 Comp. Gen. 812 (1976), discussed above, holding that the entire unobligated balance of a lump-sum appropriation should be considered available for one of the objects included in the appropriation, at least for purposes of assessing potential violations of the Antideficiency Act.

In B-114833, July 21, 1978, the Department of Agriculture wanted to use its 1978 lump-sum Resource Conservation and Development appropriation to fund existing projects rather than starting any new ones, even though the appropriations committee reports indicated that the funds were for certain new projects. Since the language referring to new projects was stated in committee reports but not in the statute itself, the Department's proposed course of action was legally permissible.

In a very early, 1922 decision, 1 Comp. Gen. 623 (1922), GAO seemed to suggest that there are constraints on an agency's discretion. The appropriation in question provided for "rent of offices of the recorder of deeds, including services of cleaners as necessary, not to exceed 30 cents per hour, . . . $6,000." The Comptroller General held that the entire $6,000 could not be spent for rent. The decision stated:

> "[S]ince [the appropriation act] provides that the amount appropriated shall cover both rent and cleaning services, it

must be held that the entire amount can not be used for rent alone.

". . . The law leaves to the discretion of the commissioners the question as to what portion of the amount appropriated shall be paid for rent and what portion shall be paid for services of cleaners, but it does not vest in the commissioners the discretion to determine that the entire amount shall be paid for rent and that the cleaning services shall be left unprovided for, or be provided for from other funds."

Id. at 624. As a practical matter it would not have been possible to rent office space and totally eliminate cleaning services, and the use of any other appropriation would have been clearly improper. A factor which apparently influenced the decision was that the "regular office force" was somehow being coerced to do the cleaning, and these were employees paid from a separate appropriation. *Id.*

2. Line-Item Appropriations and Earmarks

Congress may wish to specifically designate, or "earmark," part of a more general lump-sum appropriation for a particular object, as either a maximum, a minimum, or both.

An earmark refers to the portion of a lump-sum appropriation designated for a particular purpose.[24] The term earmark often is used interchangeably with the term "line item." In appropriations language, however, a line item is an appropriation that is dedicated for a specific purpose, rather than an amount *within* a lump-sum appropriation.[25] The following example of earmarking language in a lump-sum appropriation can be found in the Consolidated Appropriations Act of 2004:

[24] *See* GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: September 2005), at 46–47.

[25] *See Glossary,* at 64.

> "For necessary administrative expenses of the domestic nutrition assistance programs funded under this Act, $138,304,000, of which $5,000,000 shall be available only for simplifying procedures, reducing overhead costs, . . . and prosecution of fraud and other violations of law . . ."[26]

In this example, the $5 million is an earmark.

Often, cases interpreting earmarks turn on congressional intent. *See*, *e.g.*, B-285794, Dec. 5, 2000 (use of statutory interpretation to determine whether the Community Development Block Grant (CDBG) heading requiring competition for assistance "under this heading" applied to an earmark within the CDBG lump-sum appropriation).

For simplicity of illustration, let us assume that we have a lump-sum appropriation of $1 million for "general construction" and a particular object within that appropriation is "renovation of office space." If the appropriation specifies "not to exceed" $100,000 for renovation of office space or "not more than" $100,000 for renovation of office space, then $100,000 is the maximum available for renovation of office space. 64 Comp. Gen. 263 (1985).[27] A specifically earmarked maximum may not be supplemented with funds from the general appropriation.

Statutory authority to transfer funds between appropriations may permit the augmentation of a "not to exceed" earmark in some cases. In 12 Comp. Gen. 168 (1932), it was held that general transfer authority could be used to increase maximum earmarks for personal services, subject to the percentage limitations specified in the transfer statute because, in this case, the transfer authority was remedial legislation designed to mitigate the impact of reduced appropriations. The decision pointed out that if the personal services earmark had been a separate line-item appropriation, the transfer authority would clearly apply. *Id.* at 170. Somewhat similarly, in 36 Comp. Gen. 607 (1957), funds transferred to an operating appropriation from a civil defense appropriation could be used to exceed an administrative expense limitation in the operating appropriation. Congress

[26] Pub. L. No. 108-199, div. A, title IV, 118 Stat. 3, 27 (Jan. 23, 2004).

[27] A "not to exceed" earmark was held not to constitute a maximum in 19 Comp. Gen. 61 (1939), where the earmarking language was inconsistent with other language in the general appropriation. This holding was based on an interpretation of the statute as a whole. See section D of Chapter 2 for additional information on statutory interpretation.

had imposed new civil defense functions but had neglected to adjust the administrative expenses limitation. However, in 33 Comp. Gen. 214 (1953), the Comptroller General held that general transfer authority could not be used to exceed a maximum earmark on an emergency assistance program where it was clear that Congress, aware of the emergency, intended that the program be funded only from the earmark. *See also* 18 Comp. Gen. 211 (1938). As in many cases, these decisions turned on congressional intent.

Under a "not to exceed" earmark, the agency is not required to spend the entire amount on the object specified. *See*, *e.g.*, *Brown v. Ruckelshaus*, 364 F. Supp. 258, 266 (C.D. Cal. 1973) ("the phrase 'not to exceed' connotes limitation, not disbursement"). If, in our hypothetical, the entire $100,000 is not used for renovation of office space, unobligated balances may—within the time limits for obligation—be applied to other unrestricted objects of the appropriation. B-290659, July 24, 2002; 31 Comp. Gen. 578, 579 (1952); 15 Comp. Dec. 660 (1909); B-4568, June 27, 1939.

If later in the fiscal year a supplemental appropriation is made for "renovation of office space," the funds provided in the supplemental may not be used to increase the $100,000 maximum for general construction unless the supplemental appropriation act so specifies. See section D of this chapter for a further discussion of supplemental appropriations.

An earmark that authorizes an agency to use a lump-sum appropriation for "not more than" a certain dollar amount has the same effect as a "not to exceed" earmark. For example, when the Department of State received a lump-sum appropriation for "International Organizations and Programs" authorizing it to make "not more than" $34 million of that lump sum available for the United Nations Population Fund (UNFPA), the Comptroller General concluded:

> "[W]hile the appropriation limits the State Department's use of the lump-sum appropriation for 'International Organizations and Programs' for UNFPA to no more than $34 million, it does not require by law that any amounts be used for UNFPA."

B-290659, July 24, 2002. In this case, the State Department could use the funds for UNFPA only after the Department ensured that UNFPA practices satisfied three statutory conditions, one of which was that UNFPA would not fund abortions. Pub. L. No. 107-115, § 576, 115 Stat. 2118, 2168 (Jan. 10, 2002). The Department had delayed obligating funds for UNFPA pending an analysis of a report of a team reviewing UNFPA's involvement in Chinese family planning practices, including the funding of abortions.[28]

Words like "not more than" or "not to exceed" are not the only ways to establish a maximum limitation. If the appropriation includes a specific amount for a particular object (such as "for renovation of office space, $100,000"), then the appropriation establishes a maximum that may not be exceeded. 36 Comp. Gen. 526 (1957); 19 Comp. Gen. 892 (1940); 16 Comp. Gen. 282 (1936).

Another device Congress has used to designate earmarks as maximum limitations is the following general provision:

> "Whenever in this Act, an amount is specified within an appropriation for particular purposes or objects of expenditure, such amount, *unless otherwise specified*, shall be considered as the maximum amount that may be expended for said purpose or object rather than an amount set apart *exclusively* therefor." (Emphasis added.)[29]

By virtue of the "unless otherwise specified" clause, the provision does not apply to amounts within an appropriation which have their own specific earmarking "words of limitation," such as "exclusively." 31 Comp. Gen. 578 (1952).

If a lump-sum appropriation includes several particular objects and provides further that the appropriation "is to be accounted for as one fund" or "shall constitute one fund," then the individual amounts are not limitations, the only limitation being that the total amount of the lump-sum

[28] While the Comptroller General concluded that the Department did not have to use funds for UNFPA, he cautioned that whenever an agency withholds fiscal year funds from obligation, it must release the funds with sufficient time remaining in the fiscal year to obligate them before the end of the fiscal year. B-290659, July 24, 2002.

[29] District of Columbia Appropriations Act, 2005, Pub. L. No. 108-335, § 301, 118 Stat. 1322, 1399 (Oct. 18, 2004).

appropriation cannot be exceeded. However, individual items within that lump-sum appropriation that include the "not to exceed" language will still constitute maximum limitations. 22 Comp. Dec. 461 (1916); 3 Comp. Dec. 604 (1897); A-79741, Aug. 7, 1936. The "one fund" language is generally used when Congress authorizes an agency to transfer unexpended balances of prior appropriations to a current appropriation. For example, the Energy and Water Development Appropriations Act for 2002 states that—

> "The unexpended balances of prior appropriations provided for activities in the Act may be transferred to appropriation accounts for such activities established pursuant to the title. Balances so transferred may be merged with funds in the applicable established accounts and thereafter may be accounted for as one fund for the same period as originally enacted."[30]

If Congress wishes to specify a minimum for the particular object but not a maximum, the appropriation act may provide "General construction, $1 million, of which not less than $100,000 shall be available for renovation of office space." B-137353, Dec. 3, 1959. *See also* 64 Comp. Gen. 388 (1985); B-131935, Mar. 17, 1986. If the phrase "not less than" is used, in contrast with the "not to exceed" language, portions of the $100,000 not obligated for renovation of office space may not be applied to the other objects of the appropriation. 64 Comp. Gen. at 394–95; B-128943, Sept. 27, 1956.

Another phrase Congress often uses to earmark a portion of a lump-sum appropriation is "shall be available." There are variations. For example, our hypothetical $1 million "renovation of office space" appropriation may provide that, out of the $1 million, $100,000 "shall be available" or "shall be available only" or "shall be available exclusively" for renovation of office space. Still another variation is "$1 million, including $100,000 for renovation of office space."

If the "shall be available" phrase is combined with the maximum or minimum language noted above ("not to exceed," "not less than," *etc.*), then the above rules apply and the phrase "shall be available" adds little. *See*, *e.g.*, B-137353, Dec. 3, 1959. However, if the earmarking phrase "shall be

[30] Pub. L. No. 107-66, § 305, 115 Stat. 486, 509 (Nov. 12, 2001).

available" is used without the "not to exceed" or "not less than" modifiers, the rules are not quite as firm.

Cases interpreting the "shall be available" and "shall be available only" earmarks are somewhat less than consistent. The earlier decisions proclaimed "shall be available" to constitute a maximum but not a minimum (B-5526, Sept. 14, 1939), although it could be a minimum if Congress clearly expressed that intent (B-128943, Sept. 27, 1956). Later cases held the earmark to constitute both a maximum and a minimum which could neither be augmented nor diverted to other objects within the appropriation. B-137353, Dec. 3, 1959; B-137353-O.M., Oct. 14, 1958. Another early decision held summarily that "shall be available only" results in a maximum which cannot be augmented. 18 Comp. Gen. 1013 (1939). Later decisions, however, have expressed the view that the effect of "shall be available only"—whether it is a maximum or a minimum—depends on the underlying congressional intent. 53 Comp. Gen. 695 (1974); B-142190, Mar. 23, 1960. Applying this test, the earmark in 53 Comp. Gen. 695 was found to be a maximum; similar language had been found a minimum in B-142190, which could be exceeded.

If the phrase "shall be available" may be said to contain an element of ambiguity, addition of the word "only" does not produce a plain meaning. The Claims Court, reviewing an authorization earmark for a Navy project known as RACER, commented:

> "[I]t is not apparent from the language of the authorization ($45 million 'is available only for') that Congress necessarily mandated the Navy to spend all $45 million on the RACER system. Rather, Congress may have merely intended to preclude the Navy from spending that $45 million on any other activities, *i.e.*, the money would be forfeited if not spent on the RACER system."

Solar Turbines, Inc. v. United States, 23 Cl. Ct. 142, 158 (1991).

Use of the word "exclusively" is somewhat more precise. The earmark "shall be available exclusively" is both a maximum which cannot be augmented from the general appropriation, and a minimum which cannot be diverted to other objects within the appropriation. B-102971, Aug. 24, 1951. Once again, however, clearly expressed congressional intent can produce a different result. B-113272-O.M., May 21, 1953; B-111392-O.M., Oct. 17, 1952 (earmark held to be a minimum only in both cases).

Similarly, the term "including" has been held to establish both a maximum and a minimum. A-99732, Jan. 13, 1939. As such, it cannot be augmented from a more general appropriation (19 Comp. Gen. 892 (1940)), nor can it be diverted to other uses within the appropriation (67 Comp. Gen. 401 (1988)).

To sum up, the most effective way to establish a maximum (but not minimum) earmark is by the words "not to exceed" or "not more than." The words "not less than" most effectively establish a minimum (but not maximum). These are all phrases with well-settled plain meanings. The "shall be available" family of earmarking language presumptively "fences in" the earmarked sum (both maximum and minimum), but is more subject to variation based upon underlying congressional intent.

Our discussion thus far has centered on the use of earmarking language to prescribe the amount available for a particular object. Earmarking language also may be used to vary the period of availability for obligation.

An earmarked amount within a lump-sum appropriation that is available without fiscal year limitation is neither a maximum nor a minimum if the funds have not been designated for a specific purpose. The earmark addresses only the time availability of the earmarked amount. For example, in the Legislative Branch Appropriations Act for 2004, the Salaries, Officers and Employees appropriations lump-sum account contained the following language:

> "For compensation and expenses of officers and employees, as authorized by law, $156,896,000, including: . . . for salaries and expenses of the Office of the Chief Administrative Officer, $111,141,000, of which $8,400,000 shall remain available until expended . . ."[31]

In this instance, the earmark extended the time period availability of $8,400,000 of the $111,141,000 appropriated for salaries and expenses but did not prescribe the amount available for a particular object.

In a 1997 decision, GAO determined that an earmark extending the time period also constituted a minimum for the purpose for which it was

[31] Pub. L. No. 108-83, 117 Stat. 1007, 1015 (Sept. 30, 2003).

earmarked. B-278121, Nov. 7, 1997 (nondecision letter). The Library of Congress Salaries and Expenses lump-sum appropriation stated as follows:

> "For necessary expenses of the Library of Congress not otherwise provided for . . . $227,016,000 . . . *Provided further*, That of the total amount appropriated, $9,619,000 is to remain available until expended for acquisition of books, periodicals, newspapers, and all other materials including subscriptions for bibliographic services for the Library . . ."[32]

GAO determined that the Library of Congress was required to make the entire $9,619,000 available for acquisition of books and materials, even if this required reducing other expenditures within the lump-sum appropriation.[33]

Finally, earmarking language may be found in authorization acts as well as appropriation acts. The same meanings apply. Several of the cases cited above involve authorization acts. *See*, *e.g.*, 64 Comp. Gen. 388 (1985); B-131935, Mar. 17, 1986.

[32] Pub. L. No. 105-55, 111 Stat. 1177, 1191–92 (Oct. 7, 1997).

[33] *But see* B-231711, Mar. 28, 1989 (appropriation provision earmarked portion of lump sum to remain available for an additional fiscal year for a specific purpose, but was neither maximum nor minimum limitation on amount available for particular object). While B-231711 was not explicitly overruled by B-278121, Nov. 7, 1997, it has little precedential value.

C. The Antideficiency Act

1. Introduction and Overview

The Antideficiency Act is one of the major laws in the statutory scheme by which Congress exercises its constitutional control of the public purse. It has been termed "the cornerstone of Congressional efforts to bind the Executive branch of government to the limits on expenditure of appropriated funds."[34]

As with the series of funding statutes as a whole, the Antideficiency Act did not hatch fully developed but evolved over a period of time in response to various abuses. As we noted in Chapter 1, as late as the post-Civil War period, it was not uncommon for agencies to incur obligations in excess, or in advance, of appropriations. Perhaps most egregious of all, some agencies would spend their entire appropriations during the first few months of the fiscal year, continue to incur obligations, and then return to Congress for appropriations to fund these "coercive deficiencies."[35] These were obligations to others who had fulfilled their part of the bargain with the United States and who now had at least a moral—and in some cases also a legal—right to be paid. Congress felt it had no choice but to fulfill these commitments, but the frequency of deficiency appropriations played havoc with the United States budget.

The congressional response to abuses of this nature was the Antideficiency Act. Its history is summarized in the following paragraphs:[36]

> "Control in the execution of the Government's budgetary and financial programs is based on the provisions of section 3679 of the Revised Statutes, as amended . . ., commonly referred to as the Antideficiency Act. As the name . . .

[34] Hopkins & Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51, 56 (1978).

[35] Hopkins & Nutt, at 57–58; Louis Fisher, *Presidential Spending Power*, 232 (1975).

[36] Senate Committee on Government Operations, *Financial Management in the Federal Government*, S. Doc. No. 87-11, at 45–46 (1961). In the Senate document, the Antideficiency Act is cited as "section 3679 of the Revised Statutes," a designation that is now obsolete.

implies, one of the principal purposes of the legislation was to provide effective control over the use of appropriations so as to prevent the incurring of obligations at a rate which will lead to deficiency (or supplemental) appropriations and to fix responsibility on those officials of Government who incur deficiencies or obligate appropriations without proper authorization or at an excessive rate.

"The original section 3679 . . . was derived from legislation enacted in 1870 [16 Stat. 251] and was designed solely to prevent expenditures in excess of amounts appropriated. In 1905 [33 Stat. 1257] and 1906 [34 Stat. 48], section 3679 . . . was amended to provide specific prohibitions regarding the obligation of appropriations and required that certain types of appropriations be so apportioned over a fiscal year as to 'prevent expenditures in one portion of the year which may necessitate deficiency or additional appropriations to complete the service of the fiscal year for which said appropriations are made.' Under the amended section, the authority to make, waive, or modify apportionments was vested in the head of the department or agency concerned. By Executive Order 6166 of June 10, 1933, this authority was transferred to the Director of the [Office of Management and Budget]. . . .

"During and following World War II, with the expansion of Government functions and the increase in size and complexities of budgetary and operational problems, situations arose highlighting the need for more effective control and conservation of funds. In order to effectively cope with these conditions it was necessary to seek legislation clarifying certain technical aspects of section 3679 of the Revised Statutes, and strengthening the apportionment procedures, particularly as regards to agency control systems. Section 1211 of the General Appropriation Act, 1951 [64 Stat. 765], amended section 3679 . . . to provide a basis for more effective control and economical use of appropriations. Following a recommendation of the second Hoover Commission that agency allotment systems should be simplified, Congress passed legislation in 1956 [70 Stat. 783] further amending section 3679 to provide that each agency work toward the

> objective of financing each operating unit, at the highest practical level, from not more than one administrative subdivision for each appropriation or fund affecting such unit. In 1957 [71 Stat. 440] section 3679 was further amended, adding a prohibition against the requesting of apportionments or reapportionments which indicate the necessity for a deficiency or supplemental estimate except on the determination of the agency head that such action is within the exceptions expressly set out in the law. The revised Antideficiency Act serves as the primary foundation for the Government's administrative control of funds systems."

In its current form, the law prohibits:

- Making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. 31 U.S.C. § 1341(a)(1)(A).

- Involving the government in any contract or other obligation for the payment of money for any purpose in advance of appropriations made for such purpose, unless the contract or obligation is authorized by law. 31 U.S.C. § 1341(a)(1)(B).

- Accepting voluntary services for the United States, or employing personal services in excess of that authorized by law, except in cases of emergency involving the safety of human life or the protection of property. 31 U.S.C. § 1342.

- Making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulations. 31 U.S.C. § 1517(a).[37]

Subsequent sections of this chapter will explore these concepts in detail. However, the fiscal principles inherent in the Antideficiency Act are really quite simple. Government officials may not make payments or commit the United States to make payments at some future time for goods or services unless there is enough money in the "bank" to cover the cost in full. The "bank," of course, is the available appropriation.

The combined effect of the Antideficiency Act, in conjunction with the other funding statutes discussed throughout this publication, was summarized in a 1962 decision. The summary has been quoted in numerous later Antideficiency Act cases and bears repeating here:

> "These statutes evidence a plain intent on the part of the Congress to prohibit executive officers, unless otherwise authorized by law, from making contracts involving the Government in obligations for expenditures or liabilities beyond those contemplated and authorized for the period of availability of and within the amount of the appropriation under which they are made; to keep all the departments of the Government, in the matter of incurring obligations for expenditures, within the limits and purposes of appropriations annually provided for conducting their lawful functions, and to prohibit any officer or employee of the Government from involving the Government in any contract or other obligation for the payment of money for any purpose, in advance of appropriations made for such

[37] *See* S. Doc. No. 87-11, at 48; B-131361, Apr. 12, 1957. Further discussion of the Antideficiency Act from varying perspectives will be found in the following sources: James A. Harley, *Multiyear Contracts: Pitfalls and Quandaries*, 27 Public Contract L.J. 555 (1998); Col. James W. McBride, *Avoiding Antideficiency Act Violations on Fixed Price Incentive Contracts (The Hunt for Red Ink)*, June Army Lawyer (1994); Fenster & Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 Public Contract L.J. 155 (1979); Rollee H. Efros, *Statutory Restrictions on Funding of Government Contracts*, 10 Public Contract L.J. 254 (1978); Hopkins & Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51 (1978); William J. Spriggs, *The Anti-Deficiency Act Comes to Life in U.S. Government Contracting*, 10 National Contract Management Journal 33 (1976–77); Col. John R. Frazier, *Use of Annual Funds with Conditional, Option, or Indefinite Delivery Contracts*, 8 A.F. JAG L. Rev. 50 (1966).

purpose; and to restrict the use of annual appropriations to expenditures required for the service of the particular fiscal year for which they are made."

42 Comp. Gen. 272, 275 (1962).

To the extent it is possible to summarize appropriations law in a single paragraph, this is it. Viewed in the aggregate, the Antideficiency Act and related funding statutes "[restrict] in every possible way the expenditures and expenses and liabilities of the government, so far as executive offices are concerned, to the specific appropriations for each fiscal year." *Wilder's Case*, 16 Ct. Cl. 528, 543 (1880).

2. Obligation/Expenditure in Excess or Advance of Appropriations

The key provision of the Antideficiency Act is 31 U.S.C. § 1341(a)(1):[38]

> "(a)(1) An officer or employee of the United States Government or of the District of Columbia government may not—
>
> > "(A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; or
> >
> > "(B) involve either government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."

Not only is section 1341(a)(1) the key provision of the Act, it was originally the only provision, the others being added to ensure enforcement of the basic prohibitions of section 1341.

The law is not limited to the executive branch, but applies to any "officer or employee of the United States Government" and thus extends to all branches. Examples of legislative branch applications are B-303964, Feb. 3,

[38] Prior to the 1982 recodification of title 31 of the United States Code, the Antideficiency Act consisted of nine lettered subsections of what was then 31 U.S.C. § 665. The recodification scattered the law among several new sections. To better show the relationship of the material, our organization in this chapter retains the sequence of the former subsections.

2005 (Capitol Police use of the Legislative Branch Emergency Response Fund); B-303961, Dec. 6, 2004 (Architect of the Capitol); B-107279, Jan. 9, 1952 (Office of Legislative Counsel, House of Representatives); B-78217, July 21, 1948 (appropriations to Senate for expenses of Office of Vice President); 27 Op. Att'y Gen. 584 (1909) (Government Printing Office). Within the judicial branch, it applies to the Administrative Office of the United States Courts. *E.g.*, 50 Comp. Gen. 589 (1971). However, whether a federal judge is an officer or employee for purposes of 31 U.S.C. § 1341(a)(1) appears to remain an open question, at least in some contexts. *See Armster v. United States District Court*, 792 F.2d 1423, 1427 n.7 (9th Cir. 1986) (the Seventh Amendment of the Constitution prohibits suspension of civil jury trials for lack of funds, whether or not a judge is considered an employee or officer under the Antideficiency Act). The Antideficiency Act also applies to officers of the District of Columbia Courts. B-284566, Apr. 3, 2000.

Some government corporations are also classified as agencies of the United States Government, and to the extent they operate with funds which are regarded as appropriated funds, they too are subject to 31 U.S.C. § 1341(a)(1). *E.g.*, B-223857, Feb. 27, 1987 (Commodity Credit Corporation); B-135075-O.M., Feb. 14, 1975 (Inter-American Foundation). It follows that section 1341(a)(1) does not apply to a government corporation that is not an agency of the United States Government. *E.g.*, B-175155-O.M., July 26, 1976 (Amtrak). These principles are, of course, subject to variation if and to the extent provided in the relevant organic legislation.

There are two distinct prohibitions in section 1341(a)(1). Unless otherwise authorized by law, no officer or employee of the United States may (1) make any expenditure or incur an obligation *in excess* of available appropriations, or (2) make an expenditure or incur an obligation *in advance* of appropriations.

The distinction between obligating in excess of an appropriation and obligating in advance of an appropriation is clear in the majority of cases, but can occasionally become blurred. For example, an agency which tries to meet a current shortfall by "borrowing" from (*i.e.*, obligating against) the unenacted appropriation for the next fiscal year is clearly obligating in advance of an appropriation. *E.g.*, B-236667, Jan. 26, 1990. However, it is also obligating in excess of the currently available appropriation. Since both are equally illegal, determining precisely which subsection of 31 U.S.C. § 1341(a) has been violated is of secondary importance. In any

event, the point to be stressed here is that the law is violated not just when there are insufficient funds in an account when a payment becomes due. The very act of obligating the United States to make a payment when the necessary funds are not already in the account is also a violation of 31 U.S.C. § 1341(a). *E.g.*, B-300480, Apr. 9, 2003.

In B-290600, July 10, 2002, both the Office of Management and Budget (OMB) and the Airline Transportation Stabilization Board (ATSB) violated the Antideficiency Act when OMB apportioned, and ATSB obligated an appropriation, in advance of, and thus in excess of, its availability. The Air Transportation Safety and System Stabilization Act authorized the President to issue up to $10 billion in loan guarantees, and to provide the subsidy amounts necessary for such guarantees,[39] to assist air carriers who incurred losses resulting from the September 11, 2001, terrorist attacks on the United States. Pub. L. No. 107-42, title I, § 101(a)(1), 115 Stat. 230 (Sept. 22, 2001). Congress established the ATSB to review and decide on applications for these loan guarantees. The budget authority for the guarantees was available only "to the extent that a request, that includes designation of such amount as an emergency requirement . . . is transmitted by the President to Congress." *Id.* at § 101(b). The President had not submitted such a request at the time OMB apportioned the funds to ATSB and the ATSB obligated the funds; therefore, both OMB and ATSB made funds available in advance of their availability, violating the Antideficiency Act. See section C of this chapter for a discussion of the apportionment process.

Note that 31 U.S.C. § 1341(a) refers to overobligating and overspending the amount available in an "appropriation or fund." The phrase "appropriation or fund" refers to appropriation and fund accounts. An appropriation account is the basic unit of an appropriation generally reflecting each unnumbered paragraph in an appropriation act. Fund accounts include general fund accounts, intragovernmental fund accounts, special fund accounts, and trust fund accounts.[40] *See*, *e.g.*, 72 Comp. Gen. 59 (1992) (Corps of Engineers was prohibited by the Antideficiency Act from overobligating its Civil Works Revolving Fund's available budget authority).

[39] Pursuant to the Federal Credit Reform Act, agencies are required to have budget authority in advance to cover the long-term costs (*i.e.*, subsidy costs) of direct loans and loan guarantees. 2 U.S.C. § 661c(b).

[40] *See* GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: September 2005), at 3–5.

Thus, for example, the Antideficiency Act applies to Indian trust funds managed by the Bureau of Indian Affairs. However, the investment of these funds in certificates of deposit with federally insured banks under authority of 25 U.S.C. § 162a does not, in GAO's opinion, constitute an obligation or expenditure for purposes of 31 U.S.C. § 1341. Accordingly, overinvested trust funds do not violate the Antideficiency Act unless the overinvested funds, or any attributable interest income, are obligated or expended by the Bureau. B-207047-O.M., June 17, 1983. *Cf.* B-303413, Nov. 8, 2004 (the Federal Communications Commission's (FCC) regulatory action to provide spectrum rights through a license modification instead of an auction did not violate section 1341; spectrum licenses that impose costs and expenses on the licensee do not constitute an obligation and expenditure of the FCC). GAO also views the Antideficiency Act as applicable to presidential and vice-presidential "unvouchered expenditure" accounts. B-239854, June 21, 1990 (internal memorandum).

a. Exhaustion of an Appropriation

When we talk about an appropriation being "exhausted," we are really alluding to any of several different but related situations:

- Depletion of appropriation account (*i.e.*, fully obligated and/or expended).
- Similar depletion of a maximum amount specifically earmarked in a lump-sum appropriation.[41]
- Depletion of an amount subject to a monetary ceiling imposed by some other statute (usually, but not always, the relevant program legislation).

(1) Making further payments

In simple terms, once an appropriation is exhausted, the making of any further payments, apart from using expired balances to liquidate or make adjustments to valid obligations recorded against that appropriation, violates 31 U.S.C. § 1341. When the appropriation is fully expended, no further payments may be made in any case. If an agency finds itself in this position, unless it has transfer authority or other clear statutory basis for

[41] See section B of this chapter for a discussion of earmarking.

making further payments, it has little choice but to seek a deficiency[42] or supplemental appropriation from Congress, and to adjust or curtail operations as may be necessary. *E.g.*, B-285725, Sept. 29, 2000; 61 Comp. Gen. 661 (1982); 38 Comp. Gen. 501 (1959). For example, when the Corporation for National and Community Service obligated funds in excess of the amount available to it in the National Service Trust, the Corporation suspended participant enrollment in the AmeriCorps program and requested a deficiency appropriation from Congress.[43]

In many ways, the prohibitions in the Adequacy of Appropriations Act, 41 U.S.C. § 11, parallel those of 31 U.S.C. § 1341(a). The Adequacy of Appropriations Act states in part that—

> "No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Department of Defense and in the Department of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year."

41 U.S.C. § 11(a). For example, a contract in excess of the available appropriation violates both statutes. *E.g.*, 9 Comp. Dec. 423 (1903). However, a contract in compliance with 41 U.S.C. § 11 can still result in a violation of the Antideficiency Act. Assessment of Antideficiency Act violations is not frozen at the point when the obligation is incurred. Even if the initial obligation was well within available funds, the Antideficiency Act can still be violated if upward adjustments cause the obligation to exceed available funds. *E.g.*, 55 Comp. Gen. 812, 826 (1976).

[42] See 31 U.S.C. §§ 1552(a), 1553(a), 1554(a), and Chapter 5, section D, for a discussion of expired and closed appropriation accounts.

[43] GAO, *Corporation for National and Community Service: Better Internal Control and Revised Practices Would Improve the Management of AmeriCorps and the National Service Trust*, GAO-04-225 (Washington, D.C.: Jan. 16, 2004).

What one authority termed the "granddaddy of all violations"[44] occurred when the Navy overobligated and overspent nearly $110 million from its "Military Personnel, Navy" appropriation during the years 1969–1972. GAO summarized the violation in a letter report, B-177631, June 7, 1973. While there may have been some concealment, GAO concluded that the violation was not the result of some evil scheme; rather, the "basic cause of the violation was the separation of the authority to create obligations from the responsibility to control them." The authority to create obligations had been decentralized while control was centralized in the Bureau of Naval Personnel.

Granddaddy was soon to lose his place of honor on the totem pole. Around November of 1975, the Department of the Army discovered that, for a variety of reasons, it had overobligated four procurement appropriations in the aggregate amount of more than $160 million and consequently had to halt payments to some 900 contractors. The Army requested the Comptroller General's advice on a number of potential courses of action it was considering. The resulting decision was 55 Comp. Gen. 768 (1976). The Army recognized its duty to mitigate the Antideficiency Act violation.[45] It was clear that without a deficiency appropriation, all the contractors could not be paid. One option—to use current appropriations to pay the deficiencies—had to be rejected because there is no authority to apply current funds to pay off debts incurred in a previous year. *Id.* at 773. An option GAO endorsed was to reduce the amount of the deficiencies by terminating some of the contracts for convenience, although the termination costs would still have to come from a deficiency appropriation unless there was enough left in the appropriation accounts to cover them. *Id.*

(2) Limitations on contractor recovery

If the Antideficiency Act prohibits any further payments when the appropriation is exhausted, where does this leave the contractor? Is the contractor expected to know how and at what rate the agency is spending its money? There is a small body of judicial case law which discusses the effect of the exhaustion of appropriations on government obligations. The

[44] Louis Fisher, *Presidential Spending Power*, 236 (1975).

[45] "We believe it is obvious that, once an Antideficiency Act violation has been discovered, the agency concerned must take all reasonable steps to mitigate the effects of the violation insofar as it remains executory." 55 Comp. Gen. at 772.

fate of the contractor seems to depend on the type of appropriation involved and the presence or absence of notice, actual or constructive, to the contractor on the limitations of the appropriation.

Where a contractor is but one party out of several to be paid from a general appropriation, the contractor is under no obligation to know the status or condition of the appropriation account on the government's books. If the appropriation becomes exhausted, the Antideficiency Act may prevent the agency from making any further payments, but valid obligations will remain enforceable in the courts. For example, in *Ferris v. United States*, 27 Ct. Cl. 542 (1892), the plaintiff had a contract with the government to dredge a channel in the Delaware River. The Corps of Engineers made him stop work halfway through the job because it had run out of money. In discussing the contractor's rights in a breach of contract suit, the court said:

> "A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects. An appropriation *per se* merely imposes limitations upon the Government's own agents; it is a definite amount of money entrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties."

Id. at 546.

The rationale for this rule is that "a contractor cannot justly be expected to keep track of appropriations where he is but one of several being paid from the fund." *Ross Construction Corp. v. United States*, 392 F.2d 984, 987 (Ct. Cl. 1968). Other illustrative cases are *Dougherty ex rel. Slavens v. United States*, 18 Ct. Cl. 496 (1883), and *Joplin v. United States*, 89 Ct. Cl. 345 (1939). The Antideficiency Act may "apply to the official, but [does] not affect the rights in this court of the citizen honestly contracting with the Government." *Dougherty*, 18 Ct. Cl. at 503. Thus, it is settled that contractors paid from a general appropriation are not barred from recovering for breach of contract even though the appropriation is exhausted.

However, under a specific line-item appropriation, the answer is different. The contractor in this situation is deemed to have notice of the limits on the spending power of the government official with whom he contracts. A contract under these circumstances is valid only up to the amount of the available appropriation. Exhaustion of the appropriation will generally bar any further recovery beyond that limit. *E.g.*, *Sutton v. United States*, 256 U.S. 575 (1921); *Hooe v. United States*, 218 U.S. 322 (1910); *Shipman v. United States*, 18 Ct. Cl. 138 (1883); *Dougherty*, 18 Ct. Cl. at 503.

The distinction between the *Ferris* and *Sutton* lines of cases follows logically from the old maxim that ignorance of the law is no excuse. If Congress appropriates a specific dollar amount for a particular contract, that amount is specified in the appropriation act and the contractor is deemed to know it. It is certainly not difficult to locate. If, on the other hand, a contract is but one activity under a larger appropriation, it is not reasonable to expect the contractor to know how much of that appropriation remains available for it at any given time. A requirement to obtain this information would place an unreasonable burden on the contractor, not to mention a nuisance for the government as well.

In two cases in the 1960s, the Court of Claims permitted recovery on contractor claims in excess of a specific monetary ceiling. *See Anthony P. Miller, Inc. v. United States*, 348 F.2d 475 (Ct. Cl. 1965) (claim by Capehart Housing Act contractor); *Ross Construction Corp. v. United States*, 392 F.2d 984 (Ct. Cl. 1968) (claim by contractor for "off-site" construction ancillary to Capehart Act housing). The court distinguished between matters not the fault or responsibility of the contractor (for example, defective plans or specifications or changed conditions under the "changed conditions" clause), in which case above-ceiling claims are allowable, and excess costs resulting from what it termed "simple extras," in which case they are not. Without attempting to detail the fairly complex Capehart legislation here, we note merely that *Ross* is more closely analogous to the *Ferris* situation (392 F.2d at 986), while *Anthony P. Miller* is more closely analogous to the *Sutton* situation (392 F.2d at 987). The extent to which the approach reflected in these cases will be applied to the more traditional form of exhaustion of appropriations remains to be developed, although the *Ross* court intimated that it saw no real distinction for these purposes between a specific appropriation and a specific monetary ceiling imposed by other legislation (*id.*).

b. Contracts or Other Obligations in Excess or Advance of Appropriations

It is easy enough to say that the Antideficiency Act prohibits you from obligating a million dollars when you have only half a million left in the account, or that it prohibits you from entering into a contract in September purporting to obligate funds for the next fiscal year that have not yet been appropriated. Many of the situations that actually arise from day to day, however, are not quite that simple. A useful starting point is the relationship of the Antideficiency Act to the recording of obligations under 31 U.S.C. § 1501.

(1) Proper recording of obligations

Proper recording practices are essential to sound funds control. An amount of recorded obligations in excess of the available appropriation is *prima facie* evidence of a violation of the Antideficiency Act, but is not conclusive. B-134474-O.M., Dec. 18, 1957.[46]

An example of this is B-300480, Apr. 9, 2003, in which the Corporation for National and Community Services failed to recognize and record obligations for national service educational benefits of AmeriCorps participants when it incurred that obligation. In that case, the Corporation made grant awards to state corporations, who, in turn, made subgrants to nonprofit entities, who enrolled participants. In its grant awards to the state corporations, the Corporation approved the enrollment of a specified number of new program participants. Because the Corporation in the grant agreement had committed to a specified number of new participants, the Corporation incurred an obligation for the participants' educational benefits at that time; without further action by the Corporation, the Corporation was legally required to pay education benefits of all participants, up to the number the Corporation had specified in the grant agreement, if the grantee and subgrantee, who needed no further approval from the Corporation, enrolled that number of new participants, and if they satisfied the criteria for benefits. The Corporation's failure to recognize and record its obligation did not ameliorate its violation of the Act. *See also* B-300480.2, June 6, 2003.

Also, in many situations, the amount of the government's liability is not definitely fixed at the time the obligation is incurred. An example is a

[46] GAO has cautioned, however, that an Antideficiency Act violation should not be determined solely on the basis of year-end reports prior to reconciliation and adjustment. B-114841.2-O.M., Jan. 23, 1986.

contract with price escalation provisions. A violation would occur if sufficient budget authority is not available when an agency must adjust a recorded obligation. *See*, *e.g.*, B-240264, Feb. 7, 1994 (an agency would incur an Antideficiency Act violation if it must adjust an obligation for an incrementally funded contract to fully reflect the extent of the *bona fide* need contracted for and sufficient appropriations are not available to support the adjustment).

This is illustrated in B-289209, May 31, 2002. After holding that the Coast Guard had wrongly used no-year funds from the Oil Spill Liability Trust Fund for administrative expenses, GAO concluded that the agency should adjust its accounting records by deobligating the incorrectly charged expenses and charging them instead to the proper appropriation. GAO advised the Coast Guard that these adjustments could result in a violation of the Antideficiency Act to the extent that there was insufficient budget authority, and that the agency should report any deficiency in accordance with the Antideficiency Act.

The incurring of an obligation in excess or advance of appropriations violates the Act, and this is not affected by the agency's failure to record the obligation. *E.g.*, 71 Comp. Gen. 502, 509 (1992); 65 Comp. Gen. 4, 9 (1985); 62 Comp. Gen. 692, 700 (1983); 55 Comp. Gen. 812, 824 (1976); B-245856.7, Aug. 11, 1992.

(2) Obligation in excess of appropriations

Incurring an obligation in excess of the available appropriation violates 31 U.S.C. § 1341(a)(1).[47] As the Comptroller of the Treasury advised an agency head many years ago, "your authority in the matter was strictly limited by the amount of the appropriation; otherwise there would be no limit to your power to incur expenses for the service of a particular fiscal year." 9 Comp. Dec. 423, 425 (1903). If you want higher authority, the Supreme Court has stated that, absent statutory authorization, "it is clear that the head of the department cannot involve the government in an obligation to pay any thing in excess of the appropriation." *Bradley v. United States*, 98 U.S. 104, 114 (1878).

[47] Determining the amount of available budget authority against which obligations may be incurred is covered later in this chapter in section C.2.e under the heading "Amount of Available Appropriation or Fund."

To take a fairly simple illustration, the statute was violated by an agency's acceptance of an offer to install automatic telephone equipment for $40,000 when the unobligated balance in the relevant appropriation was only $20,000. 35 Comp. Gen. 356 (1955).

In a 1969 case, the Air Force wanted to purchase computer equipment but did not have sufficient funds available. It attempted an arrangement whereby it made an initial down payment, with the balance of the purchase price to be paid in installments over a period of years, the contract to continue unless the government took affirmative action to terminate. This was nothing more than a sale on credit, and since the contract constituted an obligation in excess of available funds, it violated the Antideficiency Act. 48 Comp. Gen. 494 (1969).

(3) Variable quantity contracts

A leading case discussing the Antideficiency Act ramifications of "variable quantity" contracts (requirements contracts, indefinite quantity contracts, and similar arrangements) is 42 Comp. Gen. 272 (1962).[48] That decision considered a 3-year contract the Air Force had awarded to a firm to provide any service or maintenance work necessary for government aircraft landing on Wake Island. GAO questioned the legality of entering into a contract of more than 1 year since the Air Force had only a 1-year appropriation available. The Air Force argued that it was a "requirements" contract, that no obligation would arise unless or until some maintenance work was ordered, and that the only obligation was a negative one—not to buy service from anyone else but the contractor should the services be needed. GAO disagreed. The services covered were "automatic incidents of the use of the air field." There was no place for a true administrative determination that the services were or were not needed. There was no true "contingency" as the services would almost certainly be needed if the base were to remain operational. Accordingly, the contract was not a true requirements contract but amounted to a firm obligation for the needs of future years, and was therefore an unauthorized multiyear contract. As such, it violated the Antideficiency Act. The solution was to contract on an annual basis with renewal options from year to year, and, if that did not

[48] We cover the obligational treatment of contracts of this type in Chapter 7, section B.1.e, which should be read in conjunction with this section.

meet the Air Force's needs, then ask Congress for multiyear procurement authority.[49]

The Wake Island decision noted that the contract contained no provision permitting the Air Force to reduce or eliminate requirements short of a termination for convenience. *Id.* at 277. If the contract had included such a provision—and in the unlikely event that, given the nature of the contract, such a provision could have been meaningful—a somewhat different analysis might have resulted. Compare, for example, the situation in 55 Comp. Gen. 812 (1976). The exercise of a contract option required the Navy to furnish various items of government-furnished property (GFP), but another contract clause authorized the Navy to unilaterally delete items of GFP. If the entire quantity of GFP had to be treated as a firm obligation at the time the option was exercised, the obligation would have exceeded available appropriations, resulting in an Antideficiency Act violation. However, since the Navy was not absolutely obligated to furnish all the GFP items at the time the option was exercised, the Navy could avert a violation if it were able to delete enough GFP to stay within the available appropriation; if it found that it could not do so, the violation would then exist.[50] *See also* B-134474-O.M., Dec. 18, 1957.

In 47 Comp. Gen. 155 (1967), GAO considered an Air Force contract for mobile generator sets which specified minimum and maximum quantities to be purchased over a 12-month period. Since the contract committed the Air Force to purchase only the minimum quantity, it was necessary to obligate only sufficient funds to cover that minimum. *See also* B-287619, July 5, 2001. Subsequent orders for additional quantities up to the maximum were not legally objectionable as long as the Air Force had sufficient funds to cover the cost when it placed those orders. *See also*

[49] The authority was subsequently sought and granted. *See* 10 U.S.C. § 2306(g). For a discussion of multiyear contracting authority for defense and civilian agencies, which authorize obligating annual funds in advance of appropriations, see Chapter 5, section B.9.b.

[50] The rationale worked in that case because the Navy could stay within the appropriation by deleting a relatively small percentage of GFP. If the numbers had been different, such that the amount of GFP to be deleted was so large as to effectively preclude contractor performance, the analysis might well have been different. In a 1964 report, for example, GAO found the Antideficiency Act violated where the Air Force, to keep within a "minor military construction" ceiling, deleted needed plumbing, heating, and lighting from a building alteration contract, resulting in an incomplete facility, and subsequently charged the deleted items to Operation and Maintenance appropriations. GAO, *Continuing Inadequate Control over Programming and Financing of Construction*, B-133316 (Washington, D.C.: July 23, 1964), at 12–15.

19 Comp. Gen. 980 (1940). The fact that the Air Force, at the time it entered into the contract, did not have sufficient funds available to cover the maximum quantity was, for Antideficiency Act purposes, irrelevant. The decision distinguished the Wake Island case on the basis that nothing in the mobile generator contract purported to commit the Air Force to obtain any requirements over and above the specified minimum from the contractor.

In 63 Comp. Gen. 129 (1983), GAO found no Antideficiency Act problems with a General Services Administration "Multiple Award Schedule" contract under which no minimum purchases were guaranteed and no binding obligation would arise unless and until a using agency made an administrative determination that it had a requirement for a scheduled item.

Regardless of whether we are dealing with a requirements contract, indefinite quantity contract, or some variation, two points apply as far as the Antideficiency Act is concerned:

- Whether or not there is a violation at the time the contract is entered into depends on exactly what the government is obligated to do under the contract.

- Even if there is no violation at the time the contract is entered into, a violation may occur later if the government subsequently incurs an obligation under the contract in excess of available funds, for example, by electing to order a maximum quantity without sufficient funds to cover the quantity ordered.

A conceptually related situation is a contract that gives the government the option of two performances at different prices. The government can enter into such a contract without violating the Antideficiency Act as long as it has sufficient appropriations available at the time the contract is entered into to pay the lesser amount. For example, the Defense Production Act of 1950 authorizes the President to contract for synthetic fuels, but the contract must give the President the option to refuse delivery and instead pay the contractor the amount by which the contract price exceeds the prevalent market price at the time of the delivery. Such a contract would not violate the Antideficiency Act at the time it is entered into as long as sufficient appropriations are available to pay any anticipated difference between the contract price and the estimated market price at the time of performance. 60 Comp. Gen. 86 (1980). Of course, the government could

choose not to accept delivery unless there were sufficient appropriations available at that time to cover the full cost of the fuel under the contract.

An agreement to pay "special termination" costs under an incrementally funded contract creates a firm obligation, not a contingent liability, to pay the contractor because the contracting agency remains liable for the costs even if it decides not to fund the contract further. B-238581, Oct. 31, 1990.

(4) Multiyear or "continuing" contracts

A multiyear contract is a contract covering the needs or requirements of more than one fiscal year. Our discussion here presupposes a general familiarity with relevant portions of Chapter 5, primarily the nature of a fixed-term appropriation and the *bona fide* needs rule as it applies to multiyear contracts.

We start with some very basic propositions:

- A fixed-term appropriation (fiscal year or multiple year) may be obligated only during its period of availability.

- A fixed-term appropriation may be validly obligated only for the *bona fide* needs of that fixed term.

- The Antideficiency Act prohibits the making of contracts which exceed currently available appropriations or which purport to obligate appropriations not yet made.

As we have seen in Chapter 5, performance may extend into a subsequent fiscal year in certain situations. Also, as long as a contract is properly obligated against funds for the year in which it was made, actual payment can extend into subsequent years. Apart from these situations, and unless the agency either has specific multiyear contracting authority (*e.g.*, 62 Comp. Gen. 569 (1983)), is contracting in compliance with the multiyear contracting provisions of the Federal Acquisition Streamlining Act of 1994 (discussed below and in Chapter 5 in relation to the *bona fide* needs rule), or is operating under a no-year appropriation (*e.g.*, 43 Comp. Gen. 657 (1964)), the Antideficiency Act, together with the *bona fide* needs rule, prohibits contracts purporting to bind the government beyond the

obligational duration of the appropriation.[51] This is because the current appropriation is not available for future needs, and appropriations for those future needs have not yet been made. Citations to support this proposition are numerous.[52] The rule applies to any attempt to obligate the government beyond the end of the fiscal year, even where the contract covers a period of only a few months. 24 Comp. Gen. 195 (1944).

An understanding of the principles applicable to multiyear contracting begins with a discussion of a 1926 decision of the United States Supreme Court. An agency had entered into a long-term lease for office space with 1-year (*i.e.*, fiscal year) funds, but its contract specifically provided that payment for periods after the first year was subject to the availability of future appropriations. In *Leiter v. United States*, 271 U.S. 204 (1926), the Supreme Court specifically rejected that theory. The Court held that the lease was binding on the government only for one fiscal year, and it ceased to exist at the end of the fiscal year in which the obligation was incurred. It takes affirmative action to bring the obligation back to life. The Court stated its position as follows:

> "It is not alleged or claimed that these leases were made under any specific authority of law. And since at the time they were made there was no appropriation available for the payment of rent after the first fiscal year, it is clear that in so far as their terms extended beyond that year they were in violation of the express provisions of the [Antideficiency Act]; and, being to that extent executed without authority of law, they created no binding obligation against the United States after the first year. [Citations omitted.] A lease to the Government for a term of years, when entered into under an appropriation available for but one fiscal year, is binding on the Government only for that year. [Citations omitted.] And it is plain that, to make it binding for any subsequent year, it is necessary, not only that an appropriation be made

[51] Every violation of the *bona fide* needs rule does not necessarily violate the Antideficiency Act as well. Determinations must be made on a case-by-case basis. 71 Comp. Gen. 428, 431 (1992); B-235086.2, Jan. 22, 1992 (nondecision letter).

[52] *E.g.*, 67 Comp. Gen. 190 (1988); 66 Comp. Gen. 556 (1987); 61 Comp. Gen. 184, 187 (1981); 48 Comp. Gen. 471, 475 (1969); 42 Comp. Gen. 272 (1962); 37 Comp. Gen. 60 (1957); 36 Comp. Gen. 683 (1957); 33 Comp. Gen. 90 (1953); 29 Comp. Gen. 91 (1949); 27 Op. Att'y Gen. 584 (1909).

> available for the payment of the rent, but that the Government, by its duly authorized officers, affirmatively continue the lease for such subsequent year; thereby, in effect, by the adoption of the original lease, making a new lease under the authority of such appropriation for the subsequent year."

Id. at 206–07.

The Federal Acquisition Streamlining Act of 1994 (FASA) supplied the "specific authority of law" missing in *Leiter* to enable agencies to enter into multiyear contracts using fiscal year funds.[53] The multiyear contracts provision, codified at 41 U.S.C. § 254c, authorizes executive agencies, using fiscal year funds, to enter into multiyear contracts (defined as contracts for more than 1 but not more than 5 years) for the acquisition of property or services.

To take advantage of FASA, the agency must either (1) obligate the full amount of the contract to the appropriation current at the time it enters into the contract, or (2) obligate the costs of the first year of the contract plus termination costs. Of course, if the agency elects to obligate only the costs of the individual years for each year of the contract, the agency needs to obligate the costs of each such year against the appropriation current for that year. Contracts relying on FASA must provide that the contract will be terminated if funds are not made available for the continuation of the contract in any fiscal year covered by the contract. Funds available for termination costs remain available for such costs until the obligation for termination costs has been satisfied. 41 U.S.C. § 254c(b).

