Miscellaneous Topics

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A. Boards, Committees, and Commissions

1. Introduction

In addition to the "regular" departments and agencies that tend to attract the most attention, the federal government at any given time includes—although not in a formal, structural sense—a large number of miscellaneous bodies designated as boards, committees, commissions, and various similar names. So pervasive are these miscellaneous bodies that they have been informally called the "Fifth Branch of Government."[1] This section will address funding aspects of these entities.

It is always helpful at the outset to define your universe. In this instance, however, we have been unable to discover or devise a satisfactory definition for these miscellaneous bodies. As we will see later, the Federal Advisory Committee Act (FACA) defines "advisory committee" for purposes of that statute, but advisory committees are only one type of these miscellaneous bodies, albeit the largest. The impossibility of crafting a useful definition becomes apparent upon considering the key elements of function, creation, membership, and duration:

- *Function:* Most of the bodies we are talking about are purely advisory. Some, however, are operational, and others have elements of both. Functions include, for example, such things as the investigation of specific incidents, claims adjudication, and the commemoration of historic persons or events.

- *Creation:* Advisory bodies can be created by Congress, the President, or a department head. Bodies that are not purely advisory may or may not require specific legislation, depending on their exact nature and functions.

[1] *E.g.*, House Committee on Government Operations, *The Role and Effectiveness of Federal Advisory Committees*, H.R. Rep. No. 91-1731, at 4–5 (1970). The independent regulatory agencies—which also tend to be called "commissions"—comprise the so-called Fourth Branch. *Id.*

- *Membership:* The entity may consist entirely of government officers or employees, entirely of nongovernment parties, or some of each.

- *Duration:* Some are temporary; some are indefinite; some are permanent. Some start out as temporary and, in effect, achieve immortality.[2]

One of the earliest instances of the use of presidential commissions—if not purely advisory ones—occurred in 1794, when George Washington named a commission to investigate the Whiskey Rebellion in Pennsylvania.[3] Although the explosive growth of these miscellaneous bodies did not occur until the twentieth century, they were sufficiently common in 1842 to prompt Henry Clay to observe that the practice had "grown into use long since in the Executive Department."[4]

No one knows exactly how many miscellaneous boards, committees, and commissions exist at any given time. The only statistics available are for advisory committees subject to FACA,[5] certainly the largest single category, and for these there is a clear downward trend as they are a favorite target of cost-cutters. When Congress was considering FACA, the House Government Operations Committee reported that "there are at least 2,600 interagency and advisory committees and possibly as many as 3,200 presently existing," the uncertainty being that "many agencies are unable to supply a list of all their advisory bodies." H.R. Rep. No. 92-1017, at 2 (1972). By the end of fiscal year 1992, there were 1,236 federal advisory committees. General Services Administration, *Twenty-Second Annual Report of the President on Federal Advisory Committees* (1994), at 1. On February 10, 1993, President Clinton issued Executive Order No. 12838, directing executive branch departments and agencies to terminate at least one-third of the "advisory committees subject to FACA (and not required by

[2] We are not talking about the so-called independent regulatory agencies such as the Securities and Exchange Commission, Federal Communications Commission, Surface Transportation Board, *etc.*, which, notwithstanding their designation as commissions or boards, are permanent federal agencies, and are funded as such.

[3] *E.g.*, David Flitner Jr., *The Politics of Presidential Commissions*, 7 (1986).

[4] Cong. Globe, 27th Cong., 2nd Sess. 231 (1842), *quoted in* Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51, 61 (1994).

[5] The General Services Administration maintains data for advisory committees in a "Governmentwide shared Internet-based system . . ." 41 C.F.R. § 102-3.100(b)(4).

statute) that are sponsored by the department or agency." By the end of fiscal year 1993, the number of advisory committees had dropped to 1,088.[6] GSA *Report*, at 1.

2. Title 31 Funding Provisions

Regardless of whether one likes or dislikes the use of boards and committees, there are a lot of them around, they are here to stay, and someone has to pay their bills. If, as we have noted elsewhere, the central theme of federal fiscal law is the quest for balance between executive flexibility and legislative control, the funding of miscellaneous boards and committees is unquestionably a microcosm of this reality.

Historically, Congress has asserted its presence in the area by enacting funding restrictions, now found mostly in title 31 of the United States Code. The key provisions are 31 U.S.C. §§ 1346 and 1347. These provisions are an amalgam of over a century's worth of legislation. We set out section 1346 in full here and will refer to specific portions in our discussion of this area of the law.