Importantly, FASA does not apply to all contracts that are intended to meet the needs of more than one fiscal year. Obviously, if multiple year or no-year appropriations are legally available for the full contract period, an agency need not rely on FASA. Also, certain contract forms do not constitute multiyear contracts within the scope of FASA. For example, in B-302358, Dec. 27, 2004, GAO determined that a Bureau of Customs and Border Protection procurement constituted an "indefinite-delivery, indefinite-quantity" (IDIQ) contract that was not subject to FASA. The

[53] See also 10 U.S.C. §§ 2306b and 2306c, which provide similar authority for defense agencies and the other agencies listed in 10 U.S.C. § 2302(1). FASA does not affect these authorities. 41 U.S.C. § 254c(e).

decision explained that, unlike a contract covered by FASA, an IDIQ contract does not obligate the government beyond its initial year. Rather, it obligates the government only to order a minimum amount of supplies or services. The cost of that minimum amount is recorded as an obligation against the appropriation current when the contract is entered into.[54]

Leiter provides the general framework governing the legality of contracts carrying potential liabilities beyond the fiscal year availability of the appropriations that funded them. While FASA provides the necessary authority to avoid the *Leiter* problems, the *Leiter* analysis remains relevant to the extent that FASA does not apply. Thus, GAO decisions interpreting *Leiter* before enactment of FASA still need to be considered. For example, GAO refused to approve an automatic, annual renewal of a contract for repair and storage of automotive equipment, even though the contract provided that the government had a right to terminate. The reservation of a right to terminate does not save the contract from the prohibition against binding the government in advance of appropriations. 28 Comp. Gen. 553 (1949).

The Post Office wanted to enter into a contract for services and storage of government-owned highway vehicles for periods up to 4 years because it could obtain a more favorable flat rate per mile of operations instead of an item by item charge required if the contract was for 1 year only. GAO held that any contract for continuous maintenance and storage of the vehicles would be prohibited by 31 U.S.C. § 1341 because it would obligate the government beyond the extent of the existing appropriation. However, there would be no legal objection to including a provision that gave the government an affirmative option to renew the contract from year to year, not to exceed 4 years as specified in the statute authorizing the Postmaster to enter into these types of contracts. 29 Comp. Gen. 451 (1950).[55]

Where a contract gives the government a renewal option, it may not be exercised until appropriations for the subsequent fiscal year actually become available. 61 Comp. Gen. 184, 187 (1981). Under a 1-year contract

[54] See Chapter 7, section B.1.e for a further discussion of recording obligations under IDIQ and similar contracts.

[55] Some additional cases are 67 Comp. Gen. 190 (1988); 66 Comp. Gen. 556 (1987); 42 Comp. Gen. 272, 276 (1962); 37 Comp. Gen. 155, 160 (1957); 37 Comp. Gen. 60, 62 (1957); 36 Comp. Gen. 683 (1957); 9 Comp. Gen. 6 (1929); B-116427, Sept. 27, 1955. *See also Cray Research v. United States*, 44 Fed. Cl. 327 (1999).

with renewal options, the fact that funds become available in subsequent years does not place the government under an obligation to exercise the renewal option. *Government Systems Advisors, Inc. v. United States*, 13 Cl. Ct. 470 (1987), *aff'd*, 847 F.2d 811 (Fed. Cir. 1988).[56]

Note that, in *Leiter*, the inclusion of a contract provision conditioning the government's obligation on the subsequent availability of funds was to no avail. In this regard, see also 67 Comp. Gen. 190, 194 (1988); 42 Comp. Gen. 272, 276 (1962); 36 Comp. Gen. 683 (1957). If a "subject to availability" clause were sufficient to permit multiyear contracting, the effect would be automatic continuation from year to year unless the government terminated. If funds were not available and the government nevertheless permitted or acquiesced in the continuation of performance, the contractor would obviously be performing in the expectation of being paid.[57] Apart from questions of legal liability, the failure by Congress to appropriate the money might be viewed as a serious breach of faith. Congress, as a practical if not a legal matter, would have little real choice but to appropriate funds to pay the contractor. This is another example of a type of "coercive deficiency" the Antideficiency Act was intended to prohibit.[58] Thus, it is not enough for the government to retain the option to terminate at any time if sufficient funds are not available. Under *Leiter* and its progeny, the contract "dies" at the end of the fiscal year, and may be revived only by affirmative action by the government. This "new" contract is then chargeable to appropriations for the subsequent year.

Although today FASA and the Federal Acquisition Regulation recognize "subject to availability" clauses, such a clause, by itself, is not sufficient. FASA provides that a multiyear contract for purposes of FASA—

> "may provide that performance under the contract during the second and subsequent years of the contract is

[56] The Claims Court based its conclusion in part on *Leiter* and the Antideficiency Act; the Federal Circuit relied on the language of the contract.

[57] The Federal Acquisition Regulation states that encouraging a contractor to continue performance in the absence of funds violates the Antideficiency Act. 48 C.F.R. § 32.704(c) (2005). In this regard, section C.3 of this chapter discusses how the Antideficiency Act's prohibition against acceptance of voluntary services, 31 U.S.C. § 1342, prohibits contracting officers from soliciting or permitting a contractor to continue performance on a "temporarily unfunded" basis.

[58] See section C.1 of this chapter for a discussion of the coercive deficiency concept.

> contingent upon the appropriation of funds and (if it does so provide) may provide for a cancellation payment to be made to the contractor if such appropriations are not made."

41 U.S.C. § 254c(d). If an agency decides to include a "subject to availability" clause for the second and subsequent years, the agency also has to provide for possible termination. Availability clauses are required by the Federal Acquisition Regulation in several situations. While the prescribed contract clauses vary in complexity, they all have one thing in common—each requires the contracting officer to specifically notify the contractor in writing that the contractor may resume performance. For example: (1) contract actions initiated prior to the availability of funds;[59] (2) certain requirements and indefinite-quantity contracts;[60] (3) fully funded cost-reimbursement contracts;[61] (4) facilities acquisition and use;[62] and (5) incrementally funded cost-reimbursement contracts.[63] *See* 48 C.F.R. subpt. 32.7. The objective of these clauses is compliance with the Antideficiency Act and other fiscal statutes. *See ITT Federal Laboratories*, ASBCA No. 12987, 69-2 BCA ¶ 7,849 (1969), *rev'd and remanded on other grounds*, *ITT v. United States*, 453 F.2d 1283 (1972). What is not sufficient is a simple "subject to availability" clause which would permit automatic continuation subject to the government's right to terminate.

In B-259274, May 22, 1996, the Air Force exercised an option to a severable service contract that extended the contract from September 1, 1994, to August 31, 1995, using fiscal year 1994 funds.[64] However, the Air Force only had enough fiscal year 1994 budget authority to finance 4 months of the option period, leaving the remaining 8 months unfunded. The Air Force modified the agreement by adding a clause stating that the government's obligation beyond December 31, 1994, was subject to the availability of appropriations. Significantly, however, the clause further stated that no

[59] Availability of Funds, 48 C.F.R. § 52.232-18.

[60] Availability of Funds for the Next Fiscal Year, 48 C.F.R. § 52.232-19.

[61] Limitation of Cost, 48 C.F.R. § 52.232-20.

[62] Limitation of Cost (Facilities), 48 C.F.R. § 52.232-21.

[63] Limitation of Funds, 48 C.F.R. § 52.232-22.

[64] See section B.9.a of Chapter 5 for a discussion of severable service contracts that cross fiscal years.

legal liability on the part of the government would arise for contract performance beyond December 31, 1994, unless and until the contractor received notice in writing from the Air Force contracting officer that the contractor could continue work. GAO held that this clause converted the government's obligation for the remaining 8 months to no more than a negative obligation not to procure services elsewhere should such services be needed. Since this contractual obligation created no financial exposure on the part of the government, the Air Force had not violated the Antideficiency Act.

It may be useful at this point to reiterate the basic principle that, in the context of contractual obligations, compliance with the Antideficiency Act is determined first on the basis of when an obligation occurs, not when actual payment is scheduled to be made. In the case of a contract with an option to renew, for example, as long as sufficient funds are available to cover the initial contract, there is no violation at the time the contract is made. No obligation accrues for future option years unless and until the government exercises its option.

Another issue to consider with respect to multiyear contracts is the relationship between termination charges and the Antideficiency Act. As a general proposition, the government has the right to terminate a contract "for the convenience of the government" if that action is determined to be in the government's best interests. The Federal Acquisition Regulation prescribes the required contract clauses. 48 C.F.R. subpt. 49.5.[65] Under a termination for convenience, the contractor is entitled to be compensated, including a reasonable profit, for the performed portion of the contract, but may not recover anticipatory profits on the terminated portion. *E.g.*, 48 C.F.R. §§ 49.201, 49.202. Total recovery may not exceed the contract price. *Id.* § 49.207.

In the typical contract covering the needs of only one fiscal year, termination does not pose a problem. Under 48 C.F.R. § 49.207, the contractor's recovery cannot exceed the contract price; thus, the basic contract obligation will be sufficient to cover potential termination costs. Under a contract with options to renew, however, the situation may differ. A contractor who must incur substantial capital costs at the outset has a

[65] Where a termination for convenience clause is required by regulation, it will be read into the contract whether expressly included or not. *G.L. Christian & Associates v. United States*, 312 F.2d 418 and 320 F.2d 345 (Ct. Cl.), *cert. denied*, 375 U.S. 954 (1963).

legitimate concern over recovering these costs if the government does not renew. A device sometimes used to address this problem, albeit with limited success, is a clause requiring the government to pay termination charges or "separate charges" upon early termination. As discussed in Chapter 5, section B.8.c, separate charges have been found to violate the *bona fide* needs rule to the extent they do not reasonably relate to the value of current fiscal year requirements. *E.g.*, 36 Comp. Gen. 683 (1957), *aff'd*, 37 Comp. Gen. 155 (1957).

Separate charges also have been held to violate the Antideficiency Act. The leading case in this area is 56 Comp. Gen. 142 (1976), *aff'd*, 56 Comp. Gen. 505 (1977). The Burroughs Corporation protested the award of a contract to the Honeywell Corporation to provide automatic data processing (ADP) equipment to the Mine Enforcement and Safety Administration. If all renewal options were exercised, the contract would run for 60 months after equipment installation. The contract included a "separate charges" provision under which, if the government failed to exercise any renewal option or otherwise terminated prior to the end of the 60-month systems life, the government would pay a percentage of all future years' rentals based on Honeywell's "list prices" at the time of failure to renew or of termination. This provision violated the Antideficiency Act for two reasons. First, it would amount to an obligation of fiscal year funds for the requirements of future years. And second, it would commit the government to indeterminate liability because the contractor could raise its list or catalog prices at any time. The government had no way of knowing the amount of its commitment. Similar cases involving separate charges are 56 Comp. Gen. 167 (1976); B-216718.2, Nov. 14, 1984; and B-190659, Oct. 23, 1978.[66]

The Burroughs decision also offers guidance on when separate charges may be acceptable. One instance is where it is the only way the government can obtain its needs. Cited in this regard was 8 Comp. Gen. 654 (1929), a case involving the installation of equipment and the

[66] The Burroughs case was decided before the enactment of the FASA multiyear contracts provision. As discussed above, that provision now enables agencies to enter into contracts like the one at issue in the Burroughs case without running afoul of the Antideficiency Act as long as they follow the terms of the statute by either obligating the full contract amount against appropriations available at the time of the contract or obligating the first year costs plus estimated termination costs. With reference to termination costs, FASA requires the contract to include a clause stating that the contract shall be terminated if funds are not made available for its continuation in any fiscal year and provides that amounts obligated for termination costs shall remain available until the costs are paid. 41 U.S.C. § 254c(b).

procurement of a water supply from a town. There, however, the town was the only source of a water supply, a situation clearly inapplicable to a competitive industry like ADP. 56 Comp. Gen. at 157. In addition, separate charges are permissible if they, together with payments already made, reasonably represent the value of requirements actually performed. Thus, where the contractor has discounted its price based on the government's stated intent to exercise all renewal options, separate charges may be based on the "reasonable value (*e.g.*, ADP schedule price) of the actually performed work at termination based upon the shortened term." *Id.* at 158. However, termination charges may not be inconsistent with the termination for convenience clause remedy; for example, they may not exceed the value of the contract or include costs not cognizable under a "T for C." *Id.* at 157.

Where termination charges are otherwise proper, the Antideficiency Act also requires that the agency have sufficient funds available to pay them if and when the contingency materializes. *E.g.*, 62 Comp. Gen. 143 (1983); 8 Comp. Gen. 654, 657 (1929). *See also Aerolease Long Beach v. United States*, 31 Fed. Cl. 342, 362 (1994), *aff'd*, 39 F.3d 1198 (Fed. Cir. 1994) (agency complied with Antideficiency Act requirements by including termination costs as current obligations). This requirement is sometimes specified in multiyear contracting legislation. An example is 40 U.S.C. § 322, the Information Technology Fund. In operating the Fund, the General Services Administration is authorized to enter into information technology multiyear contracts if "amounts are available and adequate to pay the costs of the contract for the first fiscal year and any costs of cancellation or termination." *Id.* § 322(e)(1)(A). Congress may also, of course, provide exceptions. *E.g.*,B-174839, Mar. 20, 1984.

c. Indemnification

Under an indemnification agreement, one party promises, in effect, to cover another party's losses. It is no surprise that the government is often asked to enter into indemnification agreements. The problem is that such agreements create a risk that the government, at some point in the future, may have to pay amounts in excess of available funds. Consequently, with one very limited exception discussed below, GAO and numerous courts have adhered to the rule that, absent express statutory authority, the government may not enter into an agreement to indemnify where the amount of the government's liability is indefinite, indeterminate, or

potentially unlimited.[67] Such an agreement would violate both the Antideficiency Act, 31 U.S.C. § 1341, and the Adequacy of Appropriations Act, 41 U.S.C. § 11, since it can never be said that sufficient funds have been appropriated to cover the government's indemnification exposure. As discussed in this section, indemnity clauses have been upheld under certain conditions:

- where the potential liability of the government was limited to a definite amount known at the time of the agreement, was within the amount of available appropriations, and was not otherwise prohibited by statute;

- where the indemnification agreement is a legitimate object of an appropriation, the agreement specifically provides that the amount of liability is limited to available appropriations, and there is no implication that Congress will, at a later date, appropriate funds to meet deficiencies; or

- where Congress has specifically authorized the agency to indemnify.

Although a provision limiting liability to appropriations available at the time a loss arises would prevent any overt Antideficiency Act or Adequacy of Appropriations Act violation by removing the "unlimited liability" objection, it could have disastrous fiscal consequences for the agency as well as present other, practical problems. For example, payment of an especially large indemnity obligation at the beginning of a fiscal year could wipe out the entire unobligated balance of the agency's appropriation for the rest of the fiscal year, forcing the agency to seek a supplemental appropriation to finance basic program activities. Conversely, if a liability arises toward the end of the fiscal year it is quite possible that no unobligated balance would be available for an indemnity payment, which means indemnification could prove largely illusory from the standpoint of the contractor or other "beneficiary."

Another practical problem concerns recording the obligations that may arise under indemnity clauses. The indemnity is a potential liability that may become an actual liability when some event outside of the

[67] The prohibition against incurring indefinite liabilities is not limited to indemnification agreements. It applies as well to types of liabilities such as contract termination charges. The cases are included in our preceding discussion of multiyear contracting. See section C.2.b of this chapter.

government's control is triggered, at which point the liability becomes a recordable obligation. This creates a fiscal dilemma, however. While the liability is not sufficiently definite at the time the indemnity agreement is made to formally record an obligation, good financial management requires that the agency recognize its contingent liability.[68] Although most of our cases do not directly address this issue, the ones that do, discussed below, have recommended either the obligation or administrative reservation[69] of sufficient funds to cover the potential liability. Clearly, however, this could create a fiscal nightmare where an estimate of potential liability could encompass the entire appropriation for the agency for that fiscal year, and tying up that entire sum would prevent the agency from meeting its mission.

What follows is a discussion of indemnification proposals in decisions issued over the years. As you will see, we have struggled with the practical problems posed by the inclusion of indemnity clauses in government contracts and agreements. For the past several years it has been our view that even if indemnification clauses are rewritten to meet the minimum requirements of the Antideficiency Act or Adequacy of Appropriations Act, there should be a clear governmentwide policy restricting their use. Given the potential liability of the government created by such clauses, exceptions to this policy should not be made without express congressional acquiescence, as has been done whenever Congress has decided that it was in the best interests of the government to assume the risks of having to pay off on an indemnity obligation. See, for example, 10 U.S.C. § 2354, 42 U.S.C. § 2210, and other examples given below.

(1) Prohibition against unlimited liability

As noted above, absent specific statutory authority, the government generally may not enter into an indemnification agreement which would impose an indefinite or potentially unlimited liability on the government. In plain English, you cannot purport to bind the government to unlimited liability. The rule is not some arcane GAO concoction. The Court of Claims stated in *California-Pacific Utilities Co. v. United States*, 194 Ct. Cl. 703, 715 (1971)):

[68] See section C.2.b of this chapter for a discussion of recording obligations.

[69] See section C.4.b of this chapter for a discussion on establishing reserves.

> "The United States Supreme Court, the Court of Claims, and the Comptroller General have consistently held that absent an express provision in an appropriation for reimbursement adequate to make such payment, [the Antideficiency Act, 31 U.S.C. § 1341] proscribes indemnification on the grounds that it would constitute the obligation of funds not yet appropriated. [Citations omitted.]"

For example, in an early case, the Interior Department, as licensee, entered into an agreement with the Southern Pacific Company under which the Department was to lay telephone and telegraph wires on property owned by the licensor in New Mexico. The agreement included a provision that the Department was to indemnify the Company against any liability resulting from the operation. Upon reviewing the indemnity provision, the Comptroller General found that it purported to impose indeterminate contingent liability on the government in violation of Revised Statutes § 3732, the predecessor to the Adequacy of Appropriations Act, 41 U.S.C. § 11. By including the indemnity provision, the contracting officer had exceeded his authority, and the provision was held void. 16 Comp. Gen. 803 (1937).

Similarly, an indefinite and unlimited indemnification provision in a lease entered into by the General Services Administration without statutory authority was held to impose no legal liability on the government since it violated the provisions of 31 U.S.C. § 1341 and 41 U.S.C. § 11. 35 Comp. Gen. 85 (1955).

In 59 Comp. Gen. 369 (1980), the National Oceanic and Atmospheric Administration (NOAA) desired to undertake a series of hurricane seeding experiments off the coast of Australia in cooperation with its Australian counterpart. The State Department, as negotiator, sought GAO's opinion on an Australian proposal under which the United States would agree to indemnify Australia against all damages arising from the activities. State recognized that an unlimited agreement would violate the Antideficiency Act and asked whether the proposal would be acceptable if it specified that the government's liability would be subject to the appropriation of funds by Congress for that purpose. GAO expressed dissatisfaction with this proposal because, even though it would impose no legal obligation unless or until funds are appropriated, it would impose a moral obligation on the

United States to make good on its promise.[70] There was a way out, however—insurance. Ordinarily, appropriations are not available to acquire insurance,[71] but GAO concluded that the government's policy of self-insurance did not apply here since the insurance would not be for the purpose of protecting against a risk to which the United States would be exposed but rather is the price exacted by Australia, as the United States' partner in an international venture, to protect Australia's interests. GAO said that NOAA could therefore purchase private insurance, with the premiums to be shared by the government of Australia, provided that the United States' liability under the agreement was limited to its share of the insurance premiums. NOAA's use of its appropriation for the United States' share of the insurance premium would simply be a necessary expense of the project.

Another decision applying the general rule held that the Federal Emergency Management Agency[72] could not agree to provide indeterminate indemnification to agents and brokers under the National Flood Insurance Act. B-201394, Apr. 23, 1981. If the agency considered indemnification necessary to the success of its program, it could either insert a provision limiting the government's liability to available appropriations or seek broader authority from Congress.

In B-201072, May 3, 1982, the Department of Health and Human Services questioned the use of a contract clause entitled "Insurance—Liability to Third Persons," found in the Federal Procurement Regulations (predecessor to the Federal Acquisition Regulation). The clause purported to permit federal agencies to agree to reimburse contractors, without limit, for liabilities to third persons for death, personal injury, or property damage, arising out of performance of the contract and not compensated by insurance, whether or not caused by the contractor's negligence. Since the clause purported to commit the government to an indefinite liability which could exceed available appropriations, the Comptroller General

[70] This is still another example of a so-called "coercive deficiency," particularly in light of the fact that the potential claimant was another sovereign nation and failure to honor the agreement would have international consequences. See section C.2.b of this chapter for a discussion of the "coercive deficiency" concept.

[71] For further information on the government's policy regarding self-insurance, see Chapter 4, section C.10.

[72] On March 1, 2003, the Federal Emergency Management Agency became part of the U.S. Department of Homeland Security.

found it in violation of the Antideficiency Act and the Adequacy of Appropriations Act. This decision was affirmed upon reconsideration in 62 Comp. Gen. 361 (1983), one of GAO's more comprehensive discussions of the indemnification problem.

For other cases applying or discussing the general rule, see B-260063, June 30, 1995; 35 Comp. Gen. 85 (1955); 20 Comp. Gen. 95, 100 (1940); 7 Comp. Gen. 507 (1928); 15 Comp. Dec. 405 (1909); B-242146, Aug. 16, 1991; B-117057, Dec. 27, 1957; A-95749, Oct. 14, 1938; 8 Op. Off. Legal Counsel 94 (1984); 2 Op. Off. Legal Counsel 219, 223–24 (1978). A brief letter report making the same point is GAO, *Agreements Describing Liability in Undercover Operations Should Limit the Government's Liability*, GGD-83-53 (Washington, D.C.: Mar. 15, 1983).

In some of the earlier GAO cases—for example, 7 Comp. Gen. 507 and 16 Comp. Gen. 803 (1937)—the Comptroller General offered as further support for the indemnification prohibition the then-existing principle that the United States was not liable for the tortious conduct of its employees. Of course, since the enactment of the Federal Tort Claims Act in 1946,[73] this is no longer true. Thus, the reader should disregard any discussion of the government's lack of tort liability appearing in the earlier cases. The thrust of those cases, namely, the prohibition against open-ended liability, remains valid.

The Comptroller General recognized a limited exception to the rule in 59 Comp. Gen. 705 (1980). In that decision, the Comptroller General held that the General Services Administration could agree to certain indemnity provisions in procuring public utility services for government agencies under the Federal Property and Administrative Services Act, 40 U.S.C. § 501. To apply the general rule against indemnification in this situation, the Comptroller General suggested, would constitute "an overly technical and literal reading of the Anti-Deficiency Act." *Id.* at 707. The decision reasoned as follows:

> "The procurement of goods or services from state-regulated utilities which are virtually monopolies is unique in important ways. As a practical matter, there is no other source for the needed goods or services. Moreover, the tariff requirements, such as this indemnification

[73] The Act is now codified at 28 U.S.C. §§ 2671–2680.

undertaking, are applicable generally to all of the same class of customers of the utility, and are included in the tariff only after administrative proceedings in which the government has the opportunity to participate. The United States is not being singled out for discriminatory treatment nor, presumably, can it complain that the objectionable provision was imposed without notice and the opportunity for a hearing.

"Under the circumstances, we have not objected in the past to the procurement of power by GSA under tariffs containing the indemnity clause and there is no reason to object to the purchase of power under contracts containing essentially the same indemnity clause. As noted already, this has of necessity been the practice in the past. The possibility of liability under the clause is in our judgment remote. In any event, we see little purpose to be served by a rule which prevents the United States from procuring a vital commodity under the same restrictions as other customers are subject to under the tariff if the utility insists that the restrictions are non-negotiable. However, because the possibility exists, however remote, that these agreements could result in future liability in excess of available appropriations, GSA should inform the Congress of the situation."

Id.

Subsequent decisions emphasize that the extent of the exception carved out by 59 Comp. Gen. 705 is limited to its facts. *See*, *e.g.*, B-260063, June 30, 1995; 62 Comp. Gen. 361 (1983); B-242146, Aug. 16, 1991. In B-197583, Jan. 19, 1981, GAO once again applied the general rule and held that the Architect of the Capitol could not agree to indemnify the Potomac Electric Power Company (PEPCO) for loss or damages resulting from PEPCO's performance of tests on equipment installed in government buildings or from certain other equipment owned by PEPCO which could be installed in government buildings to monitor electricity use for conservation purposes. GAO pointed to two distinguishing factors that justified—and limited—the exception in 59 Comp. Gen. 705. First, in 59 Comp. Gen. 705, there was no other source from which the government could obtain the needed utility services. Here, the testing and monitoring could be performed by

government employees. The second factor is summarized in the following excerpt from B-197583, Jan. 19, 1981:

> "An even more important distinction, though, is that unlike the situation in the GSA case [59 Comp. Gen. 705], the Architect has not previously been accepting the testing services or using the impulse device from PEPCO and has therefore not previously agreed to the liability represented by the proposed indemnity agreements. In the GSA case, GSA merely sought to enter a contract accepting the same service and attendant liability, previously secured under a non-negotiable tariff, at a rate more advantageous to the Government. Here, however, the Government has other means available to provide the testing and monitoring desired."

Thus, the case did not fall within the "narrow exception created by the GSA decision," and the proposed indemnity agreement was improper.

More recent decisions likewise reaffirm the general rule against open-ended indemnification agreements and reemphasize the limited application of the exception in 59 Comp. Gen. 705. In B-242146, Aug. 16, 1991, GAO held that the United States Park Police could not include in mutual assistance agreements with local law enforcement agencies a clause that the United States would indemnify the latter agencies against claims arising from police actions they took in national parks. Citing 62 Comp. Gen. 361 (1983) and other cases, the decision observed:

> "This Office has long held that absent statutory authority, indemnity provisions which subject the United States to indefinite or potentially unlimited contingent liability contravene the Antideficiency Act, 31 U.S.C. § 1341(a) . . . since it can never be said that sufficient funds have been appropriated to cover the contingency.
>
> "Here, the potential liability of the Park Police is unknown because the clause in question provides an indemnity for property damage and personal injury. There is no possible way to know at the time the [mutual assistance] memoranda are signed whether there are sufficient funds in the appropriation to cover a liability or when it arises under the

> indemnification clause because no one knows in advance how much the liability may be." (Footnote omitted.)

The decision rejected the argument that 59 Comp. Gen. 705 supported the indemnification clause in this case, stating:

> "[W]e were careful to point out in 62 Comp. Gen. at 364 . . . that 59 Comp. Gen. 705 should not serve as a precedent. Indeed, except for 59 Comp. Gen. 705, 'the accounting officers of the Government have never issued a decision sanctioning the incurring of an obligation for an open-ended indemnity in the absence of statutory authority to the contrary.' 62 Comp. Gen. 364–365."

In B-260063, June 30, 1995, GAO again distinguished 59 Comp. Gen. 705 in holding that a federal agency should not agree to indemnify a utility company for providing electricity to one of the agency's remote facilities. The decision pointed out that, unlike the situation in 59 Comp. Gen. 705, the indemnity clause proposed here was not part of a generally applicable tariff but would discriminate against the agency.

As indicated previously, the general rule against open-ended indemnity agreements has received consistent acceptance by the courts. Examples of court cases endorsing the general rule against open-ended indemnification are *Frank v. United States*, 797 F.2d 724, 727 (9th Cir. 1986); *Union Pacific Railroad Corp. v. United States*, 52 Fed. Cl. 730, 732–735 (2002); *Lopez v. Johns Manville*, 649 F. Supp. 149 (W.D. Wash. 1986), *aff'd on other grounds*, 858 F.2d 712 (Fed. Cir. 1988); *In re All Asbestos Cases*, 603 F. Supp. 599 (D. Hawaii 1984); *Johns-Manville Corp. v. United States*, 12 Cl. Ct. 1 (1987). Several of these are asbestos cases in which the courts rejected claims of an implied agreement to indemnify. In *Johns-Manville Corp.*, the court stated:

> "Contractual agreements that create contingent liabilities for the Government serve to create obligations of funds just as much as do agreements creating definite or certain liabilities. The contingent nature of the liability created by an indemnity agreement does not so lessen its effect on appropriations as to make it immune to the limitations of [the Antideficiency Act]."

12 Cl. Ct. at 25.

In *Hercules, Inc. v. United States*, 516 U.S. 417 (1996), the Supreme Court rejected the argument by a manufacturer of the Vietnam War-era defoliant "Agent Orange" that it had an implied-in-fact contract with the United States to indemnify it for tort damages arising from third-party claims against it. The Court noted that an implied-in-fact contract depends upon a meeting of the minds, and that such a meeting of the minds was unlikely given the rule against open-ended indemnity contracts:

> "There is . . . reason to think that a contracting officer would not agree to the open-ended indemnification alleged here. The Anti-Deficiency Act bars a federal employee or agency from entering into a contract for future payment of money in advance of, or in excess of, an existing appropriation. 31 U.S.C. § 1341. Ordinarily no federal appropriation covers contractors' payments to third-party tort claimants in these circumstances, and the Comptroller General has repeatedly ruled that Government procurement agencies may not enter into the type of open-ended indemnity for third-party liability that petitioner Thompson claims to have implicitly received under the Agent Orange contracts. We view the Anti-Deficiency Act, and the contracting officer's presumed knowledge of its prohibition, as strong evidence that the officer would not have provided, in fact, the contractual indemnification [petitioner] claims."

516 U.S. at 426–427 (footnotes omitted).

The Court cited several instances in which Congress had enacted statutory authorizations for indemnification, and noted that the existence of these statutory authorizations further militated against finding an implied contract to indemnify in this case:

> "These statutes [authorizing indemnification], set out in meticulous detail and each supported by a panoply of implementing regulations, . . . would be entirely unnecessary if an implied agreement to indemnify could arise from the circumstances of contracting. We will not interpret the [Agent Orange] contracts so as to render these statutes and regulations superfluous."

Id. at 429.[74]

The Federal Circuit's recent decision in *E.I. DuPont De Nemours & Company, Inc. v. United States*, 365 F.3d 1367 (Fed. Cir. 2004), provides an interesting twist. The issue in that case was whether an indemnity clause contained in a World War II-era contract required the United States to reimburse the contractor for environmental cleanup costs it incurred at the contract site as a result of liability imposed on it under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (popularly known as "CERCLA" or the "Superfund" law), 42 U.S.C. §§ 9601–9675.[75] The Court of Federal Claims had viewed the contract's indemnity clause as extending to CERCLA liability, but concluded that the general rule against open-ended indemnification applied to invalidate the clause under the Antideficiency Act:

> "Even though the Indemnification Clause was included in this contract and it is quite reasonable to assume that both the contracting officer and the contractor believed this Clause to place the risk of virtually all liabilities on the government rather than the contractor, the state of the law compels us to hold this clause to be void and unenforceable. . . .
>
> "Although we are of the opinion that the current state of the law compels the result expressed, this result is so totally at odds with the agreement the parties clearly made concerning reimbursement and indemnity, and plaintiff is so clearly entitled to the indemnity it seeks under the plain language of the contract it had with the government, made during truly emergency, wartime conditions, we suggest that plaintiff may want to consider the avenue for potential relief

[74] The Supreme Court's decision affirmed two Claims Court decisions that had similarly cited the general rule against indemnification agreements with respect to the Agent Orange contracts: *Wm. T. Thompson Co. v. United States*, 26 Cl. Ct. 17, 29 (1992); *Hercules Inc. v. United States*, 25 Cl. Ct. 616 (1992).

[75] See Major Randall J. Bunn, *Contractor Recovery for Current Environmental Cleanup Costs Under World War II-Era Government Indemnification Clauses*, 41 Air Force L. Rev. 163 (1997), for an extensive background discussion and analysis of the issues addressed in the *DuPont* case. This article also discusses at length the First War Powers Act and its successor, 50 U.S.C. § 1431 (Pub. L. No. 85-804, § 1, 72 Stat. 972 (Aug. 28, 1958)), which are referenced later in this section.

available in a Congressional Reference case pursuant to 28 U.S.C. §§ 1492 & 2509."

E.I. DuPont De Nemours & Company, Inc. v. United States, 54 Fed. Cl. 361, 372–373 (2002).

The Federal Circuit reversed in *E.I. DuPont De Nemours & Company, Inc.*, 365 F.3d 1367. The court did not question the general rule against open-ended indemnity provisions; nor did it dispute the lower court's conclusion that the indemnity clause in the DuPont contract was originally invalid under that rule. However, the court concluded that the government in effect ratified the clause through actions taken under a subsequent statute—the Contract Settlement Act of 1944, at 41 U.S.C. §§ 101, 120(a)—that did permit such indemnity provisions. Thus, the court reasoned, the indemnity clause in this case satisfied the "otherwise authorized by law" exception in the Antideficiency Act, 31 U.S.C. § 1341(a)(1)(B). *E.I. DuPont De Nemours & Company, Inc.*, 365 F.3d at 1375–80.

Executive branch adjudicative bodies such as boards of contract appeals and the Federal Labor Relations Authority have also applied the general anti-indemnity rule. *See Appeals of National Gypsum Co.*, ASBCA No. 53259, 03-1 B.C.A. ¶ 32,054 (2002) (indemnity provision of World War II contract unenforceable because in violation of the Antideficiency Act and the Executive Order under which the contract was entered into); *KMS Development Co. v. General Services Administration*, GSBCA No. 12584, 95-2 B.C.A. ¶ 27, 663 (1995) (no implied-in-fact contract of indemnity since such a contract would be *ultra vires* as a violation of the Antideficiency Act); *National Federation of Federal Employees and U.S. Department of the Interior*, 35 F.L.R.A. 1034 (1990) (proposal to indemnify union against judgments and litigation expenses resulting from drug testing program held contrary to law and therefore nonnegotiable); *American Federation of State, County and Municipal Employees and U.S. Department of Justice*, 42 F.L.R.A. 412, 515–17 (1991) (similar proposal for drug testing indemnification).

In sum, the GAO decisions, court cases, and other administrative decisions reflect a clear rule against open-ended indemnification agreements (absent statutory authority). Indeed, the Supreme Court's opinion in *Hercules, Inc. v. United States*, 516 U.S. 417 (1996), discussed previously, commented upon the nearly uniform line of Comptroller General decisions on this point, noting that 59 Comp. Gen. 705 stood as the "one peculiar exception." 516 U.S. at 428.

(2) When indemnification may be permissible

Indemnification agreements may be proper if they are limited to available appropriations and are otherwise authorized. Before ever getting to the question of amount, for an indemnity agreement to be permissible in the first place, it must be authorized either expressly or under a necessary expense theory. 59 Comp. Gen. 369 (1980). The determination as to whether an expense is necessary as incident to the object of the applicable funding source is determined on a case-by-case basis.[76] Although GAO generally affords agencies broad discretion in determining whether a specific expenditure is reasonably related to the accomplishment of an authorized purpose, an agency's discretion in such matters is not unlimited. 18 Comp. Gen. 285, 292 (1938). GAO has had occasion both to approve and to disapprove contract indemnification provisions as necessary or incident to the object of the applicable funding source. *See*, *e.g.*, 63 Comp. Gen. 145, 150 (1984) (all but one indemnity provision in contracts for vessels were approved as incidental expenses under the Navy's authorized prepositioning ship chartering program); 59 Comp. Gen. 369 (disapproved—general statutory authority to carry out international programs did not provide authority for the United States to agree to provide complete indemnification of another country for all damages resulting from an international weather modification project); 42 Comp. Gen. 708, 712 (1963) (approved—obligation of an agency for damage or destruction that might arise under an indemnity clause in an aircraft rental contract was a necessary expense incident to the hiring of aircraft for which the agency's appropriation was expressly available); B-201394, Apr. 23, 1981 (disapproved—no specific appropriation was available to pay costs arising under a clause indemnifying agents and brokers under the National Flood Insurance program); B-137976, Dec. 4, 1958 (disapproved—an obligation arising under an indemnity provision in an agency's agreement for training with a nongovernment facility was not a necessary expense under the statute authorizing such training agreements).

Once you cross the purpose hurdle—that is, once you determine that the indemnification proposal you are considering is a legitimate object on which to spend your appropriations—you are ready to grapple with the unlimited liability issue.

[76] See Chapter 4, section B for a discussion of the necessary expense rule.

One way to deal with this issue is to specifically limit the amount of the liability assumed. Such a limitation of an indemnity agreement may come about in either of two ways: it may follow necessarily from the nature of the agreement itself or it may be expressly written into the agreement, coupled with an appropriate obligation or administrative reservation of funds. The latter alternative is the only acceptable one where the government's liability would otherwise be potentially unlimited.

For example, where the government rented buses to transport Selective Service registrants for physical examination or induction, there was no objection to the inclusion of an indemnity provision for damage to the buses caused by the registrants. This was a standard provision in the applicable motor carrier charter coach tariff. 48 Comp. Gen. 361 (1968). Potential liability was not indefinite since it was necessarily limited to the value of the motor carrier's equipment.

Similarly, under a contract for the lease of aircraft, the Federal Aviation Administration (FAA) could agree to indemnify the owner for loss or damage to the aircraft in order to eliminate the need to reimburse the owner for the cost of "hull insurance" and thereby secure a lower rental rate. The liability could properly be viewed as a necessary expense incident to hiring the aircraft, FAA had no-year appropriations available to pay for any such liability, and, as in the Selective Service case, the agreement was not indefinite because maximum liability was measurable by the fair market value of the aircraft. 42 Comp. Gen. 708 (1963). *See also* 22 Comp. Gen. 892 (1943) (Maritime Commission could amend contract to agree to indemnify contractor against liability to third parties, in lieu of reimbursing contractor for cost of liability insurance premiums, to the extent of available appropriations and provided liability was limited to the amount of coverage of the discontinued insurance policies replaced by the indemnity agreement).[77]

In B-114860, Dec. 19, 1979, the Farmers Home Administration asked whether it could purchase surety bonds or enter into an indemnity agreement in order to obtain the release of deeds of trust for borrowers in Colorado where the original promissory notes had been lost while in the

[77] The decision in 22 Comp. Gen. 892 is discussed in 62 Comp. Gen. 361, 362–63 (1983), and *Johns-Manville Corp. v. United States*, 12 Cl. Ct. 1, 23 (1987). The Claims Court noted the "significant deficiency" of 22 Comp. Gen. 892 in that it nowhere mentions the Antideficiency Act.

Administration's custody. Colorado law required one or the other where the canceled original note could not be delivered to the Colorado public trustee. GAO concluded that the indemnity agreement was permissible as long as it was limited to an amount not to exceed the original principal amount of the trust deed. The decision further advised that the Administration should reserve sufficient funds to cover its potential liability. The latter aspect of the decision was reconsidered in B-198161, Nov. 25, 1980. Reviewing the particular circumstances involved, GAO was unable to foresee situations in which the government might be required to indemnify the public trustee, and accordingly advised the Administration that the reservation of funds would not be necessary. While reservation of the funds may not have been necessary, GAO did state: "Although the liability which arises from an indemnity agreement to secure the release of a trust deed may be contingent, the maximum cost of liquidating that liability would normally be a recordable expense limited by the administration's annual budget authority."

In 63 Comp. Gen. 145 (1984), certain indemnification provisions in a ship-chartering agreement were found not to impose indefinite or potentially unlimited contingent liability because liability could be avoided by certain separate actions solely under the government's control.

In cases like the Selective Service bus case (48 Comp. Gen. 361) and the FAA aircraft case (42 Comp. Gen. 708), even though the government's potential liability is limited and determinable, this fact alone does not guarantee that the agency will have sufficient funds available should the contingency ripen into an obligation. This concern is met in one of two ways. The first is either to obligate or to reserve administratively sufficient funds to cover the potential liability, although this point has not been completely explored in past decisions. In particular cases, reservation may be determined unnecessary, as in B-198161, Nov. 25, 1980, discussed above. Also, naturally, a specific directive from Congress will render reservation of funds unnecessary. *See* B-159141, Aug. 18, 1967 (reservation of termination costs for supersonic aircraft contract). The second way is for the agreement to expressly limit the government's liability to appropriations available at the time of the loss with no implication that Congress will appropriate funds to make up any deficiency.

This second device—the express limitation of the government's liability to available appropriations—is sufficient to cure an otherwise fatally defective (*i.e.*, unlimited) indemnity proposal. For example, the government may in limited circumstances assume the risk of loss to

contractor-owned property. While the maximum potential liability would be determinable, it could be very large and the administrative reservation of funds is not feasible. Thus, without some form of limitation, such an agreement could result in obligations in excess of available appropriations. The rules concerning the government's assumption of risk on property owned by contractors and used in the performance of their contracts are set forth in 54 Comp. Gen. 824 (1975), *modifying* B-168106, July 3, 1974. The rules are summarized below:[78]

- If administratively determined to be in the best interest of the government, the government may assume the risk for contractor-owned property which is used solely in the performance of government contracts.

- The government may not assume the risk for contractor-owned property which is used solely for nongovernment work. If the property is used for both government and nongovernment work and the nongovernment portion is separable, the government may not assume the risk relating to the nongovernment work.

- Where the amount of a contractor's commercial work is so insignificant when compared to the amount of the contractor's government work that the government is effectively bearing the entire risk of loss by in essence paying the full insurance premiums, the government may assume the risk if administratively determined to be in the best interest of the government.

Any agreement for the assumption of risk by the government under the above rules must contain a clause to clearly provide that, in the event the government has to pay for losses, payments may not exceed appropriations available at the time of the losses, and that nothing in the contract may be considered as implying that Congress will at a later date appropriate funds sufficient to meet deficiencies. 54 Comp. Gen. at 827.

[78] The decision in 54 Comp. Gen. 824 overruled a portion of 42 Comp. Gen. 708 (the FAA aircraft lease case), discussed in the text, to the extent it held that there was no need to either obligate or reserve funds. Thus, in a situation like 42 Comp. Gen. 708, the agency would presumably have to either obligate or administratively reserve funds or include a provision that payments for losses may not exceed appropriations available at the time of the loss and nothing in the contract may be construed as implying that Congress will appropriate funds to meet any deficiencies at a later date.

A somewhat different situation was discussed in 60 Comp. Gen. 584 (1981), involving an "installment purchase plan" for automatic data processing equipment. Under the plan, the General Services Administration would make monthly payments until the entire purchase price was paid, at which time GSA would acquire unencumbered ownership of the equipment. GSA's obligation was conditioned on its exercising an option at the end of each fiscal year to continue payments for the next year. The contract contained a risk of loss provision under which GSA would be required to pay the full price for any equipment lost or damaged during the term of the contract. GAO concluded that the equipment should be treated as contractor-owned property for purposes of the risk of loss provision, and that the provision would be improper unless one of the following conditions were met:

- The contract includes the clause specified in 54 Comp. Gen. 824 limiting GSA's liability to appropriations available at the time of the loss and expressly precluding any inference that Congress would appropriate sufficient funds to meet any deficiency; or

- If the contract does not include these restrictions, then GSA must obligate sufficient funds to cover its possible liability under the risk of loss provision.

If neither of these conditions is met, the assumption of risk clause could violate the Antideficiency Act by creating an obligation in excess of available appropriations if any equipment is lost or damaged during the term of the contract.

In 1982, the Defense Department and the state of New York entered into a contract for New York to provide certain support functions for the 1980 Winter Olympic Games at Lake Placid. The contract provided for federal reimbursement of any disability benefits which New York might be required to pay in case of death or injury of persons participating in the operation. The contract specified that the government's liability could not exceed appropriations for assistance to the Games available at the time of a disabling event, and that the contract did not imply that Congress would appropriate funds sufficient to meet any deficiencies. Since these provisions satisfied the test of 54 Comp. Gen. 824, the indemnity agreement was not legally objectionable. B-202518, Jan. 8, 1982. Under this type of arrangement, GAO noted that an estimated amount should have been recorded as an obligation when the agency was notified that a disabling event had occurred. However, no violation of the Antideficiency Act

actually occurred in this case because sufficient funds remained available for obligation at the time New York filed its claim for indemnification under the contract.

Also, the decision in the National Flood Insurance Act case mentioned above (B-201394, Apr. 23, 1981) noted that the defect could have been cured by inserting a clause along the lines of the clause in 54 Comp. Gen. 824. The same point was made in B-201072, May 3, 1982, also discussed earlier. *See also National Railroad Passenger Corp. v. United States*, 3 Cl. Ct. 516, 521 (1983) (indemnification agreement between the Federal Railroad Administration and Amtrak did not violate Antideficiency Act where liability was limited to amount of appropriation).

However, as noted in the introduction to this section, over the years GAO has expressed the view that indemnity agreements, even with limiting language, should not be entered into without congressional approval in view of their potentially disruptive fiscal consequences to the agency.[79] 63 Comp. Gen. 145, 147 (1984); 62 Comp. Gen. 361, 368 (1983); B-242146, Aug. 16, 1991. If an agency thinks that indemnification agreements in a particular context are sufficiently in the government's interest, the preferable approach is for the agency to go to Congress and seek specific statutory authority. *See* B-201394, Apr. 23, 1981.

As discussed below, Congress has seen fit to enact legislation authorizing indemnification agreements when warranted by the circumstances. In 1986, the Chairman of the Subcommittee on Nuclear Regulation, Senate Committee on Environment and Public Works, in connection with proposed Price-Anderson Act amendments the committee was considering, asked GAO to identify possible funding options for a statutory indemnification provision. GAO's response, B-197742, Aug. 1, 1986, listed several options and noted the benefits and drawbacks of each from the perspective of congressional flexibility. The options ranged from creating a statutory entitlement with a permanent indefinite appropriation for payment (indemnity guaranteed but no congressional flexibility), to making payment fully dependent on the appropriations process (full congressional flexibility but no guarantee of payment). In between were

[79] To illustrate the potential fiscal consequences, an authorized indemnity agreement entered into in 1950 produced liability of over $64 million plus interest more than four decades later. *See E.I. Du Pont De Nemours & Co. v. United States*, 24 Cl. Ct. 635 (1991), *aff'd*, 980 F.2d 1440 (Fed. Cir. 1992).

various other devices such as contract authority, use of contract provisions such as those in 54 Comp. Gen. 824, and various forms of limited funding authority.[80]

The discussion in B-197742 highlights the essence of the indemnification funding problem:

> "An indemnity statute should generally include two features—the indemnification provisions and a funding mechanism. Indemnification provisions can range from a legally binding guarantee to a mere authorization. Funding mechanisms can similarly vary in terms of the degree of congressional control and flexibility retained. It is impossible to maximize both the assurance of payment and congressional flexibility. Either objective is enhanced only at the expense of the other. . . .
>
> * * * * *
>
> "If payment is to be assured, Congress must yield control over funding, either in whole or up to specified ceilings . . . . Conversely, if Congress is to retain funding control, payment cannot be assured in any legally binding form and the indemnification becomes less than an entitlement."

B-197742 at 9, 11.

(3) Statutorily authorized indemnification

When we first stated the anti-indemnity rule at the outset of this discussion, we noted that the rule applies in the absence of express statutory authority to the contrary. Naturally, an indemnification agreement, however open-ended it may be, will be "legal" if it is expressly authorized by statute.

One statutory exception to the indemnification rules exists for certain defense-related contracts by virtue of 50 U.S.C. § 1431, often referred to by

[80] Note that the Price-Anderson Act, at 42 U.S.C. § 2210(j), provided contract rather than indemnity authority to the Nuclear Regulatory Commission (NRC) to address indemnification and other financial protection that NRC is required to provide nuclear licensees, contractors, and others to cover the consequences of nuclear incidents.

its Public Law designation, Public Law 85-804.[81] The statute evolved from a temporary wartime measure, section 201 of the First War Powers Act, 1941, ch. 493, 55 Stat. 838, 839 (Dec. 18, 1941). The implementing details on indemnification are found in Executive Order No. 10789, as amended,[82] and Federal Acquisition Regulation (FAR), 48 C.F.R. part 50 (2005). For example, while the decision to indemnify under Public Law 85-804 is discretionary, B-287121, Mar. 20, 2001, such discretion must be exercised by the agency head and cannot be delegated. B-257139, Aug. 30, 1994, *citing* FAR, 48 C.F.R. § 50.201(d).

Other examples of statutory exceptions are:

- section 4 of the Price-Anderson Act, 42 U.S.C. § 2210, which provides contract authority permitting, among other things, indemnification agreements with Nuclear Regulatory Commission licensees and Department of Energy contractors to pay claims resulting from nuclear accidents;

- section 119 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9619, which authorizes indemnification of certain Superfund cleanup contractors against negligence (but not gross negligence or intentional misconduct);

- section 308 of the National Aeronautics and Space Act, 42 U.S.C. § 2458b, which authorizes the Administrator of the National Aeronautics and Space Administration (NASA) to indemnify users of NASA space vehicles against third party claims that are not covered by insurance;

- section 2354 of title 10, United States Code, which authorizes the military departments to indemnify research and development contractors against liability not covered by insurance; and

[81] Pub. L. No. 85-804, § 1, 72 Stat. 972 (Aug. 28, 1958).

[82] Exec. Order No. 10789, *Contracting Authority of Government Agencies In Connection With National Defense Functions*, 23 Fed. Reg. 8897 (Nov. 14, 1958), as amended, 50 U.S.C. § 1431 note. A decision approving an indemnity agreement under authority of the First War Powers Act is B-33801, Apr. 19, 1943. A later related decision is B-33801, Oct. 27, 1943. Both of these decisions involved the famed "Manhattan Project," although that fact is well-concealed. The decisions had been classified, but were declassified in 1986.

- section 7423(2) of title 26, United States Code, which authorizes indemnification of federal employees for damages awarded in suits involving their performance of duties under the Internal Revenue Code.

Congress also may enact legislation to provide indemnification for a specific or one-time event. For example, Congress specifically indemnified the manufacturers, distributors, and those who administered the swine flu vaccine purchased and used as part of the National Swine Flu Immunization Program of 1976 against liability for other than their own negligence to persons alleging personal injury or death arising out of the administration of such vaccine. Pub. L. No. 94-380, 90 Stat. 1113 (Aug. 12, 1976).

d. Specific Appropriation Limitations/Purpose Violations

In Chapter 4 we covered in some detail 31 U.S.C. § 1301(a), which prohibits the use of appropriations for purposes other than those for which they were appropriated. As seen in that chapter, violations of purpose availability can arise in a wide variety of contexts—charging an obligation or expenditure to the wrong appropriation, making an obligation or expenditure for an unauthorized purpose, violating a statutory prohibition or restriction, *etc*. The question we explore in this section is the relationship of purpose availability to the Antideficiency Act. In other words, when and to what extent does a purpose violation also violate the Antideficiency Act?

Why does it matter whether you have violated one statute or two statutes? One reason is that, if the second statute is the Antideficiency Act, there are statutory reporting requirements and potential penalties to consider in addition to any administrative sanctions that agencies may impose through internal processes for violations of section 1301 alone.

A useful starting point is the following excerpt from 63 Comp. Gen. 422, 424 (1984):

> "Not every violation of 31 U.S.C. § 1301(a) also constitutes a violation of the Antideficiency Act. . . . Even though an expenditure may have been charged to an improper source, the Antideficiency Act's prohibition against incurring obligations in excess or in advance of available appropriations is not also violated unless no other funds were available for that expenditure. Where, however, no other funds were authorized to be used for the purpose in question (or where those authorized were already

> obligated), both 31 U.S.C. § 1301(a) and § 1341(a) have been violated. In addition, we would consider an Antideficiency Act violation to have occurred where an expenditure was improperly charged and the appropriate fund source, although available at the time, was subsequently obligated, making readjustment of accounts impossible."

First, suppose an agency charges an obligation or expenditure to the wrong appropriation account, either charging the wrong appropriation for the same time period, or charging the wrong fiscal year. The above passage from 63 Comp. Gen. 422 provides the answer—if the appropriation that should have been charged in the first place has sufficient available funds to enable the adjustment of accounts, there is no Antideficiency Act violation. The decision in 73 Comp. Gen. 259 (1994) illustrates this point. In that case, an agency had erroneously charged a furniture order to the wrong appropriation account, but had sufficient funds in the proper account to support an adjustment correcting the error. Thus, GAO concluded, there was no violation of the Antideficiency Act. *Id.* at 261. On the other hand, a violation exists if the proper account does not have enough money to permit the adjustment, and this includes cases where sufficient funds existed at the time of the error but have since been obligated or expended. *See also* 70 Comp. Gen. 592 (1991); B-222048, Feb. 10, 1987; B-95136, Aug. 8, 1979.

Other cases illustrating or applying this principle are 57 Comp. Gen. 459 (1978) (grant funds charged to wrong fiscal year); B-224702, Aug. 5, 1987 (contract modifications charged to expired accounts rather than current appropriations); and B-208697, Sept. 28, 1983 (items charged to General Services Administration Working Capital Fund which should have been charged to other operating appropriations). Actually, the concept of "curing" a violation by making an appropriate adjustment of accounts is not new. *See*, *e.g.*, 16 Comp. Dec. 750 (1910); 4 Comp. Dec. 314, 317 (1897). The Armed Services Board of Contract Appeals also has followed this principle. *New England Tank Industries of New Hampshire*, *Inc.*, ASBCA No. 26474, 88-1 BCA ¶ 20,395 (1987).[83]

[83] Although the Board's decision was vacated and remanded on other grounds by the Court of Appeals for the Federal Circuit, *New England Tank Industries of New Hampshire v. United States*, 861 F.2d 685 (Fed. Cir. 1988), the court noted its agreement with the Board's Antideficiency Act conclusions. *Id.* at 692 n.15.

The next situation to consider is an obligation or expenditure in excess of a statutory ceiling. This may be an earmarked maximum in a more general appropriation or a monetary ceiling imposed by some other legislation. An obligation or expenditure in excess of the ceiling violates 31 U.S.C. § 1341(a). See, for example, the following:

- *Monetary ceilings on minor military construction (10 U.S.C. § 2805):* 63 Comp. Gen. 422 (1984); GAO, *Continuing Inadequate Control Over Programming and Financing of Construction*, B-133316 (Washington, D.C.: July 23, 1964); *Review of Programming and Financing of Selected Facilities Constructed at Army, Navy, and Air Force Installations*, B-133316 (Washington, D.C.: Jan. 24, 1961).[84]

- *Monetary ceiling on lease payments for family housing units in foreign countries (10 U.S.C. § 2828(e)):* 66 Comp. Gen. 176 (1986); B-227527, B-227325, Oct. 21, 1987 (nondecision letter); GAO, *Leased Military Housing Costs in Europe Can Be Reduced by Improving Acquisition Practices and Using Purchase Contracts*, GAO/NSIAD-85-113 (Washington, D.C.: July 24, 1985), at 7–8.

- *Ceiling in supplemental appropriation:* B-204270, Oct. 13, 1981 (dollar limit on Standard Level User Charge payable by agency to General Services Administration).[85]

- *Ceiling in authorizing legislation:* 64 Comp. Gen. 282 (1985) (dollar limit on two Small Business Administration direct loan programs).

In a statutory ceiling case, the account adjustment concept described above may or may not come into play. If the ceiling represents a limit on the amount available for a particular object, then there generally will be no other funds available for that object and hence no "correct" funding source from which to reimburse the account charged. If, however, the ceiling represents only a limit on the amount available from a particular

[84] Another report in this series, making similar findings under a different statutory ceiling, is GAO, *Illegal Use of Operation and Maintenance Funds for Rehabilitation and Construction of Family Housing and Construction of a Related Facility*, B-133102 (Washington, D.C.: Aug. 30, 1963).

[85] This case also illustrates that the Antideficiency Act applies to interagency transactions the same as any other obligations or expenditures. *Cf.* B-247348, June 22, 1992 (nonreimbursable interagency personnel detail).

appropriation and not an absolute limit on expenditures for the object, as in the minor military construction cases, for example, then it may be possible to cure violations by an appropriate adjustment. 63 Comp. Gen. at 424.

The final situation is an obligation or expenditure for an object that is prohibited or simply unauthorized. In 60 Comp. Gen. 440 (1981), a proviso in the Customs Service's 1980 appropriation expressly prohibited the use of the appropriation for administrative expenses to pay any employee overtime pay in an amount in excess of $20,000. By allowing employees to earn overtime pay in excess of that amount, the Customs Service violated 31 U.S.C. § 1341. The Comptroller General explained the violation as follows:

> "When an appropriation act specifies that an agency's appropriation is not available for a designated purpose, and the agency has no other funds available for that purpose, any officer of the agency who authorizes an obligation or expenditure of agency funds for that purpose violates the Antideficiency Act. Since the Congress has not appropriated funds for the designated purpose, the obligation may be viewed either as being in excess of the amount (zero) available for that purpose or as in advance of appropriations made for that purpose. In either case the Antideficiency Act is violated."

Id. at 441.

In B-201260, Sept. 11, 1984, the Comptroller General advised that expenditures in contravention of the Boland Amendment would violate the Antideficiency Act (although none were found in that case). The Boland Amendment, an appropriation rider, provided that "[n]one of the funds provided in this Act may be used" for certain activities in Central America. In B-229732, Dec. 22, 1988, GAO found the Antideficiency Act violated when the Department of Housing and Urban Development used its funds for commercial trade promotion activities in the Soviet Union, an activity beyond its statutory authority. Similarly, a nonreimbursable interagency detail of an employee, contrary to a specific statutory prohibition, produced a violation in B-247348, June 22, 1992 (letter to Public Printer). All three cases also involved purpose violations and are consistent with

60 Comp. Gen. 440, the rationale being that expenditures would be in excess of available appropriations, which were zero.[86]

More recent GAO decisions likewise consistently apply the principle that the use of appropriated funds for unauthorized or prohibited purposes violates the Antideficiency Act (absent an alternative funding source) since zero funds are available for that purpose. B-302710, May 19, 2004 (use of funds in violation of statutory prohibition against publicity or propaganda); B-300325, Dec. 13, 2002 (appropriations used for unauthorized technical assistance purposes); B-300192, Nov. 13, 2002 (violation of appropriation rider prohibiting use of funds to implement an Office of Management and Budget memorandum); B-290005, July 1, 2002 (appropriation used to procure unauthorized legal services); 71 Comp. Gen. 402, 406 (1992) (unauthorized use of Training and Employment Services appropriation); B-246304, July 31, 1992 (potential violation of appropriation act "Buy American" provision); B-248284, Sept. 1, 1992 (nondecision letter) (reprogramming of funds to an unauthorized purpose).

One court reached a result that appears to interpret the Antideficiency Act somewhat differently. In *Southern Packaging and Storage Co. v. United States*, 588 F. Supp. 532 (D.S.C. 1984), the court found that the Defense Department had purchased certain combat meal products ("MRE") in violation of a "Buy American" appropriation rider, which provided that "[n]o part of any appropriation contained in this Act . . . shall be available" to procure items not grown or produced in the United States. The court rejected the contention that the violation also contravened the Antideficiency Act, stating:

> "There is no evidence in this case to show that [the Defense Personnel Supply Center] authorized expenditures beyond the amount appropriated by Congress for the procurement of the MRE rations and the component foods thereof."

Id. at 550.

[86] There are also a few older cases finding violations of both statutes, but they are of little help in attempting to formulate a reasoned approach. Examples are 39 Comp. Gen 388 (1959), which does not discuss the relationship, and 22 Comp. Gen. 772 (1943), which includes a rationale, now obsolete, based on the then-existing lack of authority to include interest stipulations in contracts.

Given the sparse discussion in the decision, the fact that Congress does not make specific appropriations for MRE rations, and the fact that the Antideficiency Act regulates both obligations and expenditures in excess of available authority, it is difficult to discern precisely how the *Southern Packaging* court would apply the Antideficiency Act. In any event, we have found no subsequent judicial or administrative decision that cites this aspect of the *Southern Packaging* opinion.

e. Amount of Available Appropriation or Fund

Questions occasionally arise over precisely what assets an agency may count for purposes of determining the amount of available resources against which it may incur obligations.

The starting point, of course, is the unobligated balance of the relevant appropriation. In section F of this chapter, we discuss the rule that subdivisions of a lump-sum appropriation appearing in legislative history are not legally binding on the agency. They are binding only if carried into the appropriation act itself, or are made binding by some other statute. Thus, the entire unobligated balance of an unrestricted lump-sum appropriation is available for Antideficiency Act purposes. 55 Comp. Gen. 812 (1976).

Where an agency is authorized to retain certain receipts or collections for credit to an appropriation or fund under that agency's control, those receipts are treated the same as direct appropriations for purposes of obligation and the Antideficiency Act, subject to any applicable statutory restrictions. *E.g.*, 71 Comp. Gen. 224 (1992) (National Technical Information Service may use subscription payments to defray its operating expenses but, under governing legislation, may use customer advances only for costs directly related to firm orders).

In addition, certain other assets may be "counted" as available budget authority, that is, obligated against. For example, OMB Circular No. A-11 includes certain spending authority from offsetting collections as a form of "budget authority."[87] *See also* B-134474-O.M., Dec. 18, 1957. This does not mean anticipated receipts from transactions that have not yet occurred or orders that have not yet been placed. Thus, the Library of Congress could

[87] *See generally* OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, §§ 20.4(b), 20.7, and 20.12 (June 21, 2005). See also the definitions of "Budget Authority" and "Collections" in GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: September 2005), at 20–23, 28–30.

not retain in a revolving fund advances from federal agencies in excess of amounts needed to cover current orders in anticipation of applying the excess amounts to future orders. B-288142, Sept. 6, 2001. Obligations cannot be charged against anticipated proceeds from an anticipated sale of property. *See*, *e.g.*, B-209758, Sept. 29, 1983 (nondecision memorandum) (sale of assets seized from embezzler). Thus, the Customs Service violated the Antideficiency Act by obligating against anticipated receipts from future sales of seized property unless it had sufficient funds available from other sources to cover the obligation. B-237135, Dec. 21, 1989. Similarly, the Comptroller General found that the Air Force violated the Antideficiency Act by overobligating its Industrial Fund based on estimated or anticipated customer orders. *See* GAO, *The Air Force Has Incurred Numerous Overobligations in its Industrial Fund*, AFMD-81-53 (Washington, D.C.: Aug. 14, 1981); 62 Comp. Gen. 143, 147 (1983). Even where receivables are properly included as budgetary resources, an agency may not incur obligations against receipts expected to be received after the end of the current fiscal year without specific statutory authority. 51 Comp. Gen. 598, 605 (1972).

In 60 Comp. Gen. 520 (1981), GAO considered whether the General Services Administration (GSA) could obligate against the value of inventory in the General Supply Fund. GSA buys furniture and other equipment for other agencies through the General Supply Fund, a revolving fund established by statute. Agencies pay GSA either in advance or by reimbursement. For reasons of economy, GSA normally makes consolidated and bulk purchases of commonly used items. Concern over the application of the Antideficiency Act arose when, for several reasons, the Fund began experiencing cash flow problems. To help remedy its "cash flow" problems GSA wanted to consider the amount of available budget authority to include inventory as well as cash assets and advances.

The Comptroller General held that inventory in the General Supply Fund did not constitute a budgetary resource against which obligations could be incurred. The items in the inventory had already been purchased and could not be counted again as a new budgetary resource. Thus, for Antideficiency Act purposes, GSA could not incur obligations using the value of inventory as an available "budgetary resource."

Supplemental appropriations requested but not yet enacted obviously may not be counted as a budgetary resource. B-230117-O.M., Feb. 8, 1989.

f. Intent/Factors beyond Agency Control

A violation of the Antideficiency Act does not depend on intent or lack of good faith on the part of contracting or other officials who obligate or pay in advance or in excess of appropriations. Although these factors may influence the applicable penalty, they do not affect the basic determination of whether a violation has occurred. 64 Comp. Gen. 282, 289 (1985). The Comptroller General once expressed the principle in the following passage which, although stated in a slightly different context, is equally applicable here:

> "Where a payment is prohibited by law, the utmost good faith on the part of the officer, either in ignorance of the facts or in disregard of the facts, in purporting to authorize the incurring of an obligation the payment of which is so prohibited, cannot take the case out of the statute, otherwise the purported good faith of an officer could be used to nullify the law."

A-86742, June 17, 1937.

To illustrate, a contracting officer at the United States Mission to the North Atlantic Treaty Organization accepted an offer for installation of automatic telephone equipment at twice the amount of the unobligated balance remaining in the applicable account. The Department of State explained that the contracting officer had misinterpreted GAO regulations and implementing State Department procedures. But for this misinterpretation, additional funds could have been placed in the account. State therefore felt that the transaction should not be considered in violation of the Act. GAO did not agree and held that the overobligation must be immediately reported as required by 31 U.S.C. § 1517(b). The official's state of mind was not relevant in deciding whether a violation had occurred. 35 Comp. Gen. 356 (1955).

An overobligation may result from external factors beyond the agency's control. Whether this will produce an Antideficiency Act violation depends on the particular circumstances. In 58 Comp. Gen. 46 (1978), the Army asked whether it could make payments to a contractor under a contract requiring payment in local (foreign) currency where the original dollar obligation was well within applicable funding limitations but, due to subsequent exchange rate fluctuations, payment would exceed those limitations. The Army argued that a payment under these circumstances should not be considered a violation of the Act because currency fluctuations are totally beyond the control of the contracting officer or any

other agency official. GAO disagreed. The fact that the contracting officer was a victim of circumstances does not make a payment in excess of available appropriations any less illegal. (It is, of course, as with state of mind, relevant in assessing penalties for the violation.) *See also* 38 Comp. Gen. 501 (1959) (severe adverse weather conditions or prolonged employee strikes generally are not sufficient to justify overobligation by former Post Office Department, but facts in a particular case could justify deficiency apportionment).

In apparent contrast, the Comptroller General stated in 62 Comp. Gen. 692, 700 (1983) that an overobligation resulting from a judicial award of attorney's fees under 28 U.S.C. § 2412(d), the Equal Access to Justice Act, would not violate the Antideficiency Act. *See also* 63 Comp. Gen. 308, 312 (1984) (judgments or board of contract appeals awards under Contract Disputes Act, same answer); B-227527, B-227325, Oct. 21, 1987 (nondecision letter) (amounts awarded by court judgment not counted in determining whether statutory ceiling on lease payments has been exceeded and Antideficiency Act thereby violated).

The distinction is based on the extent to which the agency can act to avoid the overobligation even though it is imposed by some external force beyond its control. Thus, the currency fluctuation decision stated:

> "[W]hen a contracting officer finds that the dollars required to continue or make final payment on a contract will exceed a statutory limitation he may terminate the contract, provided the termination costs will not exceed the statutory limitations. Alternatively, the contracting officer may issue a stop work order and the agency may ask Congress for a deficiency appropriation citing the currency fluctuation as the reason for its request."

58 Comp. Gen. at 48. Similarly, the Postmaster General could curtail operations if necessary. 38 Comp. Gen. 501, 504 (1959). *See also* 66 Comp. Gen. 176 (1986) (Antideficiency Act would not preclude Air Force from entering into lease for overseas family housing without provision limiting annual payments to statutory ceiling, even though certain costs could conceivably escalate above ceiling, where good faith cost estimates were well below ceiling and lease included termination for convenience clause). Where the agency could have acted to avert the overobligation but did not, there will be a violation. In contrast, in the case of a payment ordered by a court, comparable options (apart from seeking a deficiency appropriation)

are not available. (Curtailing activities after the overobligation has occurred to avoid compounding the violation is a separate question.)

g. Exceptions

The Antideficiency Act by its own terms recognizes that Congress can and may grant exceptions. 31 U.S.C. § 1341(a). The statute prohibits contracts or other obligations in advance or excess of available appropriations, "unless authorized by law." This is nothing more than the recognition that Congress can authorize exceptions to the statutes it enacts.

(1) Contract authority

At the outset, it is necessary to distinguish between "contract authority" and the "authority to enter into contracts." A contract is simply a legal device employed by two or more parties to create binding and legally enforceable obligations in furtherance of some objective. The federal government uses contracts every day to procure a wide variety of goods and services. An agency does not need specific statutory authority to enter into contracts. It has long been established that a government agency has the inherent authority to enter into binding contracts in the execution of its duties. *Van Brocklin v. Tennessee*, 117 U.S. 151, 154 (1886); *United States v. Maurice*, 26 F. Case 1211, 1216–17 (No. 15,747) (C.C.D. Va. 1823). It should be apparent that these contracts, "authorized by law" though they may be, are not sufficient to constitute exceptions to the Antideficiency Act, else the Act would be meaningless.

For purposes of the Antideficiency Act exception, a contract authorized by law requires not only authority to enter into a contract, but authority to do so without regard to the availability of appropriations. While the former may be inherent, the latter must be conferred by statute. The most common example of this is "contract authority" as that term is defined and described in Chapter 2—statutory authority to enter into binding contracts without the funds adequate to make payments under them.

In some cases, the "exception" language will be unmistakably explicit. An example is the Price-Anderson Act, which provides authority to "make contracts in advance of appropriations and incur obligations without regard to" the Antideficiency Act. 42 U.S.C. § 2210(j). Other examples of clear authority, although perhaps not as explicit as the Price-Anderson Act, are discussed in 27 Comp. Gen. 452 (1948) (long-term operating-differential subsidy agreements under the Merchant Marine Act); B-211190, Apr. 5, 1983 (contracts with states under the Federal Boat Safety Act); B-164497.3, June 6, 1979 (certain provisions of the Federal-Aid Highway Act of 1973);

and B-168313, Nov. 21, 1969 (interest subsidy agreements with educations institutions under the Housing Act of 1950).

In an earlier case involving contract authority, GAO insisted that the Corps of Engineers had to include a "no liability unless funds are later made available" clause for any work done in excess of available funds. 2 Comp. Gen. 477 (1923). The Corps later had trouble with this clause because a Court of Claims decision, *C.H. Leavell & Co. v. United States*, 530 F.2d 878 (Ct. Cl. 1976), allowed the contractor an equitable adjustment for suspension of work due to a delay in enacting an appropriation to pay him, notwithstanding the "availability of funds" clause. In 56 Comp. Gen. 437 (1977), GAO overruled 2 Comp. Gen. 477, deciding that section 10 of the River and Harbor Act of 1922, 33 U.S.C. § 621, by expressly authorizing the Corps to enter into large multiyear civil works projects without seeking a full appropriation in the first year, constituted the necessary exception to the Antideficiency Act and a "funds available" clause was not necessary. This applies as well to contracts financed from the Corps' Civil Works Revolving Fund. B-242974.6, Nov. 26, 1991 (internal memorandum). The rationale of 56 Comp. Gen. 437 also has been applied to long-term fuel storage facilities contracts authorized by 10 U.S.C. § 2388. *New England Tank Industries of New Hampshire, Inc.*, ASBCA No. 26474, 88-1 BCA ¶ 20,395 (1987), *vacated on other grounds*, *New England Tank Industries of New Hampshire v. United States*, 861 F.2d 685 (Fed. Cir. 1988).

In 28 Comp. Gen. 163 (1948), the Comptroller General considered whether the Commissioner of Reclamation had budget authority to enter into certain contracts in advance of appropriations (contract authority). Congress had authorized the contract authority in an appropriation act but made it subject to a monetary ceiling. Since the contract authority was explicit, with no language making it contingent on appropriations being made at some later date, the Comptroller General concluded that the statute authorized the Commissioner to enter into a firm and binding contract.

The Bureau of Mines was authorized to enter into a contract (in advance of the appropriation) to construct and equip an anthracite research laboratory. The Bureau asked the General Services Administration (GSA) to enter into the contract on its behalf pursuant to section 103 of the Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377, 380 (June 30, 1949), which provided that "funds appropriated to . . . other Federal agencies for the foregoing purposes [execution of contracts and supervision of construction] shall be available for transfer to and

expenditure by the [GSA]." GAO held that the Bureau's contract authority provided a sufficient legal basis for GSA to enter into contracts for construction of the laboratory pursuant to section 103. 29 Comp. Gen. 504 (1950).[88]

A somewhat different kind of contract authority is found in 41 U.S.C. § 11, the so-called Adequacy of Appropriations Act. An exception to the requirement to have adequate appropriations—or any appropriation at all—is made for procurements by the military departments for "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year." By administrative interpretation, the Defense Department has limited this authority to emergency circumstances where immediate action is necessary. Department of Defense Financial Management Regulation 7000.14-R, vol. 3, ch. 12, ¶ 120201 (Jan. 31, 2001).

It should again be emphasized that to constitute an exception to 31 U.S.C. § 1341(a), the "contract authority" must be specific authority to incur the obligation in excess or advance of appropriations, not merely the general authority any agency has to enter into contracts to carry out its functions. Also, an appropriation obviously is needed to liquidate the contract obligation.

Congress may grant authority to contract beyond the fiscal year in terms which amount to considerably less than the type of contract authority described above. An example is 43 U.S.C. § 388, which authorizes the Secretary of the Interior to enter into certain contracts relating to reclamation projects "which may cover such periods of time as the Secretary may consider necessary but in which the liability of the United States shall be contingent upon appropriations being made therefore." *See PCL Construction Services, Inc. v. United States*, 41 Fed. Cl. 242, 257 (1998), *aff'd*, 96 Fed. Appx. 672 (Fed. Cir. 2004) (pursuant to 43 U.S.C. § 388, firm fixed-price contract awarded by the Bureau of Reclamation to construct a visitors center and parking structure at Hoover Dam could be incrementally funded without violating the Antideficiency Act). While this provision has been referred to as an exception to the Antideficiency Act (B-72020, Jan. 9, 1948), it authorizes only "contingent contracts" under

[88] The Public Buildings Act of 1959, Pub. L. No. 86-249, 73 Stat. 479 (Sept. 9, 1959), superseded the provisions of the 1949 legislation discussed in 29 Comp. Gen. 504. The substance of the Public Buildings Act of 1959 is codified in 40 U.S.C. §§ 3301–3315.

which there is no legal obligation to pay unless and until appropriations are provided. 28 Comp. Gen. 163 (1948). A similar example, discussed in B-239435, Aug. 24, 1990, is 38 U.S.C. § 230(c) (Supp. II 1990) (subsequently recodified at 38 U.S.C. § 316) which authorized the Department of Veterans Affairs to enter into certain leases for periods of up to 35 years but further provided that the government's obligation to make payments was "subject to the availability of appropriations for that purpose." For another example, see B-248647.2, Apr. 24, 1995, which discussed the Federal Triangle Development Act, 40 U.S.C. §§ 1101–1109. This act directed GSA to enter into a long-term lease and required the lease agreement to recognize that GSA could obligate funds for lease payments only on an annual basis. 40 U.S.C. § 1105. Therefore, the GSA multiyear lease agreement at issue was specifically "authorized by law" and did not violate the Antideficiency Act. B-248647.2 at fn. 3.

(2) Other obligations "authorized by law"

The "authorized by law" exception in 31 U.S.C. § 1341(a) applies to noncontractual obligations as well as to contracts. The basic approach is the same. The statutory authority must be more than just authority to undertake the particular activity. For example, statutory authority to acquire land and to pay for it from a specified fund is not an exception to the Antideficiency Act. 27 Comp. Gen. 662 (1921). It merely authorizes acquisitions to the extent of funds available in the specified source at the time of purchase. *Id.* Similarly, the authority to conduct hearings, without more, does not confer authority to do so without regard to available appropriations. 16 Comp. Dec. 750 (1910). Provisions in the District of Columbia Code requiring Saint Elizabeth's Hospital to treat all patients who meet admission eligibility requirements were held not to authorize the Hospital to operate beyond the level of its appropriations. If mandatory expenditures, together with nonmandatory expenditures, would cause a deficiency, the Hospital would have to reduce nonmandatory expenditures. 61 Comp. Gen. 661 (1982).

Congress may expressly state that an agency may obligate in excess of the amounts appropriated, or it may implicitly authorize an agency to do so by virtue of a law that necessarily requires such obligations. *See* B-262069, Aug. 1, 1995. Several cases have considered the effect of various statutory salary or compensation increases. If a statutory increase is mandatory and does not vest discretion in an administrative office to determine the amount, or if it gives some administrative body discretion to determine the amount, payment of which then becomes mandatory, the obligation is

deemed "authorized by law" for Antideficiency Act purposes. *See*, *e.g.*, 39 Comp. Gen. 422 (1959) (salary increases for Wage Board employees); B-168796, Feb. 2, 1970 (mandatory statutory increase in retired pay for Tax Court judges); B-107279, Jan. 9, 1952 (mandatory increases for certain legislative personnel). GAO has not treated the granting of increases retroactively to correct past administrative errors as creating the same type of exception. *See* 24 Comp. Gen. 676 (1945). Increases which are discretionary do not permit the incurring of obligations in excess or advance of appropriations. 31 Comp. Gen. 238 (1951) (discretionary pension increases); 28 Comp. Gen. 300 (1948).[89]

Some other examples of obligations authorized by law for Antideficiency Act purposes are:

- Defense Health Program obligations for medical services. B-287619, July 5, 2001.

- Mandatory pilot program in Vermont under Farms for the Future Act of 1990 (loan guarantees and interest assistance). B-244093, July 19, 1991.

- Mandatory transfer from one appropriation account to another where "donor" account contained insufficient unobligated funds. 38 Comp. Gen. 93 (1958).

- Provision in Criminal Justice Act of 1964 imposing unequivocal legislative directive for commencement of certain programs which would necessarily involve creation of financial obligations. B-156932, Aug. 17, 1965.

- Provision in District of Columbia Criminal Justice Act of 1974 (CJA), as amended, making attorney representation in CJA cases a mandatory expense. B-283599, Sept. 15, 1999. *See also* B-284566, Apr. 3, 2000.

- Statute authorizing Interstate Commerce Commission to order a substitute rail carrier to serve shippers abandoned by their primary

[89] The decision in 28 Comp. Gen. 300 concerned increases to Wage Board employees under legislation which is now obsolete (see 39 Comp. Gen. 422, cited in the text). However, it is still useful for the basic proposition that nonmandatory increases are not obligations "authorized by law" as that term is used in 31 U.S.C. § 1341(a). 28 Comp. Gen. at 302.

carrier in emergency situations, and to reimburse certain costs of the substitute carrier. B-196132, Oct. 11, 1979.

What are perhaps the outer limits of the "authorized by law" exception are illustrated in B-159141, Aug. 18, 1967. The Federal Aviation Administration (FAA) had entered into long-term, incrementally funded contracts for the development of a civil supersonic aircraft (SST). To ensure compliance with the Antideficiency Act, the FAA each year budgeted for, and obligated, sufficient funds to cover potential termination liability. The appropriations committees became concerned that unnecessarily large amounts were being tied up this way, especially in light of the highly remote possibility that the SST contracts would be terminated. In considering the FAA's 1968 appropriation, the House Appropriations Committee reduced the FAA's request by the amount of the termination reserve, and in its report directed the FAA not to obligate for potential termination costs. The Comptroller General advised that if the Senate Appropriations Committee did the same thing—a specific reduction tied to the amount requested for the reserve, coupled with clear direction in the legislative history—then an overobligation resulting from a termination would be regarded as authorized by law and not in violation of the Antideficiency Act.

3. Voluntary Services Prohibition

a. Introduction

We previously discussed the Antideficiency Act prohibitions contained in section 1341 of title 31, United States Code. The next section of the Antideficiency Act is 31 U.S.C. § 1342:

> "An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property. . . ."

This provision first appeared, in almost identical form, in a deficiency appropriation act enacted in 1884.[90] Although the original prohibition read "hereafter, no department or officer of the United States shall accept . . .," it was included in an appropriation for the then Indian Office of the Interior Department, and the Court of Claims held that it was applicable only to the Indian Office. *Glavey v. United States*, 35 Ct. Cl. 242, 256 (1900), *rev'd on other grounds*, 182 U.S. 595 (1901). The Comptroller of the Treasury continued to apply it across the board. *See*, *e.g.*, 9 Comp. Dec. 181 (1902). In any event, the applicability of the 1884 statute soon became moot because Congress reenacted it as part of the Antideficiency Act in 1905[91] and again in 1906.[92]

Prior to the 1982 recodification of title 31, section 1342 was subsection (b) of the Antideficiency Act, while the basic prohibitions of section 1341, previously discussed, constituted subsection (a). The proximity of the two provisions in the United States Code reflects their relationship, as section 1342 supplements and is a logical extension of section 1341. If an agency cannot directly obligate in excess or advance of its appropriations, it should not be able to accomplish the same thing indirectly by accepting ostensibly "voluntary" services and then presenting Congress with the bill, in the hope that Congress will recognize a "moral obligation" to pay for the benefits conferred—another example of the so-called "coercive deficiency."[93] In this connection, the chairman of the House committee responsible for what became the 1906 reenactment of the voluntary services prohibition stated:

> "It is a hard matter to deal with. We give to Departments what we think is ample, but they come back with a deficiency. Under the law they can [not] make these deficiencies, and Congress can refuse to allow them; but

[90] Act of May 1, 1884, ch. 37, 23 Stat. 17.

[91] Pub. L. No. 217, ch. 1484, § 4, 33 Stat. 1214, 1257 (Mar. 3, 1905).

[92] Pub. L. No. 28, ch. 510, § 3, 34 Stat. 27, 48–49 (Feb. 27, 1906).

[93] See section C.1 of this chapter for a discussion of the coercive deficiency concept. *See also PCL Construction Services*, *Inc. v. United St*ates, 41 Fed. Cl. 242, 251–260 (1998) (incrementally funded contract did not raise coercive deficiency issues where contract clauses clearly provided that contractor assumed the sole risk of working at a rate that would exhaust funding.)

after they are made it is very hard to refuse to allow them . . . ."[94]

In addition, as we have noted previously, the Antideficiency Act was intended to keep an agency's level of operations within the amounts Congress appropriates for that purpose. The unrestricted ability to use voluntary services would permit circumvention of that objective. Thus, without section 1342, section 1341 could not be fully effective. Note that 31 U.S.C. § 1342 contains two distinct although closely related prohibitions: It bans, first, the acceptance of any type of voluntary services for the United States, and second, the employment of personal services "exceeding that authorized by law."

b. Appointment without Compensation and Waiver of Salary

(1) The rules—general discussion

One of the evils that the "personal services" prohibition was designed to correct was a practice existing in 1884, whereby lower-grade government employees were being asked to "volunteer" their services for overtime periods in excess of the periods allowed by law. This enabled the agency to economize at the employees' expense but nevertheless generated claims by the employees.[95] Currently, 31 U.S.C. § 1342 serves a number of other purposes and is relevant in a number of contexts involving services by government employees or services which would otherwise have to be performed by government employees. For example, one court suggested that 31 U.S.C. § 1342 also is based in part on the principle that only public officials should be allowed to perform governmental functions. *See Suss v. American Society for the Prevention of Cruelty to Animals*, 823 F. Supp. 181, 189 (S.D.N.Y. 1993) ("The risks of abuse of power by private parties exercising functions involving [the] exercise of sovereign compulsion is one reason for the limitations imposed by federal law on the use of volunteers in implementing public sector programs."). However, as mentioned previously, the fundamental purposes embodied in section 1342 are to preserve the integrity of the appropriations process by avoiding "coercive deficiencies" and augmentations.

[94] 39 Cong. Rec. 3687 (1906), quoted in 30 Op. Att'y Gen. 51, 53–54 (1913).

[95] See 30 Op. Att'y Gen. 51, 54–55 (1913), discussing the legislative history of the 1884 prohibition.

One of the earliest questions to arise under 31 U.S.C. § 1342—and an issue that has generated many cases—was whether a government officer or employee, or an individual about to be appointed to a government position, could voluntarily work for nothing or for a reduced salary. Initially, the Comptroller of the Treasury ducked the question on the grounds that it did not involve a payment from the Treasury, and suggested that the question was appropriate to take to the Attorney General. 19 Comp. Dec. 160, 163 (1912).

The very next year, the Attorney General tackled the question when asked whether a retired Army officer could be employed as superintendent of an Indian school without additional compensation. In what has become the leading case construing 31 U.S.C. § 1342, the Attorney General replied that the appointment would not violate the voluntary services prohibition. 30 Op. Att'y Gen. 51 (1913). In reaching this conclusion, the Attorney General drew a distinction that the Comptroller of the Treasury thereafter adopted, and that GAO and the Justice Department continue to follow to this day—the distinction between "voluntary services" and "gratuitous services." The key passages from the Attorney General's opinion are set forth below:

> "[I]t seems plain that the words 'voluntary service' were not intended to be synonymous with 'gratuitous service' and were not intended to cover services rendered in an official capacity under regular appointment to an office otherwise permitted by law to be non-salaried. In their ordinary and normal meaning these words refer to service intruded by a private person as a 'volunteer' and not rendered pursuant to any prior contract or obligation . . . . It would be stretching the language a good deal to extend it so far as to prohibit *official* services without compensation in those instances in which Congress has not required even a minimum salary for the office.
>
> "The context corroborates the view that the ordinary meaning of 'voluntary services' was intended. The very next words 'or employ personal service in excess of that authorized by law' deal with *contractual* services, thus making a balance between 'acceptance' of 'voluntary service' (*i.e.*, the cases where there is no prior contract) and 'employment' of 'personal service' (*i.e.*, the cases where there is such prior contract, though unauthorized by law).

* * * * *

> "Thus it is evident that the evil at which Congress was aiming was not appointment or employment for authorized services without compensation, but the acceptance of unauthorized services not intended or agreed to be gratuitous and therefore likely to afford a basis for a future claim upon Congress. . . ."

Id. at 52–53, 55.

The Comptroller of the Treasury agreed with this interpretation:

> "[The statute] was intended to guard against claims for compensation. A service offered clearly and distinctly as gratuitous with a proper record made of that fact does not violate this statute against acceptance of voluntary service. An appointment to serve without compensation which is accepted and properly recorded is not a violation of [31 U.S.C. § 1342], and is valid if otherwise lawful."

27 Comp. Dec. 131, 132–33 (1920).

Two main rules emerge from 30 Op. Att'y Gen. 51 and its progeny. First, if compensation for a position is fixed by law, an appointee may not agree to serve without compensation or to waive that compensation in whole or in part. *Id.* at 56. This portion of the opinion did not break any new ground. The courts had already held, based on public policy, that compensation fixed by law could not be waived.[96] Second, and this is really just a corollary to the rule just stated, if the level of compensation is discretionary, or if the relevant statute prescribes only a maximum (but not a minimum), the compensation can be set at zero, and an appointment without compensation or a waiver, entire or partial, is permissible. *Id.;* 27 Comp. Dec. at 133.

[96] *Glavey v. United States*, 182 U.S. 595 (1901); *Miller v. United States*, 103 F. 413 (C.C.S.D.N.Y. 1900). *See also* 9 Comp. Dec. 101 (1902). Later cases following *Glavey* are *MacMath v. United States*, 248 U.S. 151 (1918), and *United States v. Andrews*, 240 U.S. 90 (1916). The policy rationale is that to permit agencies to disregard compensation prescribed by statute could work to the disadvantage of those who cannot, or are not willing to, accept the position for less than the prescribed salary. *See Miller*, 103 F. at 415–16.

Both GAO and the Justice Department have had frequent occasion to address these issues, and there are numerous decisions illustrating and applying the rules.[97]

In a 1988 opinion, the Justice Department's Office of Legal Counsel considered whether the Iran-Contra Independent Counsel could appoint Professor Laurence Tribe as Special Counsel under an agreement to serve without compensation. Applying the rules set forth in 30 Op. Att'y Gen. 51, the Office of Legal Counsel concluded that the appointment would not contravene the Antideficiency Act since the statute governing the appointment set a maximum salary but no minimum. Memorandum Opinion for the Acting Associate Attorney General, *Independent Counsel's Authority to Accept Voluntary Services—Appointment of Laurence H. Tribe*, OLC Opinion, May 19, 1988.

Similarly, the Comptroller General held in 58 Comp. Gen. 383 (1979) that members of the United States Metric Board could waive their salaries since the relevant statute merely prescribed a maximum rate of pay. In addition, since the Board had statutory authority to accept gifts, a member who chose to do so could accept compensation and then return it to the Board as a gift. Both cases make the point that compensation is not "fixed by law" for purposes of the "no waiver" rule where the statute merely sets a maximum limit for the salary.

A good illustration of the kind of situation 31 U.S.C. § 1342 is designed to prevent is 54 Comp. Gen. 393 (1974). Members of the Commission on Marihuana and Drug Abuse had, apparently at the chairman's urging, agreed to waive their statutory entitlement to $100 per day while engaged in Commission business. The year after the Commission ceased to exist, one of the former members changed his mind and filed a claim for a portion of the compensation he would have received but for the waiver. Since the $100 per day had been a statutory entitlement, the purported waiver was invalid and the former commissioner was entitled to be paid. Similar claims by any or all of the other former members would also have to be allowed. If insufficient funds remained in the Commission's now-expired appropriation, a deficiency appropriation would be necessary.

[97] Some cases in addition to those cited in the text are 32 Comp. Gen. 236 (1952); 23 Comp. Gen. 109, 112 (1943); 14 Comp. Gen. 193 (1934); 34 Op. Att'y Gen. 490 (1925); 30 Op. Att'y Gen. 129 (1913); 13 Op. Off. Legal Counsel 113 (1989); 3 Op. Off. Legal Counsel 78 (1979).

A few earlier cases deal with fact situations similar to that considered in 30 Op. Att'y Gen. 51—the acceptance by someone already on the federal payroll of additional duties without additional compensation. In 23 Comp. Gen. 272 (1943), for example, GAO concluded that a retired Army officer could serve, without additional compensation, as a courier for the State Department. The voluntary services prohibition, said the decision, does not preclude "the assignment of persons holding office under the Government to the performance of additional duties or the duties of another position without additional compensation." *Id.* at 274. Another World War II era decision held that American Red Cross Volunteer Nurses' Aides who also happened to be full-time federal employees could perform volunteer nursing services at Veterans Administration hospitals. 23 Comp. Gen. 900 (1944).

One thing the various cases discussed above have in common is that they involve the appointment of an individual to an official government position, permanent or temporary. Services rendered prior to appointment are considered purely voluntary and, by virtue of 31 U.S.C. § 1342, cannot be compensated. *Lee v. United States*, 45 Ct. Cl. 57, 62 (1910); B-181934, Oct. 7, 1974.[98] It also follows that post-retirement services, apart from appointment as a reemployed annuitant, are not compensable. 65 Comp. Gen. 21 (1985). In that case, an alleged agreement to the contrary by the individual's supervisor was held unauthorized and therefore invalid.

It also has been held that experts and consultants employed under authority of 5 U.S.C. § 3109 (the basic governmentwide authority for procuring expert and consultant services) may serve without compensation without violating the Antideficiency Act as long as it is clearly understood and agreed that no compensation is expected. 27 Comp. Gen. 194 (1947); 6 Op. Off. Legal Counsel 160 (1982). *Cf.* B-185952, Aug. 18, 1976 (uncompensated participation in pre-bid conference, on-site inspection, and bid opening by contractor engineer who had prepared specifications regarded as "technical violation" of 31 U.S.C. § 1342).

[98] While the principle in B-181934 remains valid, the decision was overruled by 55 Comp. Gen. 109 (1975) on factual grounds. Additional information showed that the individual involved in that case was a "*de facto* employee" performing under color of appointment and with a claim of right to the position. A "voluntary" employee has no such "color of appointment" or indicia of lawful employment.

Several of the decisions note the requirement for a written record of the agreement to serve without compensation. Proper documentation is important for evidentiary purposes should a claim subsequently be attempted. *E.g.*, 27 Comp. Gen. at 195; 26 Comp. Gen. 956, 958 (1947); 27 Comp. Dec. 131, 132–33 (1920); 2 Op. Off. Legal Counsel 322, 323 (1977). Specifically, the decisions state that the individuals should acknowledge in writing and in advance that they will receive no compensation and that they should explicitly waive any and all claims against the government on account of their service.

The rule that compensation fixed by statute may not be waived does not apply if the waiver or appointment without compensation is itself authorized by statute. The Comptroller General stated the principle as follows in 27 Comp. Gen. at 195:

> "[E]ven where the compensation for a particular position is fixed by or pursuant to law, the occupant of the position may waive his ordinary right to the compensation fixed for the position and thereafter forever be estopped from claiming and receiving the salary previously waived, *if there be some applicable provision of law authorizing the acceptance of services without compensation*." (Emphasis in original.)

As noted above, the decision in 27 Comp. Gen. 194 cited as the provision authorizing the acceptance of services without compensation in that case what is now section 3109(b) of title 5, United States Code. Under section 3109(b), agencies may, when authorized by an appropriation or other act, procure the services of experts or consultants for up to 1 year without regard to other provisions of title 5 governing appointment and compensation. This authority is subject to a maximum rate of compensation in some cases, but there is no minimum rate.

In B-139261, June 26, 1959, GAO reiterated the above principle, and gave several additional examples of statutes sufficient for this purpose. The examples included the following statutory provisions that remain essentially the same in substance as they were in 1959:

- section 204(b) of title 29, United States Code, which authorizes the Administrator of the Labor Department's Wage and Hour Division to utilize voluntary and uncompensated services;

- section 401(7) of title 39, United States Code, which authorizes the Postal Service to accept gifts or donations of services or property; and

- section 210(b) of title 47, United States Code, which states that no provision of law shall be construed to prohibit common carriers from rendering free service to any agency of the government in connection with preparation for the national defense, subject to rules prescribed by the Federal Communications Commission.

At this point a 1978 case, 57 Comp. Gen. 423, should be noted. The decision held that a statute authorizing the Agency for International Development (AID) to accept gifts of "services of any kind" (22 U.S.C. § 2395(d)) did not permit waiver of salary by AID employees whose compensation was fixed by statute. Section 2395(d) is very similar to one of the examples given in B-139261, June 26, 1959, discussed above, of statutes that would authorize the acceptance of voluntary services. *See* 39 U.S.C. § 401(7). However, 57 Comp. Gen. 423 is distinguishable from B-139261, 27 Comp. Gen. 194, and the other voluntary services cases discussed previously. The question in 57 Comp. Gen. 423 was whether AID could invoke its gift-acceptance authority to justify paying regular federal employees less than the salaries prescribed by law. The decision held that it did not:

> "Section 2395(d) . . . authorizes the acceptance of gifts. Therefore, AID may accept services from private sources either gratuitously or at a fraction of their value. However, section 2395(d) does not authorize individuals to be appointed to regular positions having compensation rates fixed by or pursuant to statute at rates less than those specified. It, therefore, differs from the statute, which was the subject of 27 Comp. Gen. 194, *supra*, and accordingly is not a provision of law authorizing employees whose compensation is fixed by or pursuant to statute to waive any part of such compensation."

57 Comp. Gen. at 424–25.[99]

[99] Further support for the decision's conclusion that 22 U.S.C. § 2395(d) was addressed to services from private sources rather than federal employees can be found in the immediately preceding subsection, which states: "It is the sense of Congress that the President, in furthering the purposes of this [chapter], shall use to the maximum extent practicable the services and facilities of voluntary, nonprofit organizations registered with, and approved by, the Agency for International Development." 22 U.S.C. § 2395(c).

As noted earlier, 27 Comp. Gen. 194 concerned temporary experts or consultants. B-139261 concerned civilian volunteers who sought to provide services for an Air Force reserve center. Likewise, the other statutory examples cited in B-139261 clearly were aimed at individuals other than regular federal employees. Thus, 57 Comp. Gen. 423 appears to represent the sensible caveat that general statutory authorities to accept voluntary services or "gifts" of services do not supersede statutes providing for the compensation of federal employees and cannot be invoked to avoid the consequences of those statutes.

The rules for waiver of salary or appointment without compensation may be summarized as follows:

- If compensation is not fixed by statute, that is, if it is fixed administratively or if the statute merely prescribes a maximum but no minimum, it may be waived as long as the waiver qualifies as "gratuitous." There should be an advance written agreement waiving all claims.

- If compensation is fixed by statute, it may not be waived, the voluntary *versus* gratuitous distinction notwithstanding, without specific statutory authority. This authority generally may take the form of authority to accept donations of services or to employ persons without compensation.

- If the employing agency has statutory authority to accept gifts, the employee can accept the compensation and return it to the agency as a gift. Even if the agency has no such authority, the employee can still accept the compensation and donate it to the United States Treasury.

(2) Student interns

In 26 Comp. Gen. 956 (1947), the then Civil Service Commission asked whether an agency could accept the uncompensated services of college students as part of a college's internship program. The students "would be assigned to productive work, that is, to the regular work of the agency in a position which would ordinarily fall in the competitive civil service." The answer was no. Since the students would be used in positions the compensation for which was fixed by law, and since compensation fixed by law cannot be waived, the proposal would require legislative authority.

Thirty years later, the Justice Department's Office of Legal Counsel considered another internship program and provided similar advice. Without statutory authority, uncompensated student services that furthered the agency's mission, that is, "productive work," could not be accepted. 2 Op. Off. Legal Counsel 185 (1978).

In view of the long-standing rule, supported by decisions of the Supreme Court,[100] prohibiting the waiver of compensation for positions required by law to be salaried, GAO and Justice had little choice but to respond as they did. Clearly, however, this answer had its downside. It meant that uncompensated student interns could be used only for essentially "make-work" tasks, a benefit to neither the students nor the agencies.

The solution, apparent from both cases, was legislative authority, which Congress provided later in 1978 by the enactment of 5 U.S.C. § 3111. The statute authorizes agencies, subject to regulations of the Office of Personnel Management, to accept the uncompensated services of high school and college students, "[n]otwithstanding section 1342 of title 31," if the services are part of an agency program designed to provide educational experience for the student, if the student's educational institution gives permission, and if the services will not be used to displace any employee. 5 U.S.C. § 3111(b).

A paper entitled *A Part-Time Clerkship Program in Federal Courts for Law Students* by the Honorable Jack B. Weinstein and William B. Bonvillian, written in 1975 and printed at 68 F.R.D. 265, considered the use of law students as part-time law clerks, without pay, to mostly supplement the work of the regular law clerks in furtherance of the official duties of the courts. Based on the statute's legislative history and 30 Op. Att'y Gen. 51 (1913), previously discussed, Judge Weinstein concluded that the program did not violate the Antideficiency Act. Although this aspect of the issue is not explicitly discussed in the paper, it appears that the compensation of regular law clerks is fixed administratively. *See* 28 U.S.C. § 604(a)(5). In any event, the Administrative Office of the United States Courts was given authority in 1978 to "accept and utilize voluntary and incompensated (gratuitous) services." 28 U.S.C. § 604(a)(17).

[100] See footnote number 96, *supra*, and accompanying text.

(3) Program beneficiaries

Programs are enacted from time to time to provide job training assistance to various classes of individuals. The training is intended, among other things, to enable participants to enter the labor market at a higher level of skill. Questions have arisen under programs of this nature as to the authority of federal agencies to serve as employers.

A 1944 case, 24 Comp. Gen. 314, considered a vocational rehabilitation program for disabled war veterans. GAO concluded that 31 U.S.C. § 1342 did not preclude federal agencies from providing on-the-job training, without payment of salary, to program participants. The decision is further discussed in 26 Comp. Gen. 956, 959 (1947).

In 51 Comp. Gen. 152 (1971), GAO concluded that 31 U.S.C. § 1342 precluded federal agencies from accepting work by persons hired by local governments for public service employment under the Emergency Employment Act of 1971.[101] Four years later, GAO modified the 1971 decision, holding that a federal agency could provide work without payment of compensation to (*i.e.*, accept the free services of) trainees sponsored and paid by nonfederal organizations from federal grant funds under the Comprehensive Employment and Training Act of 1973.[102] 54 Comp. Gen. 560 (1975). The decision stated:

> "[C]onsidering that the services in question will arise out of a program initiated by the Federal Government, it would be anomalous to conclude that such services are proscribed as being voluntary within the meaning of 31 U.S.C. § [1342]. That is to say, it is our opinion that the utilization of enrollees or trainees by a Federal agency under the circumstances here involved need not be considered the acceptance of 'voluntary services' within the meaning of that phrase as used in 31 U.S.C. § [1342]."

Id. at 561.

[101] Pub. L. No. 92-54, 85 Stat. 146 (July 12, 1971).

[102] Pub. L. No. 93-203, 87 Stat. 839 (Dec. 28, 1973).

In B-211079.2, Jan. 2, 1987, the relevant program legislation expressly authorized program participants to perform work for federal agencies "notwithstanding section 1342 of title 31." The decision suggests that the statutory authority was necessary not because of the Antideficiency Act but to avoid an impermissible augmentation of appropriations. It is in any event consistent in result with 24 Comp. Gen. 314 and 54 Comp. Gen. 560. The relationship between voluntary service and the augmentation concept is explored later in this chapter in our discussion of augmentation of appropriations.

(4) Applicability to legislative and judicial branches

The applicability of 31 U.S.C. § 1342 to the legislative and judicial branches of the federal government does not appear to have been seriously questioned.

The salary of a Member of Congress is fixed by statute and therefore cannot be waived without specific statutory authority. B-159835, Apr. 22, 1975; B-123424, Mar. 7, 1975; B-123424, Apr. 15, 1955; A-8427, Mar. 19, 1925; B-206396.2, Nov. 15, 1988 (nondecision letter). However, as each of these cases points out, nothing prevents a Senator or Representative from accepting the salary and then, as several have done, donate part or all of it back to the United States Treasury.

In 1977, GAO was asked by a congressional committee chairman whether section 1342 applies to Members of Congress who use volunteers to perform official office functions. GAO responded, first, that section 1342 seems clearly to apply to the legislative branch. GAO then summarized the rules for appointment without compensation and advised that, to the extent that a particular employee's salary could be fixed administratively by the Member in any amount he or she chooses to set, that employee's salary could be fixed at zero. This once again was essentially an application of the rules set down decades earlier in 30 Op. Att'y Gen. 51 (1913) and 27 Comp. Dec. 131 (1920). *See also* B-69907, Feb. 11, 1977.

The salary of a federal judge is also "fixed by law"—even more so because of the constitutional prohibition against diminishing the compensation of a federal judge while in office. U.S. Const. art III, § 1. A case applying the standard "no waiver" rules to a federal judge is B-157469, July 24, 1974.

c. Other Voluntary Services

Before entering the mainstream of the modern case law, two very early decisions should be noted. In 12 Comp. Dec. 244 (1905), the Comptroller of

the Treasury held that an offer by a meat-packing firm to pay the salaries of Department of Agriculture employees to conduct a pre-export pork inspection could not be accepted because of the voluntary services prohibition.[103] Similar cases have since come up, but they have been decided under the augmentation theory without reference to 31 U.S.C. § 1342. See 59 Comp. Gen. 294 (1980) and 2 Comp. Gen. 775 (1923), discussed later in section E of this chapter.

To restate, apart from the 1905 decision, which has not been followed since, the voluntary services prohibition has not been applied to donations of money. In another 1905 decision, a vendor asked permission to install an appliance on Navy property for trial purposes at no expense to the government. Presumably, if the Navy liked the appliance, it would then buy it. The Comptroller of the Treasury pointed out an easily overlooked phrase in the voluntary service prohibition—the services that are prohibited are voluntary services "for the United States." Here, temporary installation by the vendor for trial purposes amounted to service for his own benefit and on his own behalf, "as an incident to or necessary concomitant of a proper exhibition of his appliance for sale." Therefore, the Navy could grant permission without violating the Antideficiency Act as long as the vendor agreed to remove the appliance at his own expense if the Navy chose not to buy it. 11 Comp. Dec. 622 (1905). This case has not been cited since.