> "§ 1346. *Commissions, councils, boards, and interagency and similar groups*
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> "(a) Except as provided in this section—
>
> (1) public money and appropriations are not available to pay—
>
> (A) the pay or expenses of a commission, council, board, or similar group, or a member of that group;
>
> (B) expenses related to the work or the results of work or action of that group; or

[6] Although the number was to drop still further, GAO found that the costs and number of members per committee had increased. GAO, *Federal Advisory Committee Act: Overview of Advisory Committees Since 1993*, GAO/T-GGD-98-24 (Washington, D.C.: Nov. 5, 1997). The number of such committees fell to approximately 950 in fiscal year 2003. GAO, *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance*, GAO-04-328 (Washington, D.C.: Apr. 16, 2004), at 10.

(C) for the detail or cost of personal services of an officer or employee from an executive agency in connection with that group; and

(2) an accounting or disbursing official, absent a special appropriation to pay the account or charge, may not allow or pay an account or charge related to that group.

"(b) Appropriations of an executive agency are available for the expenses of an interagency group conducting activities of interest common to executive agencies when the group includes a representative of the agency. The representatives receive no additional pay because of membership in the group. An officer or employee of an executive agency not a representative of the group may not receive additional pay for providing services for the group.

"(c) Subject to section 1347 of this title, this section does not apply to—

(1) commissions, councils, boards, or similar groups authorized by law;

(2) courts-martial or courts of inquiry of the armed forces; or

(3) the contingent fund related to foreign relations at the disposal of the President."

Section 1347, also known as the "Russell Amendment," is set out later in this discussion.

a. 1842: The First Attempt

The earliest congressional attempt to rein in the use of boards and committees grew out of controversy surrounding a commission appointed by President Tyler to investigate certain irregularities at the New York customs house. The result was section 25 of the Act of August 26, 1842, ch. 202, 5 Stat. 523, 533, which, with certain exceptions, prohibited the payment of "any account or charge whatever" in connection with "any commission or inquiry . . . until special appropriations shall have been made by law to pay such accounts and charges." The prohibition is now found at 31 U.S.C. § 1346(a)(2); sections 1346(c)(2) and (c)(3) are the exceptions.

Initially, this attempt was successful. The Attorney General had occasion to consider the statute less than 2 months after it was enacted. A private relief bill directed the Secretary of the Treasury to investigate, and estimate the damages resulting from, an incident involving "emigrating Creek Indians." Treasury asked whether appointment of an individual to perform the investigation would be subject to the statute. Yes, replied the Attorney General. "The words of the law are too comprehensive to admit of any exception, and too express to warrant any relaxation." 4 Op. Att'y Gen. 106 (1842). The following year, the Attorney General discussed the statute in this much-quoted passage:

> "The power of appointment results from the obligation of the executive department of the government 'to take care that the laws be faithfully executed;' an obligation imposed by the constitution, and from the authority of which no mere act of legislation can operate a dispensation. Congress may, however, indirectly limit the exercise of this power by refusing appropriations to sustain it, and thus paralyze a function which it is not competent to destroy. This would seem to be the purpose of the act of 26th August, 1842. . . ."

4 Op. Att'y Gen. 248 (1843). The Attorney General went on to point out that payment would require a specific appropriation. Charging a general appropriation would not suffice because general appropriations must be read as limited by existing prohibitory statutes. *Id.* at 249.

The "undoing" of the 1842 restriction was furthered by a 1915 decision of the Comptroller of the Treasury. The Comptroller quoted the Attorney General's 1843 opinion and agreed that "the purpose of this provision was to prohibit, indirectly, the creation of commissions by the executive [branch] . . . through its inherent power to make appointments." 21 Comp. Dec. 442, 443 (1915). However, the Comptroller continued: "I do not think it was the intent or purpose of this law to prohibit the use of an appropriation otherwise available, though general in terms, for the payment of expenses of a commission specifically authorized by Congress." *Id.* In this way, a general appropriation available for the expenses of a body specifically created by Congress became a "special appropriation" for purposes of the 1842 law. *Id.* at 443–44.

Congress's 1842 attempt to restrict funding for boards and committees was further weakened by a distinction alluded to in an early GAO decision. This distinction, between a group of persons acting individually and a group acting collectively, would be invoked in all subsequent legislation on this subject. In the 1922 case before GAO, the Secretary of War had sent four men to the Canal Zone to investigate existing conditions at the Panama Canal. Each had his own area of expertise, and the governing legislation authorized the President to appoint or employ persons to carry out these responsibilities. In finding the 1842 statute inapplicable, the Comptroller General stated:

> "The right of the President to appoint any one of these experts to advise him in an individual capacity would undoubtedly be authorized. . . . If he sees fit to appoint or employ four experts to make a concurrent investigation and report on the various matters of which each is an expert in his particular field, it would not appear that such designation of the individuals thus selected would make them a 'commission [or] inquiry' in the legal sense of the term."