For the most part, the subsequent cases have been resolved by applying the "voluntary *versus* gratuitous" distinction first enunciated by the Attorney General in 1913 in 30 Op. Att'y Gen. 51, discussed above. The underlying philosophy is perhaps best conveyed in the following statement by the Justice Department's Office of Legal Counsel:

> "Although the interpretation of § [1342] has not been entirely consistent over the years, the weight of authority does support the view that the section was intended to eliminate subsequent claims against the United States for compensation of the 'volunteer,' rather than to deprive the government of the benefit of truly gratuitous services."

[103] It would now also contravene 18 U.S.C. § 209, which prohibits payment of salaries of government employees from nongovernmental sources. This statute did not exist at the time of the 1905 decision.

6 Op. Off. Legal Counsel 160, 162 (1982).

In an early formulation that has often been quoted since, the Comptroller General noted that:

> "The voluntary service referred to in [31 U.S.C. § 1342] is not necessarily synonymous with gratuitous service, but contemplates service furnished on the initiative of the party rendering the same without request from, or agreement with, the United States therefor. Services furnished pursuant to a formal contract are not voluntary within the meaning of said section."

7 Comp. Gen. 810, 811 (1928).

In 7 Comp. Gen. 810, a contractor had agreed to prepare stenographic transcripts of Federal Trade Commission public proceedings and to furnish copies to the Commission without cost, in exchange for the exclusive right to report the proceedings and to sell transcripts to the public. The decision noted that consideration under a contract does not have to be monetary consideration, and held that the contract in question was supported by sufficient legal consideration. While the case is thus arguably not a true "voluntary services" case, it has often been cited since, not so much for the actual holding but for the above-quoted statement of the rule.

For example, in B-13378, Nov. 20, 1940, the Comptroller General held that the Secretary of Commerce could accept gratuitous services from a private agency, created by various social science associations, which had offered to assist in the preparation of official monographs analyzing census data. The services were to be rendered under a cooperative agreement which specified that they would be free of cost to the government. The Commerce Department agreed to furnish space and equipment, but the monographs would not otherwise have been prepared.

Applying the same approach, GAO found no violation of 31 U.S.C. § 1342 for the Commerce Department to accept services by the Business Advisory Council, which were agreed in advance to be gratuitous. B-125406, Nov. 4, 1955. Likewise, the Commission on Federal Paperwork could accept free services from the private sector as long as they were agreed in advance to be gratuitous. B-182087-O.M., Nov. 26, 1975.

In a 1982 decision, the American Association of Retired Persons wanted to volunteer services to assist in crime prevention activities (distribute literature, give lectures, *etc.*) on Army installations. GAO found no Antideficiency Act problem as long as the services were agreed in advance, and so documented, as gratuitous. B-204326, July 26, 1982.

In B-177836, Apr. 24, 1973, the Army had entered into a contract with a landowner under which it acquired the right to remove trees and other shrubs from portions of the landowner's property incident to an easement. A subsequent purchaser of the property complained that some tree stumps had not been removed, and the Army proceeded to contract to have the work done. The landowner then submitted a claim for certain costs he had incurred incident to some preliminary work he had done prior to the Army's contract. Since the landowner's actions had been purely voluntary and had been taken without the knowledge or consent of the government, 31 U.S.C. § 1342 prohibited payment.

In 7 Comp. Gen. 167 (1927), a customs official had stored, in his own private boathouse, a boat which had been seized for smuggling whiskey. The customs official later filed a claim for storage charges. Noting that "the United States did not expressly or impliedly request the use of the premises and therefore did not by implication promise to pay therefor," GAO concluded that the storage had been purely a voluntary service, payment for which would violate 31 U.S.C. § 1342.

As if to prove the adage that there is nothing new under the sun, GAO considered another storage case over 50 years later, B-194294, July 12, 1979. There, an Agriculture Department employee had an accident while driving a government-owned vehicle assigned to him for his work. A Department official ordered the damaged vehicle towed to the employee's driveway, to be held there until it could be sold. Since the government did have a role in the employee's assumption of responsibility for the wreck, GAO found no violation of 31 U.S.C. § 1342 and allowed the employee's claim for reasonable storage charges on a *quantum meruit* basis.[104]

Section 1342 covers any type of service which has the effect of creating a legal or moral obligation to pay the person rendering the service. Naturally, this includes government contractors. *See PCL Construction Services*,

[104] See generally Chapter 12, section C.2.b in volume III of the second edition of *Principles of Federal Appropriations Law.*

Inc. v. United States, 41 Fed. Cl. 242, 257–260 (1998), quoting with approval from the second edition of *Principles of Federal Appropriations Law* on this point. The prohibition includes arrangements in which government contracting officers solicit or permit—tacitly or otherwise—a contractor to continue performance on a "temporarily unfunded" basis while the agency, which has exhausted its appropriations and cannot pay the contractor immediately, seeks additional appropriations. This was one of the options considered in 55 Comp. Gen. 768 (1976), discussed previously in connection with 31 U.S.C. § 1341(a). The Army proposed a contract modification which would explicitly recognize the government's obligation to pay for any work performed under the contract, possibly including reasonable interest, subject to subsequent availability of funds. The government would use its best efforts to obtain a deficiency appropriation. Certificates to this effect would be issued to the contractor, including a statement that any additional work performed would be done at the contractor's own risk. In return, the contractor would be asked to defer any action for breach of contract.

GAO found this proposal "of dubious validity at best." Although the certificate given to the contractor would say that continued performance was at the contractor's own risk, it was clear that both parties expected the contract to continue. The government expected to accept the benefits of the contractor's performance and the contractor expected to be paid—eventually—for it. This is certainly not an example of a clear written understanding that work for the government is to be performed gratuitously. Also, the proposal to pay interest was improper as it would compound the Antideficiency Act violation. Although 55 Comp. Gen. 768 does not specifically discuss 31 U.S.C. § 1342, the relationship should be apparent.

GAO's opinion in B-302811, July 12, 2004, provides a recent example of an appropriate "gratuitous services" type contract that did not run afoul of the 31 U.S.C. § 1342 prohibition against voluntary services. This decision concerned the General Services Administration's (GSA) proposed National Brokers Contract, under which GSA would award four real estate brokers exclusive rights to represent the United States with respect to all GSA real property leases. The brokers would be required to provide a range of services commonly offered in commercial leasing transactions such as assisting federal agencies in developing their space requirements, surveying the rental market, and negotiating and preparing leases. The proposal took the form of a "no-cost" contract in which GSA would make no payments to the brokers for their services. Rather, the brokers would

collect commissions from the landlords who leased property to the federal agencies. In approving the legality of this proposed arrangement, the decision observed:

> "Because the contract was constructed as a no cost contract, GSA will have no financial liability to brokers, and brokers will have no expectation of a payment from GSA. The acceptance of services without payment pursuant to a valid, binding no-cost contract does not augment an agency's appropriation nor does it violate the voluntary services prohibition. Although the brokers contract clearly expects that brokers will be remunerated by commissions from landlords, as is a common practice in the real estate industry, GSA does not require landlords to pay commissions. If a landlord were to fail to pay a broker, the broker would have no claim against GSA."

Id. at 7.[105]

d. Exceptions

Two kinds of exceptions to 31 U.S.C. § 1342 have already been discussed—where acceptance of services without compensation is specifically authorized by law, and where the government and the volunteer have a written agreement that the services are to be rendered gratuitously with no expectation of future payment.

There is a third exception, written into the statute itself: "emergencies involving the safety of human life or the protection of property." The cases dealing with this statutory exception have arisen in a variety of contexts and are discussed below, along with recent developments.

[105] The July 12, 2004, opinion clarified an earlier opinion on the subject of the National Brokers Contract, B-291947, Aug. 15, 2003. Also, it distinguished another opinion, B-300248, Jan. 15, 2004, which held that the Small Business Administration improperly augmented its appropriations by requiring certain lenders to pay fees to an agency contractor. See section E.2.a of this chapter for a detailed discussion of the Small Business Administration opinion and how it compares with the GSA opinion.

(1) Safety of human life

In order to invoke this exception, the services provided to protect human life must have been rendered in a true emergency situation. What constitutes an emergency was discussed in several early decisions.

In 12 Comp. Dec. 155 (1905), a municipal health officer disinfected several government buildings to prevent the further spread of diphtheria. Several cases of diphtheria had already occurred at the government compound, including four that resulted in deaths. The Comptroller of the Treasury found that the services had been rendered in an emergency involving the loss of human life, and held accordingly that the doctor could be reimbursed for the cost of materials used and the fair value of his services.

In another case, the S.S. Rexmore, a British vessel, deviated from its course to London to answer a call for help from an Army transport ship carrying over 1,000 troops. The ship had sprung a leak and appeared to be in danger of sinking. The Comptroller General allowed a claim for the vessel's actual operating costs plus lost profits attributable to the services performed. The Rexmore had rendered a tangible service to save the lives of the people aboard the Army transport, as well as the transport vessel itself. 2 Comp. Gen. 799 (1923).

On the other hand, GAO denied payment to a man who was boating in the Florida Keys and saw a Navy seaplane make a forced landing. He offered to tow the aircraft over two miles to the nearest island, and did so. His claim for expenses was denied. The aircraft had landed intact and the pilot was in no immediate danger. Rendering service to overcome mere inconvenience or even to avoid a potential future emergency is not enough to overcome the statutory prohibition. 10 Comp. Gen. 248 (1930).

(2) Protection of property

The main thing to remember here is that the property must be either government-owned property or property for which the government has some responsibility. The standard was established by the Comptroller of the Treasury in 9 Comp. Dec. 182, 185 (1902) as follows:

> "I think it is clear that the statute does not contemplate property in which the Government has no immediate interest or concern; but I do not think it was intended to apply exclusively to property owned by the Government.

> The term 'property' is used in the statute without any qualifying words, but it is used in connection with the rendition of services for the Government. The implication is, therefore, clear that the property in contemplation is property in which the Government has an immediate interest or in connection with which it has some duty to perform."

In the cited decision, an individual had gathered up mail scattered in a train wreck and delivered it to a nearby town. The government did not "own" the mail but had a responsibility to deliver it. Therefore, the services came within the statutory exception and the individual could be paid for the value of his services.

Applying the approach of 9 Comp. Dec. 182, the Comptroller General held in B-152554, Feb. 24, 1975, that section 1342 did not permit the Agency for International Development to make expenditures in excess of available funds for disaster relief in foreign countries. A case clearly within the exception is 3 Comp. Gen. 979 (1924), allowing reimbursement to a municipality which had rendered firefighting assistance to prevent the destruction of federal property where the federal property was not within the territory for which the municipal fire department was responsible.

An exception was also recognized in 53 Comp. Gen. 71 (1973), where a government employee brought in food for other government employees in circumstances which would justify a determination that the expenditure was incidental to the protection of government property in an extreme emergency. In this case, the General Services Administration had to assemble and maintain for 5 days a cadre of approximately 175 special police in connection with the unauthorized occupation of a Bureau of Indian Affairs building. The police officers were required to perform tours of duty that sometimes extended to 24 hours. They were kept at the ready to reoccupy the building and they were not permitted to leave the marshalling area because of the imminence of court orders and administrative directives.

(3) Recent developments

During the past two decades, cases addressing the "emergencies involving the safety of human life or the protection of property" exception to 31 U.S.C. § 1342 have arisen primarily in the context of "funding gaps" where an agency is faced with an appropriations lapse (or potential lapse)

usually at the outset of a fiscal year. These cases are discussed in detail in section C.6 of this chapter. However, several points from that discussion are also relevant here. Most notably, in 1990, Congress amended 31 U.S.C. § 1342 by adding the following language:

> "As used in this section, the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."[106]

Two recent GAO decisions have considered the emergency exception to 31 U.S.C. § 1342 (including its 1990 amendment) in a context other than a funding gap. The question in B-262069, Aug. 1, 1995, was whether the District of Columbia could exceed its appropriation for certain programs, including Aid to Families with Dependent Children and Medicaid, without violating the Antideficiency Act. The main issue in that decision was whether the "unless authorized by law exception" to the Antideficiency Act in 31 U.S.C. § 1341(a)(1)(A) applied. GAO held that it did not. The decision also noted the existence of the emergencies exception to 31 U.S.C. § 1342, but held that it was likewise inapplicable:

> "An 'emergency' under section 1342 'does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property.' We are not presently aware of any facts or circumstances that would make this limited exception available to the District. See, 5 Op. O.L.C. 1, 7–11 (1981)."

B-262069 at 3, fn. 1.

The decision in B-262069 addressed a hypothetical situation; the District had not actually exceeded its appropriation there. Unfortunately, a subsequent opinion, B-285725, Sept. 29, 2000, involved the real thing. In that case, the District of Columbia Health and Hospitals Public Benefit Corporation (PBC) had incurred obligations and made payments in excess

[106] As explained in section C.6, this amendment was intended to guard against what might have been viewed as an overly broad application of one of the Attorney General's funding gap opinions.

of its appropriations. The PBC maintained that the emergency exception to 31 U.S.C. § 1342 as construed by the Attorney General applied; thus, there was no violation. GAO disagreed:

> "The funding gap situations discussed by the Attorney General arise typically at the beginning of a fiscal year because of the absence or expiration of budget authority under circumstances that are beyond an agency's control. In the present situation, the exhaustion of appropriations occurred during the fiscal year because of a rate of operations and obligations in excess of available resources. Viewed in this light, PBC's failure to regulate its activities and spending so as to operate within its available budget resources is not the type of 'emergency' covered either by the Attorney General's earlier opinions or 31 U.S.C. § 1342."

B-285725, Enclosure at 9.

The opinion acknowledged that PBC's ongoing functions of operating a hospital and clinics involved the provision of services essential to the protection of human life. However, the opinion observed that PBC, like many federal agencies engaged in protecting human life and safety, requested and received appropriations to cover these functions. It added:

> "Once the Congress enacts appropriation[s], it is incumbent on the PBC (and similarly situated federal agencies) to manage its resources to stay within the authorized level. Nothing in the District's Submission demonstrates that the PBC's exhaustion of appropriations prior to the end of the fiscal year was caused by some unanticipated event or events (*e.g.*, mass injuries resulting from hurricane, flood or other natural disasters) requiring PBC to provide services for the protection of life beyond the level it should have reasonably been expected to anticipate when it prepared its budget."

Id. By way of summary, the opinion observed:

> "While the failure of Congress to enact appropriations at the beginning of the fiscal year may qualify as an emergency event for purposes of section 1342, it would be a novel

> proposition, one that we are unwilling to endorse, to conclude that an agency's failure to manage and live within the resources provided for an activity involved in protecting human life permits it to incur obligations in excess of amounts provided. Nothing that we have been provided warrants the conclusion that the overobligations resulted from an unanticipated emergency rather than from the PBC's failure to manage and live within its budgetary resources during the fiscal year."[107]

B-285725 at 3.

In essence, B-285725 held that the emergencies exception to 31 U.S.C. § 1342 does not apply where an agency exceeds its appropriations—at least absent events beyond the agency's control that the agency (and presumably the Congress) could not have foreseen in determining the agency's funding levels.

In two opinions to the United States Marshals Service (USMS) in 1999 and 2000, the Office of Legal Counsel addressed a potential exhaustion of USMS appropriations, which never materialized: Memorandum Opinion for the General Counsel, United States Marshals Service, *USMS Obligation To Take Steps To Avoid Anticipated Appropriations Deficiency*, OLC Opinion, May 11, 1999, and Memorandum Opinion for the General Counsel, United States Marshals Service, *Continuation of Federal Prisoner Detention Efforts in the Face of a USMS Appropriations Deficiency*, OLC Opinion, Apr. 5, 2000. The opinions dealt with a potential exhaustion of appropriations for USMS prisoner-detention functions, but did not describe the circumstances giving rise to the potential exhaustion. While these opinions recognized the "affirmative obligation" on the part of agencies to manage available appropriations in order to avoid deficiencies, they did not address the important distinction between an exhaustion of appropriations (or funding gap) resulting from unforeseen circumstances and an exhaustion of appropriations resulting from the agency's failure to manage its operations within the limits of enacted appropriations. We would disagree with the Office of Legal Counsel opinions to the extent they could be read to suggest that regardless of the reasons for the exhaustion of

[107] Finally, the opinion noted that, even if the exception to section 1342 applied, it would not sanction the agency's actual disbursement of funds in excess of its appropriations. Thus, the agency violated the Antideficiency Act in any event.

appropriations, whenever an agency like USMS, whose statutory mission involves the protection of life and property, runs out of money, it has open-ended authority to continue to incur obligations under the Antideficiency Act's emergencies exception.[108] This is exactly the "coercive deficiency" that the Congress legislated against in enacting the Antideficiency Act.[109] *See* B-285725, Sept. 29, 2000. The Antideficiency Act was intended to keep agency operations at a level within the amounts that Congress appropriates for that purpose. If an agency concludes that it needs more funds than Congress has appropriated for a fiscal year, the agency should ask Congress to enact a supplemental appropriation; it should not continue operations without regard to the Antideficiency Act.

e. Voluntary Creditors

A related line of decisions are the so-called "voluntary creditor" cases. A voluntary creditor is an individual, government or private, who pays what he or she perceives to be a government obligation from personal funds. The rule is that the voluntary creditor cannot be reimbursed, although there are significant exceptions. For the most part, the decisions have not related the voluntary creditor prohibition to the Antideficiency Act, with the exception of one very early case (17 Comp. Dec. 353 (1910)) and two more recent ones (53 Comp. Gen. 71 (1973) and 42 Comp. Gen. 149 (1962)). The voluntary creditor cases are discussed in detail in Chapter 12, section C.4.c in volume III of the second edition of *Principles of Federal Appropriations Law*, dealing with claims against the United States.

4. Apportionment of Appropriations

Because of the apportionment and related provisions of the Antideficiency Act, 31 U.S.C. §§ 1511–1519, an agency generally does not have the full amount of its appropriations available to it at the beginning of the fiscal year. Apportionment is an administrative process by which, as its name suggests, appropriated funds are distributed to agencies in portions over the period of their availability. The Office of Management and Budget (OMB) apportions funds for executive branch agencies. 31 U.S.C. § 1513(b); Exec. Order No. 6166, § 16 (June 10, 1933), *at* 5 U.S.C. § 901 note. Appropriations for legislative branch agencies, the judicial branch,

[108] The opinions did acknowledge, of course, that USMS could not actually spend funds if its appropriations were exhausted. They also noted that a determination whether particular obligations would satisfy the emergencies exception could not be made in the abstract and would require case-by-case evaluation.

[109] See section C.2.b of this chapter for a discussion of the "coercive deficiency" concept.

the District of Columbia, and the International Trade Commission are apportioned by officials having administrative control of those funds. 31 U.S.C. § 1513(a). In addition to apportionment, appropriations are subject to further administrative subdivision by the heads of the agencies to which the appropriations are made. 31 U.S.C. § 1514.

Section 1517(a) of title 31 prohibits officers and employees of the federal and District of Columbia governments from making or authorizing an expenditure or obligation that exceeds an apportionment or the amount permitted under certain other subdivisions of appropriated funds. Agencies must report violations of section 1517(a) to the Congress and the President. Those who violate section 1517(a) are subject to administrative discipline as well as criminal penalties in the case of willful violations. *See* 31 U.S.C. §§ 1517(b), 1518, and 1519.

a. Statutory Requirement for Apportionment

Subsection (a) of section 1512 establishes the basic requirement for the apportionment of appropriations:

> "(a) Except as provided in this subchapter, an appropriation available for obligation for a definite period shall be apportioned to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period. An appropriation for an indefinite period and authority to make obligations by contract before appropriations shall be apportioned to achieve the most effective and economical use. An apportionment may be reapportioned under this section."

Although apportionment was first required legislatively in 1905,[110] the current form of the statute derives from a revision enacted in 1950 in section 1211 of the General Appropriation Act, 1951.[111] The 1950 revision was part of an overall effort by Congress to amplify and enforce the basic restrictions against incurring deficiencies in violation of the Antideficiency Act, 31 U.S.C. § 1341.

[110] Pub. L. No. 217, ch. 1484, 33 Stat. 1214, 1257 (Mar. 3, 1905).

[111] Pub. L. No. 759, ch. 896, 64 Stat. 595, 765 (Sept. 6, 1950).

Section 1512(a) requires that all appropriations be administratively apportioned so as to ensure their obligation and expenditure at a controlled rate which will prevent deficiencies from arising before the end of a fiscal year. Although section 1512 does not tell you who is to make the apportionment, section 1513 names the President as the apportioning official for most executive branch agencies. The President delegated the function to the Director of the Bureau of the Budget in 1933,[112] and it now reposes in the successor to that office, the Director of the Office of Management and Budget (OMB).[113] Legislative and judicial branch appropriations are apportioned by officials in those branches. 31 U.S.C. § 1513(a).

The term "apportionment" may be defined as follows:

> "The action by which [the apportioning official] distributes amounts available for obligation, including budgetary reserves established pursuant to law, in an appropriation or fund account. An apportionment divides amounts available for obligation by specific time periods (usually quarters), activities, projects, objects, or a combination thereof. The amounts so apportioned limit the amount of obligations that may be incurred. An apportionment may be further subdivided by an agency into allotments, suballotments, and allocations. In apportioning any account, some funds may be reserved to provide for contingencies or to effect savings made possible pursuant to the Antideficiency Act. Funds apportioned to establish a reserve must be proposed for deferral or rescission pursuant to the Impoundment Control Act of 1974 (2 U.S.C. §§ 681–688).
>
> "The apportionment process is intended to (1) prevent the obligation of amounts available within an appropriation or fund account in a manner that would require deficiency or supplemental appropriations and (2) achieve the most

[112] Exec. Order No. 6166, § 16 (June 10, 1933), *at* 5 U.S.C. § 901 note.

[113] Reorganization Plan No. 2 of 1970, 35 Fed. Reg. 7959, 84 Stat. 2085 (effective July 1, 1970), designated the Bureau of the Budget as OMB and transferred to the President all functions vested in the former Bureau of the Budget. Executive Order No. 11541, 35 Fed. Reg. 10737 (July 1, 1970), 31 U.S.C. § 501 note, transferred those functions to the Director of OMB.

> effective and economical use of amounts made available for obligation."[114]

Apportionment is required not only to prevent the need for deficiency or supplemental appropriations, but also to ensure that there is no drastic curtailment of the activity for which the appropriation is made. 36 Comp. Gen. 699 (1957). *See also* 38 Comp. Gen. 501 (1959). In other words, the apportionment requirement is designed to prevent an agency from spending its entire appropriation before the end of the fiscal year and then putting Congress in a position in which it must either enact an additional appropriation or allow the entire activity to come to a halt. 64 Comp. Gen. 728, 735 (1985). *See also* Memorandum Opinion for the General Counsel, United States Marshals Service, *USMS Obligation To Take Steps To Avoid Anticipated Appropriations Deficiency*, OLC Opinion, May 11, 1999 (opining that 31 U.S.C. § 1512(a) imposes "an affirmative obligation" on federal agencies to take steps to use their available funds in a way that will avoid the need for a deficiency or supplemental appropriations, citing 64 Comp. Gen. 728 and 36 Comp. Gen. 699).

In 36 Comp. Gen. 699, Post Office funds had been reapportioned in such a way that the fourth quarter funds were substantially less than those for the third quarter. The Comptroller General stated:

> "A drastic curtailment toward the close of a fiscal year of operations carried on under a fiscal year appropriation is a *prima facie* indication of a failure to so apportion an appropriation 'as to prevent obligation or expenditure thereof in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period.' In our view, this is the very situation the amendment of the law in 1950 was intended to remedy."

36 Comp. Gen. at 703. *See also* 64 Comp. Gen. 728, 735–36 (1985). However, the mere fact that an agency faces a severe lack of funds and needs to curtail services late in a fiscal year does not necessarily mean that the apportioning authority has violated 31 U.S.C. § 1512(a). Programmatic

[114] GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: September 2005), at 12–13. *See also* OMB Circular No. A-11, pt. 4, *Instructions on Budget Execution*, §§ 120.1–120.5 (June 21, 2005). For a discussion of the Impoundment Control Act, see section D.3.b of Chapter 1.

factors that could not reasonably be foreseen at the time of an apportionment or reapportionment may affect the pattern or pace of spending over the course of the year. Also, as discussed hereafter in section C.4.e, the statute itself permits apportionments indicating the need for a deficiency or supplemental appropriation in certain limited circumstances.

A 1979 decision involved the Department of Agriculture's Food Stamp Program. The program was subject to certain spending ceilings which it seemed certain, given the rate at which the Department was incurring expenditures, that the Department was going to exceed. The Department feared that, if it was bound by a formula in a different section of its authorizing act to pay the mandated amount to each eligible recipient, it would have to stop the whole program when the funds were exhausted. Based on both the Antideficiency Act and the program legislation, GAO concluded that there had to be an immediate *pro rata* reduction for all participants. Discontinuance of the program when the funds ran out would violate the purpose of the apportionment requirement. A-51604, Mar. 28, 1979.

This is not to say that every subactivity or project must be carried out for the full fiscal year, on a reduced basis, if necessary. Section 1512(a) applies to amounts made available in an appropriation or fund. Where, for example, the then Veterans Administration (VA) nursing home program was funded from moneys made available in a general, lump-sum VA medical care appropriation, the agency was free to discontinue the nursing home program and reprogram the balance of its funds to other programs also funded under that heading. B-167656, June 18, 1971. (The result would be different if the nursing home program had received a line-item appropriation.)

The general rule against apportionments that indicate the need for a deficiency or supplemental appropriation does not preclude an agency from requesting an apportionment of all or most of its existing appropriations at the same time that it is seeking a supplemental so long as the agency has in place a plan that would enable it to function through the end of the fiscal year should Congress not enact the supplemental. 64 Comp. Gen. 728, 735 (1985). *See also* B-255529, Jan. 10, 1994. In 64 Comp. Gen. 728, the former Interstate Commerce Commission (ICC) had requested an apportionment of the full annual amount available to it under a continuing resolution at the outset of fiscal year 1985. At the same time, the ICC voted to seek a supplemental appropriation in order to avoid

severe staffing cuts that would have been required without it. The Comptroller General held that the apportionment was not improper:

> "As we have indicated, at the recommendation of its Managing Director the ICC adopted an operating plan for fiscal year 1985 which included a request for a supplemental appropriation. However, part of that operating plan was an emergency plan which would enable the ICC to operate for the entire fiscal year even without a supplemental. Under the plan, if the Congress did not enact a supplemental appropriation by the end of March, the Commission was to furlough all its employees for 1 day per week for the remainder of the year. This would allow the Commission to operate through the end of the fiscal year within the $48 million already appropriated. In fact a supplemental was not passed by the end of March and the furlough was implemented. . . .
>
> "[T]he actions taken by the ICC . . . demonstrate that from the time at which the Congress and the President approved legislation reducing ICC's funding below the requested level, every decision related to expenditures was made to avoid violation of the Antideficiency Act."

64 Comp. Gen. at 735.

The requirement to apportion applies not only to 1-year appropriations and other appropriations limited to a fixed period of time, but also to "no-year" money and even to contract authority (authority to contract in advance of appropriations). 31 U.S.C. §§ 1511(a), 1512(a). In the case of indefinite appropriations and contract authority, the requirement states only that the apportionment is to be made in such a way as "to achieve the most effective and economical use" of the budget authority. *Id.* § 1512(a).

Prior to the 1982 recodification of title 31 of the United States Code, the apportionment requirement applied explicitly to government corporations which are instrumentalities of the United States.[115] While the applicability of the requirement has not changed, the recodification dropped the explicit

[115] 31 U.S.C. § 665(d)(2) (1976 ed.).

language, viewing it as covered by the broad definition of "executive agency" in 31 U.S.C. § 102.[116] The authority of some government corporations to determine the necessity of their expenditures and the manner in which they shall be incurred is not sufficient to exempt a corporation from the apportionment requirement. 43 Comp. Gen. 759 (1964).

The apportionment process provides a set of administrative controls over the use of appropriations in addition to those Congress has imposed through the appropriations act itself. The apportionment process cannot alter or otherwise affect the operation of statutory requirements concerning the availability or use of appropriated funds. In this regard, OMB's guidance on apportionments states:

> ". . . The apportionment of funds should not be used as a means of resolving any question dealing with the legality of using funds for the purposes for which they are appropriated. Any questions as to the legality of using funds for a particular purpose must be resolved through legal channels."

OMB Circ. No. A-11, pt. 4, § 120.17.[117]

Furthermore, an apportioning official cannot apportion funds in advance of their availability for obligation or expenditure. In B-290600, July 10, 2002, OMB had apportioned certain budget authority for loan guarantees to the Air Transportation Stabilization Board pursuant to the Board's request. The statute enacting this budget authority had conditioned its availability such that the budget authority "shall be available only to the extent that a request . . . that includes designation of such amount as an emergency requirement . . . is transmitted by the President to Congress." The President had not transmitted this designation at the time of the apportionment. Therefore, GAO concluded that OMB and the Board had violated the Antideficiency Act. OMB and the Board recognized the violation and had already taken steps to avoid a recurrence.

b. Establishing Reserves

Section 1512(c) of 31 U.S.C. provides as follows:

[116] See the codification note following 31 U.S.C. § 1511.

[117] Before 2002, OMB's guidance on apportionments was located in Circular No. A-34.

> "(c)(1) In apportioning or reapportioning an appropriation, a reserve may be established only—
>
> > "(A) to provide for contingencies;
> >
> > "(B) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or
> >
> > "(C) as specifically provided by law.
>
> "(2) A reserve established under this subsection may be changed as necessary to carry out the scope and objectives of the appropriation concerned. When an official designated in section 1513 of this title to make apportionments decides that an amount reserved will not be required to carry out the objectives and scope of the appropriation concerned, the official shall recommend the rescission of the amount in the way provided in chapter 11 of this title for appropriation requests. Reserves established under this section shall be reported to Congress as provided in the Impoundment Control Act of 1974 (2 U.S.C. 681 *et seq.*)."

Section 1512(c) seeks to limit the circumstances in which the full appropriation is not apportioned or utilized and a reserve fund is established. Under this provision, the apportioning official is authorized to establish reserves only to provide for contingencies or to effect savings, unless the reserve is specifically authorized by statute.

At one time, this section was a battleground between the executive and legislative branches. The executive branch had relied on this portion of the Antideficiency Act to impound funds for general fiscal or economic policy reasons such as containment of federal spending and executive judgment of the relative merits, effectiveness, and desirability of competing federal programs (often referred to as "policy impoundments"). *See* 54 Comp. Gen. 453, 458 (1974); B-135564, July 26, 1973.

Prior to 1974, the predecessor of 31 U.S.C. § 1512(c) contained rather expansive language to the effect that a reserve fund could be established pursuant to "other developments subsequent to the date on which [the] appropriation was made available." 31 U.S.C. § 665(c)(2) (1970 ed.).

Despite this expansive language, the Comptroller General's position had been that the authority to establish reserves under the Antideficiency Act was limited to providing for contingencies or effecting savings which are in furtherance of, or at least consistent with, the purposes of an appropriation. B-130515, July 10, 1973. The Comptroller General did not interpret the law as authorizing a reserve of funds (*i.e.*, an impoundment) based upon general economic, fiscal, or policy considerations that were extraneous to the individual appropriation or were in derogation of the appropriation's purpose. B-125187, Sept. 11, 1973; B-130515, July 10, 1973. *See also State Highway Commission of Missouri v. Volpe*, 479 F.2d 1099, 1118 (8th Cir. 1973), which held that the right to reserve funds in order to "effect savings" or due to "subsequent events," *etc.*, must be considered in the context of the applicable appropriation statute.

The Impoundment Control Act of 1974[118] amended section 1512(c) by eliminating the "other developments" clause and by prohibiting the establishment of appropriation reserves except as provided under the Antideficiency Act for contingencies or savings, or as provided in other specific statutory authority. The intent was to preclude reliance on section 1512(c) as authority for "policy impoundments." *City of New Haven v. United States*, 809 F.2d 900, 906 (D.C. Cir. 1987); 54 Comp. Gen. 453 (1974); B-148898-O.M., Aug. 28, 1974.

The executive branch, however, continued to defer for policy reasons, arguing that section 1013 of the Impoundment Control Act provided authority, independent of the Antideficiency Act, to withhold funds from obligation temporarily for fiscal policy reasons. GAO agreed that this interpretation was consistent with the language of the Impoundment Control Act and with the statutory scheme, pointing out that Congress had reserved the power under the Impoundment Control Act to disapprove any deferral, particularly deferrals for fiscal policy reasons, as a counterweight to the President's power to defer. 54 Comp. Gen. at 455. At that time, the Impoundment Control Act provided for disapproval using a one-house veto. This counterweight vanished when the Supreme Court held one-house legislative veto provisions unconstitutional. *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983). Accordingly, in a decision issued on January 20, 1987, the U.S. Court of Appeals for the District of Columbia invalidated section 1013, which was the sole general

[118] Pub. L. No. 93-344, title X, § 1002, 88 Stat. 297, 332 (July 12, 1974).

legislative authority for policy deferrals.[119] *City of New Haven*, 809 F.2d at 902, 905–09. In September of 1987, Congress reenacted section 1013(b) of the Impoundment Control Act, 2 U.S.C. § 684(b), without the unconstitutional legislative veto provision and reiterated that the same limits on appropriation reserves that appear in 31 U.S.C. § 1512(c) are the sole justifications for deferrals. *See* Pub. L. No. 100-119, § 206, 101 Stat. 754, 785 (Sept. 29, 1987). See Chapter 1, section D.3.b for a general discussion of impoundments and the Impoundment Control Act.

The Comptroller General discussed examples of permissible (*i.e.*, nonpolicy) reserves in 51 Comp. Gen. 598 (1972) and 51 Comp. Gen. 251 (1971). The first decision concerned the provisions of a long-term charter of several tankers for the Navy. The contract contained options to renew the charter for periods of 15 years. In the event that the Navy declined to renew the charter short of a full 15-year period, the vessels were to be sold by a Board of Trustees, acting for the owners and bondholders. Any shortfall in the proceeds over the termination value was to be unconditionally guaranteed by the Navy. GAO held that it would not violate the Antideficiency Act to cover this contingent liability by setting up a reserve. 51 Comp. Gen. 598 (1972). In 51 Comp. Gen. 251 (1971), GAO said that it was permissible to provide in regulations for a clause to be inserted in future contracts for payment of interest on delayed payments of a contractor's claim. Reserving sufficient funds from the appropriation used to support the contract to cover these potential interest costs would protect against potential Antideficiency Act violations.

In 1981, the Community Services Administration established a reserve as a cushion against Antideficiency Act violations while the agency was terminating its operations. Grantees argued that the reserve improperly reduced amounts available for discretionary grants. In *Rogers v. United States*, 14 Cl. Ct. 39, 46–47 (1987), *aff'd*, 801 F.2d 729 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1034 (1989), the court held that a reasonable reserve for contingencies was properly within the agency's discretion.

c. Method of Apportionment

The remaining portions of 31 U.S.C. § 1512 are subsections (b) and (d), set forth below:

[119] The Court concluded that the one-house legislative veto was not severable from the Act's deferral provision, and invalidated that provision as well. *Id.*

> "(b)(1) An appropriation subject to apportionment is apportioned by—
>
> > "(A) months, calendar quarters, operating seasons, or other time periods;
> >
> > "(B) activities, functions, projects, or objects; or
> >
> > "(C) a combination of the ways referred to in clauses (A) and (B) of this paragraph.
> >
> > * * * * *
>
> "(d) An apportionment or reapportionment shall be reviewed at least 4 times a year by the official designated in section 1513 of this title to make apportionments."

Subsection (b) and (d) are largely technical, implementing the basic apportionment requirement of 31 U.S.C. § 1512(a). Section 1512(b) makes it clear that apportionments need not be made strictly on a monthly, quarterly, or other fixed time basis, nor must they be for equal amounts in each time period. The apportioning officer is free to take into account the "activities, functions, projects, or objects" of the program being funded and the usual pattern of spending for such programs in deciding how to apportion the funds. Absent some statutory provision to the contrary, OMB's determination is controlling. Thus, in *Maryland Department of Human Resources v. United States Department of Health & Human Services*, 854 F.2d 40 (4th Cir. 1988), the court upheld OMB's quarterly apportionment of social services block grant funds, rejecting the state's contention that it should receive its entire annual allotment at the beginning of the fiscal year. Section 1512(d) requires a minimum of four reviews each year to enable the apportioning officer to make reapportionments or other adjustments as necessary.

Conversely, OMB may decide to apportion all or most of an available appropriation at the outset of a fiscal year. In B-255529, Jan. 10, 1994, GAO held that OMB's apportionments at the beginning of the fiscal year of the full amounts available for two State Department appropriation ("Contributions to International Organizations" and "Contributions for International Peacekeeping Activities") constituted an appropriate exercise of OMB's discretion. Quoting from an earlier opinion, B-152554, Feb. 17,

1972, the decision then observed that the amounts to be apportioned depended on the needs of the programs as determined by OMB:

> "It must be recognized that, with respect to a number of programs, particularly where grant or other assistance funds are involved, a large portion of the funds normally are obligated during the early part of the fiscal year. The pattern of obligations is much different than where, for example, an appropriation is primarily available for salaries and administrative expenses. In such case the expenditures would be comparatively constant throughout the year. The pattern of obligations, however, is primarily an administrative matter . . . [for resolution through] the apportionment process."

The decision pointed out that, according to the State Department, payments under the Contributions to International Organizations account traditionally were made in the first quarter of the fiscal year. Payments under the Peacekeeping account usually occurred as bills were received and funds were available, but the Department advised GAO that there was a large backlog of bills at the time funds became available, thereby justifying immediate apportionment of the entire annual appropriation.[120]

d. Control of Apportionments

Section 1513 of title 31, United States Code, specifies the authorities and timetables for making the apportionments or reapportionments of appropriations required by section 1512. Section 1513(a) applies to appropriations of the legislative and judicial branches of the federal government, as well as appropriations of the International Trade Commission and the District of Columbia government.[121] It assigns authority to apportion to the "official having administrative control" of the

[120] The two decisions cited concerned apportionments that OMB made under continuing resolutions. As a general matter, the discussion of OMB's apportionment discretion would apply to any appropriation. For a discussion of continuing resolutions, see Chapter 8.

[121] A permanent provision of law included in the 1988 District of Columbia appropriation act states that appropriations for the D.C. government "shall not be subject to apportionment except to the extent specifically provided by statute." Pub. L. No. 100-202, § 135, 101 Stat. 1329, 1329-102 (1987). This provision appears to implicitly repeal 31 U.S.C. § 1513(a) as applied to the D.C. government.

appropriation.[122] Apportionment must be made 30 days before the start of the fiscal year for which the appropriation is made, or within 30 days after the enactment of the appropriation, whichever is later. The apportionment must be in writing.

Section 1513(b) deals with apportionments for the executive branch. The President is designated as the apportioning authority. As we have seen, the function has been delegated to the Director, Office of Management and Budget (OMB).[123] The Director of OMB has up to 20 days before the start of the fiscal year or 30 days after enactment of the appropriation act, whichever is later, to make the actual apportionment and notify the agency of the action taken. 31 U.S.C. § 1513(b)(2). Again, the apportionments must be in writing. Although primary responsibility for a violation of section 1512 lies with the Director of OMB, the head of the agency concerned also may be found responsible if he or she fails to send the Director accurate information on which to base an apportionment.

In B-163628, Jan. 4, 1974, GAO responded to a question from the chairman of a congressional committee about the power of OMB to apportion the funds of independent regulatory agencies, such as the Securities and Exchange Commission (SEC). The Comptroller General agreed with the chairman that independent agencies should generally be free from executive control or interference. The response then stated:

> "[T]he apportionment power may not lawfully be used as a form of executive control or influence over agency functions. Rather, it may only be exercised by OMB in the manner and for the purposes prescribed in 31 U.S.C. § [1512]—*i.e.*, to prevent obligation or expenditure in a manner which would give rise to a need for deficiency or supplemental appropriations, to achieve the most effective and economical use of appropriations and to establish reserves either to provide for contingencies or to effect savings which are in furtherance of or at least consistent with, the purposes of an appropriation.

[122] Neither section 1513 nor case law defines the phrase "official having administrative control." Consequently, the apportioning official for legislative and judicial appropriations is named by the head of the agency to whom the appropriation is made.

[123] See footnote 113, *supra*, and accompanying text.

> "As thus limited, the apportionment process serves a necessary purpose—the promotion of economy and efficiency in the use of appropriations. . . .
>
> * * * * *
>
> "[S]ince a useful purpose is served by OMB's proper exercise of the apportionment power, we do not believe that the potential for abuse of the power is sufficient to justify removing it from OMB."

Thus, the appropriations of independent regulatory agencies like the Securities and Exchange Commission (SEC) are subject to apportionment by OMB, but OMB may not lawfully use its apportionment power to compromise the independence of those agencies.

The Impoundment Control Act may permit OMB, in effect, to delay the apportionment deadlines prescribed in 31 U.S.C. § 1513(b). For example, when the President sends a rescission message to Congress, the budget authority proposed to be rescinded may be withheld for up to 45 days pending congressional action on a rescission bill. 2 U.S.C. §§ 682(3), 683(b). In B-115398.33, Aug. 12, 1976, GAO responded to a congressional request to review a situation in which an apportionment had been withheld for more than 30 days after enactment of the appropriation act. The President had planned to submit a rescission message for some of the funds but was late in drafting and transmitting his message. If the full amount contained in the rescission message could be withheld for the entire 45-day period, and Congress ultimately declined to enact the full rescission, release of the funds for obligation would occur only a few days before the budget authority expired. The Comptroller General suggested that, where Congress has completed action on a rescission bill rescinding only a part of the amount proposed, OMB should immediately apportion the amounts not included in the rescission bill without awaiting the expiration of the 45-day period. *See also* B-115398.33, Mar. 5, 1976.

e. Apportionments Requiring Deficiency Estimate

In our discussion of the basic requirement for apportionment, we quoted 31 U.S.C. § 1512(a) to the effect that appropriations must be apportioned "to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation." The requirement that appropriations be apportioned so as to avoid the need for

deficiency or supplemental appropriations is fleshed out in 31 U.S.C. § 1515 (formerly subsection (e) of the Antideficiency Act):

> "(a) An appropriation required to be apportioned under section 1512 of this title may be apportioned on a basis that indicates the need for a deficiency or supplemental appropriation to the extent necessary to permit payment of such pay increases as may be granted pursuant to law to civilian officers and employees (including prevailing rate employees whose pay is fixed and adjusted under subchapter IV of chapter 53 of title 5) and to retired and active military personnel.
>
> "(b)(1) Except as provided in subsection (a) of this section, an official may make, and the head of an executive agency may request, an apportionment under section 1512 of this title that would indicate a necessity for a deficiency or supplemental appropriation only when the official or agency head decides that the action is required because of—
>
> > "(A) a law enacted after submission to Congress of the estimates for an appropriation that requires an expenditure beyond administrative control; or
> >
> > "(B) an emergency involving the safety of human life, the protection of property, or the immediate welfare of individuals when an appropriation that would allow the United States Government to pay, or contribute to, amounts equired to be paid to individuals in specific amounts fixed by law or under formulas prescribed by law, is insufficient.
>
> "(2) If an official making an apportionment decides that an apportionment would indicate a necessity for a deficiency or supplemental appropriation, the official shall submit immediately a detailed report of the facts to Congress. The report shall be referred to in submitting a proposed deficiency or supplemental appropriation."

Section 1515 thus provides certain exceptions to the requirement of section 1512(a) that apportionments be made in such manner as to assure that the funds will last throughout the fiscal year and there will be no necessity for a deficiency appropriation. Under subsection 1515(a), deficiency apportionments are permissible if necessary to pay salary increases granted pursuant to law to federal civilian and military personnel. Under subsection 1515(b), apportionments can be made in an unbalanced manner (*e.g.*, an entire appropriation could be obligated by the end of the second quarter) if the apportioning officer determines that (1) a law enacted subsequent to the transmission of budget estimates for the appropriation requires expenditures beyond administrative control, or (2) there is an emergency involving safety of human life, protection of property, or immediate welfare of individuals in cases where an appropriation for mandatory payments to those individuals is insufficient.

Prior to 1957, what is now subsection 1515(b) prohibited only the *making* of an apportionment indicating the need for a deficiency or supplemental appropriation, so the only person who could violate this subsection was the Director of OMB. An amendment in 1957 made it equally a violation for an agency to *request* such an apportionment. *See* 38 Comp. Gen. 501 (1959). The exception in subsection 1515(b)(1)(A) for expenditures "beyond administrative control" required by a statute enacted after submission of the budget estimate may be illustrated by statutory increases in compensation, although many of the cases would now be covered by subsection (a). We noted several of the cases in our consideration of when an obligation or expenditure is "authorized by law" for purposes of 31 U.S.C. § 1341.[124] Those cases established the rule that a mandatory increase is regarded as "authorized by law" so as to permit overobligation, whereas a discretionary increase is not. The same rule applies in determining when an expenditure is "beyond administrative control" for purposes of 31 U.S.C. § 1515(b). Thus, statutory pay increases for Wage Board employees granted pursuant to a wage survey meet the test. 39 Comp. Gen. 422 (1959); 38 Comp. Gen. 538, 542 (1959). *See also* 45 Comp. Gen. 584, 587 (1966) (severance pay in fiscal year 1966).[125] Discretionary increases, just as they are not "authorized by law" for purposes of 31 U.S.C. § 1341, are not "beyond administrative control" for

[124] See section C.2.g of this chapter.

[125] The law mandating payment of severance pay was enacted after the start of fiscal year 1966, which is why the expenditures in that case would qualify under 31 U.S.C. § 1515(b).

purposes of section 1515(b). 44 Comp. Gen. 89 (1964) (salary increases to Central Intelligence Agency employees); 31 Comp. Gen. 238 (1951) (pension increases to retired District of Columbia police and firefighters).

The Wage Board exception was separately codified in 1957 and now appears at 31 U.S.C. § 1515(a), quoted above. Subsection 1515(a) reached its present form in 1987 when Congress expanded it to include pay increases granted pursuant to law to non-Wage Board civilian officers and employees and to retired and active military personnel.[126]

The "emergency" exceptions in subsection 1515(b)(1)(B) have not been discussed in GAO decisions, although a 1989 internal memorandum suggested that the exception would apply to Forest Service appropriations for fighting forest fires. B-230117-O.M., Feb. 8, 1989. The exceptions for safety of human life and protection of property appear to be patterned after identical exceptions in 31 U.S.C. § 1342 (acceptance of voluntary services), so the case law under that section would likely be relevant for construing the scope of the exceptions under section 1515(b). *See* 43 Op. Att'y Gen. 293, 5 Op. Off. Legal Counsel 1, 9–10 (1981) ("as provisions containing the same language, enacted at the same time, and aimed at related purposes, the emergency provisions of" sections 1342 and 1515(b)(1)(B) "should be deemed *in pari materia* and given a like construction"); Memorandum for the General Counsel, United States Marshals Service, *Continuation of Federal Prisoner Detention Efforts in the Face of a USMS Appropriation Deficiency*, OLC Opinion, Apr. 5, 2000 ("we think it clear that, if an agency's functions fall within § 1342's exception for emergency situations, the standard for the 'emergency' exception under § [1515(b)(1)(B)] also will be met"). *See also* Memorandum for the Director, Office of Management and Budget, *Government Operations in the Event of a Lapse in Appropriations*, OLC Opinion, Aug. 16, 1995, at 7, fn. 6.

It is less obvious that the converse would necessarily be true—that is, that an "emergency" for purposes of subsection 1515(b)(1)(B) automatically qualifies as an "emergency" for purposes of section 1342. As we pointed out in discussing section 1342, this section was amended in 1990 to add the following language:

[126] Pub. L. No. 100-202, § 105, 101 Stat. 1329, 1329-433 (Dec. 22, 1987) (1988 continuing resolution).

> "As used in this section, the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."

Such language was not added to subsection 1515(b)(1)(B). Thus, on its face, subsection 1515(b)(1)(B) may embody at least a slightly more flexible standard of "emergency" than section 1342, although we have found no cases addressing this point.

Importantly, the exceptions in 31 U.S.C. § 1515(b) are exceptions only to the prohibition against making or requesting apportionments requiring deficiency estimates; they are not exceptions to the basic prohibitions in 31 U.S.C. § 1341 against obligating or spending in excess or advance of appropriations. The point was discussed at some length in B-167034, Sept. 1, 1976. Legislation had been proposed in the Senate to repeal 41 U.S.C. § 11 (the Adequacy of Appropriations Act),[127] which prohibits the making of a contract, not otherwise authorized by law, unless there is an appropriation "adequate to its fulfillment," except in the case of contracts made by a military department for "clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies." The question was whether, if 41 U.S.C. § 11 were repealed, the military departments would have essentially the same authority under section 1515(b).

The Defense Department expressed the view that section 1515(b) would not be an adequate substitute for the 41 U.S.C. § 11 exception which allows the incurring of obligations for limited purposes even though the applicable appropriation is insufficient to cover the expenses at the time the commitment is made. Defense commented as follows:

> "The authority to apportion funds on a deficiency basis in [31 U.S.C. § 1515(b)] does not, as alleged, provide authority to incur a deficiency. It merely authorizes obligating funds at a deficiency rate under certain circumstances, *e.g.*, a $2,000,000 appropriation can be obligated in its entirety at the end of the third quarter, but it does not provide authority to obligate one dollar more than $2,000,000."

[127] See section C.2.a of this chapter for a further discussion of 41 U.S.C. § 11.

Letter from the Deputy Secretary of Defense to the Chairman, House Armed Services Committee, Apr. 2, 1976 (quoted in B-167034, Sept. 1, 1976).

The Comptroller General agreed with the Deputy Secretary, stating:

> "[Section 1515(b)] in no way authorizes an agency of the Government actually to incur obligations in excess of the total amount of money appropriated for a period. It only provides an exception to the general apportionment rule set out in [31 U.S.C. § 1512(a)] that an appropriation be allocated so as to insure that it is not exhausted prematurely. [Section 1515(b)] says nothing about increasing the total amount of the appropriation itself or authorizing the incurring of obligations in excess of the total amount appropriated. On the contrary, as noted above, apportionment only involves the subdivision of appropriations already enacted by Congress. It necessarily follows that the sum of the parts, as apportioned, could not exceed the total amount of the appropriations being apportioned.
>
> "Any deficiency that an agency incurs where obligations exceed total amounts appropriated, including a deficiency that arises in a situation where it was determined that one of the exceptions set forth in [section 1515(b)] was applicable, would constitute a violation of 31 U.S.C. § [1341(a)] . . . ."

B-167034, Sept. 1, 1976.

f. Exemptions from Apportionment Requirement

A number of exemptions from the apportionment requirement, formerly found in subsection (f) of the Antideficiency Act, are now gathered in 31 U.S.C. § 1516:

> "An official designated in section 1513 of this title to make apportionments may exempt from apportionment—
>
> > "(1) a trust fund or working fund if an expenditure from the fund has no significant effect on the financial operations of the United States Government;

"(2) a working capital fund or a revolving fund established for intragovernmental operations;

"(3) receipts from industrial and power operations available under law; and

"(4) appropriations made specifically for—

"(A) interest on, or retirement of, the public debt;

"(B) payment of claims, judgments, refunds, and drawbacks;

"(C) items the President decides are of a confidential nature;

"(D) payment under a law requiring payment of the total amount of the appropriation to a designated payee; and

"(E) grants to the States under the Social Security Act (42 U.S.C. 301 *et seq.*)."

Section 1516 is largely self-explanatory and the various enumerated exceptions appear to be readily understood. Note that the statute does not make the exemptions mandatory. It merely authorizes them, within the discretion of the apportioning authority (OMB). OMB's implementing instructions, OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, part 4, § 120 (June 21, 2005), have not adopted all of the exemptions permitted under the statute. For example, the Circular's list of funds exempted from apportionment pursuant to 31 U.S.C. § 1516 does not include trust funds or intragovernmental revolving funds. *See* OMB Cir. No. A-11, at § 120.7.

In addition, 10 U.S.C. § 2201(a) authorizes the President to exempt appropriations for military functions of the Defense Department from apportionment upon determining "such action to be necessary in the interest of national defense."

Another exemption, this one mandatory, is contained in 31 U.S.C. § 1511(b)(3): appropriations for "the Senate, the House of Representatives, a committee of Congress, a member, officer, employee, or office of either House of Congress, or the Office of the Architect of the Capitol or an officer or employee of that Office" are exempt from the apportionment requirement. The remainder of the legislative branch along with the judicial branch are subject to apportionment. *See* 31 U.S.C. § 1513(a).

g. Administrative Division of Apportionments

Thus far, we have reviewed the provisions of the Antideficiency Act directed at the appropriation level and the apportionment level. The law also addresses agency subdivisions.

The first provision to note is 31 U.S.C. § 1513(d):

> "An appropriation apportioned under this subchapter may be divided and subdivided administratively within the limits of the apportionment."

Thus, administrative subdivisions are expressly authorized. The precise pattern of subdivisions will vary based on the nature and scope of activities funded under the apportionment and, to some extent, agency preference. The levels of subdivision below the apportionment level are, in descending order, allotment, suballotment, and allocation. See OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, § 20.3 (June 21, 2005), which notes under its definition of apportionment: "An apportionment may be further subdivided by an agency into allotments, suballotments, and allocations." As we will see later in our discussion of 31 U.S.C. § 1517(a), there are definite Antideficiency Act implications flowing from how an agency structures its fund control system.

The next relevant statute is 31 U.S.C. § 1514:[128]

> "(a) The official having administrative control of an appropriation available to the legislative branch, the judicial branch, the United States International Trade Commission, or the District of Columbia government, and, subject to the approval of the President, the head of each executive

[128] Prior to the 1982 recodification of title 31, sections 1513(d) and 1514 had been combined as subsection (g) of the Antideficiency Act.

agency (except the Commission) shall prescribe by regulation a system of administrative control not inconsistent with accounting procedures prescribed under law. The system shall be designed to—

> "(1) restrict obligations or expenditures from each appropriation to the amount of apportionments or reapportionments of the appropriation; and
>
> "(2) enable the official or the head of the executive agency to fix responsibility for an obligation or expenditure exceeding an apportionment or reapportionment.

"(b) To have a simplified system for administratively dividing appropriations, the head of each executive agency (except the Commission) shall work toward the objective of financing each operating unit, at the highest practical level, from not more than one administrative division for each appropriation affecting the unit."

Section 1514 is designed to ensure that the agencies in each branch of the government keep their obligations and expenditures within the bounds of each apportionment or reapportionment. The official in each agency who has administrative control of the apportioned funds is required to set up, by regulation, a system of administrative controls to implement this objective. The system must be consistent with any accounting procedures prescribed by or pursuant to law, and must be designed to (1) prevent obligations and expenditures in excess of apportionments or reapportionments, and (2) fix responsibility for any obligation or expenditure in excess of an apportionment or reapportionment.[129] Agency fund control regulations in the executive branch must be approved by OMB. *See* OMB Cir. No. A-11, pt. 4, § 150.7.

[129] See, in this regard, GAO, *Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: Nov. 9, 1999); GAO, *Policy and Procedures Manual for the Guidance of Federal Agencies*, title 7 (Washington, D.C.: May 18, 1993).

Subsection (b) of 31 U.S.C. § 1514 was added in 1956[130] and was intended to simplify agency allotment systems. Prior to 1956, it was not uncommon for agencies to divide and subdivide their apportionments into numerous "pockets" of obligational authority called "allowances." Obligating or spending more than the amount of each allowance was a violation of the Antideficiency Act as it then existed. The Second Hoover Commission (Commission on Organization of the Executive Branch of the Government) had recommended simplification in 1955. The Senate and House Committees on Government Operations agreed. Both committees reported as follows:

> "The making of numerous allotments which are further divided and suballotted to lower levels leads to much confusion and inflexibility in the financial control of appropriations or funds as well as numerous minor violations of [the Antideficiency Act]."

S. Rep. No. 84-2265, at 9 (1956); H.R. Rep. No. 84-2734, at 7 (1956). The result was what is now 31 U.S.C. § 1514(b).[131]

As noted, one of the objectives of 31 U.S.C. § 1514 is to enable the agency head to fix responsibility for obligations or expenditures in excess of apportionments. The statute encourages agencies to fix responsibility at the highest practical level, but does not otherwise prescribe precisely how this is to be done. Apart from subsection (b), the substance of section 1514 derives from a 1950 amendment to the Antideficiency Act.[132] In testimony on that legislation, the Director of the then Bureau of the Budget stated:

> "At the present time, theoretically, I presume the agency head is about the only one that you could really hold responsible for exceeding [an] apportionment. The revised section provides for going down the line to the person who creates the obligation against the fund and fixes the

[130] Pub. L. No. 863, ch. 814, § 3, 70 Stat. 782, 783 (Aug. 1, 1956).

[131] The historical summary in this paragraph is taken largely from 37 Comp. Gen. 220 (1957).

[132] Pub. L. No. 759, ch. 896, § 1211, 64 Stat. 595, 765 (Sept. 6, 1950).

> responsibility on the bureau head or the division head, if he is the one who creates the obligation."[133]

Thus, depending on the agency regulations and the level at which administrative responsibility is fixed, the violating individual could be the person in charge of a major agency bureau or operating unit, or it could be a contracting officer or finance officer.

Identifying the person responsible for a violation will be easy in probably the majority of cases. However, where there are many individuals involved in a complex transaction, and particularly where the actions producing the violation occurred over a long period of time, pinpointing responsibility can be much more difficult. Hopkins and Nutt, in their study of the Antideficiency Act, present the following as a sensible approach:

> "Generally, [the individual to be held responsible] will be the highest ranking official in the decision-making process who had knowledge, either actual or constructive, of (1) precisely what actions were taken and (2) the impropriety or at least questionableness of such actions. There will be officials who had knowledge of either factor. But the person in the best and perhaps only position to prevent the ultimate error—and thus the one who must be held accountable—is the highest one who is aware of both.[134]

Thus, Hopkins and Nutt conclude, where multiple individuals are involved in a violation, the individual to be held responsible "must not be too remote from the cause of the violation and must be in a position to have prevented the violation from occurring."[135]

h. Expenditures in Excess of Apportionment

The former subsection (h) of the Antideficiency Act, now 31 U.S.C. § 1517(a), provides:

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[133] *Hearings Before Senate Comm. on Appropriations on H.R. 7786*, 81st Cong., 2d Sess. 10 (1950), quoted in Hopkins & Nutt, *The Anti-Deficiency Act (Revised Statutes 3679) and Funding Federal Contracts: An Analysis*, 80 Mil. L. Rev. 51, 128 (1978).

[134] Memorandum for the Assistant Secretary of the Army (Financial Management), 1976, quoted in Hopkins & Nutt, *supra*, at 130.

[135] *Id.*

> "(a) An officer or employee of the United States Government or of the District of Columbia government may not make or authorize an expenditure or obligation exceeding—
>
> > "(1) an apportionment; or
> >
> > "(2) the amount permitted by regulations prescribed under section 1514(a) of this title."

Section 1517(a) must be read in conjunction with sections 1341, 1512, and 1514, previously discussed.

Subsection 1517(a)(1) prohibits obligations or expenditures in excess of an apportionment. Thus, an agency must observe the limits of its apportionments just as it must observe the limits of its appropriations. It follows that an agency cannot obligate or expend appropriations before they have been apportioned. Thus, GAO stated in B-290600, July 10, 2002:

> "The Antideficiency Act prohibits . . . the making or the authorizing of obligations or expenditures in advance of, or in excess of, available appropriations. 31 U.S.C. § 1341. An agency may obligate an appropriation only after OMB has apportioned it to the agency."

Since the Antideficiency Act requires an apportionment before an agency can obligate the appropriation, 31 U.S.C. § 1512(a), an obligation in advance of an apportionment violates the Act. *See* B-255529, Jan. 10, 1994. In other words, if zero has been apportioned, zero is available for obligation or expenditure.[136] When an agency anticipates a need to obligate appropriations upon their enactment, it may request (but not receive) an apportionment before a regular appropriation or continuing resolution has been enacted. Typically, for regular appropriation acts, agencies submit their apportionment requests to OMB by August 21 or within 10 calendar days after enactment of the appropriation, whichever is later. *See* OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, § 120.30 (June 21, 2005). OMB permits agencies to submit requests on the day Congress completes action on the appropriation bill. *Id.* § 120.34. OMB encourages agencies to begin their preparation of apportionment requests as soon as the House and Senate have reached agreement on funding levels (*id.* § 120.30) and to discuss the proposed request with OMB representatives (*id.* § 120.34). OMB will entertain expedited requests and, for emergency funding needs, may approve the apportionment request by telephone or fax. *Id.* For continuing resolutions, OMB typically expedites the process by making "automatic" apportionments under continuing resolutions. *See* B-255529, Jan. 10, 1994; OMB Cir. No. A-11, § 123.5.

[136] *But see Cessna Aircraft Co. v. Dalton*, 126 F.3d 1442 (Fed. Cir. 1997), *cert. denied*, 525 U.S. 818 (1998). In that case, the Navy had exercised an option to extend a contract on October 1. The appropriation that Navy charged the obligation to was signed into law on October 1; however, OMB had not yet apportioned the appropriation. Cessna, trying to get out of the contract, argued that the obligation for the contract extension was not valid since it was made in advance of the apportionment. The court held that the provisions of the Antideficiency Act were only internal government operating requirements and, as such, they did not confer legal rights on outside parties. *Id.* at 1451–52. *See generally Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 n.9 (Ct. Cl. 1980); *Rough Diamond Co. v. United States*, 351 F.2d 636, 640, 642 (Ct. Cl. 1965), *cert. denied*, 383 U.S. 957 (1966).

In *dicta*, the court said that apportionment is not a prerequisite to the obligation of appropriated funds. The court noted that 31 U.S.C. § 1341 explicitly prohibits obligations both in excess of and (unless otherwise authorized) in advance of appropriations. By contrast, the court pointed out, the apportionment sections of title 31 explicitly prohibit only obligations exceeding an apportionment; they do not literally forbid obligations in advance of an apportionment. *Cessna*, 126 F.3d at 1450–51. The court also rejected Cessna's reliance on provisions of the Defense Department accounting manual that generally prohibited obligations in advance of an apportionment. The *Cessna dicta* has not been followed in any subsequent case.

Under some circumstances, an agency may have a legal duty to seek an additional apportionment from OMB. *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 552 n.9 (Ct. Cl. 1980); *Berends v. Butz*, 357 F. Supp. 143, 155–56 (D. Minn. 1973). In *Berends v. Butz*, the Secretary of Agriculture had terminated an emergency farm loan program, allegedly due to a shortage of funds. The court found the termination improper and directed reinstatement of the program. Since the shortage of funds related to the amount apportioned and not the amount available under the appropriation, the court found that the Secretary had a duty to request an additional apportionment in order to continue implementing the program. The case does not address the nature and extent of any duty OMB might have in response to such a request.

Subsection 1517(a)(2) makes it a violation to obligate or expend in excess of an administrative subdivision of an apportionment to the extent provided in the agency's fund control regulations prescribed under section 1514. The importance of 31 U.S.C. § 1514 becomes much clearer when it is read in conjunction with 31 U.S.C. § 1517(a)(2). Section 1514 does not prescribe the level of fiscal responsibility for violations below the apportionment level. It merely recommends that the agency set the level at the highest practical point and suggests no more than one subdivision below the apportionment level. The agency thus, under the statute, has a measure of discretion. If it chooses to elevate overobligations or overexpenditures of lower-tier subdivisions to the level of Antideficiency Act violations, it is free to do so in its fund control regulations.

At this point, it is important to return to OMB Circular No. A-11. Since agency fund control regulations must be approved by OMB (*id.* § 150.7), OMB has a role in determining what levels of administrative subdivision should constitute Antideficiency Act violations. Under OMB Circular No. A-11, § 145.2, overobligation or overexpenditure of an allotment or suballotment are always violations. Overobligation or overexpenditure of other administrative subdivisions are violations only if and to the extent specified in the agency's fund control regulations. *See* 31 U.S.C. §§ 1514(a), 1517(a)(2).

In 37 Comp. Gen. 220 (1957), GAO considered proposed fund control regulations of the Public Housing Administration. The regulations provided for allotments as the first subdivision below the apportionment level. They then authorized the further subdivision of allotments into "allowances," but retained responsibility at the allotment level. The "allowances" were intended as a means of meeting operational needs

rather than an apportionment control device. GAO advised that this proposed structure conformed to the purposes of 31 U.S.C. § 1514, particularly in light of the 1956 addition of section 1514(b), and that expenditures in excess of an "allowance" would not constitute Antideficiency Act violations.

For further illustration, see 35 Comp. Gen. 356 (1955) (overobligation of allotment stemming from misinterpretation of regulations); B-95136, Aug. 8, 1979 (overobligation of regional allotments would constitute reportable violation unless sufficient unobligated balance existed at central account level to adjust the allotments); B-179849, Dec. 31, 1974 (overobligation of allotment held a violation of section 1517(a) where agency regulations specified that allotment process was the "principal means whereby responsibility is fixed for the conduct of program activities within the funds available"); B-114841.2-O.M., Jan. 23, 1986 (no violation in exceeding allotment subdivisions termed "work plans"); B-242974.6, Nov. 26, 1991 (nondecision memorandum) (under Defense Department regulations, overobligations of administrative subdivisions of funds that are exempt from apportionment do not constitute Antideficiency Act violations.).

5. Penalties and Reporting Requirements

a. Administrative and Penal Sanctions

Violations of the Antideficiency Act are subject to sanctions of two types, administrative and penal. The Antideficiency Act is the only one of the title 31, United States Code, fiscal statutes to prescribe penalties of both types, a fact which says something about congressional perception of the Act's importance.

An officer or employee who violates 31 U.S.C. § 1341(a) (obligate/expend in excess or advance of appropriation), section 1342 (voluntary services prohibition), or section 1517(a) (obligate/expend in excess of an apportionment or administrative subdivision as specified by regulation) "shall be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office." 31 U.S.C. §§ 1349(a), 1518. For a case in which an official was reduced in grade and reassigned to other duties, see *Duggar v. Thomas*, 550 F. Supp. 498 (D.D.C. 1982) (upholding the agency's action against a charge of discrimination).

In addition, an officer or employee who "knowingly and willfully" violates any of the three provisions cited above "shall be fined not more than $5,000, imprisoned for not more than 2 years, or both." 31 U.S.C. §§ 1350, 1519. As far as GAO is aware, it appears that no officer or employee has ever been prosecuted, much less convicted, for a violation of the Antideficiency Act as of this writing. The knowing and willful failure to record an overobligation in order to conceal an Antideficiency Act violation is also a criminal offense. *See* 71 Comp. Gen. 502, 509–10 (1992) (discussing several relevant criminal provisions in title 18, United States Code).

Earlier in this chapter, we pointed out that factors such as the absence of bad faith or the lack of intent to commit a violation are irrelevant for purposes of determining whether a violation has occurred. However, intent *is* relevant in evaluating the assessment of penalties. Note that the criminal penalties are linked to a determination that the law was "knowingly and willfully" violated, but the administrative sanction provisions do not contain similar language. Thus, intent or state of mind *may* (and probably should) be taken into consideration when evaluating potential administrative sanctions (whether to assess them and, if so, what type), but *must* be taken into consideration in determining applicability of the criminal sanctions. Understandably, the provisions for fines and/or jail are intended to be reserved for particularly flagrant violations.

Finally, the administrative and penal sanctions apply only to violations of the three provisions cited—31 U.S.C. §§ 1341(a), 1342, and 1517(a). They do not, for example, apply to violations of 31 U.S.C. § 1512 (requiring that all appropriations be administratively apportioned so as to ensure obligation and expenditure at a controlled rate which will prevent deficiencies from arising before the end of a fiscal year). 36 Comp. Gen. 699 (1957).

b. Reporting Requirements

Once it is determined that there has been a violation of 31 U.S.C. § 1341(a), 1342, or 1517(a), the agency head "shall report immediately to the President and Congress all relevant facts and a statement of actions taken." 31 U.S.C. §§ 1351, 1517(b). Further instructions on preparing the reports may be found in OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, § 145 (June 21, 2005). The reports are to be signed by the agency head. *Id.* § 145.7. The report to the President is to be forwarded through the Director of OMB. *Id.*

In the Consolidated Appropriations Act, 2005, Congress amended the Antideficiency Act to add that the heads of executive branch agencies and the Mayor of the District of Columbia shall also transmit "[a] copy of each report . . . to the Comptroller General on the same date the report is transmitted to the President and Congress."[137]

The report is to include all pertinent facts and a statement of all actions taken to address and correct the Antideficiency Act violation (any administrative discipline imposed, referral to the Justice Department where appropriate, new safeguards imposed, *etc.*). An agency also should include a request for a supplemental or deficiency appropriation when needed. It is also understood that the agency will do everything it can lawfully do to correct or mitigate the financial effects of the violation. For example, when the Fish and Wildlife Service improperly entered into contracts for legal services, we explained that there were a number of ways the Department of Interior could correct the Service's Antideficiency Act violations if unable to obtain a deficiency appropriation of the budget authority needed to cover amounts the Service paid to these contractors, including ratifying the contracts and covering their costs out of unobligated balances of the applicable fiscal year appropriation, or paying the contractors on a *quantum meruit* basis[138] out of unobligated balances. B-290005, July 1, 2002. *See also* B-255831, July 7, 1995; 55 Comp. Gen. 768, 772 (1976); B-223857, Feb. 27, 1987; B-114841.2-O.M., Jan. 23, 1986. In view of the explicit provisions of 31 U.S.C. § 1351, there is no private right of action for declaratory, mandatory, or injunctive relief under the Antideficiency Act. *Thurston v. United States*, 696 F. Supp. 680 (D.D.C. 1988).

Factors such as mistake, inadvertence, lack of intent, or the minor nature of a violation do not affect the duty to report. For example, the Office of Management and Budget (OMB) and the Air Transportation Stabilization

[137] 31 U.S.C. §§ 1351, 1517(b), as amended by Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. G, title II, § 1401, 118 Stat. 2809, 3192 (Dec. 8, 2004). See, in this regard, the Comptroller General's Memorandum to Heads of Departments, Agencies, and Others Concerned, *Transmission of Antideficiency Act Reports to the Comptroller General of the United States*, B-304335, Mar. 8, 2005.

[138] Payment under this authority is appropriate where there is no enforceable contractual obligation on the part of the government but where the government has received a benefit not prohibited by law conferred in good faith. See chapter 12, section C.2.b in volume III of the second edition of *Principles of Federal Appropriations Law* for a general discussion of *quantum meruit* claims.

Board (ATSB) were required to report an Antideficiency Act violation when, as discussed in section C.2 above, OMB erroneously apportioned, and ATSB erroneously obligated, funds to cover the subsidy cost of a loan guarantee prior to the availability of budget authority. B-290600, July 10, 2001. Of course, if the agency feels there are extenuating circumstances, it is entirely appropriate to include them in the report. 35 Comp. Gen. 356 (1955).

What if GAO uncovers a violation but the agency thinks GAO is wrong? The agency must still make the required reports, and must include an explanation of its disagreement. OMB Cir. No. A-11, § 145. *See also* GAO, *Anti-Deficiency Act: Agriculture's Food and Nutrition Service Violates the Anti-Deficiency Act*, GAO/AFMD-87-20 (Washington, D.C.: Mar. 17, 1987).

6. Funding Gaps

The term "funding gap" refers to a period of time between the expiration of an appropriation and the enactment of a new one. A funding gap is one of the most difficult fiscal problems a federal agency may have to face. As our discussion here will demonstrate, the case law reflects an attempt to forge a workable solution to a bad situation.

Funding gaps occur most commonly at the end of a fiscal year when new appropriations, or a continuing resolution, have not yet been enacted. In this context, a gap may affect only a few agencies (if, for example, only one appropriation act remains unenacted as of October 1), or the entire federal government. A funding gap may also occur if a particular appropriation becomes exhausted before the end of the fiscal year, in which event it may affect only a single agency or a single program, depending on the scope of the appropriation. In the latter case the lack of funds occurs as a consequence of unforeseen circumstances beyond the agency's control as opposed to the exhaustion of appropriations as a result of poor management.

Funding gaps occur for a variety of reasons. For one thing, the complexity of the budget and appropriations process makes it difficult at best for Congress and the President to get everything done on time. Add to this the enormity of some programs and the need to address budget deficits, and the scope of the problem becomes more apparent. Also, funding gaps are perhaps an inevitable reflection of the political process.

As GAO has pointed out, funding gaps, actual or threatened, are both disruptive and costly.[139] They also produce difficult legal problems under the Antideficiency Act. The basic question, easy to state but not quite as easy to answer, is—what is an agency permitted or required to do when faced with a funding gap? Can it continue with "business as usual," must it lock up and go home, or is there some acceptable middle ground?

In 1980, a congressional subcommittee asked GAO whether agency heads could legally permit employees to come to work when the applicable appropriation for salaries had expired and Congress had not yet enacted either a regular appropriation or a continuing resolution for the next fiscal year. The Comptroller General replied in B-197841, Mar. 3, 1980, that 31 U.S.C. §§ 1341(a) and 1342 were both violated if agency employees reported for work under those circumstances. Permitting the employees to come to work would result in an obligation to pay salary for the time worked, an obligation in advance of appropriations in violation of section 1341(a). With respect to section 1342, no one was suggesting that the employees were offering to work gratuitously, even assuming they could lawfully do so, which for the most part they cannot. The fact that employees were willing to take the risk that the necessary appropriation would eventually be enacted did not avoid the violation. Clearly, the employees still expected to be paid eventually. "During a period of expired appropriations," the Comptroller General stated, "the only way the head of an agency can avoid violating the Antideficiency Act is to suspend the operations of the agency and instruct employees not to report to work until an appropriation is enacted." B-197841, at 3.

Notwithstanding the literal effect of the Antideficiency Act, however, the Comptroller General went on to observe in B-197841, "[W]e do not believe that the Congress intends that federal agencies be closed during periods of expired appropriations." In this regard, the opinion pointed out that at the beginning of fiscal year 1980, GAO had prepared an internal memorandum to address its own operations in the event of a funding gap. The memorandum said, in effect, that employees could continue to come to work, but that operations would have to be severely restricted. No new obligations could be incurred for contracts or small purchases of any kind,

[139] *See, e.g.*, GAO, *Government Shutdown: Funding Lapse Furlough Information*, GAO/GGD-96-52R (Washington, D.C.: Dec. 1, 1995); *Government Shutdown: Permanent Funding Lapse Legislation Needed*, GAO/GGD-91-76 (Washington, D.C.: June 6, 1991); *Funding Gaps Jeopardize Federal Government Operations*, PAD-81-31 (Washington, D.C.: Mar. 3, 1981).

and of course the employees could not actually be paid until appropriations were enacted. The opinion further noted that the then chairman of the Senate Appropriations Committee had placed the 1980 GAO memorandum in the Congressional Record, and had described it as providing "common sense guidelines."[140] The opinion also pointed to the fact that when Congress enacted appropriations following a funding gap, it generally made the appropriations retroactive to the beginning of the fiscal year and included language ratifying obligations incurred during the funding gap.

"It thus appears," the opinion concluded, "that the Congress expects that the various agencies of the Government will continue to operate and incur obligations during a period of expired appropriations." Nevertheless, the opinion conceded that this approach would "legally produce widespread violations of the Antideficiency Act." B-197841, at 4. Therefore, the opinion reiterated GAO's support at that time for legislation then pending that would provide permanent statutory authority to continue the pay of federal employees during funding gaps. *Id.*[141]

Less than two months after GAO issued B-197841, the Attorney General issued his opinion to the President. The Attorney General essentially agreed with GAO's analysis that permitting employees to work during a funding gap would violate the Antideficiency Act, but concluded further that the approach outlined in the GAO internal memorandum went beyond what the Act permitted. 43 Op. Att'y Gen. 224, 4A Op. Off. Legal Counsel 16 (1980). The opinion stated:

> "[T]here is nothing in the language of the Antideficiency Act or in its long history from which any exception to its terms during a period of lapsed appropriations may be inferred. . . .
>
> * * * * *
>
> "[F]irst of all . . ., on a lapse in appropriations, federal agencies may incur no obligations that cannot lawfully be funded from prior appropriations unless such obligations are otherwise authorized by law. There are no exceptions to

[140] 125 Cong. Rec. 26974 (Oct. 1, 1979) (remarks of Sen. Magnuson).

[141] GAO commented on this legislation in B-197584, Feb. 5, 1980, and B-197059, Feb. 5, 1980. The legislation was not enacted.

> this rule under current law, even where obligations incurred earlier would avoid greater costs to the agencies should appropriations later be enacted.
>
> "Second, the Department of Justice will take actions to enforce the criminal provisions of the Act in appropriate cases in the future when violations of the Antideficiency Act are alleged. This does not mean that departments and agencies, upon a lapse in appropriations, will be unable logistically to terminate functions in an orderly way. . . . [A]uthority may be inferred from the Antideficiency Act itself for federal officers to incur those minimal obligations necessary to closing their agencies."

4A Op. Off. Legal Counsel at 19, 20.

This opinion stands for the proposition that agencies had little choice but to lock up and go home. A second opinion, 43 Op. Att'y Gen. 293, 5 Op. Off. Legal Counsel 1 (1981), went into much more detail on possible exceptions and should be read in conjunction with the 1980 opinion.

As set forth in the 1981 Attorney General opinion, the exceptions fall into two broad categories. The first category is obligations "authorized by law." Within this category, there are four types of exceptions:

- Activities funded with appropriations that do not expire at the end of the fiscal year, that is, multiple year and no-year appropriations.[142]

- Activities authorized by statutes that expressly permit obligations in advance of appropriations, such as contract authority (see section C.2.g of this chapter).

- Activities "authorized by necessary implication from the specific terms of duties that have been imposed on, or of authorities that have been invested in, the agency." To take the example given in the opinion, there will be cases where benefit payments under an entitlement program are funded from other than 1-year appropriations (*e.g.*, a trust

[142] This would also include certain revolving fund operations, but not those whose use requires affirmative authorization in annual appropriation acts. B-241730.2, Feb. 14, 1991 (Government Printing Office revolving fund).

fund), but the salaries of personnel who administer the program are funded by 1-year money. As long as money for the benefit payments remains available, administration of the program is, by necessary implication, "authorized by law," unless the entitlement legislation or its legislative history provides otherwise or Congress takes affirmative measures to suspend or terminate the program.

- Obligations "necessarily incident to presidential initiatives undertaken within his constitutional powers," for example, the power to grant pardons and reprieves. This same rationale would apply to legislative branch agencies that incur obligations "necessary to assist the Congress in the performance of its constitutional duties." B-241911, Oct. 23, 1990 (nondecision letter).

The second broad category reflected the exceptions authorized under 31 U.S.C. § 1342—emergencies involving the safety of human life or the protection of property (see also the discussion of this provision in section C.3.d of this chapter). The Attorney General suggested the following rules for interpreting the scope of this exception:

> "First, there must be some reasonable and articulable connection between the function to be performed and the safety of human life or the protection of property. Second, there must be some reasonable likelihood that the safety of human life or the protection of property would be compromised, in some degree, by delay in the performance of the function in question."

5 Op. Off. Legal Counsel at 8.

The Attorney General then cited the identical exception language in the deficiency apportionment prohibition of 31 U.S.C. § 1515, and noted that the Office of Management and Budget followed a similar approach in granting deficiency apportionments over the years.[143] Given the wide variations in agency activities, it would not be feasible to attempt an advance listing of functions or activities that might qualify under this exception. Accordingly, the Attorney General made the following recommendation:

[143] See section C.4 of this chapter for a more detailed discussion of apportionment authorities.

> "To erect the most solid foundation for the Executive Branch's practice in this regard, I would recommend that, in preparing contingency plans for periods of lapsed appropriations, each government department or agency provide for the Director of the Office of Management and Budget some written description, that could be transmitted to Congress, of what the head of the agency, assisted by its general counsel, considers to be the agency's emergency functions."

5 Op. Off. Legal Counsel at 11.

Lest this approach be taken too far, Congress added the following sentence to 31 U.S.C. § 1342:

> "As used in this section, the term 'emergencies involving the safety of human life or the protection of property' does not include ongoing, regular functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."

Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 13213(b), 104 Stat. 1388, 1388-621 (Nov. 5, 1990).

The conference report on the 1990 legislation explained the intent:

> "The conference report also makes conforming changes to title 31 of the United States Code to make clear that . . . ongoing, regular operations of the Government cannot be sustained in the absence of appropriations, except in limited circumstances. These changes guard against what the conferees believe might be an overly broad interpretation of an opinion of the Attorney General issued on January 16, 1981, regarding the authority for the continuance of Government functions during the temporary lapse of appropriations, and affirm that the constitutional power of the purse resides with Congress."

H.R. Conf. Rep. No. 101-964, at 1170 (1990).

The Ninth Circuit Court of Appeals added to the list of exceptions, holding the suspension of the civil jury trial system for lack of funds unconstitutional. *Armster v. United States District Court*, 792 F.2d 1423 (9th Cir. 1986). Faced with the potential exhaustion of appropriations for juror fees, the Administrative Office of the United States Courts, at the direction of the Judicial Conference of the United States, had sent a memorandum to all district court judges advising that civil jury trials would have to be suspended until more money was available.[144] Basing its holding on the Constitution and expressly declining to rule on the Antideficiency Act, the court held that a suspension for more than a "most minimal" time violated the seventh amendment. *Id.* at 1430. *See also Hobson v. Brennan*, 637 F. Supp. 173 (D.D.C. 1986). The court said that "we do not hold that the Anti-Deficiency Act requires the result suggested by the Administrative Office. If it did, its commands would, of course, have to yield to those of the Constitution."[145] *Armster*, 792 F.2d at 1430 n.13.

Since the appropriation was not yet actually exhausted, and since there was still ample time for Congress to provide additional funds, the court noted that its decision did not amount to ordering Congress to appropriate money. The court noted, but did not address, the far more difficult question of what would happen if the appropriation became exhausted and Congress refused to appropriate additional funds. *Armster*, 792 F.2d at 1430–31 and 1431 n.14.

This, then, is the basic framework. There are a number of exceptions to the Antideficiency Act which would permit certain activities to continue during a funding gap. For activities not covered by any of the exceptions, however, the agency must proceed with prompt and orderly termination or violate the Act and risk invocation of the criminal sanctions. A very brief restatement may be found in 6 Op. Off. Legal Counsel 555 (1982).

Within this framework, GAO and the Justice Department addressed a number of specific problems agencies encountered in coming to grips with funding gaps during the 1980s and early 1990s. For example, toward the

[144] The Administrative Office noted a combination of factors contributing to its projected shortfall, including Congress's decision to enact an appropriation in an amount less than the Administrative Office had requested and the appointment of new judges, which increased the number of jury trials. *Armster*, 792 F.2d at 1425 n.3.

[145] Although this case addressed an agency's projected exhaustion of its appropriations rather than a funding gap, the court's *dicta* would appear relevant for a funding gap.

end of fiscal year 1982, the President vetoed a supplemental appropriations bill. As a result, the Defense Department did not have sufficient funds to meet the military payroll. The total payroll obligation consisted of (1) the take-home pay of the individuals, and (2) various items the employing agency was required to withhold and transfer to someone else, such as federal income tax and Social Security contributions. The Treasury Department published a change to its regulations permitting a temporary deferral of the due date for payment of the withheld items, and the Defense Department, relying on the "safety of human life or protection of property" exception, used the funds it had available to pay military personnel their full take-home pay. The Attorney General upheld the legality of this action. 43 Op. Att'y Gen. 369, 6 Op. Off. Legal Counsel 27 (1982). The Comptroller General agreed, but questioned the blanket assumption that *all* military personnel fit within the exception. B-208985, Oct. 29, 1982; B-208951, Oct. 5, 1982. The extent to which this device might be available to civilian agencies would depend on (1) Treasury's willingness to grant a similar deferral, and (2) the extent to which the agency could legitimately invoke the emergency exception.

Additional cases dealing with funding gap problems are:

- Salaries of commissioners of Copyright Royalty Tribunal attach by virtue of their status as officers without regard to availability of funds. Salary obligation is therefore viewed as "authorized by law" for purposes of Antideficiency Act, and commissioners could be retroactively compensated for periods worked without pay during a funding gap. 61 Comp. Gen. 586 (1982).

- Richmond district office of Internal Revenue Service shut down for half a day in October 1986 due to a funding gap. Subsequent legislation authorized retroactive compensation of employees affected. GAO concluded that the legislation applied to intermittent as well as regular full-time employees, and held that the intermittent employees could be compensated in the form of administrative leave for time lost during the half-day furlough. B-233656, June 19, 1989.

- Witness who had been ordered to appear in federal court was stranded without money to return home when court did not convene due to funding gap. Cash disbursement to permit witness to return home or secure overnight lodging was held permissible since hardship circumstances indicated reasonable likelihood that safety of witness would be jeopardized. 5 Op. Off. Legal Counsel 429 (1981).

There are also a few cases addressing actions an agency has taken to forestall the effects of a funding gap. In 62 Comp. Gen. 1 (1982), the Merit Systems Protection Board, faced with a substantial cut in its appropriation, placed most of its employees on half-time, half-pay status in an attempt to stretch its appropriation through the end of the fiscal year. A subsequent supplemental appropriation provided the necessary operating funds. GAO advised that it was within the Board's discretion, assuming the availability of sufficient funds, to grant retroactive administrative leave to the employees who had been affected by the partial shutdown.

GAO reviewed another furlough plan in 64 Comp. Gen. 728 (1985). The Interstate Commerce Commission had determined that if it continued its normal rate of operations, it would exhaust its appropriation six weeks before the end of the fiscal year. To prevent this from happening, it furloughed its employees for one day per week. GAO found that the Commission's actions were in compliance with the Antideficiency Act. While the ICC was thus able to continue essential services, the price was financial hardship for its employees, plus "serious backlogs, missed deadlines and reduced efficiency." *Id.* at 732.

During the 1980s and early 1990s, GAO also issued several reports on funding gaps. The first was *Funding Gaps Jeopardize Federal Government Operations*, PAD-81-31 (Washington, D.C.: Mar. 3, 1981). In that report, GAO noted the costly and disruptive effects of funding gaps, and recommended the enactment of permanent legislation to permit federal agencies to incur obligations, but not disburse funds, during a funding gap. In the second report, *Continuing Resolutions and an Assessment of Automatic Funding Approaches*, GAO/AFMD-86-16 (Washington, D.C.: Jan. 29, 1986), GAO compared several possible options but this time made no specific recommendation. The Office of Management and Budget had pointed out, and GAO agreed, that automatic funding legislation could have the undesirable effects of (1) reducing pressure on Congress to make timely funding decisions, and (2) permitting major portions of the government to operate for extended periods without action by either House of Congress or the President. The ideal solution, both agencies agreed, is the timely enactment of the regular appropriation bills.

In *Managing the Cost of Government: Proposals for Reforming Federal Budgeting Practices*, GAO/AFMD-90-1 (Washington, D.C.: Oct. 1, 1989) at 28–29, GAO reiterated its support for the concept of an automatic continuing resolution in a form that does not reduce the incentive to

complete action on the regular appropriation bills. A 1991 GAO report analyzed the impact of a funding gap which occurred over the 1990 Columbus Day weekend and again renewed the recommendation for permanent legislation to, at a minimum, allow agencies to incur obligations to compensate employees during temporary funding gaps but not pay them until enactment of the appropriation. *Government Shutdown: Permanent Funding Lapse Legislation Needed*, GAO/GGD-91-76 (Washington, D.C.: June 6, 1991). The report stated:

> "In our opinion, shutting down the government during temporary funding gaps is an inappropriate way to encourage compromise on the budget. Beyond being counterproductive from a financial standpoint, a shutdown disrupts government services. In addition, forcing agency managers to choose who will and will not be furloughed during these temporary funding lapses severely tests agency management's ability to treat its employees fairly."

Id. at 9.

The history of funding gaps over recent decades reveals several distinct phases, which were captured in an analysis by a Congressional Research Service report to Congress entitled *Preventing Federal Government Shutdowns: Proposals for an Automatic Continuing Resolution*, No. RL30339 (Washington, D.C.: May 19, 2000) (hereafter "CRS Report"). The first phase, covering fiscal years 1977 through 1980, was a period in which agencies reacted to funding gaps along the lines suggested in GAO's opinion in B-197841, Mar. 3, 1980, described previously, by curtailing operations but not shutting down. During this period, there were 6 funding gaps that lasted from 8 to 17 days. *See* the CRS Report at 4, Table 1. The second phase, covering fiscal years 1981 through 1995, occurred under the stricter approach to funding gaps reflected in the Attorney General opinions described above. As the CRS Report notes, funding gaps during this period were less frequent and shorter. There were 11 funding gaps in all over this period, many of which took place over weekends. None lasted more than 3 days. *Id.*

The string of shorter funding gaps came to an abrupt halt in fiscal year 1996. As CRS reported, the unusually difficult and acrimonious budget negotiations for that year led to two funding gaps: the first was 5 days and the second, the longest in history, lasted for 21 days. *Id.* at 3, 5. Both of these funding gaps resulted in widespread shutdowns of government

operations. During the first funding gap, an estimated 800,000 federal employees were furloughed. During the second, about 284,000 employees were furloughed and another 475,000 continued to work in a nonpay status under the emergency exception to the Antideficiency Act.[146]

Not surprisingly, the events of 1995–1996 spawned additional legal opinions from the Office of Legal Counsel. These opinions essentially followed the legal framework described previously and did not break much new ground. However, they do illustrate the scope and application of the Antideficiency Act in different funding gap contexts. *See*, *e.g.*, Memorandum for the Attorney General, *Effect of Appropriations for Other Agencies and Branches on the Authority To Continue Department of Justice Functions During the Lapse in the Department's Appropriations*, OLC Opinion, Dec. 13, 1995 (if a suspension of the Justice Department's functions during the period of anticipated funding lapse would prevent or significantly damage the execution of those functions, the Department's functions and activities may continue); Memorandum for the Attorney General, *Participation in Congressional Hearings During An Appropriations Lapse*, OLC Opinion, Nov. 16, 1995 (Justice Department officials may testify at congressional hearings during a lapse in funding for the Department); Memorandum for the Counsel to the President, *Authority To Employ the Services of White House Office Employees During An Appropriations Lapse*, OLC Opinion, Sept. 13, 1995 (outlined the authorities that permitted White House employees to continue to work, but not actually be paid, during a funding gap); Memorandum for the Director of the Office of Management and Budget, *Government Operations in the Event of a Lapse in Appropriations*, OLC Opinion, Aug. 16, 1995 (reinforced the Justice Department's existing narrow interpretation that the emergency exception

[146] These figures are based on another CRS report, *Shutdown of the Federal Government: Causes*, *Effects*, *and Process*, No. 98-844 (Washington, D.C.: Nov. 1, 2003), at 2–3. For a discussion of the nature, background, and dynamics of the fiscal year 1996 funding gaps and shutdowns, see Anita S. Krishnakumar, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995–1996 Budget "Train Wreck,"* 35 Harv. J. On Legis. 589 (1998).

applied only in the case of an imminent threat or set of circumstances requiring immediate action).[147]

The 1995–1996 funding gaps also produced at least one lawsuit, although it did not reach a final decision on the merits. In *American Federation of Government Employees v. Rivlin*, Civ. A. No. 95-2115 (EGS) (D.D.C. Nov. 17, 1995), the plaintiffs sought a temporary restraining order to prevent the executive branch from requiring federal employees who had been designated "emergency" personnel to work during the funding gap. They contended that forcing employees to work without pay violated several personnel statutes and also constituted a misapplication of 31 U.S.C. § 1342 since many of the employees did not meet the emergency criteria under section 1342. The court denied the requested relief, observing:

> "[T]he court is not convinced at this juncture that plaintiffs will either suffer irreparable harm in the event a temporary restraining order is not issued or that the interests of the public will be best served by the issuance of a temporary restraining order. Plaintiffs essentially concede that if the court were to issue a TRO, the government would indeed be shut down, because the Executive Branch could not require its employees to work without compensation. Although undoubtedly the public has an interest in having the budget impasse resolved and indeed has an interest in the outcome of this judicial proceeding, one could easily imagine the chaos that would be attendant to a complete governmental shutdown. It is inconceivable, by any stretch of the imagination, that the best interests of the public at large would somehow be served by the creation of that chaos."

American Federation of Government Employees, slip. op. at 4.

[147] The August 1995 opinion was discussed at length and reaffirmed in a Memorandum for the General Counsel, United States Marshals Service, *Continuation of Federal Prisoner Detention Efforts in the Face of a USMS Appropriation Deficiency*, OLC Opinion, Apr. 5, 2000. Current Office of Management and Budget guidance still references the August 1995 opinion as well as the earlier opinions in 43 Op. Att'y Gen. 224 (1980) and 43 Op. Att'y Gen. 293 (1981) as the principal legal authorities governing what agencies can do during a funding gap. *See* OMB Circular No. A-11, *Preparation, Submission, and Execution of the Budget*, § 124.1 (a) (June 21, 2005).

The court further observed that it was "purely speculative" whether any employees would actually go without pay since Congress had always appropriated funds to compensate employees for services rendered during a government shutdown. *Id.* The lawsuit was eventually dismissed as moot following resolution of the budget impasse. *American Federation of Government Employees v. Rivlin*, 995 F. Supp. 165 (D.D.C. 1998).

The current phase in the history of funding gaps commenced on the heels of the 1995–1996 government shutdowns and has featured, thus far, the total absence of funding gaps. While there have been delays in the enactment of regular appropriations, there has been no funding gap since 1996.

Of course, the potential for future funding gaps still exists and proposals for legislation to cushion their impact have been raised again in recent years. However, such proposals have met with little enthusiasm. GAO was more cautionary in its most recent comments on this subject. *See* GAO, *Budget Process: Considerations for Updating the Budget Enforcement Act*, GAO-01-991T (Washington, D.C.: July 19, 2001), at 12:

> "The periodic experience of government 'shutdowns'—or partial shutdowns when appropriations bills have not been enacted—has led to proposals for an automatic continuing resolution. The automatic continuing resolution, however, is an idea for which the details are critically important. Depending on the detailed structure of such a continuing resolution, the incentive for policymakers—some in the Congress and the President—to negotiate seriously and reach agreement may be lessened."

For example, GAO pointed out that some negotiators might find the "default position" specified in an automatic continuing resolution to be preferable to proposals on the table.

Likewise, several efforts to enact an automatic continuing resolution in recent years have been unsuccessful. In 1997, President Clinton vetoed a

supplemental appropriations bill that contained such a provision. In 2000, the House of Representatives rejected such a proposal in a floor vote.[148]

D. Supplemental and Deficiency Appropriations

A supplemental appropriation may be defined as "[a]n act appropriating funds in addition to those already enacted in an annual appropriation act." GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: September 2005) (*Glossary*), at 93. The *Glossary* adds that:

> "Supplemental appropriations provide additional budget authority usually in cases where the need for funds is too urgent to be postponed until enactment of the regular appropriation bill. Supplementals may sometimes include items not appropriated in the regular bills for lack of timely authorizations."

Id.

The *Glossary*, at 43, defines a deficiency appropriation as "[a]n appropriation made to pay obligations for which sufficient funds are not available."

There is an important distinction between supplemental appropriations and deficiency appropriations. A supplemental appropriation "supplements the original appropriation," 4 Comp. Dec. 61 (1897); that is, it provides additional appropriations to cover additional obligations to meet needs identified by the executive branch and concurred in by Congress *in advance of* the obligational event. A deficiency appropriation is an appropriation made to pay obligations for which sufficient funds were not available *at the time* the obligations were incurred. 27 Comp. Gen. 96 (1947); 25 Comp. Gen. 601, 604 (1946); 4 Comp. Dec. 61, 62 (1897). The need for deficiency appropriations often results from violations of the Antideficiency Act, and they can be made in the same fiscal year as the overobligated appropriation or in a later year. Notwithstanding the

[148] These legislative actions are described in the Congressional Research Service report, *Preventing Federal Government Shutdowns: Proposals for an Automatic Continuing Resolution*, cited previously. Other automatic continuing resolution bills have been introduced but died in committee. *See* H.R. 29, 107th Cong. (2000); H.R. 3744, 107th Cong. (2001).

distinctions between supplemental and deficiency appropriations, Congress often will use supplemental appropriations bills as the legislative vehicle for enacting deficiency appropriations, just as Congress may use a supplemental appropriations bill as the legislative vehicle to enact new appropriations in addition to those supplementing appropriations already enacted.

Because a supplemental appropriation "supplements the original appropriation," it "partakes of its nature, and is subject to the same limitations as to the expenses for which it can be used as attach by law to the original appropriation" unless otherwise provided. 4 Comp. Dec. 61. *See also* 27 Comp. Gen. 96 (1947); 25 Comp. Gen. 601 (1946); 20 Comp. Gen. 769 (1941). This means that a supplemental appropriation is subject to the purpose and time limitations, plus any other applicable restrictions, of the appropriation being supplemented.

Thus, an appropriation made to supplement the regular annual appropriation of a given fiscal year is available beyond the expiration of that fiscal year only to liquidate obligations incurred within the fiscal year. The unobligated balance of a supplemental appropriation will expire at the end of the fiscal year in the same manner as the regular annual appropriation. *See* 27 Comp. Gen. 96; 4 Comp. Dec. 61; 3 Comp. Dec. 72 (1896). Of course, Congress can enact a supplemental appropriation, just like any other appropriation, to be available until expended (no-year). *E.g.*, 36 Comp. Gen. 526 (1957); B-72020, Jan. 9, 1948.

Unless otherwise provided, a restriction contained in an annual appropriation act will apply to funds provided in a supplemental appropriation act even though the restriction is not repeated in the supplemental. For example, a restriction in a foreign assistance appropriation act prohibiting the use of funds for assistance to certain countries would apply equally to funds provided in a supplemental appropriation for foreign assistance for the same fiscal year. B-158575, Feb. 24, 1966. Similarly, a provision in an annual appropriation act that "no part of any appropriation for the Bureau of Reclamation contained in *this* Act shall be used for the salaries and expenses" (emphasis added) of certain officials who were not qualified engineers would apply as well to Bureau funds appropriated in supplemental appropriation acts for the same fiscal year, so long as the supplemental appropriation adds funds to amounts already enacted in the regular appropriation, but not to any new appropriations enacted in the supplemental appropriation act. B-86056, May 11, 1949. The rule applies to supplemental authorizations as well as

supplemental appropriations. B-106323, Nov. 27, 1951. If a supplemental appropriation act includes a new appropriation which is separate and distinct from the appropriations being supplemented, restrictions contained in the original appropriation act will not apply to the new appropriation unless specifically provided. *Id.* The fiscal year limitations of the original appropriation, however, would still apply.

The rule that supplemental appropriations are subject to restrictions contained in the regular appropriation act being supplemented applies equally to specific dollar limitations. Thus, if a regular annual appropriation act specifies a maximum limitation for a particular object, either by using the words "not to exceed" or otherwise, a more general supplemental appropriation for the same fiscal year does not authorize an increase in that limitation. 19 Comp. Gen. 324 (1939); 4 Comp. Gen. 642 (1925); B-71583, Feb. 20, 1948; B-66030, May 9, 1947. Naturally, this principle will not apply if the supplemental appropriation specifically provides for the object in question. 19 Comp. Gen. 832 (1940).

New restrictions appearing in a supplemental appropriation act may or may not reach back and apply to balances remaining in the original annual appropriation, depending on the precise statutory language used. Thus, without more, a restriction in a supplemental applicable by its terms to "this appropriation" would apply only to the supplemental funds. B-31546, Jan. 12, 1943. *See also* 31 Comp. Gen. 543 (1952).

At one time, supplemental appropriation acts specified that the funds were for the same objects and subject to the same limitations as the appropriations being supplemented. The then Bureau of the Budget wanted to delete this language pursuant to its mandate to eliminate unnecessary words in appropriations.[149] The Comptroller General agreed that the language was unnecessary, pointing out that these conditions would apply even without being explicitly stated in the supplemental appropriation acts themselves. B-13900, Dec. 17, 1940.

In addition to supplementing prior appropriations, a supplemental appropriation act may make entirely new appropriations and enact new

[149] Prior to the 1982 recodification of title 31, the mandate was found in 31 U.S.C. § 623. The recodifiers thought those words themselves were unnecessary, and the concept is now included in the general mandate in 31 U.S.C. § 1104(a) to "use uniform terms" in requesting appropriations.

legislative provisions which are separate and distinct from those made by an earlier appropriation act. Where a supplemental appropriation act contains new legislation, whether permanent or temporary, the new legislation will take effect on the date the supplemental is enacted absent a clear intent to make it retroactive. 20 Comp. Gen. 769 (1941). In the cited decision, a supplemental appropriation enacted late in fiscal year 1941 for the first time permitted payment of transportation expenses of certain military dependents. The provision was held effective on the date of enactment of the supplemental act and not on the first day of fiscal year 1941.

A supplemental appropriation also may add funds to a lump-sum appropriation for a new object. If the original appropriation was not available for that object, then the supplemental amounts to a new appropriation that is, in effect, distinct from the lump-sum appropriation. For example, a fiscal year 1957 supplemental appropriation for the Maritime Administration provided $18 million for a nuclear-powered merchant ship under the heading "ship construction." Funds for the nuclear-powered ship had been sought under the regular "ship construction" lump-sum appropriation for fiscal year 1957, but had been denied. Under the circumstances, the Comptroller General found that the supplemental appropriation amounted to a specifically earmarked maximum for the vessel, and that the agency could not exceed the $18 million by using funds from the regular appropriation. 36 Comp. Gen. 526 (1957).

E. Augmentation of Appropriations

1. The Augmentation Concept

As a general proposition, an agency may not augment its appropriations from outside sources without specific statutory authority. When Congress makes an appropriation, it also is establishing an authorized program level. In other words, it is telling the agency that it cannot operate beyond the level that it can finance under its appropriation. To permit an agency to operate beyond this level with funds derived from some other source without specific congressional sanction would amount to a usurpation of the congressional prerogative. Restated, the objective of the rule against augmentation of appropriations is to prevent a government agency from

undercutting the congressional power of the purse by circuitously exceeding the amount Congress has appropriated for that activity. As one recent decision put it:

> "When Congress establishes a new program or activity, it also must decide how to finance it. Typically it does this by appropriating funds from the U.S. Treasury. In addition to providing necessary funds, a congressional appropriation establishes a maximum authorized program level, meaning that an agency cannot, absent statutory authorization, operate beyond the level that can be paid for by its appropriations. An agency may not circumvent these limitations by augmenting its appropriations from sources outside the government. One of the objectives of these limitations is to prevent agencies from avoiding or usurping Congress' 'power of the purse."

B-300248, Jan. 15, 2004 (citations omitted).

There is no statute which, in those precise terms, prohibits the augmentation of appropriated funds. The concept does nevertheless have an adequate statutory basis, although it must be derived from several separate enactments. Specifically:

- 31 U.S.C. § 3302(b), the "miscellaneous receipts" statute.

- 31 U.S.C. § 1301(a), restricting the use of appropriated funds to their intended purposes. Early Comptroller of the Treasury decisions often based the augmentation prohibition on the combined effect of 31 U.S.C. §§ 3302(b) and 1301(a). *See*, *e.g.*, 17 Comp. Dec. 712 (1911); 9 Comp. Dec. 174 (1902).

- 18 U.S.C. § 209, which prohibits the payment of, contribution to, or supplementation of the salary of a government officer or employee as compensation for his or her official duties from any source other than the government of the United States.

The augmentation concept manifests itself in a wide variety of contexts. One application is the prohibition against transfers between appropriations without specific statutory authority. An unauthorized transfer is an improper augmentation of the receiving appropriation. *E.g.*, 23 Comp. Gen. 694 (1944); B-206668, Mar. 15, 1982. In B-206668, a department

received a General Administration appropriation plus separate appropriations for the administration of its component bureaus. The unauthorized transfer of funds from the bureau appropriations to the General Administration appropriation was held to be an improper augmentation of the latter appropriation. Likewise, the Department of Labor illegally augmented its departmental management account by "pooling" funds from component appropriations in order to purchase computer equipment where the costs borne by the components far exceeded the value of the equipment they received. 70 Comp. Gen. 592 (1991). The Comptroller General rejected the Department's characterization of this transaction as a "reprogramming," viewing it instead as an unauthorized transfer among appropriations.

As with the transfer prohibition itself, however, the augmentation rule has no application at the agency allotment level within the same appropriation account. 70 Comp. Gen. 601 (1991). It also should be apparent that the augmentation rule is related to the concept of purpose availability. A very early case pointed out that charging a general appropriation when a specific appropriation is exhausted not only violates 31 U.S.C. § 1301(a) by using the general appropriation for an unauthorized purpose, but also improperly augments the specific appropriation. [1] Bowler, First Comp. Dec. 257, 258 (1894). However, the augmentation rule is most closely related to the subject of this chapter—availability as to amount—because it has the effect of restricting executive spending to the amounts appropriated by Congress. In this respect, it is a logical, perhaps indispensable, complement to the Antideficiency Act.

For the most part, although the cases are not entirely consistent, GAO has distinguished between receipts of money and receipts of services, dealing with the former under the augmentation rule and the latter under the voluntary services prohibition (31 U.S.C. § 1342).[150] For example, in B-13378, Nov. 20, 1940, a private organization was willing to donate either funds or services. Since the agency lacked statutory authority to accept gifts, acceptance of a cash donation would improperly augment its appropriations. Acceptance of services was distinguished, however, and addressed in relation to the limits on acceptance of voluntary services set forth in 31 U.S.C. § 1342. GAO drew the same distinction in B-125406, Nov. 4, 1955. See also B-287738, May 16, 2002, distinguishing between

[150] For a further discussion of the voluntary services prohibition, see section C.3 of this chapter.

agency acceptance of money as compensation for damage to government property, which would constitute an augmentation if retained in agency appropriations, and acceptance of actual repairs to the property, which would be permissible.[151]

In apparent conflict with these cases, however, is B-211079.2, Jan. 2, 1987, which stated that, without statutory authority, an agency would improperly augment its appropriations by accepting the uncompensated services of "workfare" participants to do work which would normally be done by the agency with its own personnel and funds. Logic would seem to support the formulation in B-211079.2. Certainly, if I wash your car without charge or if I give you money to have it washed, the result is the same—the car gets washed and your own money is free to be used for something else. Be that as it may, the majority of the cases support limiting the augmentation rule to the receipt of money. In the final analysis, the distinction probably makes little practical difference. In view of 31 U.S.C. § 1342, limiting the augmentation rule to the receipt of funds does not mean that the rule can be negated by the unrestricted acceptance of services.[152]

In a 1991 case, 70 Comp. Gen. 597, GAO concluded that the then Interstate Commerce Commission (ICC) would not improperly augment its appropriations by permitting private carriers to install computer equipment at the ICC headquarters, to facilitate access to electronically filed rate tariffs. Installation was viewed as a reasonable exercise of the ICC's statutory authority to prescribe the form and manner of tariff filing by those over whom the agency has regulatory authority. Somewhat similar in

[151] In a 1984 decision, GAO found that acceptance by the Federal Communications Commission of booth space and utility services at industry trade shows did not augment the Commission's appropriation because "no money changed hands, nor was money paid on the Commission's behalf to anyone else." 63 Comp. Gen. 459, 461 (1984). GAO found that there was a "mutually beneficial arrangement" between the Commission and trade show promoters that was "neither an augmentation of appropriations nor an illegal retention of a gift." *Id.* For a discussion of "no-cost" contract, see section E.2.b of this chapter.

[152] Akin to B-211079.2, the decision in B-286182, Jan. 11, 2001, suggested that acceptance of services might be considered an improper augmentation in some circumstances. That decision concerned a settlement agreement in a rate case whereby a company agreed to provide telecommunications equipment and services valued at $1.53 million to the District of Columbia courts for the purpose of facilitating access to the legal system. The decision concluded, however, that there was no augmentation issue in this case because the courts had statutory gift-acceptance authority, which is discussed in section E.3 of this chapter.

concept to the workfare case, however, the decision suggests that use of the equipment for other purposes, such as word processing by ICC staff, would be an improper augmentation, and advised the ICC to establish controls to prevent this. *See also* B-277521, July 31, 1997 (granting the Radio and TV Correspondents Association a permit to locate equipment in the Capitol in order to broadcast events would not constitute an augmentation of congressional appropriations since the equipment is not for official business use of the government).

2. Disposition of Moneys Received: Repayments and Miscellaneous Receipts

a. General Principles

(1) The "miscellaneous receipts" statute

A very important statute in the overall scheme of government fiscal operations is 31 U.S.C. § 3302(b), known as the "miscellaneous receipts" statute. Originally enacted on March 3, 1849 (ch. 110, 9 Stat. 398), 31 U.S.C. § 3302(b) states:

> "Except as provided in section 3718(b) of this title, an official or agent of the Government receiving money for the Government from any source shall deposit the money in the Treasury as soon as practicable without deduction for any charge or claim."[153]

Penalties for violating 31 U.S.C. § 3302(b) are found in 31 U.S.C. § 3302(d), and include the possibility of removal from office. In addition, if funds which should have been deposited in the Treasury (but were not) are lost or stolen, the official may be personally liable. *E.g.*, 20 Op. Att'y Gen. 24 (1891) (liability would attach where funds, which disbursing agent had placed in bank which was not an authorized depositary, were lost due to bank failure).

[153] The exception referenced as section 3718(b) now appears in section 3718(d). It permits agencies to contract for assistance in the collection of debts due the United States, and to pay the contractor from the amounts recovered. For a decision addressing the scope and application of this exception, see 72 Comp. Gen. 85 (1993).

"It is difficult to see," said an early decision, "how a legislative prohibition could be more clearly expressed." 10 Comp. Gen. 382, 384 (1931). Simply stated, any money an agency receives for the government from a source outside of the agency must be deposited into the Treasury. This means deposited into the general fund ("miscellaneous receipts") of the Treasury,not into the agency's own appropriations, even though the agency's appropriations may be technically still "in the Treasury" until the agency actually spends them.[154] The Comptroller of the Treasury explained the distinction in the following terms:

> "It [31 U.S.C. § 3302(b)] could hardly be made more comprehensive as to the moneys that are meant and these moneys are required to be paid 'into the Treasury.' This does not mean that the moneys are to be added to a fund that has been appropriated *from* the Treasury and may be in the Treasury or outside. [Emphasis in original.] It seems to me that it can only mean that they shall go into the general fund of the Treasury which is subject to any disposition which Congress might choose to make of it. This has been the holding of the accounting officers for many years . . . [citations omitted]. If Congress intended that these moneys should be returned to the appropriation from which a similar amount had once been expended it could have been readily so stated, and it was not."

22 Comp. Dec. 379, 381 (1916). *See also* 5 Comp. Gen. 289 (1925).

The term "miscellaneous receipts" does not refer to any single account in the Treasury. Rather, it refers to a number of receipt accounts under the heading "General Fund." These are all listed in the Treasury Department's *Federal Account Symbols and Titles Book*, recently revised according to the *Treasury Financial Manual Announcement No. A-2005-04*, May 2005. The revised version can be accessed at www.fms.treas.gov/fastbook (last visited September 15, 2005).

[154] As a general proposition, an agency's appropriations do remain "in the Treasury" until needed for a valid purpose. Unless Congress expressly so provides, an agency may not have its appropriations paid over directly to it to be held pending disbursement. 21 Comp. Gen. 489 (1941).

In addition to 31 U.S.C. § 3302(b), several other statutes require that moneys received in various specific contexts be deposited as miscellaneous receipts.[155] Examples are:

- 7 U.S.C. §§ 384, 2241, 2246, 2247 (proceeds from sale of various products by Secretary of Agriculture);
- 16 U.S.C. § 499 (revenue from the national forests, such as timber sales and proceeds from hunting, fishing, and camping permits, subject to the deductions specified in 16 U.S.C. §§ 500 and 501);
- 19 U.S.C. § 527 (customs fines, penalties, and forfeitures);
- 40 U.S.C. § 571 (proceeds from the transfer of excess property or the sale of surplus public property, except as otherwise provided in subchapter IV of chapter 5 of title 40).[156]

Although it is preferable, it is not necessary that the statute use the words "miscellaneous receipts." A statute requiring the deposit of funds "into the Treasury of the United States" will be construed as meaning the general fund of the Treasury. 27 Comp. Dec. 1003 (1921).

To understand the significance of 31 U.S.C. § 3302(b) and related statutes, it is necessary to recall the provision in article I, section 9, clause 7 of the U.S. Constitution, the so-called "Appropriations Clause," directing that "No Money shall be drawn from the Treasury but in Consequence of Appropriations made by Law." Once money is deposited into a "miscellaneous receipts" account, it takes an appropriation to get it out. *E.g.*, 3 Comp. Gen. 296 (1923); 2 Comp. Gen. 599, 600 (1923); 13 Comp. Dec. 700, 703 (1907). Thus, the effect of 31 U.S.C. § 3302(b) is to ensure

[155] Several specific references to miscellaneous receipts in the pre-1982 version of title 31 were deleted in the recodification because they were regarded as covered by the general prescription of the new section 3302. An example is the so-called User Charge Statute. The pre-recodification version, 31 U.S.C. § 483a, required fees to be deposited as miscellaneous receipts. The current version, 31 U.S.C. § 9701, omits the requirement because, as the Revision Note points out, it is covered by § 3302.

[156] Section 571 stems from the Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377 (June 30, 1949). Prior to this law, proceeds from the sale of public property were required to be deposited as miscellaneous receipts under the more general authority of what is now 31 U.S.C. § 3302(b). *See Mammoth Oil Co. v. United States*, 275 U.S. 13, 34 (1927); *Pan-American Petroleum & Transport Co. v. United States*, 273 U.S. 456, 502 (1927). (These are the notorious "Teapot Dome" cases.)

that the executive branch remains dependent upon the congressional appropriation process. Viewed from this perspective, 31 U.S.C. § 3302(b) emerges as another element in the statutory pattern by which Congress retains control of the public purse under the separation of powers doctrine. *See* B-302825, Dec. 22, 2004; B-303413, Nov. 8, 2004, at 9; B-287738, May 16, 2002; 51 Comp. Gen. 506, 507 (1972); 11 Comp. Gen. 281, 283 (1932). *See also* 10 Comp. Gen. 382, 383 (1931) (the intent is that "all the public moneys shall go into the Treasury; appropriations then follow").

As the court observed in *Scheduled Airlines Traffic Offices v. Department of Defense*, 87 F.3d 1356, 1361 (D.C. Cir. 1996), the miscellaneous receipts statute "derives from and safeguards a principle fundamental to our constitutional structure, the separation-of-powers precept embedded in the Appropriations Clause" (U.S. Const. art I, § 9, cl. 7). *See also* Kate Stith, *Congress' Power of the Purse*, 97 Yale L. J. 1343 (1988). Professor Stith notes that the miscellaneous receipts statute "articulates the Principle of the Public Fisc: All monies of the federal government must be claimed as public revenues, subject to public control through constitutional processes." *Id.* at 1364. This is indeed an important role for a statute that she describes as having such an "unfortunately bland and unrevealing name." *Id.* at 1365.

Accordingly, for an agency to retain and credit to its own appropriation moneys which it should have deposited into the general fund of the Treasury is an improper augmentation of the agency's appropriation. This applies even though the appropriation is a no-year appropriation. 46 Comp. Gen. 31 (1966). (No-year status relates to duration, not amount.)

Receipts in the form of "monetary credits" are treated for deposit and augmentation purposes the same as cash. 28 Comp. Gen. 38 (1948) (use by government of monetary credits received as payment for sale of excess electric power held unauthorized unless agency transfers corresponding amount from its appropriated funds to miscellaneous receipts). This will not apply, however, where it is clear that the appropriation or other legislation involved contemplates a different treatment. B-125127, Feb. 14, 1956 (transfer to miscellaneous receipts not required where settlement of accounts was to be made on "net balance" basis). *See also* B-283731, Dec. 21, 1999 (Defense Department has specific statutory authority to accept credits under contracts for travel-related services); 62 Comp. Gen. 70, 74–75 (1982) (credit procedure which would differ from treatment of cash receipts recognized in legislative history). When an agency is entitled to retain a fund in its appropriations (see section E.2.a, below), it

may accept the refund in the form of a credit against future payments due to the party owing the refund instead of requiring the party to issue a separate refund check. 72 Comp. Gen. 63, 64 (1992).

(2) Exceptions

Exceptions to the miscellaneous receipts requirement fall into two broad categories, statutory and nonstatutory:

- An agency may retain moneys it receives if it has statutory authority to do so. In other words, 31 U.S.C. § 3302(b) will not apply if there is specific statutory authority for the agency to retain the funds. *E.g.*, 72 Comp. Gen. 164, 165–66 (1993) and cases cited.[157]

- Receipts that qualify as "repayments" to an appropriation may be retained to the credit of that appropriation and are not required to be deposited into the General Fund. B-302366, July 12, 2004; 6 Comp. Gen. 337 (1926); 5 Comp. Gen. 734, 736 (1926); B-138942-O.M., Aug. 26, 1976.

Repayments falling within the above nonstatutory exception may be further defined in terms of two general classes, reimbursements and refunds, as follows:

- Reimbursements are sums received as a result of commodities sold or services furnished either to the public or to another government account, which are authorized by law to be credited directly to a specific appropriation.

- Refunds are repayments for excess payments and are to be credited to the appropriation or fund accounts from which the excess payments were made. They must be directly related to previously recorded expenditures and are reductions of those expenditures. Refunds to

[157] In addition to instances described elsewhere in the text, the following are examples of statutory exceptions to section 3302(b): 42 U.S.C. § 8287 (measured savings from energy savings performance contracts), discussed in B-287488, June 19, 2001; 42 U.S.C. § 8256 and note (rebates received by federal agencies from utility companies on account of energy-saving measures), discussed in B-265734, Feb. 13, 1996; and 38 U.S.C. § 1729A (compensatory settlement amounts under the Federal Medical Care Recovery Act stemming from care provided at Department of Veterans Affairs facilities), discussed in Memorandum Opinion for the Assistant Attorney General, Civil Division, *Miscellaneous Receipts Act Exception for Veterans' Health Care Recoveries*, OLC Opinion, Dec. 3, 1998.

> appropriations represent amounts collected from outside sources for payments made in error, overpayments, or adjustments for previous amounts disbursed.

See, *e.g.*, 62 Comp. Gen. 70, 73 (1982); *see also*, GAO, *Policy and Procedures Manual for the Guidance of Federal Agencies*, title 7, § 5.4 (Washington, D.C.: May 18, 1993).

As used in the above definitions, the term "reimbursement" generally refers to situations in which retention by the agency is authorized by statute. The term "refund" embraces a category of mostly nonstatutory exceptions in which the receipt is directly related to, and is a direct reduction of, a previously recorded expenditure. Thus, the recovery of an erroneous payment or overpayment which was erroneous at the time it was made qualifies as a refund to the appropriation originally charged. *E.g.*, B-139348, May 12, 1959 (utility overcharge refund); B-138942-O.M., Aug. 26, 1976 (collections resulting from disallowances by GAO under the "Fly America Act"). Also, the return of an authorized advance, such as a travel advance, is a refund.

At this point, an important distinction must be made. Moneys collected to reimburse the government for expenditures previously made are not automatically the same as "adjustments for previous amounts disbursed." Reimbursements must generally, absent statutory authority to the contrary, be deposited as miscellaneous receipts. The mere fact that the reimbursement is related to the prior expenditure—although this is an indispensable element of an authorized refund—is not in itself sufficient to remove the transaction from the scope of 31 U.S.C. § 3302(b). *See*, *e.g.*, 16 Comp. Gen. 195 (1936); 24 Comp. Dec. 694 (1918); 22 Comp. Dec. 253 (1915); B-45198, Oct. 27, 1944. The controlling principles were stated as follows in two early decisions:

> "The question as to whether moneys collected to reimburse the Government for expenditures previously made should be used to reimburse the appropriations from which the expenditures were made or should be covered into the general fund of the Treasury has often been before the accounting officers of the Treasury and this office, and it has been uniformly held that in the absence of an express provision in the statute to the contrary, such funds should be covered in as miscellaneous receipts."

5 Comp. Gen. 289, 290 (1925).

> "On the other hand, if the collection involves a refund or repayment of moneys paid from an appropriation in excess of what was actually due such refund has been held to be properly for credit to the appropriation originally charged . . . ."

5 Comp. Gen. 734, 736 (1926).

The key language in the above passage is "in excess of what was actually due." Apart from the more obvious situations—refunds of overpayments, erroneous payments, unused portions of authorized advances—the type of situation contemplated by the "adjustments for previous amounts disbursed" portion of the definition is illustrated by 23 Comp. Gen. 652 (1944). The Agriculture Department was authorized to enter into cooperative agreements with states for soil conservation projects. Some states were prohibited by state law from making advances and were limited to making reimbursements after the work was performed. In these cases, Agriculture initially put up the state's share and was later reimbursed. The Comptroller General held that Agriculture could credit the reimbursements to the appropriation charged for the project. The distinction between this type of situation and the simpler "related to a previous expenditure" situation in which the money must go to miscellaneous receipts lies in the nature of the agency's obligation. Here, Agriculture was not required to contribute the state's share; it could simply have foregone the projects in those states which could not advance the funds. This is different from a situation in which the agency is required to make a given expenditure in any event, subject to later reimbursement. In 23 Comp. Gen. 652, the agency made payments larger than it was required to make, knowing that the "excess" of what it paid over what it had to pay would (or at least was required to) be returned. *See also* 64 Comp. Gen. 431 (1985); 61 Comp. Gen. 537 (1982); B-69813, Dec. 8, 1947; B-220911.2-O.M., Apr. 13, 1988. For more recent decisions dealing with an agency's authority to retain "excess" payments, see B-271127.2, Jan. 30, 1997; 73 Comp. Gen. 321 (1994).

The rationale for crediting refunds to an appropriation account is to enable the account to be made whole for the overpayment that gave rise to the refund. As a recent decision pointed out, the refund exception to the general requirement of section 3302(b) "simply restores to the appropriation amounts that should not have been paid from the appropriation." B-302366, July 12, 2004. It follows that the exception does

not permit crediting refunds to appropriations in amounts *greater* than the overpayment. The decision in B-302366 illustrates this point. In that case, a Department of Energy contractor turned over to the department a refund it had received from the State of Washington for taxes which the contractor had previously paid and for which it had been reimbursed by the department. Along with the tax refund, the contractor also turned over to the department an additional amount it had received from the state as interest on the refunded taxes. GAO agreed with the department that the tax refund itself could be credited to the appropriation originally used to reimburse the contractor for the tax payment. However, the decision held that the additional amount representing interest could not be credited to the appropriation but must be returned to the Treasury as miscellaneous receipts pursuant to 31 U.S.C. § 3302(b):

> "The nonstatutory refund exception . . . does not allow the department to retain the interest paid by the state. Because the nonstatutory exception operates simply and solely to restore to an appropriation amounts that should not have been paid from the appropriation, crediting an amount in excess of that paid from the appropriation would improperly augment the appropriation."

In this regard, the decision rejected the department's suggestion that the interest payment could be regarded as merely restoring the appropriation to an amount adjusted for inflation. The decision noted that Congress does not appropriate on a net present value basis. Likewise, GAO has held that agencies may retain and credit to their appropriations refunds in the form of recoveries under the False Claims Act (31 U.S.C. § 3729) to the extent that they represent compensatory damages to reimburse erroneous payments, but not "exemplary" damages in the nature of penalties. B-281064, Feb. 14, 2000; 69 Comp. Gen. 260 (1990).

For other examples of refunds that may be retained to the credit of an appropriation, see 65 Comp. Gen. 600 (1986) (rebates from Travel Management Center contractors); 62 Comp. Gen. 70 (1982) (partial repayment of contribution to International Natural Rubber Organization occasioned by addition of new members); B-139348, May 12, 1959 (refund of overcharge by public utility); and B-209650-O.M., July 20, 1983 (same).

It should be noted that crediting refunds to agency appropriations is permissive, not mandatory. Thus, the Comptroller General advised the General Services Administration that rebates received from travel

management contractors could be deposited to the general fund of the Treasury if the small amounts involved did not justify the cost of processing these payments to the credit of the agency appropriation accounts that "earned" them. 73 Comp. Gen. 210 (1994). The Comptroller General also approved crediting *de minimis* ($100 or less) rebates to currently available accounts rather than the prior year accounts that earned them. 72 Comp. Gen. 63 (1992). However, the Comptroller General refused to extend this *de minimis* exception to rebates that could aggregate $1,000 or more. 72 Comp. Gen. 109 (1993).

A repayment is credited to the appropriation initially charged with the related expenditure, whether current or expired. If the appropriation is still current, then the funds remain available for further obligation within the time and purpose limits of the appropriation. However, if the appropriation has expired for obligational purposes (but has not yet been closed), the repayment must be credited to the expired account, not to current funds. *See* 23 Comp. Gen. 648 (1944); 6 Comp. Gen. 337 (1926); B-138942-O.M., Aug. 26, 1976. If the repayment relates to an expired appropriation, crediting the repayment to current funds is an improper augmentation of the current appropriation unless authorized by statute. B-114088, Apr. 29, 1953. These same principles apply to a refund in the form of a credit, such as a credit for utility overcharges. B-139348, May 12, 1959; B-209650-O.M., July 20, 1983.[158] *Cf.* B-260063, June 30, 1995, fn. 3 (there is no authority for an agency to hold refunds of erroneous payments in an interest bearing account pending final payment to a contractor since such refunds should be credited to the appropriation account initially charged with the erroneous payment). Once an appropriation account has been closed in accordance with 31 U.S.C. §§ 1552(a) or 1555, repayments must be deposited as miscellaneous receipts regardless of how they would have been treated prior to closing. 31 U.S.C. § 1552(b). *See also* B-260993, June 26, 1996; B-257905, Dec. 26, 1995; 73 Comp. Gen. 210, 211 (1994).

Where funds are authorized to be credited to an appropriation, restrictions on the basic appropriation apply to the credits as well as to the amount originally appropriated. A-95083, June 18, 1938.

[158] It should not be automatically assumed that every form of credit accruing to the government under a contract will qualify as a refund to the appropriation. *See, e.g.*, B-302366, July 12, 2004; A-51604, May 31, 1977.

The fact that some particular reimbursement is authorized or even required by law is not, standing alone, sufficient to overcome 31 U.S.C. § 3302(b). *E.g.*, 67 Comp. Gen. 443 (1988); 22 Comp. Dec. 60 (1915); 1 Comp. Dec. 568 (1895). The accounting for that reimbursement—whether it may be retained by the agency and, if so, how it is to be credited—will depend on the terms of the statute. Some statutes, for example, permit reimbursements to be credited to current appropriations regardless of which appropriation "earned" the reimbursement. *See*, *e.g.*, 10 U.S.C. § 2208(g); 10 U.S.C. § 2210(a)(1); 22 U.S.C. § 2392(c); 22 U.S.C. § 2509(g). As a general proposition, however, this practice, GAO has pointed out, diminishes congressional control.[159]

As might be expected, there have been a great many decisions involving the miscellaneous receipts requirement. It is virtually impossible to draw further generalizations from the decisions other than to restate the basic rule: An agency must deposit into the General Fund of the Treasury any funds it receives from sources outside of the agency unless the receipt constitutes an authorized repayment or unless the agency has statutory authority to retain the funds for credit to its own appropriations.

(3) Timing of deposits

As to the timing of the deposit in the Treasury, 31 U.S.C. § 3302(b) says merely "as soon as practicable." There is another statute, however, now found at 31 U.S.C. § 3302(c), which provides in relevant part:

> "(1) A person having custody or possession of public money, including a disbursing official having public money not for current expenditure, shall deposit the money without delay in the Treasury or with a depositary designated by the Secretary of the Treasury under law. Except as provided in paragraph (2), money required to be deposited pursuant to this subsection shall be deposited not later than the third day after the custodian receives the money. . . .

[159] For further discussion of these concepts in the context of statutes applicable to the Defense Department, see GAO, *Reimbursements to Appropriations: Legislative Suggestions for Improved Congressional Control*, FGMSD-75-52 (Washington, D.C.: Nov. 1, 1976). A more recent report made a similar point in relation to agencies crediting user fee proceeds to their appropriations. GAO, *Federal User Fees: Budgetary Treatment, Status, and Emerging Management Issues*, GAO/AIMD-98-11 (Washington, D.C.: Dec. 19, 1997).

> "(2) The Secretary of the Treasury may by regulation prescribe that a person having custody or possession of money required by this subsection to be deposited shall deposit such money during a period of time that is greater or lesser than the period of time specified by the second sentence of paragraph (1)."

This statute, formerly designated as Revised Statutes § 3621, originated on March 3, 1857 (ch. 114, 11 Stat. 249). It was amended on May 28, 1896 (ch. 252, § 5, 29 Stat. 179), to specify a deadline of 30 days. The time limit was reduced to 3 days by section 2652(b)(1) of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, div. B. title VI, 98 Stat. 494, 1152 (July 18, 1984).

A Treasury Department regulation urges agencies to "achieve same day deposit of money." When same day deposit is not cost-effective or is impracticable, the regulation generally requires next-day deposit. 31 C.F.R. § 206.5 (2005).[160]

As a general proposition, section 3302(c) and the Treasury regulations place an outer limit on what is practicable under section 3302(b). 11 Comp. Gen. 281, 283–84 (1932); 10 Comp. Gen. 382, 385 (1931). The deadline applies to all receipts, including those to be credited to an appropriation account (which, of course, is "in the Treasury"), not just those for deposit as miscellaneous receipts. *E.g.*, 10 Comp. Gen. 382.

The deposit timing requirements of 31 U.S.C. § 3302(c) and the implementing Treasury regulations apply as well when public moneys are held by nonfederal custodians. Thus, GAO found that these requirements were violated where the Department of Veterans Affairs (VA) allowed contractors to hold payments it collected on VA loans in an interest-bearing account for 30 days or more before transferring the payments to the Treasury. *See* GAO, *Internal Controls: VA Lacked Accountability Over Its Direct Loan and Loan Sale Activities*, GAO/AIMD-99-24 (Washington, D.C.: Mar. 24, 1999), at 16–18.

[160] Further guidance is contained in I *Treasury Financial Manual* chapter 6-8000. For example, the *Manual* provides at section 6-8030.20 that collections totaling less than $5,000 may be accumulated and deposited when the total reaches $5,000. However, deposits must be made at least weekly regardless of amount.

(4) Money received (or not received) "for the Government"

As originally enacted, 31 U.S.C. § 3302(b) required deposit into the Treasury of moneys received "for the use of the United States."[161] The 1982 codification of title 31 changed this language to moneys received "for the Government."[162] The meaning, of course, is the same. There is no distinction between money received for the use of the United States and money received for the use of a particular agency; such a distinction would largely nullify the statute.

Although the concept of money received "for the use of the United States" or "for the Government" does not lend itself to precise definition, both the Comptroller General and the courts have applied this concept broadly, consistent with the key role and purpose of section 3302(b), in preserving Congress's constitutional power of the purse. For example, as one recent decision observed:

> "[T]he miscellaneous receipts statute . . . requires that money received for the use of the United States be deposited in the Treasury unless otherwise authorized by law. Court cases and decisions of this Office make clear that an agency cannot avoid the miscellaneous receipts statute simply by changing the form of its transactions to avoid the receipt of money otherwise owed to it."

B-303413, Nov. 8, 2004. See also B-300826, Mar. 3, 2005, at 6, noting that an agency cannot avoid section 3302(b) by authorizing a contractor to charge fees to outside parties and keep the payments in order to offset costs that would otherwise be borne by agency appropriations.

Neither of the above-cited decisions actually involved transactions that violated section 3302(b). However, another recent Comptroller General opinion held that a fee arrangement between the Small Business Administration (SBA) and a contractor did violate 31 U.S.C. § 3302(b) and constituted an improper augmentation of SBA's appropriations. B-300248,

[161] Act of March 3, 1849, ch. 110, 9 Stat. 398.

[162] Pub. L. No. 97-258, § 1, 96 Stat. 877, 948 (Sept. 13, 1982).

Jan. 15, 2004.[163] This case concerned SBA's "Preferred Lender Program" (PLP). Lenders in this program, so-called "PLP lenders," had authority to make loans without prior SBA approval; however, the law specifically required SBA to conduct assessments of these lenders at least annually. SBA contracted with a firm to assist in conducting the required assessments. Under the contract, assessments were conducted by a review team consisting of an SBA employee and one or more employees of the contractor. The SBA employees, of course, were paid from agency appropriations. However, the contractor was compensated from fees that SBA imposed on the PLP lenders and that the lenders paid directly to the contractor.

SBA maintained that the fee proceeds did not constitute "money for the Government" within the application of 31 U.S.C. § 3302(b) since they were paid directly to the contractor as compensation for the contractor's work. The agency also argued that "no-cost" contracts such as this were largely beyond the reach of the augmentation rule or section 3302(b). The Comptroller General rejected these arguments, holding that SBA had "effectively retained and used the fees without specific authorization" and that the agency's "constructive disposition" of the fees violated section 3302(b). In essence, the opinion reasoned that the fee arrangement amounted to shifting to PFP lenders an expense imposed upon SBA incident to carrying out its statutory duties that should be borne by the agency's appropriations:

> "SBA's position . . . is in conflict with our prior decisions and not supported by the courts. A government official or agent is deemed to receive money for the government under the Miscellaneous Receipts Statute if the money is to be used to bear the expenses of the government or pay the government obligations. . . . SBA's functions clearly include conducting oversight of PLP lenders, whether the review is conducted by SBA's own employees or with the assistance of a contractor. These functions are among the purposes for which Congress appropriates funds to SBA . . . Thus the fees paid by PLP lenders represent expenses SBA would have to pay from its appropriations regardless of whether the expenses were for actions performed by SBA employees or

[163] The opinion also concluded that the fee arrangement was not authorized under the user charge statute, 31 U.S.C. § 9701, or under provisions of SBA's organic legislation.

> by a contractor's employees. SBA has devised an arrangement by which another party incurs these expenses, in effect using the PLP review fees to substitute for appropriated funds in paying the cost of the PLP reviews."

B-300248 at 7.

The courts also have given broad application to the section 3302(b) concept of money received "for the Government." In *Reeve Aleutian Airways, Inc. v. Rice*, 789 F. Supp. 417 (D.D.C. 1992), the Air Force had awarded a contract to a commercial air carrier (MarkAir) to provide passenger and cargo service to a remote base in the Aleutian Islands. The carrier's revenue would be derived almost entirely from fares either purchased directly or reimbursed by the United States (military personnel, their dependents, and government contractor employees). The contract granted the carrier landing rights and ground support at the base, and the contractor agreed to return a specified portion of its receipts as a "concession fee," to be deposited in the base morale, welfare, and recreation fund. In upholding a disappointed bidder's challenge to the award, the court stated:

> "[T]he so-called concession fees to be paid by MarkAir were 'public monies' both in the sense that they would be paid by MarkAir exclusively to purchase the use of property of the United States and in the sense that the funds were or were derived directly from public sources—United States taxpayers and the creditors of the United States who have lent it funds to cover expenses which exceed its revenue. Obviously, innovation consistent with the law should be encouraged but this transaction so plainly violates the express terms of 31 U.S.C. § 3302(b) . . . that it should be nipped in the bud."

Reeve Aleutian Airways, 789 F. Supp. at 421.

Since there was no authority to divert the funds from the Treasury to the welfare fund, and since the diversion would actually increase the cost to the government, the court found the contract award to be arbitrary and capricious and declared the contract "null, void and of no force and effect." *Id.* at 423.

In a case it regarded as "virtually identical" to *Reeve Aleutian Airways*, the United States Court of Appeals for the District of Columbia held that a Department of Defense contract solicitation requiring payment of the portion of concession fees derived from unofficial travel to a morale fund rather than to the Treasury violated 31 U.S.C. § 3302(b). *Scheduled Airlines Traffic Offices, Inc. v. Department of Defense*, 87 F.3d 1356, 1363 (D.C. Cir. 1996).[164] The court stated:

> "Mindful of both the plain language of the Miscellaneous Receipts statute and its underlying purpose to preserve congressional control of the appropriations power, we have no doubt that concession fees for unofficial travel constitute 'money for the Government' within the meaning of the statute. Travel agents pay the fees pursuant to contracts awarded by agencies of the United States, doing so in consideration for government resources—the right to occupy agency office space, to utilize government services associated with that space, and to serve as the exclusive on-site travel agent."

Id. at 1362. The court was not persuaded by the argument that the required payments to the morale fund did not violate 31 U.S.C. § 3302(b) since they were attributable entirely to commissions on unofficial travel purchased with private funds:

> "This argument is inconsistent with the statute's unequivocal language. Government officials must deposit in the Treasury 'money for the Government *from any source*.' 31 U.S.C. § 3302(b) (emphasis added). The original source of the money—whether from private parties or the government—is thus irrelevant."

Id.[165]

[164] The court's disposition in *Scheduled Airlines* differed from a Comptroller General decision that had denied a protest against this solicitation. 73 Comp. Gen. 310 (1994).

[165] Subsequently, Congress enacted legislation that specifically authorized Defense agencies to enter into contracts of the type invalidated in *Scheduled Airlines Traffic Offices* that permit a portion of commissions from unofficial travel to be deposited into nonappropriated morale funds. 10 U.S.C. § 2646. See, in this regard, B-283731, Dec. 21, 1999.

In two decisions, GAO found that the Environmental Protection Agency (EPA) and the Federal Election Commission did not violate the miscellaneous receipts statute when they engaged contractors to respond to public requests for information and to charge, and retain, fees for the service. In B-166506, Oct. 20, 1975, the Environmental Protection Agency (EPA) had a number of contracts with private firms for the processing, storage, and retrieval of various kinds of recorded environmental information. Much of this information was of value to private parties and available under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. Fees collected by an agency under FOIA must be deposited as miscellaneous receipts. Here, however, EPA proposed advising requesting parties to deal directly with the contractors, who would charge and retain fees for providing the data, although the requestors would retain the right to deal with EPA. GAO approved the proposal, concluding that fees charged by the contractors in these circumstances did not constitute money received for the government.

The EPA decision viewed the contract arrangement as an alternative to the FOIA process for satisfying information requests and reasoned that the contractors acted as "independent entrepreneurs" rather than as agents of EPA in providing such information. The decision cautioned, however, that the fees charged and retained by the contractors could not exceed the fees which EPA could charge if it provided the services directly. Thus, the fees could include the direct costs of document search and duplication, but not costs associated with developing the information. In 61 Comp. Gen. 285 (1982), GAO provided similar advice to the Federal Election Commission in connection with requests from the public for microfilm copies of its reports, citing B-166506, Oct. 20, 1975.

It may be hard to reconcile the EPA and Federal Election Commission decisions with more recent decisions, and they should be approached with caution. The contractor fee arrangements in both of these cases clearly had at least the indirect effect of relieving the agencies of expenses incident to the performance of their statutory obligations that otherwise would have been paid from their appropriations.

In a recent decision, GAO considered whether an agency improperly avoided the miscellaneous receipts statute by structuring a regulatory action so that money would not be owed to the government. B-303413, Nov. 8, 2004. The Federal Communications Commission proposed to provide spectrum rights to a private company through a "license modification" in which the company would not pay the government for the

spectrum but would pay certain costs incurred by it and other spectrum users. If the Federal Communications Act of 1934, as amended, at 47 U.S.C. § 309(j), required the Commission to license the spectrum through auction instead of a license modification, then the Commission's proposed regulatory action would improperly avoid the government's receipt of money otherwise owed to it and thus would violate the miscellaneous receipts statute. GAO found the Commission's proposed regulatory action to be within the scope of its authority under the Federal Communications Act, at 47 U.S.C. § 316(a)(1), and concluded that the license modification did not violate the miscellaneous receipts statute.

Both the Comptroller General and the courts have on occasion held that certain receipts of money did not constitute the receipt of moneys within the scope of 31 U.S.C. § 3302(b). In B-205901, May 19, 1982, a railroad had furnished 15,000 gallons of fuel to the Federal Bureau of Investigation (FBI) for use in an undercover investigation of thefts of diesel fuel from the railroad. The railroad and FBI agreed that the fuel or the proceeds from its sale would be returned upon completion of the investigation. In view of 31 U.S.C. § 3302(b), the FBI then asked whether money generated from the sale of the fuel had to be deposited in the Treasury as miscellaneous receipts. In one sense, it could be argued that the money was received "for the use of the United States," in that the FBI planned to use it as evidence. However, the Comptroller General pointed out, this is not the kind of receipt contemplated by 31 U.S.C. § 3302(b). The decision concluded that "[f]unds are received for the use of the United States only if they are to be used to bear the expenses of the Government or to pay the obligations of the United States." Therefore, there was no legal barrier to returning the funds to the railroad.

In another case, GAO held that misconduct fines levied on Job Corps participants by the Labor Department need not be treated as money received for the Government for purposes of 31 U.S.C. § 3302(b). The governing legislation specifically authorized "reductions of allowances" as a disciplinary measure. Labor felt that, in some cases, immediate collection of a cash fine from the individual's pocket would be more effective. Finding a legislative intent to confer broad discretion in matters of enrollee discipline, GAO agreed that the cash fines could be regarded as a form of disciplinary allowance reduction, and accordingly credited to Job Corps appropriations. B-130515, Aug. 18, 1970. GAO followed the same approach in a similar question several years later in 65 Comp. Gen. 666, 671 (1986). The two Job Corps decisions relied heavily on the language of the

program statute involved in those cases and appear to have little, if any, application beyond that statute.

In 64 Comp. Gen. 217 (1985), a food service concession contract required the contractor to reserve a percentage of income to be used for the replacement of government-owned equipment. The reserve was found not to constitute money for the Government within the meaning of 31 U.S.C. § 3302(b). GAO distinguished an earlier decision, 35 Comp. Gen. 113 (1955), on the basis that the reserve here constituted "a mere bookkeeping entry" whereas the proposal in the 1955 case would have required the actual transfer of funds to a bank account. 64 Comp. Gen. at 219.

In *Thomas v. Network Solutions, Inc.*, 176 F.3d 500 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000), the court concluded that fees charged by a party to a cooperative agreement did not constitute money for the government and thus were not subject to deposit into the Treasury under 31 U.S.C. § 3302(b). In *Thomas*, the National Science Foundation (NSF) entered into a cooperative agreement with Network Solutions to register Internet domain names and provide related services to the registrants. In return, Network Solutions was permitted to charge registrants a fee and to retain the fee as payment for its services. The plaintiff domain registrants challenged the legality of the registration fees. Relying in part on the above-cited Comptroller General decisions dealing with EPA and the Federal Election Commission, the plaintiffs asserted, among other things, that the fees exceeded the amount that NSF itself could have imposed under the user charges statute, 31 U.S.C. § 9701, had the agency provided domain registration services directly. The court rejected this argument and distinguished the Comptroller General decisions on the basis that Network Solutions was not assisting NSF in performing a statutory duty imposed upon it. Since Congress did not require NSF or any other federal agency to register Internet domain names, the registration was not a government service. Thus, neither 31 U.S.C. § 9701 nor 31 U.S.C. § 3302(b) applied. *Thomas*, 176 F.3d at 510–12.

Finally, several of the trust fund cases discussed hereafter in section E.2.h of this chapter also address the money received "for the Government" concept. As explained in section E.2.h, the general rule is that funds properly received by an agency in a trust capacity are not subject to section 3302(b); however, there are exceptions and limits to this general rule.

b. Contract Matters

(1) Excess reprocurement costs

We use the term "excess reprocurement costs" here to include two factually different but conceptually related situations:

- *Original contractor defaults.* Agency still needs the work done and contracts with someone else to complete the work, almost invariably at a cost higher than the original contract price. Original contractor is liable to the government for these "excess reprocurement costs."

- *Defective work by original contractor.* Agency incurs additional expense to correct defective work. Contractor is liable for the amount of this additional expense.

Disposition of amounts recovered in these situations has generated numerous cases. Generally, the answer depends on the timing of the recovery in relation to the agency's reprocurement or corrective action and the status of the applicable appropriation. The objective is to avoid the depletion of currently available appropriations to get what the government was supposed to get under the original obligation. The rules were summarized, and the case law reviewed, in 65 Comp. Gen. 838 (1986).

The rules are as follows:

- If, at the time of the recovery from the original contractor, the agency has not yet incurred the additional expense, the agency may retain the amount recovered to the extent necessary to fund the reprocurement or corrective measures. The collection is credited to the appropriation obligated for the original contract, without regard to the status of that appropriation. Even if that appropriation has expired and is generally no longer available for obligation, it usually can still be used to fund the reprocurement or corrective measures under the "replacement contract" theory until it closes.[166]

[166] *See* Chapter 5, section B.6. The basic rule is 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 availability, for purposes of funding a contract to complete the unfinished work. *Id.* As discussed in section B.6, certain conditions must be met in order to invoke the replacement contract rule. Excess reprocurement costs recovered from defaulting contractors cannot be retained by an agency in its appropriations and applied to a new contract if the reprocurement does not constitute an appropriate replacement contract. *Cf.* B-242274, Aug. 27, 1991 (applying this principle in the context of recovered liquidated damages).

- If, at the time of recovery from the original contractor, the agency has already incurred the additional reprocurement or corrective expense, the agency may retain the recovery for credit to the applicable appropriation, to the extent necessary to reimburse itself, if that appropriation is still available for obligation.

- If the appropriation has expired and is no longer available for obligation, the recovery should go to miscellaneous receipts.[167]

These rules apply equally to default and defective work situations but vary with the type and status of the appropriation involved. If the appropriation used to fund the original contract is a no-year appropriation, the recovery may be credited to that appropriation regardless of whether the agency has or has not yet actually incurred the additional costs. If the appropriation is an annual or multiple year appropriation and the agency has not yet incurred the additional costs as of the time of recovery, the agency may credit the collection to the appropriation regardless of whether it is still current or expired up until the time the account closes. In the case of an annual or multiple year appropriation, where the agency has already incurred the reprocurement or corrective costs as of the time of recovery, the agency may retain the recovery if the appropriation is still available for obligation, but not if it has expired. (Where the excess costs have already been incurred and the appropriation has expired at the time of recovery, it is too late to avoid a depletion of currently available funds.)

Prior to 1983, essentially two separate lines of cases dealt with defective work and default. The defective work cases had always applied the above principles, although not necessarily in those terms. Some illustrative cases are summarized below:

- Supplies delivered by a contractor were found upon inspection to be unsatisfactory for use, that is, not in accordance with the terms of the contract. A refund by the contractor could be credited to the

[167] In 1990, subsequent to the decision in 65 Comp. Gen. 838 and many of the other decisions discussed in this section, Congress amended the statutory provisions applicable to the closing of appropriation accounts and the disposition of account balances. *See generally* Chapter 5, section D. These statutory changes do not fundamentally affect the substantive rules discussed in this section, although the changes they make in the time periods that appropriation accounts retain their identity after they expire for obligation purposes and before they close may affect the practical application of those rules in particular circumstances.

appropriation originally charged, on the theory that the payment was improperly made from the appropriation in the first instance. The appropriation involved was an annual appropriation, and the corrective costs had not been paid as of the time of the recovery. 8 Comp. Gen. 103 (1928).

- An amount recovered from a contractor's surety because the work failed to meet specifications, after the contractor had received final payment, was regarded as in the nature of a reduction in contract price representing the value of unfinished work, and therefore amounted to the recovery of an unauthorized overpayment. It could thus be deposited in the appropriation charged with the contract and expended for completion of the work. The appropriation involved was a no-year appropriation. 34 Comp. Gen. 577 (1955).

- Recovery for defective work could be credited to an expired annual appropriation. Because the corrective work had not yet been undertaken, the funds would remain available for that corrective work under the "replacement contract" theory. 44 Comp. Gen. 623 (1965).

In default cases, however, the decisions had consistently held for several decades that excess reprocurement costs recovered from defaulting contractors had to be deposited as miscellaneous receipts.[168]

The two lines of cases met in a 1983 decision, 62 Comp. Gen. 678. That decision recognized that there was no real reason to distinguish between default and defective work for purposes of accounting for recoveries. The rules should be the same in both situations. Accordingly, 62 Comp. Gen. 678 modified the prior default cases and held, in effect, that the rules previously applied in the defective work cases should be applied in the future to all excess reprocurement cost cases "without reference to the event that gave rise to the need for the replacement contract—that is, whether occasioned by a default or by defective workmanship." *Id.* at 681. The decision further held that the Bureau of Prisons could retain damages

[168] *E.g.*, 46 Comp. Gen. 554 (1966); 40 Comp. Gen. 590 (1961); 27 Comp. Gen. 117 (1947); 14 Comp. Gen. 729 (1935); 14 Comp. Gen. 106 (1934); 10 Comp. Gen. 510 (1931); 8 Comp. Gen. 284 (1928); 26 Comp. Dec. 877 (1920); 23 Comp. Dec. 352 (1916); A-26073, Mar. 20, 1929, *aff'd upon reconsideration*, A-26073, Aug. 8, 1929; A-24614, June 20, 1929. The rule was applied regardless of whether the funds were actually collected back from the contractor or merely withheld from future contract payments due. 52 Comp. Gen. 45 (1972).

recovered from a contractor charged with defective work, for credit to the appropriation which had been used to replace the defective work.

The 1983 decision added another new element: Where the recovery, by virtue of factors such as inflation or underbidding, exceeds the amount paid to the original contractor, any amounts recovered over and above what is actually necessary to fund the reprocurement or corrective work (or to reimburse the appropriation charged with that work, if it is still currently available) must be deposited in the Treasury as miscellaneous receipts. Authority to retain funds enables the agency to get what it originally bargained for, not to make a "profit" on the transaction. 62 Comp. Gen. at 683.

Logically, the proceeds of a forfeited performance bond should be available to the contracting agency if and to the extent necessary to fund a replacement contract to complete the work of the original contract, and this was the holding in 64 Comp. Gen. 625 (1985).

In 65 Comp. Gen. 838 (1986), GAO reviewed the evolution of the case law on excess reprocurement costs, restated the rules, and pointed out that in no case had GAO approved agency retention of recovered funds where the reprocurement or corrective costs "had already been paid from an appropriation which, at the time of the recovery, was no longer available for obligation." *Id.* at 841 n.5.

Before leaving the subject, it may be helpful to again summarize the rules in a slightly different manner. Considering the status and the timing of agency action, in the following five categories, an agency may retain amounts recovered to the extent necessary to fund the reprocurement or corrective work, or to reimburse itself for costs already incurred:

- No-year appropriation where recovery was made before agency incurs additional costs.

- No-year appropriation where additional costs were incurred prior to recovery.

- Annual or multiple year appropriation where recovery is made before the agency incurs additional costs and the appropriation is still current at time of recovery.

- Annual or multiple year appropriation where additional costs were incurred prior to recovery and the appropriation is still current at time of recovery.

- Annual or multiple year appropriation where recovery is made before the agency incurs additional costs and the appropriation expired at time of recovery.

Finally, the recovery goes to the Treasury as miscellaneous receipts when an agency has annual or multiple year appropriations where additional costs were incurred prior to recovery and the appropriation had expired at time of recovery.

(2) Other damage claims

One form of other damage claims is liquidated damages. Liquidated damages constitute a specific amount of money stipulated in advance by the contracting parties as the measure of damages for certain breaches of the contract, such as failure to meet applicable performance deadlines. *See* B-148493, Mar. 25, 1963. *See also* 44 Comp. Gen. 623 (1965). The traditional rule for liquidated damages is that they may be credited to the appropriation originally charged in circumstances similar to those applicable to excess reprocurement costs, as discussed above. 44 Comp. Gen. 623; 23 Comp. Gen. 365 (1943); 9 Comp. Gen. 398 (1930); 18 Comp. Dec. 430 (1911). *See also* B-237421, Sept. 11, 1991. The rationale for retaining liquidated damages in the appropriation account rather than depositing them in the Treasury as miscellaneous receipts is that liquidated damages effect an authorized reduction in the price of the individual contract concerned, and also that this would make the damages available for return to the contractor should the liability subsequently be relieved. B-242274, Aug. 27, 1991. However, where this rationale does not apply—for example, in a case where the contractor did nothing and therefore earned nothing and remission of liquidated damages under 41 U.S.C. § 256a[169] had been denied—the liquidated damages should be deposited in the Treasury as miscellaneous receipts. 46 Comp. Gen. 554 (1966). Likewise, as in

[169] This section provides that whenever a federal contract includes a provision for liquidated damages for delay, the Secretary of the Treasury may, upon the recommendation of the head of the procuring agency, remit all or part of the damages if such action would be just and equitable. The Comptroller General formerly exercised this remission function, but it was transferred by law to the executive branch in 1996. See the codification note following 41 U.S.C. § 256a.

B-242274, Aug. 27, 1991, liquidated damages cannot be retained and used to fund reprocurements that do not constitute "replacement contracts" for the contract that gave rise to the liquidated damages.

In some liquidated damage situations, the agency will not have incurred any additional reprocurement or corrective costs. This might happen in a case where an agency received liquidated damages for delay in performance but the contractor's performance, though late, was otherwise satisfactory. In other cases, however, the agency will incur additional costs. In the situation described in 46 Comp. Gen. 554, for example, the agency would presumably need to reprocure, in which event it could retain the liquidated damages in accordance with the rules for excess reprocurement costs just discussed. 64 Comp. Gen. 625 (1985) (modifying 46 Comp. Gen. 554 to that extent). Consistent with these rules, liquidated damages credited to an expired appropriation may not be used for work which is not part of a legitimate replacement contract. B-242274, Aug. 27, 1991.

(3) Refunds and credits

As discussed previously, the general rule is that refunds, which include returns of erroneous or excess contract payments as well as adjustments to previous contract payments, represent an exception to the miscellaneous receipts deposit requirement of 31 U.S.C. § 3302(b) and are to be credited to the appropriation or fund accounts from which the original payments were made.[170] Thus, refunds received by the government under a price redetermination clause may be credited to the appropriation from which the contract was funded. 33 Comp. Gen. 176 (1953). *Contra* 24 Comp. Gen. 847, 851 (1945).[171]

Refunds received by the government under a warranty clause may be considered as an adjustment in the contract price and therefore credited to the appropriation originally charged under the contract. 34 Comp. Gen. 145 (1954). The same result applies where the warranty refund is in the form of a replacement purchase credit. 27 Comp. Gen. 384 (1948). (These cases

[170] See section E.2.a of this chapter and 65 Comp. Gen. 600 (1986).

[171] The 1953 decision is inconsistent with the 1945 decision on this point and appears to have effectively overruled the latter decision.

are conceptually related to the "defective work" cases discussed earlier, and the result follows logically from the result in those cases.)

Not all contract adjustments qualify as "refunds" for purposes of the section 3302(b) exception. In B-265727, July 19, 1996, the Securities and Exchange Commission (SEC) asked whether it could reduce its obligation of appropriated funds for its building lease to reflect the reduced rent SEC paid as a result of a sublease. Under the arrangement in question, an SEC employee group subleased parking in the building from the SEC but paid the landlord directly for this sublease. SEC deducted these payments under the sublease from its own lease payments. Relying on the two cases cited above—34 Comp. Gen. 145 and 27 Comp. Gen. 384—SEC argued that the sublease payment was a "refund" that it could use to reduce the rental payments from its appropriations. GAO rejected this argument, holding that SEC's use of amounts paid by the sublessee to reduce the obligation created by SEC's own lease with the landlord constituted an improper augmentation of its appropriations. The decision stated:

> "In situations where we treated a contract adjustment or price renegotiation as a refund that could be credited to an appropriation like those cited by the SEC . . . the 'refund' reflected a change in the amount the government owed its contractor based on the contractor's performance or a change in the government's requirements."

It went on to point out that neither of these factors was present in the SEC case.

A different type of credit was discussed in 53 Comp. Gen. 872 (1974). Prospective timber sale purchasers were to be required to make certain property surveys, the cost of which would be credited against the sale price. Forest Service appropriations had previously financed the surveys. GAO viewed the proposal as an unauthorized augmentation of those appropriations. Similarly, the Department of Agriculture could not apply savings in the form of credits accrued under a contract for the handling of food stamp sales receipts to offset the cost of a separate data collection contract, even though both contracts were necessary to the same program objective. A-51604, May 31, 1977.

Credits in the form of rebates may be credited to agency accounts where they meet the criteria for refunds, that is, they represent adjustments to previous expenditures from those accounts and thus serve to make the

accounts whole. In 65 Comp. Gen. 600 (1986), GAO held that agencies could credit rebates of travel agent commissions to the appropriations charged with the costs of federal employee travel that included those commissions. *See also* 73 Comp. Gen. 210 (1994); 72 Comp. Gen. 109 (1993); 72 Comp. Gen. 63 (1992). On the other hand, rebates that do not meet these criteria must be deposited into the Treasury pursuant to 31 U.S.C. § 3302(b) unless the agency has specific statutory authority to retain them. Thus, in a 1996 decision, GAO observed that energy efficiency rebates received by the SEC from a local utility company did not meet the criteria for refunds. B-265734, Feb. 13, 1996, at fn. 1. Nevertheless, GAO held that, because SEC had the necessary specific statutory authority,[172] it could credit half of an energy efficiency rebate to the accounts that funded its energy and water conservation activities.

Recoveries of amounts paid under fraudulent contracts constitute "refunds" that may be deposited to the credit of the appropriation charged with the payments until the appropriation account is closed. Once the account is closed, the recoveries should be deposited to the general fund of the Treasury to the credit of the appropriate receipt account. B-257905, Dec. 26, 1995.

If a contract requires the government to pay a deposit on containers and provides for a refund by the contractor of the deposit upon return of the empty containers by the government, the refund may be credited to the appropriation from which the deposit was paid. B-8121, Jan. 30, 1940. However, if the contract establishes a time limit for the government to return the empty containers and provides further that thereafter title to the containers shall be deemed to pass to the government, a refund received from the contractor after expiration of the time limit is treated as a sale of surplus property and must be deposited as miscellaneous receipts. 23 Comp. Gen. 462 (1943).

(4) "No-cost" contracts

The federal government sometimes enters into so-called "no-cost" contracts to obtain services. Typically, the contractor receives no compensation from the government. B-300248, Jan. 15, 2004. In 63 Comp. Gen. 459 (1984), GAO considered whether the Federal Communications

[172] See 42 U.S.C. § 8256(c)(5)(A), which authorizes such credits for most agencies, subject to appropriation.

Commission could accept offers from industry trade show promoters of "rent-free" exhibition space and "other free services" intended to entice the Commission to participate in industry trade shows. The Commission's participation in a trade show entailed erecting an exhibition booth and placing staff members and equipment there for the duration of the show in order to educate the public and respond to questions about the Commission and its activities. *Id.* at 459–60. The Commission felt that it could not afford to rent space from the promoters; the promoters, realizing that the Commission's presence at their show would be a "drawing card," offered the Commission rent-free space, as well as free electricity and other services necessary to support the Commission's display. *Id.* GAO found a "mutually beneficial arrangement" between the Commission and the promoters, although it did not refer to the mutually beneficial arrangement as a no-cost contract:

> "[I]t is to the advantage of the promoters to solicit the Commission's participation and to waive the usual fees. [At the same time,] acceptance of the free space and services affords [the Commission] with an additional opportunity to inform the public . . . at no increased cost to the agency."

Id.

Several recent GAO decisions have addressed no-cost contracts in relation to the miscellaneous receipts statue, 31 U.S.C. § 3302(b). As a study of these decisions will show, an agency considering a no-cost contract should approach the proposed contract with a great deal of care lest the agency find that it has incurred a constructive augmentation.

In one case, a no-cost contract arrangement was specifically authorized by law and thus obviously did not violate section 3302(b). *See* B-283731, Dec. 21, 1999 (no-cost contract for travel services authorized by 10 U.S.C. § 2646). In two related decisions, GAO also held that the General Services Administration's proposed no-cost national real estate brokers contract would not violate section 3302(b). B-302811, July 12, 2004; B-291947, Aug. 15, 2003. Under the proposed contract, real estate brokers would provide lease acquisition and related services to federal agencies without cost to the government. Rather, consistent with industry practice, their compensation would take the form of commissions paid by the lessors. In affirming the legality of this arrangement, the decision in B-302811 observed:

> "Because the contract was constructed as a no cost contract, GSA will have no financial liability to brokers, and brokers will have no expectation of a payment from GSA. The acceptance of services without payment pursuant to a valid, binding no-cost contract does not augment an agency's appropriation nor does it violate the voluntary services prohibition. Although the brokers contract clearly expects that brokers will be remunerated by commissions from landlords, as is a common practice in the real estate industry, GSA does not require landlords to pay commissions. If a landlord were to fail to pay a broker, the broker would have no claim against GSA."

However, the fact that an agency makes no direct payment for contractor services does not necessarily mean that arrangement constitutes a no-cost contract with no implications under 31 U.S.C. § 3302(b). In B-300248, Jan. 15, 2004, discussed at length in section E.2 of this chapter, the contractor was compensated from fees that the Small Business Administration (SBA) imposed on lenders and that the lenders paid directly to the contractor. The opinion rejected SBA's argument that the "no-cost" nature of the contract took it outside the application of the normal augmentation and miscellaneous receipts principles:

> "SBA's assertion regarding no-cost contracts . . . is misplaced. Although we have observed that no-cost contracts do not *per se* violate the prohibition against augmentation, we have neither applied nor endorsed the principle that an agency may avoid the prohibition merely by requiring third parties to pay for an agency's contractual commitment."

GAO's opinion in B-302811, July 12, 2004, elaborated on the distinction between the SBA contract, which was found to be a "constructive augmentation" in violation of section 3302(b), and the GSA contract, which did not constitute an illegal augmentation:

> "The important difference between the GSA and SBA contracts is that under GSA's contract with brokers, brokers offer their services without any expectation of payment from GSA, whereas under SBA's contract, the contractor offered its services only after SBA agreed to impose a fee on

its preferred lenders to cover the contractor's costs and to require the lenders to pay that fee to the contractor."

c. Damage to Government Property and Other Tort Liability

As a general proposition, amounts recovered by the government for loss or damage to government property cannot be credited to the appropriation available to repair or replace the property, but must be deposited in the Treasury as miscellaneous receipts. B-287738, May 16, 2002 (damage to government buildings); 64 Comp. Gen. 431 (1985) (damage to government motor vehicle); 26 Comp. Gen. 618 (1947) (recovery from insurance company for damage to government vehicle); 3 Comp. Gen. 808 (1924) (loss of Coast Guard vessel resulting from collision).[173] While the recovery may well be "related" to a prior expenditure for repair of the property, it does not constitute a refund in the form of an "adjustment" of a previous disbursement that would qualify for crediting to agency accounts. 64 Comp. Gen. 431, 433 (1985).

There are statutory exceptions to this general proposition. One involves property purchased and maintained by the General Services Administration from the General Supply Fund, a revolving fund established by 40 U.S.C. § 321. By virtue of 40 U.S.C. § 321(b)(2), recoveries for loss or damage to General Supply Fund property are credited to the General Supply Fund. This includes recoveries from other federal agencies for damage to GSA motor pool vehicles. 59 Comp. Gen. 515 (1980).

Another is 16 U.S.C. § 579c, which authorizes the Forest Service to retain the proceeds of bond forfeitures resulting from failure to complete performance under a permit or timber sale contract, and money received from a judgment, compromise, or settlement of a government claim for present or potential damage to lands or improvements under the administration of the Forest Service. If the receipt exceeds the amount necessary to complete the required work or make the needed repairs, the excess must be transferred to miscellaneous receipts. This provision is discussed in 67 Comp. Gen. 276 (1988), holding that the proceeds of a bond forfeiture could be used to reimburse a general Forest Service appropriation which had been charged with the cost of repairs.

[173] Additional cases for this proposition are 35 Comp. Gen. 393 (1956); 28 Comp. Gen. 476 (1949); 15 Comp. Gen. 683 (1936); 5 Comp. Gen. 928 (1926); 20 Comp. Dec. 349 (1913); 14 Comp. Dec. 87 (1907); and 9 Comp. Dec. 174 (1902).

In addition, where an agency has statutory authority to retain income derived from the use or sale of certain property, and the governing legislation evinces an intent for the particular program or activity to be self-sustaining, the agency may also retain recoveries for loss or damage to that property. 27 Comp. Gen. 352 (1947) (recovery from party responsible for loss or damage); 24 Comp. Gen. 847 (1945) (recovery from insurer); 22 Comp. Gen. 1133 (1943) (same).

There is also a nonstatutory exception to the general proposition. Where a private party responsible for loss or damage to government property agrees to replace it in kind or to have it repaired to the satisfaction of the proper government officials and to make payment directly to the party making the repairs, the arrangement is permissible and the agency is not required to transfer an amount equal to the cost of the repair or replacement to miscellaneous receipts.[174] This principle was first recognized in 14 Comp. Dec. 310 (1907) and has been followed, either explicitly or implicitly, ever since. *E.g.*, B-287738, May 16, 2002; 67 Comp. Gen. 510 (1988); B-87636, Aug. 4, 1949; B-128209-O.M., July 12, 1956. The exception applies even though the money would have to go to miscellaneous receipts if the responsible party paid it directly to the government. 67 Comp. Gen. at 511; B-87636, Aug. 4, 1949. For an apparent "exception to the exception" based on the specific legislation involved, see 28 Comp. Gen. 476 (1949).

Logically, the nonstatutory exception in 14 Comp. Dec. 310 appears difficult to support. It is, in fact, an extremely rare instance in which decisions have sanctioned doing indirectly something that cannot be done directly. Be that as it may, the exception has been followed since 1907 and appears firmly entrenched. Thus, in B-128209-O.M., July 12, 1956, GAO addressed the relationship between 14 Comp. Dec. 310 and 28 Comp. Gen. 476, stating that "14 Comp. Dec. 310 has been followed for almost 50 years and we have never expressed disagreement with the conclusion reached therein." The exception does not disturb the rule itself; it is "nothing more than an exception that may be advantageous if the timing of repair and payment can be made to coincide." 64 Comp. Gen. 431, 433 (1985).

[174] A 1943 case suggested a different result, that is, the agency might have to transfer the value of the repairs to miscellaneous receipts, if the agency had a specific appropriation for repair or replacement of the property in question. 22 Comp. Gen. 1133, 1137 (1943). GAO indicated in 67 Comp. Gen. 510 (1988) that this would not be the case, although 67 Comp. Gen. 510 did not deal with a specific repair appropriation, which would appear to be a rare case in any event.

Compensation paid by an insurance company for damage to government property caused by a contractor may not be used to augment the agency's appropriation used for the contract. Therefore, absent specific statutory authority, the moneys, whether paid to the government or to the contractor, are for deposit into the Treasury as miscellaneous receipts. B-287738, May 16, 2002; 67 Comp. Gen. 129 (1987); 48 Comp. Gen. 209 (1968). The retention of insurance proceeds was also at issue in B-93322, Apr. 19, 1950, an apparent exception based on the particular circumstances involved. In that case, the General Services Administration had entered into a contract for renovation of the Executive Mansion. The contract required the contractor to carry adequate fire and hazard insurance. The renovation project had been undertaken under a specific appropriation which was enough for the initial cost but would not have been sufficient for repairs in the event of a fire or other hazard. Since the renovation was a "particular job of a temporary nature," and since a contrary result would defeat the purpose of the appropriation, the Comptroller General held that insurance proceeds received if a covered risk occurred could be retained and used for the cost of repairs. *Id.* at 4.[175]

The rule that recoveries for loss or damage to government property must be deposited as miscellaneous receipts applies equally to recoveries from common carriers for government property lost or damaged in transit. 46 Comp. Gen. 31 (1966); 28 Comp. Gen. 666 (1949); 22 Comp. Dec. 703 (1916); 22 Comp. Dec. 379 (1916). There is a narrow exception in cases where the freight bill on the shipment of the property lost or damaged equals or exceeds the amounts paid for repairs and both are payable from the same appropriation, in which event the bill is reduced and the amount deducted to cover the cost of repairs is allowed to remain to the credit of the appropriation. 21 Comp. Dec. 632 (1915), *as amplified by* 8 Comp. Gen. 615 (1929) and 28 Comp. Gen. 666 (1949). The rule and exception are discussed in 46 Comp. Gen. 31 and in B-4494, Sept. 19, 1939. Also, as with receipts in general, the miscellaneous receipts requirement does not apply if the appropriation or fund involved is made reimbursable by statute. 46 Comp. Gen. at 33–34.

In 50 Comp. Gen. 545 (1971), the Comptroller General held that the requirement to deposit as miscellaneous receipts recoveries from carriers for property lost or damaged in transit does not apply to operating funds of

[175] As these cases demonstrate, the government occasionally purchases insurance; however, it is a self-insurer in most areas. *See generally* Chapter 4, section C.10.

the National Credit Union Administration. The decision noted that, under 12 U.S.C. § 1755, the Administration's funds consist entirely of fees and assessments collected from member credit unions and do not include any general revenue appropriations. Thus, the recoveries should go to the source that bore the costs of the transactions that gave rise to them.

What happens when one federal agency damages the property of another agency? Under the so-called "interdepartmental waiver doctrine," the general rule is that funds available to the agency causing the damage may not be used to pay claims for damages by the agency whose property suffered the damage. 65 Comp. Gen. 910, 911 (1986); 46 Comp. Gen. 586, 587 (1966). The interdepartmental waiver doctrine is based primarily on the concept that property of the various agencies is not the property of separate entities but rather of the government as a single entity, and there can be no reimbursement by the government for damages to or loss of its own property. B-302962, June 10, 2005; 46 Comp. Gen. at 586, 587. However, as GAO pointed out in B-302962, this general rule also has a well-established exception:

> "The interdepartmental waiver doctrine does not apply . . . where an agency has statutory authority to retain income derived from the use or sale of certain property, and the governing legislation shows an intent for the particular program or activity to be self-sustaining. 24 Comp. Gen. 847 (1945). Thus, where an agency operation is financed through reimbursements or a revolving fund, the prohibition does not apply. 65 Comp. Gen. 910 (1986). *See also* 3 Comp. Gen. 74, 75 (1923). In such cases, the agency should recover amounts sufficient to cover loss or damage to property financed by the reimbursements or revolving fund, regardless of whether that damage is caused by another federal agency or a private party, and deposit those funds into the revolving fund. *See* 65 Comp. Gen. 910. The rationale for this exception is that the revolving fund, established to operate like a self-sustaining business, should not bear the cost for 'other than objects for which the fund was created.' *Id.*"

The decision in B-302962 held that the exception to the interdepartmental waiver doctrine applied in the case of damage to facilities of the National Archives and Records Administration whose operations were financed by a revolving fund. Thus, the Administration should collect from other federal

agencies, their contractors, or the Administration's own contractors, as the case may be, amounts sufficient to repair damages they caused to the Administration's facilities and deposit those amounts into the revolving fund.

While the preceding cases involved loss or damage to property, the United States may also recover amounts resulting from tortious injury to persons, for example, under the so-called Federal Medical Care Recovery Act, 42 U.S.C. § 2651. *See, e.g.*, 57 Comp. Gen. 781 (1978). Such recoveries, absent express congressional authorization, must be deposited in the Treasury as miscellaneous receipts. 52 Comp. Gen. 125 (1972). Because of a statutory exception to the miscellaneous receipts statute, the Department of Veterans Affairs may retain recoveries under the Federal Medical Care Recovery Act to the extent of medical care or services furnished under chapter 17 of title 38, United States Code. The recoveries may be deposited into the Department of Veterans Affairs Medical Care Collections Fund. Memorandum Opinion for the Assistant Attorney General, Civil Division, *Miscellaneous Receipts Act Exception for Veterans' Health Care Recoveries*, OLC Opinion, Dec. 3, 1998 (construing 38 U.S.C. § 1729A).

A case involving the Military Personnel and Civilian Employees Claims Act of 1964, 31 U.S.C. § 3721, provides a good illustration of an adjustment to a prior disbursement, that is, an authorized refund which the agency may retain for credit to the disbursing appropriation. The statute authorizes agencies to pay claims by their employees for personal property lost or damaged incident to service. In cases where there may be third-party liability (*e.g.*, an insurer or carrier), the agency has a choice. It may pay the entire amount of the employee's claim and be subrogated to the employee's claim against the third party, or it may require the employee to pursue the third-party claim first. If the agency chooses the former option, it may retain any third-party recoveries for credit to the appropriation used to pay the claim. 61 Comp. Gen. 537 (1982). An agency adopting the former policy, the decision stated,

> "will be making payments in some cases that are, strictly speaking, higher than are required. In such cases, it is entirely legitimate to treat a third-party recovery as a reduction in the amount previously disbursed rather than as an augmentation of the agency's appropriation."

Id. at 540.

A comparison of 61 Comp. Gen. 537 to the Federal Medical Care Recovery Act case discussed above, 52 Comp. Gen. 125 (1972), illustrates the distinction previously discussed with respect to applying the definition of "refund"—61 Comp. Gen. 537 is an example of an adjustment to an amount previously disbursed; 52 Comp. Gen. 125 illustrates a collection which must go to miscellaneous receipts even though it is "related" to a prior expenditure.

d. Fees and Commissions

Federal agencies must have statutory authority both (1) to charge fees for their programs and activities in the first instance and (2), even if they have fee-charging authority, to retain in their appropriations and use the amounts collected. *See, e.g.*, B-300826, Mar. 3, 2005; B-300248, Jan. 15, 2004. Thus, fees and commissions paid either to the government itself or to a government employee for activities relating to official duties must be deposited in the Treasury as miscellaneous receipts, absent statutory authority to the contrary.

In the case of fees paid directly to the government, the result is a simple application of 31 U.S.C. § 3302(b). Thus, the following items must be deposited as miscellaneous receipts:

- Commissions from the use of pay telephones in government buildings. 59 Comp. Gen. 213 (1980); 44 Comp. Gen. 449 (1965); 23 Comp. Gen. 873 (1944); 14 Comp. Gen. 203 (1934); 5 Comp. Gen. 354 (1925); B-4906, Oct. 11, 1951.

- Fees and related reimbursable incidental expenses paid to the Department of Agriculture in connection with the investigation of and issuance of certifications of quality on certain farm products. 2 Comp. Gen. 677 (1923).

- Fees collected under the Freedom of Information Act. 4B Op. Off. Legal Counsel 684, 687 (1980).

- Fees for copying and shipping documents by the Office of Federal Housing Enterprise Oversight as part of discovery in administrative proceedings before that agency. B-302825, Dec. 22, 2004.

Of course, if and to the extent expressly authorized by statute an agency may retain fees and use them to offset operating costs. *See, e.g.*, 2 U.S.C. § 68-7(b) (fees and other charges collected for services provided by the Senate Office of Public Records); 7 U.S.C. § 7333(k)(3) (fees for certain

services collected by the Commodity Credit Corporation); 28 U.S.C. § 1921(e) (fees collected by the United States Marshals Service for service of civil process and judicial execution seizures and sales, to the extent provided in advance in appropriation acts); 28 U.S.C. § 1931 (specified portions of filing fees paid to the clerk of court). The relevant legislation will determine precisely what may be retained. *E.g.*, 34 Comp. Gen. 58 (1954).

Training fees illustrate both the general rule and statutory exceptions. Under the Government Employees Training Act, an agency may extend its training programs to employees of other federal agencies on a reimbursable or nonreimbursable basis. 5 U.S.C. § 4104. The agency, unless it receives appropriations for interagency training, may retain the fees. B-241269, Feb. 28, 1991 (nondecision letter). Similarly, an agency may admit state and local government employees to its training programs and may charge a fee or waive it in whole or in part. 42 U.S.C. § 4742(a). Under 42 U.S.C. § 4742(b), the agency that provided the training is authorized to credit its appropriation for reimbursement of fees received. The agency may also admit private persons to its training programs on a space-available and fee basis, but, unless it has statutory authority to the contrary, the agency must deposit the fees as miscellaneous receipts. B-271894, July 24, 1997; 65 Comp. Gen. 666 (1986); 42 Comp. Gen. 673 (1963); B-241269, Feb. 28, 1991; B-190244, Nov. 28, 1977.

Parking fees assessed by federal agencies under the authority of 40 U.S.C. § 586 are to be credited to the appropriation or fund originally charged for providing the service. However, any amounts collected in excess of the actual cost of providing the service must be deposited as miscellaneous receipts. 55 Comp. Gen. 897 (1976). Statutes other than 40 U.S.C. § 586 may authorize parking fees, in which event the terms of the particular statute must be examined. For example, parking fees at Department of Veterans Affairs medical facilities are addressed in 38 U.S.C. § 8109. Originally, the fees had to go to miscellaneous receipts under 31 U.S.C. § 3302(b). 45 Comp. Gen. 27 (1965). However, 38 U.S.C. § 8109 was amended, and the fees now go into a revolving fund.

Income derived from the installation and operation of vending machines on government-owned or controlled property is generally for deposit as miscellaneous receipts. 32 Comp. Gen. 124 (1952); A-44022, Aug. 14, 1944. There are, however, two major exceptions. First, if an employee association with administrative approval makes a contractual arrangement with the vendor, the employee group may retain the income. 32 Comp.

Gen. 282 (1952); B-112840, Feb. 2, 1953. Second, under the Randolph-Sheppard Act, 20 U.S.C. § 107d-3, vending machine income in certain cases must go to blind licensee-operators or state agencies for the blind. *See* B-238937, Mar. 22, 1991; B-199132, Sept. 10, 1980 (nondecision letters).

Donations, which are voluntary, and fees and assessments, which are not, require different dispositions of amounts collected.[176] Statutory authority to accept gifts and donations does not include fees and assessments exacted involuntarily. 25 Comp. Gen. 637, 639 (1946); B-195492, Mar. 18, 1980; B-225834.2-O.M., Apr. 11, 1988. However, on occasion, GAO has held that gift-acceptance authorities extended to certain payments that were not wholly gratuitous or purely voluntary. *See* B-286182, Jan. 11, 2001 (statutory authority of the District of Columbia courts to accept gifts permits acceptance of services provided as part of an administrative settlement in a rate case); B-232482, June 4, 1990 (not improper for Commerce Department to treat certain registration fees as "contributions" within scope of 22 U.S.C. § 2455(f)). For a discussion of the difference between the statutory authority to accept donations and the authority to charge fees to cover the costs of services provided, see B-272254, Mar. 5, 1997.

Fees paid to individual employees require a two-step analysis. The first step is the principle that the earnings of a government employee in excess of the regular compensation gained in the course of or in connection with his or her services belong to the government. *See*, *e.g.*, 62 Comp. Gen. 39, 40 (1982) and cases cited (military member must remit to the government fee for service on state jury while he was not in leave status). The second step is the application of 31 U.S.C. § 3302(b). Using this analysis, GAO has held that agencies must deposit such fees as miscellaneous receipts in the following instances:

- An honorarium paid to an Army officer for lecturing at a university in his capacity as an officer of the United States. 37 Comp. Gen. 29 (1957).

- Fees collected from private individuals by government employees for their services as notaries public. 16 Comp. Gen. 306 (1936).

- Witness fees and any allowances for travel and subsistence, over and above actual expenses, paid to federal employees for testifying in

[176] See section E.3 of this chapter for a discussion of gifts and donations.

certain state court proceedings. 36 Comp. Gen. 591, 592 (1957); 23 Comp. Gen. 628 (1944); 15 Comp. Gen. 196 (1935); B-160343, Nov. 23, 1966.

Applying the same analysis, a proposal under which a nonprofit corporation funded entirely by private industry would pay monthly "bonuses" to Army enlistees to encourage enlistment and satisfactory service, even if otherwise proper, could not be implemented without specific statutory authority, because the payments could not be retained by the enlistees but would have to be deposited in the Treasury under 31 U.S.C. § 3302(b). B-200013, Apr. 15, 1981.

e. Economy Act

The Economy Act, 31 U.S.C. §§ 1535 and 1536, authorizes the inter- and intra-departmental furnishing of materials or performance of work or services on a reimbursable basis.[177] It is a statutory exception to the miscellaneous receipts statute, 31 U.S.C. § 3302(b), authorizing a performing agency to credit reimbursements to the appropriation or fund charged in executing its performance.[178] Crediting Economy Act reimbursements to agency appropriations is not mandatory. The performing agency may, at its discretion, deposit reimbursements for both direct and indirect costs in the Treasury as miscellaneous receipts. 57 Comp. Gen. 674, 685 (1978), *modifying* 56 Comp. Gen. 275 (1977). There is one area in which the performing agency has no discretion. Reimbursements may not be credited to an appropriation against which no charges have been made in executing the order.[179] This would constitute an improper augmentation of the credited appropriation(s). As noted in section E.4 of this chapter, this also applies to appropriations available in different time periods. *See* B-288142, Sept. 6, 2001. Such reimbursements must therefore be deposited into the General Fund as miscellaneous receipts. An example would be crediting reimbursement for depreciation

[177] See section B.1 of Chapter 15 for a more detailed discussion of the Economy Act. Chapter 15 also discusses a variety of other interagency ordering authorities including working capital funds, special revolving funds, franchise funds, and program-specific funds.

[178] Temporary credits among appropriations are authorized by 31 U.S.C. § 1534, which generally provides for common service charges to more than one appropriation. *See* Chapter 2, section B.3.a.

[179] Compare 10 U.S.C. § 2205(a), which provides that reimbursements to Defense Department appropriations under the Economy Act and similar authorities may be credited to authorized accounts and are available for obligation for the same period as the funds in the account so credited.

to an appropriation that did not bear any costs of the transaction. If the appropriation that bore the costs is no longer available, the reimbursement for depreciation must be deposited into the Treasury as miscellaneous receipts. 57 Comp. Gen. at 685–86. An agency must deobligate funds at the end of their availability period to the extent that obligations for Economy Act work exceed costs incurred for that work. 31 U.S.C. § 1535(d). *See* B-286929, Apr. 25, 2001; 39 Comp. Gen. 317, 319 (1959); 34 Comp. Gen. 418, 421–22 (1955). Likewise, where performance of an Economy Act order extends beyond a fiscal year and is funded by more than one fiscal year appropriation, the reimbursement must be split between the two appropriations based on the work actually performed by each. B-301561, June 14, 2004 (nondecision letter).

Reimbursement under the Economy Act is to be made on the basis of "actual cost" as determined by the performing agency. 31 U.S.C. § 1535(b). Advance payments based on estimated costs are authorized, but the final payment amount must be adjusted to account for actual costs. 31 U.S.C. § 1535(b), (d); B-282601, Sept. 27, 1999; B-260993, June 26, 1996. *See also* GAO, *DFOH Financial Management*, GAO/AIMD-96-167R (Washington, D.C.: Sept. 30, 1996). While agencies have some flexibility in determining costs, their determinations must be reasonable in order to avoid an augmentation. B-257823, Jan. 22, 1998; B-250377, Jan. 28, 1993.[180] In reviewing cost issues under the Economy Act, GAO's role is to assess the general accuracy and reasonableness of a performing agency's charges, not to "recompute" those charges. B-257823, Jan. 22, 1998.

Failure to obtain reimbursement for all required costs in a reimbursable Economy Act transaction improperly augments the appropriations of the ordering agency. 57 Comp. Gen. 674, 682 (1978). Thus, an ordering agency must reimburse all appropriate costs incurred by the performing agency even if they exceed those agreed upon so long as the ordering agency received the benefit of the added costs. B-260993, June 26, 1996. The ordering agency's obligation to reimburse such additional costs remains

[180] The cited decisions note, for example, that agencies can use standard costs for items provided from inventory as well as standard costs for transportation and labor. While the standard cost for inventory items may be based on the latest cost to acquire the item provided, it may not be the cost to acquire a more technologically advanced item. Also, reimbursement must include reasonable amounts for both direct and indirect costs. Of course, agencies may have more latitude to set rates under other, more specific statutes. *See, e.g.*, 10 U.S.C. § 2205(b); Department of Defense Financial Management Regulation 7000.14-R, vol. 11A, ch. 3, *Economy Act Orders* (April 2000), *available at* www.defenselink.mil/comptroller/fmr/11A/index.html (last visited September 15, 2005).

even if those costs are not identified until years later and after the appropriation of the ordering agency originally charged for the transaction has closed. In this event, the additional costs are payable from the ordering agency's current appropriations for the same general purpose. B-260993, June 26, 1996. By the same token, the performing agency must return to the ordering agency advance payments that exceeded actual costs. 72 Comp. Gen. 120 (1993).

On occasion, the costs may be so out of proportion as to undercut the legitimacy of a purported Economy Act transaction altogether. In 70 Comp. Gen. 592 (1991), the Labor Department cited the Economy Act as authority to combine funds from a number of different departmental appropriation accounts for component agencies in order to purchase computer equipment for a department-wide network. However, the value of equipment provided to the various components under this arrangement did not match their contributions. For example, one component paid about four times more than the value of the equipment it received. Accordingly, the Comptroller General held that this arrangement was not a legitimate Economy Act transaction or reprogramming. Rather, it constituted an unauthorized transfer of appropriations that resulted in a subsidy to, and thus an improper augmentation of, the department's central management account. 70 Comp. Gen. at 594–96.

Finally, the general authority of the Economy Act cannot be used to overcome 31 U.S.C. § 3302(b) if the transaction in question is governed by a more specific statutory authority. In B-241269, Feb. 28, 1991, the Treasury Department's Financial Management Service asked whether it could invoke the Economy Act to retain reimbursements for training it provided to employees of other federal and state agencies as well as a few nongovernmental participants. GAO responded that the reimbursements were governed not by the Economy Act but by other statutory authorities dealing specifically with federal training programs. These statutory authorities allowed the agency that provided training to credit its appropriations for reimbursements on behalf of federal and other governmental participants. However, since the statutes did not cover nongovernmental trainees, they could not provide an exception from section 3302 that applied to them. Thus, the fees paid by nongovernmental participants must be deposited into the General Fund of the Treasury as miscellaneous receipts.[181]

[181] This and related decisions are also discussed in section E.2.d of this chapter.

The Comptroller General has applied Economy Act cost-reimbursement principles by analogy to interagency transactions conducted under other statutory authority requiring reimbursement where that authority does not otherwise specify the basis for reimbursement. *See* 72 Comp. Gen. 159 (1993). *Cf.* B-276509, Aug. 28, 1998 (implicitly following Economy Act principles). However, rules that are unique to the Economy Act, such as the deobligation requirement of 31 U.S.C. § 1535(d), do not apply to interagency transactions carried out under other statutory authorities. B-302760, May 17, 2004.

f. Setoff

Collections by setoff may be factually distinguishable from direct collections, but the effect on the appropriation is the same. If crediting an agency appropriation with a direct collection in a particular instance would result in an improper augmentation, then retaining an amount collected by setoff would equally constitute an improper augmentation. Thus, setoffs must be treated the same as direct collections. If an agency could retain a direct collection in a given situation, it can retain the setoff. However, if a direct collection would have to go to miscellaneous receipts, the setoff also has to go to miscellaneous receipts. In this latter situation, the agency must take the amount of the setoff from its own appropriation and transfer it to the General Fund of the Treasury. *E.g.*, 2 Comp. Gen. 599 (1923); 20 Comp. Dec. 349 (1913).

A hypothetical situation will illustrate. Suppose a contractor negligently damages a piece of government equipment and becomes liable to the government in the amount of $500. Suppose further that an employee of the contracting agency, in a separate transaction, negligently damages property of the contractor. The contractor files a claim under the Federal Tort Claims Act and the agency settles the claim for $600. Neither party disputes the validity or amount of either claim. The agency sets the contract debt off against the tort claim and makes a net payment to the contractor of $100. However, if the agency stops here and if it lacks specific statutory authority to retain offsets, it has augmented its appropriation to the tune of $500. If the tort claim had never occurred and the agency collected the $500 from the contractor, the $500 would have to go to miscellaneous receipts (see "Contract Matters," above). Conversely, if the contract claim did not exist, the agency would end up paying $600 on the tort claim. Now, combining both claims, if both were paid without setoff, the net result would be that the agency is out $600. The setoff cannot operate to put the agency's appropriation in a better position than it would have been in had the agency and contractor simply exchanged checks. Thus, in addition to paying the contractor $100, the agency must

deposit $500 from its own appropriation into the Treasury as miscellaneous receipts.

A different type of "setoff" occurs under the Back Pay Act, 5 U.S.C. § 5596. When an agency pays an employee back pay under the Back Pay Act, it must deduct amounts the employee earned through other employment during the time period in question. The agency simply pays the net amount. There is no requirement to transfer the amount of the deduction for outside earnings to miscellaneous receipts. 31 Comp. Gen. 318 (1952). The deduction for outside earnings is not really a collection; it is merely part of the statutory formula for determining the amount of the payment.

g. Revolving Funds

A major exception to the requirements of 31 U.S.C. § 3302(b) is the revolving fund.[182] For most revolving funds, receipts are credited directly to the fund and are available, without further appropriation by Congress, for expenditures to carry out the purposes of the fund. An agency must have statutory authority to establish a revolving fund. The enabling statute will specify the receipts that may be credited to the fund and the purposes for which they may be expended. An example is the General Services Administration's "General Supply Fund," noted above under "Damage to Government Property." Receipts that are properly for deposit to a revolving fund are, obviously, exempt from the miscellaneous receipts requirement of section 3302(b). *E.g.*, B-271894, July 24, 1997 (explaining when a revolving fund may retain receipts and when it must deposit receipts into the Treasury as miscellaneous receipts).

However, the existence of a revolving fund does not automatically signal that 31 U.S.C. § 3302(b) will never apply. Thus, where the statute establishing the fund does not authorize the crediting of receipts of a given type into the fund, those receipts must be deposited in the Treasury as miscellaneous receipts. To credit those receipts to the revolving fund would augment the revolving fund. *See*, *e.g.*, B-302825, Dec. 22, 2004 (the Office of Federal Housing Enterprise Oversight had authority to collect and deposit into its Oversight Fund annual assessments from the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation; its authority to conduct administrative and enforcement actions did not permit it to retain copying fees charged for document discovery). *See also* 69 Comp. Gen. 260 (1990); 40 Comp. Gen. 356 (1960); 23 Comp. Gen. 986 (1944); 20 Comp. Gen. 280 (1940).

[182] See section C of Chapter 15 for a much more detailed discussion of revolving funds.

Augmentation of a revolving fund may occur in other ways, depending on the nature of the fund and the terms of the governing legislation:

- While the Bureau of Land Management has authority to retain funds collected as a result of coal trespasses on federal lands, to use those funds to repair damage to the specific lands involved in the trespass, and, within the Bureau's discretion, to refund any excess, the Bureau may not retain an excess of collections over repair costs which the Bureau determines is inappropriate to refund. To retain such amounts in the revolving fund to be used for other purposes would augment the revolving fund. The Bureau must deposit this amount in the Treasury as miscellaneous receipts. B-204874, July 28, 1982.

- The Corps of Engineers provides construction contract supervision and administrative services to other agencies and has a revolving fund (the supervision and administration, or S&A, revolving fund) that it uses to cover its S&A costs. The Corps changes its customer agencies a flat rate for this service so that, over time, its S&A revolving fund will break even. Where the Air Force (a customer agency) received an amount from an Air Force contractor for additional expenses incurred by the government as a result of the contractor's defective workmanship, the Corps could cover into its S&A revolving fund only that portion representing S&A costs that the Corps had actually charged the Air Force, regardless of the amount collected from the contractor. 65 Comp. Gen. 838 (1986). To avoid augmenting its S&A revolving fund, the Corps had to deposit amounts in excess of that portion into miscellaneous receipts. *Id.* *See also* B-237421, Sept. 11, 1991.

- Although the Corps of Engineers may choose to offer training to nongovernmental personnel on a limited space-available basis, such training is not within the scope of the Corps' revolving fund for furnishing facilities and services for other government agencies. Therefore, any fees it receives for training nongovernmental personnel must be deposited to the Treasury under 31 U.S.C. § 3302(b) rather than being credited to Corps' revolving fund. B-271894, July 24, 1997.

- The Tennessee Valley Authority (TVA) cannot credit to its revolving fund double and treble damages recovered under the False Claims Act. Since these damages are in the nature of penalties rather than compensation for actual losses, TVA must deposit them to the Treasury as miscellaneous receipts. TVA has no authority to augment its revolving fund with proceeds that exceed costs it has incurred and that

are unrelated to its commercial and proprietary activities. B-281064, Feb. 14, 2000.

Legislation that merely authorizes, or even requires, that certain expenditures be reimbursed is not sufficient to create a revolving fund. Reimbursements must be deposited as miscellaneous receipts unless the statute specifically authorizes retention by the agency. 67 Comp. Gen. 443 (1988); 22 Comp. Dec. 60 (1915); 1 Comp. Dec. 568 (1895).

h. Trust Funds

Moneys properly received by a federal agency in a trust capacity are not subject to 31 U.S.C. § 3302(b) and thus do not have to be deposited in the Treasury as miscellaneous receipts, unless otherwise required.[183] B-303413, Nov. 8, 2004; 60 Comp. Gen. 15, 26 (1980); 27 Comp. Gen. 641 (1948). Other authorities supporting this general proposition are *Emery v. United States*, 186 F.2d 900, 902 (9th Cir.), *cert. denied*, 341 U.S. 925 (1951) (money paid to the United States under court order as refund of overcharges by persons who had violated rent control legislation was held in trust for tenants and could be disbursed to them without need for appropriation); *Varney v. Warehime*, 147 F.2d 238, 245 (6th Cir.), *cert. denied*, 325 U.S. 882 (1945) (assessments levied against milk handlers to defray certain wartime expenses were trust funds and did not have to be covered into the Treasury); 62 Comp. Gen. 245, 251–52 (1983) (proceeds from sale of certain excess stockpile materials where federal agency was acting on behalf of foreign government); B-223146, Oct. 7, 1986 (moneys received by Pension Benefit Guaranty Corporation when acting in its trustee capacity); B-23647, Feb. 16, 1942 (taxes and fines collected in foreign territories occupied by American armed forces).

In addition, receipts generated by activities financed with trust funds are generally credited to the trust fund and not deposited as miscellaneous receipts. *United States v. Sinnott*, 26 F. 84 (D. Ore. 1886) (proceeds from sale of lumber made at Indian sawmill were to be applied for benefit of Indians and were not subject to 31 U.S.C. § 3302(b)); B-166059, July 10, 1969 (recovery for damage to property purchased with trust funds). *See also* 50 Comp. Gen. 545, 547 (1971). In 51 Comp. Gen. 506 (1972), GAO advised the Smithsonian Institution that receipts generated by various activities at the National Zoo need not be deposited as miscellaneous

[183] Chapter 17, section D discusses trust funds in far greater detail. *See also* 31 U.S.C. §§ 1321–1323.

receipts. The Smithsonian is financed in part by trust funds and in part by appropriated funds.

In a 1991 case, an agency had discovered a $10,000 bank account belonging to an employee morale club which had become defunct. No documentation of the club's creation or dissolution could be located. Thus, if the club had ever provided for the disposition of its funds, it could no longer be established. Clearly, the money was not received for the use of the government for purposes of 31 U.S.C. § 3302(b). It was equally clear that the money could not be credited to the agency's appropriations. GAO advised that the money could be turned over to a successor employee morale organization to be used for its intended purposes. If no successor organization stepped forward, the funds would have to be deposited in a Treasury trust account in accordance with 31 U.S.C. § 1322. B-241744, May 31, 1991 (nondecision letter).

There are limits on the extent to which trust funds can legitimately avoid the application of 31 U.S.C. § 3302(b). The Justice Department's Office of Legal Counsel has cautioned against carrying the trust theory too far in the case of trusts created by executive action rather than statute. For example, the United States and the Commonwealth of Virginia sued a transportation company for causing an oil spill in the Chesapeake Bay. A settlement was proposed under which the defendant would donate money to a private waterfowl preservation organization. The Justice Department's Office of Legal Counsel found that the proposal would contravene 31 U.S.C. § 3302(b). 4B Op. Off. Legal Counsel 684 (1980). The opinion did not question that section 3302(b) could be overcome by a statutorily created trust or in other circumstances where money is "given to the government which is not available to the United States for disposition on its own behalf." *Id.* at 687. However, it listed the following weaknesses in a nonstatutory trust argument:

> "(1) that trusts created by nonstatutory executive action could indeed be used to circumvent legislative prerogatives in the appropriations area; (2) that to some extent all money held in the Treasury . . . is received 'in trust' for the citizenry and (3) that Congress has created or recognized trust funds explicitly in numerous cases and implicitly in others, but it has neglected to do so in this context."

Id. at 687–68 (footnotes omitted).

The opinion also noted that the applicability of section 3302(b) was not affected simply because the government did not physically receive any funds. Rather, "constructive receipt" of funds is sufficient to trigger the statute:

> "In our view, the fact that no cash actually touches the palm of a federal official is irrelevant for purposes of § [3302(b)], if a federal agency could have accepted possession and retains discretion to direct the use of the money. The doctrine of constructive receipt will ignore the form of a transaction in order to get to its substance. . . . Since we believe that money available to the United States and directed to another recipient is constructively 'received' for purposes of § [3302(b)], we conclude that the proposed settlement is barred by that statute."

Id. at 688.

There was a solution in that case, however. Since the United States had not suffered any monetary loss, it was not required to seek damages. The proposed contribution by the defendant could be attributed to the co-plaintiff, Virginia, which of course was not subject to 31 U.S.C. § 3302(b). *Id.*[184]

Along the lines of the Office of Legal Counsel opinion discussed above, the court in *Motor Coach Industries, Inc. v. Dole*, 725 F.2d 958 (4th Cir. 1984), rejected a nonstatutory trust arrangement developed by the Federal Aviation Administration (FAA) in order to finance increased surface transportation to Dulles International Airport. FAA agreed to waive landing fees it charged airlines using Dulles if they agreed to establish and contribute to an "Air Carriers Trust Fund," which would be used to purchase additional ground transport buses to serve Dulles. The court observed:

> "[T]he trust arrangement both undermined the integrity of the congressional appropriation process and ignored substantive duties under the procurement statutes. Viewed realistically, the Trust was an attempt by the FAA to divert

[184] The opinion noted that the proposed settlement would be authorized under subsequent amendments to the governing legislation.

> funds from their intended destination—the United States Treasury. Although the purpose for which the FAA sought the funds was laudable, its methods certainly cannot be praised. Were the contract between the Trust and [the transport company] left intact, the agency's end-run around the normal appropriation channels would have been successful, enabling it effectively to supplement its budget by $3 million without congressional action."

725 F.2d at 968 (footnote omitted).

i. Fines and Penalties

Generally speaking, moneys collected as a fine or penalty must be deposited in the Treasury as miscellaneous receipts pursuant to 31 U.S.C. § 3302(b). *E.g.*, B-281064, Feb. 14, 2000 (double or treble damages under the False Claims Act, which constitute "exemplary" or punitive rather than compensatory damages); 70 Comp. Gen. 17 (1990) (civil penalties assessed against Nuclear Regulatory Commission licensees); 69 Comp. Gen. 260 (1990) (penalties—as opposed to the recovery of actual losses—under the False Claims Act); 47 Comp. Gen. 674 (1968) (dishonored checks); B-235577.2-O.M., Nov. 9, 1989 (civil penalties under Food Stamp Act).

In B-210210, Sept. 14, 1983, the Comptroller General held that the Commodity Futures Trading Commission lacked authority to enter into a settlement agreement under which a party charged with violation of the Commodity Exchange Act would donate funds to an educational institution with no relationship to the violation. The decision pointed out that monetary penalties imposed by the Commission were subject to deposit into the Treasury under 31 U.S.C. § 3302(b) and rejected the Commission's characterization of the donation as a "voluntary contribution" as opposed to a "penalty":

> "Despite the statement that the donations would not supplant the Commission's regular practice of imposing monetary penalties as part of a settlement, it is difficult to distinguish the proposed donations from money penalties. The money would be donated as a result of an enforcement action and in consideration of not imposing some further sanction or penalty. It is difficult for us to conceive of a situation under the proposed plan where one making the payment would not consider the payment a penalty."

Another case concluded that, without statutory authority, permitting a party who owes a penalty to contribute to a research project in lieu of paying the penalty amounts to a circumvention of 31 U.S.C. § 3302(b) and improperly augments the agency's research appropriations. 70 Comp. Gen. 17 (1990). A case saying essentially the same thing in the context of Clean Air Act violations is B-247155, July 7, 1992, *aff'd on reconsideration*, B-247155.2, Mar. 1, 1993.

GAO considered similar issues in several cases involving consent orders between the Department of Energy and oil companies charged with violation of federal oil price and allocation regulations. The Department has limited authority to use recovered overcharge funds for restitution purposes, and in fact has a duty to attempt restitution. However, to the extent this cannot reasonably be accomplished or funds remain after restitution efforts have been exhausted, the funds may not be used for energy-related programs with no restitution nexus but must be deposited in the Treasury pursuant to 31 U.S.C. § 3302(b). 62 Comp. Gen. 379 (1983); 60 Comp. Gen. 15 (1980). It is equally unauthorized to give the funds to charity or to use them to augment appropriations for administering the overcharge refund program. B-200170, Apr. 1, 1981.

To the same effect is *United States v. Smithfield Foods, Inc.*, 982 F. Supp. 373 (E.D. Va. 1997). Smithfield was assessed a civil penalty of over $12 million for violating the Clean Water Act. The trial judge initially ordered the government to submit a proposal for "allocation" of the penalty with an emphasis on directing all or part of the penalty toward restoration of the Chesapeake Bay and its tributaries. The Government responded that, since the Clean Water Act did not specify an alternative disposition, the penalty must be paid into the Treasury pursuant to 31 U.S.C. § 3302(b). The court "regretfully agree[d]" that the penalty proceeds could not be directed toward local environmental projects. *Smithfield Foods*, 982 F. Supp. at 375.

j. Miscellaneous Cases: Money to Treasury

In addition to the categories discussed above, there have been numerous other decisions involving the disposition of receipts in various contexts. Some cases in which the Comptroller General held that receipts of a particular type must be deposited in the Treasury as miscellaneous receipts under 31 U.S.C. § 3302(b) or related statutes are set forth below.

- Costs awarded to the United States by a court under 28 U.S.C. § 2412. 47 Comp. Gen. 70 (1967).

- Interest earned on grant advances by grantees other than states. *E.g.*, 69 Comp. Gen. 660 (1990).

- Interest earned by grantees on unauthorized loans of grant funds. 71 Comp. Gen. 387 (1992).

- Interest improperly earned on federal grant funds by various agencies of the District of Columbia government. B-283834, Feb. 24, 2000.

- Reimbursements received for child care services provided by federal agencies for their employees under authority of 40 U.S.C. § 590. 67 Comp. Gen. 443, 448–49 (1988).

- Receipts generated by undercover operations by law enforcement agencies. 67 Comp. Gen. 353 (1988); 4B Op. Off. Legal Counsel 684, 686 (1980). In GAO's opinion, however, short-term operations (a card game or dice game, for example) may be treated as single transactions. 67 Comp. Gen. 353, clarifying B-201751, Feb. 17, 1981. Thus, 31 U.S.C. § 3302(b) need not be read as requiring an undercover agent participating in a card game to leave the table to make a miscellaneous receipts deposit after every winning hand. If, however, the agent ends up with winnings at the end of the game, the money cannot be used to offset expenses of the operation.[185] Related cases are 5 Comp. Gen. 289 (1925) and 3 Comp. Gen. 911 (1924) (moneys used to purchase evidence for use in criminal prosecutions and recovered when no longer needed for that purpose must be deposited as miscellaneous receipts).

- Proceeds from silver and gold sold as excess property by the Interior Department as successor to the American Revolutionary Bicentennial Administration. (The silver and gold had been obtained by melting down unsold commemorative medals which had been struck by the

[185] The Federal Bureau of Investigation and the Drug Enforcement Administration now have statutory authority to retain and use the proceeds from undercover operations, subject to certain conditions. See Pub. L. No. 102-395, § 102(b), 106 Stat. 1838 (Oct. 10, 1992), which was continued in effect by Pub. L. No. 104-132, § 815(d), 110 Stat. 1315 (Apr. 24, 1996), and extended to the Bureau of Alcohol, Tobacco, Firearms, and Explosives by Pub. L. No. 108-447, div. B, title I, § 116, 118 Stat. 2809, 2870 (Dec. 8, 2004). *See* 28 U.S.C. § 533 note. Other agencies have similar authority. *See also* 8 U.S.C. § 1363a(a)(3) (Immigration and Naturalization Service); 19 U.S.C. § 2081(a)(2) (Customs Service); 26 U.S.C. § 7608(c)(1)(B) and (C) (Internal Revenue Service).

Treasury Department for sale by the American Revolutionary Bicentennial Administration.) B-200962, May 26, 1981.

- Income derived from oil and gas leases on "acquired lands" (as distinguished from "public domain lands") of the United States used for military purposes. B-203504, July 22, 1981.

k. Miscellaneous Cases: Money Retained by Agency

Most cases in which an agency may credit receipts to its own appropriation or fund involve the areas previously discussed: authorized repayments, Economy Act transactions, revolving funds, or the other specific situations noted. There is another group of cases, not susceptible to further generalization, in which an agency simply has specific statutory authority to retain certain receipts. Examples are:

- Forest Service may retain moneys paid by permittees on national forest lands representing their *pro rata* share under cooperative agreements for the operation and maintenance of waste disposal systems under the Granger-Thye Act, 16 U.S.C. § 572 (1970). 55 Comp. Gen. 1142 (1976).

- Customs Service may, under 19 U.S.C. § 1524, retain charges collected from airlines for preclearance of passengers and baggage at airports in Canada, for credit to the appropriation originally charged with providing the service. 48 Comp. Gen. 24 (1968).

- Overseas Private Investment Corporation may retain interest on loans of excess foreign currencies made under the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2196. 52 Comp. Gen. 54 (1972).

- The African Development Foundation, by virtue of its statutory gift-acceptance authority, may retain funds it receives from certain African governments in order to supplement its grants. B-300218, Mar. 17, 2003.

- Payroll deductions for government-furnished quarters under 5 U.S.C. § 5911 are retained in the appropriation(s) or fund(s) from which the employee's salary is paid. 59 Comp. Gen. 235 (1980), *as modified by* 60 Comp. Gen. 659 (1981). However, if the employee pays directly rather than by payroll deduction, the direct payments must go to

miscellaneous receipts unless the agency has specific statutory authority to retain them. 59 Comp. Gen. at 236.[186]

- Under the Mineral Lands Leasing Act of 1920, 30 U.S.C. § 191, receipts from the sale or lease of public lands are distributed in the manner specified in the statute. This was held to include the proceeds of bid deposits forfeited by successful mineral lease bidders who fail to execute the lease. 65 Comp. Gen. 570 (1986).

- By virtue of provisions in the Job Training Partnership Act[187] and annual appropriation acts, certain receipts generated by Job Corps Centers may be retained for credit to the Labor Department appropriation from which the Centers are funded. 65 Comp. Gen. 666 (1986).

- Legislation establishing the Commission on the Bicentennial of the United States Constitution authorized the Commission to retain revenues derived from its licensing activities but did not address sales revenues. Sales revenues, therefore, had to be deposited as miscellaneous receipts. B-228777, Aug. 26, 1988.

In the occasional case, the authority may be less than specific. In B-114860, Mar. 20, 1975, for example, based on the broad authority of the National Housing Act, GAO advised that the Department of Housing and Urban Development could require security deposits from tenants in HUD-owned multifamily projects. Consistent with practice in the private sector, the deposit would be considered the property of the tenant and held in an escrow account, to be either returned to the tenant upon completion of the lease or forfeited to the government in cases of breach.

A final case we will note is 24 Comp. Gen. 514 (1945), an exception stemming from the particular funding arrangement involved rather than a specific statute. The case dealt with certain government corporations that did not receive annual appropriations but instead received annual authorizations for expenditures from their capital funds for administrative expenses. An appropriation act had imposed a limit on certain

[186] For agencies funded under the annual Interior Department and Related Agencies appropriation acts, the rentals, whether collected by payroll deduction or otherwise, go into a "special fund" maintained by each agency to be used for maintenance and operation of the quarters. 5 U.S.C. § 5911 note.

[187] Pub. L. No. 97-300, 96 Stat. 1324 (Oct. 13, 1982).

communication expenditures and provided that savings resulting from the limit "shall not be diverted to other use but shall be covered into the Treasury as miscellaneous receipts." The Comptroller General construed this as meaning returned to the source from which made available. In the case of the corporations in question, this meant that the savings could be returned to their capital funds.

l. Money Erroneously Deposited as Miscellaneous Receipts

The various accounts that comprise the heading "miscellaneous receipts" are just that—they are receipt accounts, not expenditure or appropriation accounts. As noted earlier, by virtue of the Constitution, once money is deposited into miscellaneous receipts, it takes an appropriation to get it back out. What, therefore, can be done if an agency deposits some money into miscellaneous receipts by mistake?

This question really involves two separate situations. In the first situation, an agency receives funds which it is authorized, under the principles discussed above, to credit to its own appropriation or fund, but erroneously deposits them as miscellaneous receipts. The decisions have always recognized that the agency can make an appropriate adjustment to correct the error. In an early case, the Interior Department sold some property and deposited the proceeds as miscellaneous receipts when in fact it was statutorily authorized to credit the proceeds to its reclamation fund. The Interior Department then requested a transfer of the funds back to the reclamation fund, and the Secretary of the Treasury asked the Comptroller of the Treasury if it was authorized. Of course it was, replied the Comptroller:

> "This is not taking money out of the Treasury in violation of paragraph 7, section 9, Article I of the Constitution . . . .
>
> "The proceeds of the sale . . . have been appropriated by law. Taking it from the Treasury and placing it to the credit in the Treasury of the appropriation to which it belongs violates neither the Constitution nor any other law, but simply corrects an error by which it was placed to the unappropriated surplus instead of to the appropriation to which it belongs."

12 Comp. Dec. 733, 735 (1906).

This concept has consistently been followed. *See* 45 Comp. Gen. 724 (1966); 3 Comp. Gen. 762 (1924); 2 Comp. Gen. 599 (1923). *Cf.* B-275490, Dec. 5, 1996.[188] The concept also has been applied to permit correction of some errors in accounts that had been closed and their balances canceled pursuant to 31 U.S.C. §§ 1552 or 1555. *See* 72 Comp. Gen. 343 (1993). This decision held that, while canceled balances cannot be restored for purposes of recording obligations or making disbursements, bookkeeping records of closed accounts can be adjusted to correct obvious accounting errors. The decision was prompted by the Defense Department's request that the Treasury Department reopen some of its accounts in order to record disbursements against those accounts for payments that, according to Defense, had been made from those accounts before cancellation but had not been properly charged against the accounts. The decision emphasized that—

> "Treasury's authority to correct the accounts relates only to obvious clerical errors such as misplaced decimals, transposed digits, or transcribing errors that result in inadvertent cancellations of budget authority, and is not meant to serve as a palliative for deficiencies in DOD's accounting systems."

72 Comp. Gen. at 346.

A subsequent decision again stressed that while patently erroneous appropriation transactions can and often must be corrected, the authority to make corrections "extends only to clerical and administrative errors, not all misjudgments and miscalculations by government officials." B-286661, Jan. 19, 2001, at fn. 5.

In the second situation, a private party pays money to a federal agency, the agency deposits it as miscellaneous receipts, and it is subsequently determined that the party is entitled to a refund. Here, in contrast to the first situation, an appropriation is necessary to get the money out. *E.g.*, 3 Comp. Gen. 296 (1923).

[188] The reverse adjustment is made when funds which should have been deposited as miscellaneous receipts are erroneously credited to an appropriation. The remedy is a transfer from the appropriation to the appropriate miscellaneous receipts account. *E.g.*, B-48722, Apr. 16, 1945.

There is a permanent indefinite appropriation for refunding collections "erroneously received and covered" that are not properly chargeable to any other appropriation. 31 U.S.C. § 1322(b)(2). The availability of this appropriation depends on exactly where the receipts were deposited. If the amount subject to refund was credited to some specific appropriation account, the refund is chargeable to the same account. If, however, the receipt was deposited in the general fund as miscellaneous receipts, then the appropriation made by 31 U.S.C. § 1322(b)(2) is available for the refund, provided that the amount in question was "erroneously received and covered." B-257131, May 30, 1995; 71 Comp. Gen. 464 (1992); 61 Comp. Gen. 224 (1982); 55 Comp. Gen. 625 (1976); 17 Comp. Gen. 859 (1938). Also, the 31 U.S.C. § 1322(b) appropriation is not available as a source for adjusting an erroneous intra-governmental transfer between two appropriation accounts since such an adjustment does not involve a "refund" of funds "erroneously received" by the government. B-286661, Jan. 19, 2001, at fn. 6.

Examples of cases in which use of the "Moneys Erroneously Received and Covered" appropriation was found authorized are 71 Comp. Gen. 464 (1992) (refund to investment company of late filing fee upon issuance of order by Securities and Exchange Commission exempting company from filing deadline for fiscal year in question); 63 Comp. Gen. 189 (1984) (Department of Energy deposited overcharge recoveries from oil companies into general fund instead of first attempting to use them to make restitution refunds); B-217595, Apr. 2, 1986 (interest collections subsequently determined to have been erroneous).

One case, 53 Comp. Gen. 580 (1974), combined elements of both situations. The Army Corps of Engineers had been authorized to issue discharge permits under the Refuse Act Permit Program. The program was statutorily transferred in 1972 to the Environmental Protection Agency. Under the user charge statute, 31 U.S.C. § 9701, both the Corps and EPA had charged applicants a fee. In some cases, the fees had been deposited as miscellaneous receipts before the applications were processed. The legislation that transferred the program to EPA also provided that EPA could authorize states to issue the permits. However, there was no provision that authorized EPA to transfer to the states any fees already paid. Thus, some applicants found that they had paid a fee to the Corps or EPA, received nothing for it, and were now being charged a second fee by the state for the same application. EPA felt that the original fees should be refunded. So did the applicants.

GAO noted that the user charge statute contemplates that the federal agency will furnish something in exchange for the fee. Since this had not been done, the fees could be viewed as having been erroneously deposited in the general fund. However, the fees had not been erroneously received—the Corps and EPA had been entirely correct in charging the fees in the first place—so the appropriation made by 31 U.S.C. § 1322(b)(2) could not be used. There was a way out, but the refunds would require a two-step process. The Corps and EPA should have deposited the fees in a trust account[189] and kept them there until the applications were processed, at which time depositing as miscellaneous receipts would have been proper. Thus, EPA could first transfer the funds from the general fund to its suspense account as the correction of an error, and then make the refunds directly from the suspense account.

In cases where the "Moneys Erroneously Received and Covered" appropriation is otherwise available, it is available without regard to whether the original payment was made under protest. 55 Comp. Gen. 243 (1975).

The appropriation made by 31 U.S.C. § 1322(b)(2) for Refund of Moneys Erroneously Received and Covered is available only to refund amounts actually received and deposited. If a given refund bears interest, for example, a refund claim approved by a contracting officer under the Contract Disputes Act, the interest portion must be charged to the contracting agency's operating appropriations for the fiscal year in which the award is made. B-217595, Apr. 2, 1986.

If an agency collects money from someone to whom it owes a refund from a prior transaction, it should not simply deposit the net amount. The correct procedure is to deposit the new receipt into the general fund (assuming that is the proper receptacle), and then make the refund using the "Moneys Erroneously Received and Covered" appropriation. B-19882, Oct. 28, 1941; A-96279, Sept. 15, 1938. However, GAO has approved offsetting a refund against future amounts due from the same party in cases where there is a continuing relationship, but suggested that the party be given the choice. B-217595, Apr. 2, 1986, at 4.

[189] *See also* B-3596, A-51615, Nov. 30, 1939. Use of a deposit fund suspense account is equally acceptable. B-158381, June 21, 1968.

Clearly, if the receipt cannot be regarded as erroneous, 31 U.S.C. § 1322(b)(2) is not available. *E.g.*, *Lee v. United States*, 33 Fed. Cl. 374 (1995); 53 Comp. Gen. 580 (1974); B-146111, July 6, 1961. Citing several of the Comptroller General decisions discussed previously, the court in *Lee* held that a filing fee appropriately paid by a litigant and deposited into the Treasury was not subject to refund under section 1322(b)(2). *Lee*, 33 Fed. Cl. at 381–84. Also, the "Moneys Erroneously Received and Covered" appropriation is available only where the amount to be refunded was deposited into the general fund. *E.g.*, 11 Comp. Dec. 300 (1904). If a refund is due of moneys deposited somewhere other than the general fund, some other basis must be sought.

Republic National Bank of Miami v. United States, 506 U.S. 80 (1992), and the varied opinions of the Justices it spawned, illustrate how perplexing the issues can be when it comes to retrieving from the Treasury funds that should not have been deposited there. *Republic National Bank* was an "*in rem*" forfeiture action against property (a house) that the government alleged had been purchased with income from illegal drug trafficking. The bank intervened, claiming to be an innocent owner of the property by virtue of its mortgage interest. With the consent of the bank, the property was sold and the proceeds were held by the U.S. marshal pending the outcome of the litigation. The trial court rejected the bank's claim and ordered the sale proceeds forfeited to the United States. The bank appealed; however, when it did not seek to stay execution of the judgment the government had the marshal deposit the sales proceeds into the Assets Forfeiture Fund of the Treasury. Once this occurred, the government sought to dismiss the appeal as moot. The government argued that since the proceeds were now in the Treasury, they could not be withdrawn without an appropriation and, thus, the courts could provide no remedy to the bank.

When the case reached the Supreme Court, all of the Justices rejected the government's argument and agreed that the bank could be paid if it prevailed on the merits. However, they were deeply split as to the rationale. Justice Blackmun, author of most of the Court's opinion in *Republic National Bank*, characterized the government's position as being that, by virtue of the Constitution's Appropriations Clause, "absent an appropriation, *any* funds that find their way into a Treasury account must remain there, regardless of their ownership." 506 U.S. at 89. Rejecting this position as producing "bizarre" and "absur[d]" results, Justice Blackmun concluded that an appropriation was not necessary. He reasoned that money involved in a pending *in rem* forfeiture proceeding could not be

regarded as "public funds" within the scope of the Appropriations Clause where the very purpose of the proceeding was to sort out their proper ownership. Furthermore, he observed:

> "Contrary to the Government's broad submission here, the Comptroller General has long assumed that, in certain situations, an erroneous deposit of funds into a Treasury account can be corrected without a specific appropriation. See 53 Comp. Gen. 580 (1974); 45 Comp. Gen. 724 (1966); 3 Comp. Gen. 762 (1924); 12 Comp. Dec. 733, 735 (1906); Principles of Federal Appropriations Law, at 5-79 to 5-81. Most of these cases have arisen where money intended for one account was accidentally deposited in another. It would be unrealistic, for example, to require congressional authorization before a data processor who misplaces a decimal point can 'undo' an inaccurate transfer of Treasury funds. The Government's absolutist view of the scope of the Appropriations Clause is inconsistent with these commonsense understandings."

Republic National Bank, 506 U.S. at 92.

However, Chief Justice Rehnquist, joined by four other Justices, wrote the opinion of the Court on this point. The Chief Justice expressed "difficulty accepting the proposition that funds which have been deposited into the Treasury are not public money, regardless of whether the Government's ownership of those funds is disputed." *Id.* at 93. He added, "even if there are circumstances in which funds that have been deposited into the Treasury may be returned absent an appropriation, I believe it unnecessary to plow that uncharted ground here." *Id.* at 95. Instead, he concluded that the judgment fund appropriation under 31 U.S.C. § 1304 would be available to provide a source of payment if the bank prevailed in the case.

Justice Blackmun had rejected the Chief Justice's judgment fund rationale for two reasons. First, he viewed the judgment fund as being limited to the payment of money judgments. Second, he pointed out that the proceeds from the *in rem* action were not in the judgment fund. Rather, they were in

the Treasury Assets Forfeiture Fund. *See Republic National Bank*, 506 U.S. at 91, fn. 6.[190]

Finally, in their separate opinions, Justice White and Justice Stevens both expressed displeasure over the need to address the Appropriations Clause issue, indicating surprise that the Government would advance "such a transparently fallacious position." *See* 506 U.S. at 97–99.

3. Gifts and Donations to the Government

a. Donations to the Government

It has long been recognized that the United States (as opposed to a particular agency) may receive and accept gifts. No particular statutory authority is necessary. As the Supreme Court has said: "Uninterrupted usage from the foundation of the Government has sanctioned it." *United States v. Burnison*, 339 U.S. 87, 90 (1950). The gifts may be of real property or personal property, and they may be testamentary (made by will) or *inter vivos* (made by persons who are not dead yet). Monetary gifts to the United States go to the general fund of the Treasury and present no augmentation problem since there is no appropriation to augment.

However, as the Supreme Court held in the *Burnison* case, a state may prohibit testamentary gifts by its domiciliaries to the United States. Also, a state may impose an inheritance tax on property bequeathed to the United States. *United States v. Perkins*, 163 U.S. 625 (1896). The tax is not regarded as a constitutionally impermissible tax on federal property "since the tax is imposed upon the legacy before it reaches the hands of the government. The legacy becomes the property of the United States only after it has suffered a diminution to the amount of the tax . . . ." *Id.* at 630.

While gifts to the United States do not require statutory authority, gifts to an individual federal agency stand on a different footing. The rule is that a government agency may not accept for its own use (*i.e.*, for retention by the agency or credit to its own appropriations) gifts of money or other

[190] In B-259065, Dec. 21, 1995, the Comptroller General sided with Justice Blackmun on this point, holding that awards against the United States for the return of forfeited cash or cash proceeds of forfeited property that had been deposited in the Justice Department's Assets Forfeiture Fund should be satisfied from that fund.

property in the absence of specific statutory authority. 16 Comp. Gen. 911 (1937). As the Comptroller General said in that decision, "[w]hen the Congress has considered desirable the receipt of donations . . . it has generally made specific provision therefor . . . ." *Id.* at 912. *See also* B-286182, Jan. 11, 2001; B-289903, Mar. 4, 2002 (nondecision letter).

Thus, acceptance of a gift of money or other property by an agency lacking statutory authority to do so is an improper augmentation. *E.g.*, B-286182, Jan. 11, 2001 (District of Columbia Courts statutory gift-acceptance authority permitted receipt of a private company's contribution of telecommunications services and equipment). If an agency does not have statutory authority to accept donations of money, it must turn the money in to the Treasury as miscellaneous receipts. *E.g.*, B-139992, Aug. 31, 1959 (proceeds of life insurance policy designating federal agency as beneficiary). Under the Federal Property and Administrative Services Act of 1949, as amended, agencies without gift retention authority must report gifts of property to the General Services Administration (GSA) and the property is treated in accordance with its regulations. *See* 40 U.S.C. § 121; 41 C.F.R. §§ 102-36.410 and 102-36.415 (2005). Gifts from foreign governments or entities must also be reported to GSA and treated in accordance with 41 C.F.R. § 102-36.420 and part 101-49.

For purposes of this discussion, the term "gifts" may be defined as "gratuitous conveyances or transfers of ownership in property without any consideration." B-286182, Jan. 11, 2001; 25 Comp. Gen. 637, 639 (1946); B-217909, Sept. 22, 1986. A receipt that does not meet this definition does not become a gift merely because the agency characterizes it as one. For example, a fee paid for the privilege of filming a motion picture in a national park is not a gift and must be deposited as miscellaneous receipts rather than in the agency's trust fund. 25 Comp. Gen. 637. *See also* B-89294, Aug. 6, 1963. Similarly, a reduction of accrued liability in fulfillment of a contractual obligation is not a donation for purposes of a statute authorizing appropriations to match "donations." B-183442, Oct. 21, 1975 (statute indicated that only gifts may be matched and payment in satisfaction of a contractual debt is not a gift). On the other hand, some payments that are not wholly voluntary or gratuitous may occasionally qualify for acceptance as gifts or contributions. *See* B-286182, Jan. 11, 2001 (District of Columbia Court System may accept and use a contribution of telecommunication services and equipment from a telecommunication company as part of a settlement agreement in a rate case); B-232482, June 4, 1990 (payments of fees by nongovernment participants for services provided as part of Department of Commerce-sponsored international

trade shows are considered "contributions" under specific language in Commerce's appropriation act).

A number of departments and agencies have statutory authority to accept gifts. A partial listing is contained in B-149711, Aug. 20, 1963 (although dated, B-149711 is still useful since there is no more recent comprehensive compilation of these authorities). The statutory authorizations contain varying degrees of specificity as to precisely what may be accepted (money, property, services, *etc.*). For example, the State Department's general gift statute, 22 U.S.C. § 2697, authorizes the State Department to accept gifts of money or property, real or personal, and, in the Secretary's discretion, conditional gifts. A case discussing this statute is 67 Comp. Gen. 90 (1987) (United States Information Agency may accept donations of radio programs prepared by private syndicators for broadcast over Voice of America facilities). Another is 70 Comp. Gen. 413 (1991) (United States Information Agency may accept donations of foreign debt). Authority to accept voluntary services does not include donations of cash. A-86115, July 15, 1937; A-51627, Mar. 15, 1937. For a further discussion of voluntary services, see section C.3 of this chapter.

The authority of the Defense Department to accept gifts is found in several statutes. First, the Defense Department may accept contributions of money or real or personal property "for use by the Department of Defense" from any person, foreign government, or international organization. The money and proceeds from the sale of property are credited to the Defense Cooperation Account in the Treasury. The money is not automatically available to Defense, but is available for obligation or expenditure only in the manner and to the extent provided in appropriation acts. 10 U.S.C. § 2608. Second, the Department may accept services, supplies, real property, or the use of real property under a mutual defense or similar agreement or as reciprocal courtesies, from a foreign government for the support of any element of United States armed forces in that country. 10 U.S.C. § 2350g. These authorities formed the basis for the United States to accept contributions from foreign governments and others to defray the costs of the 1991 military operations in the Persian Gulf. *See* GAO, *Operations Desert Shield/Storm: Foreign Government and Individual Contributions to the Department of Defense*, GAO/NSIAD-92-144 (Washington, D.C.: May 11, 1992). Other limited-purpose authorities available to the military are found in 10 U.S.C. §§ 2601–2607.

We also should note a statute tailor-made for the philanthropist desiring to make a donation for the express purpose of reducing the national debt.

(Some people mistakenly think they already do this in April of each year.) The Secretary of the Treasury may accept gifts of money, obligations of the United States, or other intangible personal property made for the express purpose of reducing the public debt. Gifts of other real or personal property for the same purpose may be made to the Administrator of the General Services Administration. 31 U.S.C. § 3113.

Assuming the existence of the requisite statutory authority, it is quite easy to make a gift to the government. The essential elements of a gift are donative intent, delivery, and acceptance. There are no particular forms required. A simple letter to the appropriate agency head transmitting the funds for the stated purpose will suffice. *See* B-274855, Jan. 23, 1997; B-157469, July 24, 1974 (nondecision letter).

A 1980 GAO study found that, during fiscal year 1979, 41 government agencies received a total of $21.6 million classified as gift revenue. *See* GAO, *Review of Federal Agencies' Gift Funds*, FGMSD-80-77 (Washington, D.C.: Sept. 24, 1980). The report pointed out that the use of gift funds dilutes congressional oversight because the funds do not go through the appropriation process. The report recommended that agencies be required to more fully disclose gift fund operations in their budget submissions.

The issue raised in most gift cases is the purpose for which gift funds may be used. This ultimately depends on the scope of the agency's statutory authority and the terms of the gift. Gift funds are accounted for as trust funds. They generally must be deposited in the Treasury as trust funds under 31 U.S.C. § 1321(b), to be disbursed in accordance with the terms of the trust. In 16 Comp. Gen. 650, 655 (1937), the Comptroller General stated:

> "Where the Congress authorizes Federal officers to accept private gifts or bequests for a specific purpose, often subject to certain prescribed conditions as to administration, authority must of necessity be reposed in the custodians of the trust fund to make expenditures for administration in such a manner as to carry out the purposes of the trust and to comply with the prescribed conditions thereof without reference to general regulatory and prohibitory statutes applicable to public funds."

While this passage correctly states the trust fund concept, agencies have sometimes misconstrued it to mean that they have free and unrestricted use of donated funds. This is not the case. On the one hand, donated funds

may not be subject to all of the restrictions applicable to direct appropriations. Yet on the other hand, gift funds constitute appropriated funds unless Congress provides otherwise[191] and they are still "public funds" in a very real sense. As GAO stated in B-274855, Jan. 23, 1997:

> "[F]unds available to agencies are considered appropriated, regardless of their source, if they are made available for collection and expenditure pursuant to specific statutory authority. *See* B-215042, April 12, 1985. This means that although donated funds may not be subject to all the restrictions applicable to direct appropriations, they are still public funds. *See* B-197565, May 13, 1980."

Id. at 3. *See also* B-275669.2, July 30, 1997. Consequently, gift funds can be used only in furtherance of authorized agency purposes and incident to the terms of the trust. *See* B-300218, Mar. 17, 2003; B-195492, Mar. 18, 1980.

An interesting illustration of this point occurred in B-16406, May 17, 1941. A citizen had bequeathed money in her will to a hospital. When the will was made, the hospital belonged to the state of Louisiana. By the time the will was probated, however, it had been acquired by the United States. Louisiana was concerned that the bequest might, if deposited in the United States Treasury, be diverted from the decedent's intent. There was no need for concern, the Comptroller General advised. The money would have to be deposited as trust funds and would be available for expenditure only for the purposes specified in the trust, that is, for the hospital.

In evaluating the propriety of a proposed use of gift funds, it is first necessary to examine the precise terms of the statute authorizing the agency to accept the gift. Limitations imposed by that statute must be followed. Thus, under a statute which authorized the Forest Service to accept donations "for the purpose of establishing or operating any forest research facility," the Forest Service could not turn over unconditional gift funds to a private foundation under a cooperative agreement, with the foundation to invest the funds and use the proceeds for purposes other than establishing or operating forest research facilities. 55 Comp. Gen. 1059 (1976). *See also* B-198730, Dec. 10, 1986 (funds donated to

[191] *See*, *e.g.*, 36 U.S.C. § 2307 (specifically provides that funds donated to the United States Holocaust Memorial Museum are not to be regarded as appropriated funds and are not subject to requirements or restrictions applicable to appropriated funds).

Library of Congress to further purposes of Library's Center for the Book could not be used for unrelated Library programs); 40 Op. Att'y Gen. 66 (1941) (Library of Congress could not, without statutory authority, share income from donated property with Smithsonian Institution).

Under a statute authorizing the Federal Board for Vocational Education to accept donations to be used "in connection with the appropriations hereby made or hereafter to be made, to defray the expenses of providing and maintaining courses of vocational rehabilitation," the funds could be used only to supplement the Board's regular appropriations and could not be used for any expense not legally payable from the regular appropriation. The statute here conferred no discretion. 27 Comp. Dec. 1068 (1921).

If an agency is authorized to accept gifts, the funds may be used to augment a "not to exceed" earmark applicable to that purpose. B-52501, Nov. 9, 1945. (Although the statute involved in B-52501, the predecessor of 10 U.S.C. § 2608 noted above, no longer exists, the point of the decision is still valid.)

Once it is determined that the proposed use will not contravene the terms of the agency's authorizing statute, the agency will have some discretion under the trust fund concept. For example, donated funds may be used for entertainment only if the entertainment will further a valid function of the agency for which the donated funds were provided, if the government could not accomplish the function as effectively without the expenditure, and if the expenditure does not violate any restrictions imposed by the donor on the use of the funds. 46 Comp. Gen. 379 (1966); B-195492, Mar. 18, 1980; B-170938, Oct. 30, 1972; B-142538, Feb. 8, 1961. *See also* B-152331, Nov. 19, 1975 (involving a trust fund which included both gift and non-gift funds). It follows that donated funds may not be used for entertainment which does not bear a legitimate relationship to official agency purposes. 61 Comp. Gen. 260 (1982), *aff'd upon reconsideration*, B-206173, Aug. 3, 1982 (donated funds improperly used for breakfast for Cabinet wives and Secretary's holiday party).

The trust fund concept was also applied in 36 Comp. Gen. 771 (1957). The Alexander Hamilton Bicentennial Commission had been given statutory authority to accept gifts and wanted to use the donations to award Alexander Hamilton Commemorative Scholarships. The Commission was to have a brief existence and would not have sufficient time to administer the scholarship awards. The Comptroller General held that the Commission could, prior to the date of its expiration, transfer the funds to a

responsible private organization for the purpose of enabling proper administration of the scholarship awards. The distinction between this case and 55 Comp. Gen. 1059, mentioned above, is that in 36 Comp. Gen. 771, the objective of transferring the funds to a private organization was to better carry out an authorized purpose. In 55 Comp. Gen. 1059, the objective was to enable the funds to be used for unauthorized purposes.

Another case illustrating permissible administrative discretion under the trust fund concept is B-131278, Sept. 9, 1957. A number of persons had made donations to St. Elizabeth's Hospital to enable it to buy an organ for its chapel. The donors (organ donors?) had made the gifts on the condition that the Hospital purchase a high-quality (expensive) organ. When the Hospital issued its invitation for bids on the organ, the specifications were sufficiently restrictive so as to preclude offers on lower quality organs. The decision found this to be entirely within the Hospital's discretion in using the gift funds in accordance with their terms.

As noted above, however, the agency's discretion in administering its gift funds is not unlimited. Thus, for example, an agency may not use gift funds for purely personal items such as greeting cards that do not further agency purposes for which the gift funds were donated. 47 Comp. Gen. 314 (1967). *See also* B-195492, Mar. 18, 1980 (when an agency uses trust funds for what appear to be personal purposes, it has the burden of showing that this use furthers the trust purposes).

The particular statutory scheme will determine the extent to which donated funds are subject to other laws governing the expenditure of public funds. In two cases, for example, where a designated activity was to be carried out solely or primarily with donated funds, GAO found that the recipient agency could invest the gift funds in non-Treasury interest-bearing accounts and was not required to comply with the Federal Property and Administrative Services Act of 1949 (FPASA), 41 U.S.C. § 251–266, or the Federal Acquisition Regulation (FAR), 48 C.F.R. §§ 1.104 and 12.101. 68 Comp. Gen. 237 (1989) (Christopher Columbus Quincentenary Jubilee Commission); B-211149, Dec. 12, 1985 (Holocaust Memorial Council). However, these cases were distinguished in B-275669.2, July 30, 1997, in which GAO determined that the American Battle Monuments Commission charged with establishing the World War II memorial must use donated funds for contracts in accordance with the FPASA and FAR since neither the authorizing legislation nor the legislative history indicated an intention to exempt the Commission from such requirements.

Gifts that would require the government to incur significant expenses in future years present special issues. Although there are no recent cases, indications are that the agency needs specific statutory authority—not merely general authority to accept gifts—since the agency's appropriations would not otherwise be available to make the future expenditures. For example, an individual made a testamentary gift to a United States naval hospital. The will provided that the money was to be invested in the form of a memorial fund, with the income to be used for specified purposes. The Comptroller General objected to this, finding that the gift appeared to be conditional and that "the United States would become, in effect, a trustee for charitable uses, would never gain a legal title to the money, but would have the burden and obligation of administering in perpetuity a trust fund . . . ." 11 Comp. Gen. 355, 366 (1932). Also, absent specific authorization by Congress, appropriations would not be available for the expenses of administering the trust. Therefore, absent congressional authorization to accept the donation "as made," it could not be accepted either by the naval hospital, *id.*, or by the Treasury Department, A-40707, Dec. 15, 1936. *See Story v. Snyder*, 184 F.2d 454, 456 (D.C. Cir.), *cert. denied*, 340 U.S. 866 ((1950) ("gifts to the United States which involve any duty, burden, or condition, or are made dependent upon some future performance by the United States, are not accepted by the Government unless by the express authority of Congress"). *See also* 10 Comp. Gen. 395 (1931); 22 Comp. Dec. 465 (1916);[192] 30 Op. Att'y Gen. 527 (1916). A few of the cases (*e.g.*, 10 Comp. Gen. 395 and 30 Op. Att'y Gen. 527) have tied the result to the Antideficiency Act prohibition against incurring obligations in advance of appropriations, reasoning that acceptance would, in effect, create an unauthorized and unfunded contractual commitment to incur future expenses. *See* 10 Comp. Gen. at 398.

A question that received little attention in the past is whether an agency with statutory authority to accept gifts may use either appropriated funds or donated funds to solicit the gifts. GAO found that the Holocaust Memorial Council may use either appropriated or donated funds to hire a fund-raiser, but the cases have little precedential value since the legislation involved included specific authority to solicit as well as accept donations. *See* B-211149, Dec. 12, 1985; B-211149, June 22, 1983.

[192] Some wag once said, jokingly we think, that if you looked hard enough you could probably find a case dealing with the use of appropriated funds to buy dog food. 22 Comp. Dec. 465 is it.

An interesting, and hopefully unique, situation presented itself in B-230727, Aug. 1, 1988. Congress had enacted legislation to establish a Commission on Improving the Effectiveness of the United Nations, to be funded solely from private contributions. Pub. L. No. 100-204, title VII, pt. B, § 727, 101 Stat. 1331, 1394 (Dec. 22, 1987). The effective date of the legislation was March 1, 1989. Unfortunately, the legislation failed to provide a mechanism for anyone (Treasury Department or General Services Administration, for example) to accept and account for donations prior to the effective date, and the Commission itself could not do so since it had no legal existence. Thus, unless the statute were amended to authorize some other agency to act on the Commission's behalf, potential donors could not make contributions prior to the effective date since there was no one authorized to accept them.

In 1995, GAO was asked whether, under the Public Health Service's gift acceptance statute, 42 U.S.C. § 238(a), the National Institutes of Health (NIH), a component of the Public Health Service, may use its appropriated funds to apply for grants from nongovernmental sources, a kind of solicitation of funds. GAO determined that, since NIH had the authority to accept grants as conditional gifts under the statute, it could use its appropriated funds to cover the costs incurred in applying for such grants. B-255474, Apr. 3, 1995.

Finally, if an agency is authorized to accept gifts, it may also accept a loan of equipment by a private party without charge to be used in connection with particular government work. The agency's appropriations for the work will be available for repairs to the equipment, but only to the extent necessary for the continued use of the equipment on the government work, and not after the government's use has terminated. 20 Comp. Gen. 617 (1941). In one case, GAO approved the loan of private property to a federal agency by one of its employees, without charge and apparently without statutory authority, where the agency administratively determined that the equipment was necessary to the discharge of agency functions and the loan was in the interest of the United States. 22 Comp. Gen. 153 (1942). The decision stressed, however, that the practice of borrowing property should not be encouraged since it might give rise to claims against the government or questions about favors received or expected by the persons loaning the property. The decision seems to have been based in part on wartime needs and its precedent value would therefore seem minimal. *See, e.g.*, B-168717, Feb. 18, 1970.

b. Donations to Individual Employees

(1) Contributions to salary or expenses

As a general proposition, unless authorized by statute, private contributions to the salary or expenses of a federal employee are improper. First, they may in some circumstances violate 18 U.S.C. § 209, which prohibits the supplementation of a government employee's salary from private sources. "The evils of such, were it permitted, are obvious." *Exchange National Bank v. Abramson*, 295 F. Supp. 87, 90 (D. Minn. 1969). For purposes of 18 U.S.C. § 209, the proverb that it is better to give than to receive does not work. Both the giving and the receiving are criminal offenses under the statute. The employee would presumably violate the law by receiving more than he or she is entitled to receive under applicable statutes and regulations. 33 Op. Att'y Gen. 273, 275 (1922) (object of the predecessor to 18 U.S.C. § 209 was that "no Government official or employee should serve two masters to the prejudice of his unbiased devotion to the interests of the United States"). For further discussion of section 209, see the Memorandum Opinion for the General Counsel, Federal Bureau of Investigation, *Applicability of 18 U.S.C. § 209 to Acceptance by FBI Employees of Benefits under the "Make a Dream Come True" Program*, OLC Opinion, Oct. 28, 1997. See also the Office of Government Ethics, *Standards of Ethical Conduct for Employees of the Executive Branch*, 5 C.F.R. part 2635 (2005) (implementing 18 U.S.C. § 201), which prohibit an employee from accepting gifts from persons whose interests may be substantially affected by the employee.

Second, they are improper as unauthorized augmentations. To the extent the private contribution replaces the employee's government salary, it is a direct augmentation of the employing agency's appropriations. To the extent the contribution supplements the government salary, it is an augmentation in an indirect sense, the theory being that when Congress appropriates money for an activity, all expenses of that activity must be borne by that appropriation unless Congress specifically provides otherwise.

An early case in point is 2 Comp. Gen. 775 (1923). The American Jewelers' Protective Association offered to pay the salary and expenses of a customs agent for one year on the condition that the agent be assigned exclusively for that year to investigate jewelry smuggling. The Comptroller General found the arrangement improper, for the two reasons noted above. Whether the payments were to be made directly to the employee or to the agency by way of reimbursement was immaterial.

Most questions in this area involve schemes for private entities to pay official travel expenses. From the sheer number of cases GAO has considered, one cannot help feeling that the bureaucrat must indeed be a beloved creature. A long series of decisions established the proposition that donations from private sources for official travel to conduct government business constituted an unlawful augmentation unless the employing agency had statutory authority to accept gifts. If the agency had such authority, the donation could be made to the agency, not the individual employee, and the agency would then reimburse the employee in accordance with applicable travel laws and regulations, with the allowances reduced as appropriate in the case of contributions in kind.[193]

One problem with this system was the lack of uniformity in treatment, varying with the agency's statutory authority. Congress addressed the situation in the Ethics Reform Act of 1989, Pub. L. No. 101-194, § 302, 103 Stat. 1716, 1745 (Nov. 30, 1989), codified at 31 U.S.C. § 1353. Subsection (a) provides as follows:

> "Notwithstanding any other provision of law, the Administrator of General Services, in consultation with the Director of the Office of Government Ethics, shall prescribe by regulation the conditions under which an agency in the executive branch (including an independent agency) may accept payment, or authorize an employee of such agency to accept payment on the agency's behalf, from non-Federal sources for travel, subsistence, and related expenses with respect to attendance of the employee (or the spouse of such employee) at any meeting or similar function relating to the official duties of the employee. Any cash payment so accepted shall be credited to the appropriation applicable to such expenses. In the case of a payment in kind so accepted, a pro rata reduction shall be made in any entitlement of the employee to payment from the Government for such expenses."

GSA's implementing regulations are found at 41 C.F.R. chapter 304 (2005). Thus, as long as acceptance complies with the statute and regulations,

[193] Some cases from this series are 59 Comp. Gen. 415 (1980); 55 Comp. Gen. 1293 (1976); 49 Comp. Gen. 572 (1970); 46 Comp. Gen. 689 (1967); 36 Comp. Gen. 268 (1956); 26 Comp. Dec. 43 (1919).

there is no longer an augmentation problem. The existence or lack of separate statutory authority to accept gifts is immaterial.

Another relevant statute, which seemingly overlaps 31 U.S.C. § 1353 to some extent but was left untouched by it, is 5 U.S.C. § 4111, enacted as part of the Government Employees Training Act, Pub. L. No. 85-507, 72 Stat. 327 (July 7, 1958). Under this provision, an employee may accept (1) contributions and awards incident to training in nongovernment facilities, and (2) payment of travel, subsistence, and other expenses incident to attendance at meetings, but only if the donor is a tax-exempt nonprofit organization. If an employee receives a contribution in cash or in kind under this section, travel and subsistence allowances are subject to an "appropriate reduction."

Section 4111 authorizes the *employee* to accept the donation. It does not authorize the *agency* to accept the donation, credit it to its appropriations, and then reimburse the employee. 55 Comp. Gen. 1293 (1976). An employee who receives an authorized donation after the government has already paid the travel expenses cannot keep everything. The employee must refund to the government the amount by which his or her allowances would have been reduced had the donation been received before the allowances were paid. The agency may then credit this refund to its travel appropriation as an authorized repayment. *Id.* at 1294–95. *See also* 41 C.F.R. § 304-9.5.

The statute requires an "appropriate reduction" in travel payments in order to preclude the agency from paying for something that has already been reimbursed by an authorized private organization. An employee being reimbursed on an "actual expense" basis should not be claiming items which would duplicate private reimbursements. Thus, the agency is not required to reduce the actual expense entitlement by the value of provided meals. 64 Comp. Gen. 185 (1985). However, the value of subsistence items furnished in kind must be deducted where the employee is being reimbursed on a per diem basis. *Id.* at 188; 49 Comp. Gen. 572, 576 (1970).

The authority conferred by 5 U.S.C. § 4111 is expressly limited to organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code, 26 U.S.C. § 501(c)(3) (religious, charitable, scientific, educational, *etc.*). It does not extend to organizations which may be tax-exempt under other portions of section 501. B-225986, Mar. 2, 1987. Also, it does not apply to an organization whose application for exemption under section 501(c)(3) has not yet been approved; subsequent approval is not

retroactive for purposes of 5 U.S.C. § 4111. B-225264, Nov. 24, 1987 (nondecision letter).

Donations made under the express condition that they be used for some unauthorized purpose should be returned to the donor. 47 Comp. Gen. 319 (1967).

(2) Travel-related promotional items

Over the years, commercial airlines and others have devised a variety of programs to reward frequent customers. Promotional materials awarded to customers may take various forms—bonus trips, reduced-fare coupons, cash, merchandise, credits toward future goods or services, *etc.* Government employees traveling on government business are eligible for these promotional items the same as anyone else. Historically, statutes, regulations, and case law had maintained that the government employee, with certain exceptions, could not keep such promotional items. The fundamental principle underlying the prior decisions and regulations in this area was that any benefit, cash payment or otherwise, received by a government employee from private sources incident to or resulting from the performance of official duty was regarded as having been received on behalf of the government and was the property of the government.[194]

On December 28, 2001, the President signed into law a provision that federal employees may retain travel-related promotional items for personal use. Pub. L. No. 107-107, div. A, title XI, subtitle B, § 1116, 115 Stat. 1012, 1241 (Dec. 28, 2001), 5 U.S.C. § 5702 note. The law specifically provides that a federal traveler who receives a promotional item (such as frequent flyer miles, upgrades, or access to carrier clubs or facilities) as a result of using travel or transportation services obtained at federal government

[194] GAO's decisions involving promotional items obtained as a result of government-sponsored travel were decided under its claims settlement authority and predate the transfer of this authority to the executive branch in 1995. For details of this transfer see B-275605, Mar. 17, 1997. GAO has not issued decisions on such promotional items subsequent to that transfer. In testimony before the House of Representative's Subcommittee on Technology and Procurement Policy of the Committee on Government Reform, the Comptroller General spoke in favor of proposals that would allow employees who travel on government business to keep their frequent flyer miles, describing it as a "small benefit but one that private sector employers commonly provide their people as part of a mosaic of competitive employee benefits." GAO, *Human Capital: Building the Information Technology Workforce to Achieve Results*, GAO-01-1007T (Washington, D.C.: July 31, 2001), at 23.

expense may retain those items for personal use if the item is obtained under the same terms as those offered to the general public and at no additional cost to the government. The Federal Travel Regulation addresses promotional items in 41 C.F.R. part 301-53 (2005).

4. Other Augmentation Principles and Cases

As pointed out earlier in our introductory comments, the augmentation theory is relevant in a wide variety of contexts. The most common applications are the areas previously discussed—the spectrum of situations involving the miscellaneous receipts statute and the acceptance of gifts. This portion of the discussion will present a sampling of cases to illustrate other applications of the theory.

Another way of stating the augmentation rule is that when Congress appropriates funds for an activity, the appropriation represents a limitation Congress has fixed for that activity, and all expenditures for that activity must come from that appropriation absent express authority to the contrary. Thus, a federal institution is normally not eligible to receive grant funds from another federal institution. It is not necessary for the grant statute to expressly exclude federal institutions as eligible grantees; the rule will apply based on the augmentation theory unless the grant statute expressly includes federal institutions. 57 Comp. Gen. 662, 664 (1978); 23 Comp. Gen. 694 (1944); B-114868, Apr. 11, 1975.[195]

The improper treatment of reimbursable transactions may result in an augmentation. An example of this type of transaction is an order under the Economy Act, 31 U.S.C. § 1535.[196] Thus, if a given reimbursement must be credited to the appropriation that "earned" it (*i.e.*, that financed the transaction), and that appropriation has expired, crediting the reimbursement to current funds is an improper augmentation. *E.g.*, 72 Comp. Gen. 109, 110 (1993); B-242274, Aug. 27, 1991. However, a *de minimis* exception to this rule was recognized in 72 Comp. Gen. 63 (1992). This decision held that a refund of $100 or less that related to an expired account could be treated as a credit against a future invoice to the party owing the refund, and thus applied to a current account since the cost of

[195] GAO has no decisions addressing whether a federal agency with gift acceptance authority may receive a gift of money transferred to it from another federal agency.

[196] Economy Act transactions are described in more detail in section E.2.e of this chapter, above, and in section B.1 of Chapter 15.

processing a separate refund check would exceed the amount of the refund. The decision reasoned that this approach would save the government money and have an insignificant impact on the agency's account integrity. *Id.* at 64. The decision in 72 Comp. Gen. 109 (1993), which was issued shortly thereafter, underscored that this exception applied to *de minimis* amounts of $100 or less and did not apply to refunds that regularly exceeded $1,000. 72 Comp. Gen. at 110.

Some statutes give an agency the option of crediting reimbursements either to current funds or to the appropriation that financed the transaction. *E.g.*, 10 U.S.C. §§ 2205 and 2210; 22 U.S.C. § 2392(c) and (d).[197] Even here, however, crediting a reimbursement to an appropriation that bears no relationship to the transaction would be an unauthorized augmentation. B-132900-O.M., Nov. 1, 1977.

Likewise, treating a transaction which should be reimbursed as nonreimbursable may result in an improper augmentation. For example, an agency receives appropriations to do its own work, not that of another agency. Accordingly, as a general proposition, interdepartmental loans of personnel on a nonreimbursable basis improperly augment the appropriations of the receiving agency. 65 Comp. Gen. 635 (1986); 64 Comp. Gen. 370 (1985). Such nonreimbursable loans also constitute a misuse of the detailing agency's appropriation under 31 U.S.C. § 1301. B-247348, June 22, 1992.

Reimbursement by one agency to another in situations which are not the proper subject of an Economy Act agreement or where reimbursement is not otherwise statutorily authorized is improper for several reasons: It is an unauthorized transfer of appropriations; it violates 31 U.S.C. § 1301(a) by using the reimbursing agency's appropriations for other than their intended purpose; and it is an improper augmentation of the appropriations of the agency receiving the reimbursement. (The cases do not always cite all of these theories; they again illustrate the close interrelationship of the various concepts discussed throughout this publication.) The situation arises, for example, when agencies attempt to use the Economy Act for a "service" that is a normal part of the providing agency's mission and for which it receives appropriations.

[197] For a discussion of some of these statutes as well as related and predecessor provisions, see B-179708-O.M., Dec. 1, 1975, and B-179708-O.M., July 21, 1975.

To illustrate, an agency acquiring land cannot reimburse the Justice Department for the legal expenses incurred incident to the acquisition because these are regular administrative expenses of the Justice Department for which it receives appropriations. 16 Comp. Gen. 333 (1936). Similarly, an agency cannot reimburse the Treasury Department for the administrative expenses incurred in making disbursements on its account. 17 Comp. Gen. 728 (1938).

Federal agencies may not reimburse the Patent Office for services performed in administering the patent and trademark laws since the Patent Office is required by law to furnish these services and receives appropriations for them. 33 Comp. Gen. 27 (1953). Nor may they reimburse the Library of Congress for recording assignments of copyrights to the United States. 31 Comp. Gen. 14 (1951). *See also* 40 Comp. Gen. 369 (1960) (Interior Department may not charge other agencies for the cost of conducting hearings incident to the validation of unpatented mining claims, although it may charge for other services in connection with the validation which it is not required to furnish); B-211953, Dec. 7, 1984 (General Services Administration may not seek reimbursement for costs of storing records which it is required by law to store and for which it receives appropriations).

The Merit Systems Protection Board may not accept reimbursement from other federal agencies for travel expenses of hearing officers to hearing sites away from the Board's regular field offices. Holding the hearings is not a service to the other agency, but is a Board function for which it receives appropriations. The inadequacy of the Board's appropriations to permit sufficient travel is legally irrelevant. 59 Comp. Gen. 415 (1980), *aff'd upon reconsideration*, 61 Comp. Gen. 419 (1982). Where an agency provides personnel to act as hearing officers for another agency, it may be reimbursed if it is not required to provide the officers (B-192875, Jan. 15, 1980) but may not be reimbursed if it is required to provide them (32 Comp. Gen. 534 (1953)). Likewise, the Export-Import Bank cannot charge its customers for travel expenses incurred by Bank employees in transacting their business. B-277254, Mar. 5, 1997.

A client agency must bear from its own appropriations costs it incurs in assisting the Justice Department to defend it in litigation. Such support costs, which may include substantial temporary services provided by the agency's staff lawyers and paralegals, cannot be billed to Justice. 73 Comp. Gen. 90 (1994), *citing* 39 Comp. Gen. 643 (1960).

The decision in 70 Comp. Gen. 601 (1991) provides a variant on this principle. That decision approved the Army Civilian Appellate Review Agency's practice of obtaining reimbursement from other Army components for costs it incurred in investigating grievances filed by employees of the other components. For one thing, both the Review Agency and the other components were funded from the same appropriation in most instances; thus, there could be no augmentation. However, even when different appropriations were involved, the other component's appropriation could be charged pursuant to 31 U.S.C. § 1534. Indeed, the decision pointed out that such charges were "precisely the kind of situation contemplated by section 1534" since the Review Agency assisted the other components in satisfying their obligation to provide a grievance resolution process for their employees. 70 Comp. Gen. at 604.

Augmentation issues also can arise when an agency is trying to decide which of its appropriations to use for a given object. In 68 Comp. Gen. 337 (1989), for example, the Railroad Retirement Board wanted to make performance awards to personnel in its Office of Inspector General (IG), and was unsure whether to charge its appropriation for the IG's office or its general appropriation. A reasonable argument could be made to support either choice. Thus, the Board could make an election as long as it remained consistent thereafter. Since there was no indication that the IG appropriation was intended to be the exclusive funding source for the performance awards, using the general appropriation would not result in an improper augmentation of the IG appropriation.[198]

A somewhat analogous situation could arise if an agency agrees to reduce or forgo receipts to which it is entitled, and the party owing those receipts agrees in return to make some expenditure which would otherwise have to be borne by a separate appropriation of the same agency. GAO examined such a situation in B-77467, Nov. 8, 1950, involving the leasing of lands under the Bankhead-Jones Farm Tenant Act at reduced rentals on condition that the lessees in return perform certain improvements to the land. There was no augmentation in that case, however, since the statute expressly authorized the leasing with or without consideration and on such

[198] No augmentation requiring an election between potential funding sources exists, however, where the law clearly authorizes an agency to use both sources interchangeably in order to supplement each other. *See* B-272191, Nov. 4, 1997, *distinguishing* 68 Comp. Gen. 337.

terms as the Secretary of Agriculture determined would best accomplish the purposes of the act.

The following cases illustrate other situations which GAO found would result in unauthorized augmentations:

- The Customs Service may not charge the party-in-interest for travel expenses of customs employees incurred incident to official duties performed at night or on a Sunday or holiday. 43 Comp. Gen. 101 (1963); 3 Comp. Gen. 960 (1924). *See also* 22 Comp. Dec. 253 (1915).Department of Energy may not use overcharge refunds collected from oil companies to pay the administrative expenses of its Office of Hearings and Appeals. B-200170, Apr. 1, 1981.

- Proposal for airlines to reimburse Treasury to permit Customs Service to hire additional staff to reduce clearance delays at Miami airport was unauthorized in that it would augment appropriations made by Congress for that service. 59 Comp. Gen. 294 (1980).