Review Nos. 2249 *et al.*, Aug. 22, 1922, at 4–5.[7] The 1842 enactment never purported to address the extent of the executive's power to create boards and committees, and even though it is still on the books, these administrative interpretations mean that it is no longer a significant funding impediment either.

b. 1909: The Tawney Amendment

The next congressional attempt to control boards and committees grew out of President Theodore Roosevelt's creation in 1909 of a Commission on Fine Arts to advise on artistic aspects of certain public structures and monuments.[8] The following year, Congress gave the Commission a permanent statutory basis in what is now 40 U.S.C. § 9101. Before doing that, however, Congress, disturbed over the President's willingness to create such bodies without first obtaining congressional approval, enacted the Act of March 4, 1909, ch. 299, § 9, 35 Stat. 945, 1027, which prohibited the use of appropriated funds to pay any expenses in connection with any

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[7] The 1922 decision failed to address 4 Op. Att'y Gen. 106, which found the statute applicable to the appointment of a single individual, but the point would appear moot in view of the authority to hire experts and consultants now found in 5 U.S.C. § 3109.

[8] Jay S. Bybee, *Advising the President: Separation of Powers and the Federal Advisory Committee Act*, 104 Yale L.J. 51, 63–65 (1994).

commission, council, board, or similar body, or any members of such a group, "unless the creation of the [group] shall be or shall have been authorized by law." This statute, sometimes referred to as the Tawney Amendment, is now found at 31 U.S.C. §§ 1346(a)(1) (prohibition) and 1346(c)(1) ("authorized by law" exception).

This second congressional attempt met with weakening administrative interpretations even more swiftly than did the first attempt. Less than 2 months after it was enacted, the Attorney General concluded that the 1909 law did not apply to groups consisting entirely of government officers or employees dealing with matters relating to their scope of employment. 27 Op. Att'y Gen. 308 (1909) (special committee appointed by President Roosevelt to conduct an investigation of agency contracts, composed of a representative official of each executive agency, was not subject to the prohibition). *See also* 8 Comp. Gen. 294 (1928); B-79195, Sept. 30, 1948. As the Attorney General stated in another opinion, it would make no sense to construe the statute as prohibiting an agency head "from submitting to the concurrent investigation and report of several employees of his department any question which he might submit for investigation to any one of them." 27 Op. Att'y Gen. 300, 307 (1909). The same interpretation applies to experts and consultants as long as their employment has been properly authorized. 37 Op. Att'y Gen. 484 (1934).

The key question under the 1909 statute is the meaning of "authorized by law." In another 1909 opinion, the Attorney General adopted an interpretation that effectively weakened the law's requirements. Noting that every action an agency takes does not have to be spelled out in legislation, he concluded: "Congress did not intend to require that the creation of the commissions, *etc.*, mentioned should be specifically authorized by a law of the United States, but that it would be sufficient if their appointment were authorized in a general way by law." 27 Op. Att'y Gen. 432, 437 (1909).

The Comptroller of the Treasury followed suit. 16 Comp. Dec. 422 (1910); 16 Comp. Dec. 278 (1909) (quoting extensively from the Attorney General's opinion). Somewhat inexplicably, several early GAO decisions took the position that specific authority was required. The difficulty with this divergence was that the Attorney General's conclusion was supported by some pretty strong legislative history. *See* 27 Op. Att'y Gen. at 437. In 22 Comp. Gen. 140 (1942), the Comptroller General reviewed this legislative history, repudiated his earlier "specific authority" decisions, and adopted the Attorney General's "authorized in a general way" formulation.

To avoid rendering the statute totally meaningless, GAO developed the following approach:

> "[T]here must be sufficient authority in general or specific terms for the creation of a commission, board, *etc.*, such as an authorization for work which could be accomplished only by a commission, board, *etc.*, or authorization for duties of such a nature generally recognized as best performed by a commission, board, *etc.*"

11 Comp. Gen. 495, 497 (1932). Virtually identical statements are found in 31 Comp. Gen. 454, 455 (1952) and B-116975, Apr. 27, 1954, at 4.[9]

There needs to be something more than just the authority to perform the function because the "authorized by law" portion of the statute applies to creation of the body, not performance of the function. *See*, *e.g.*, B-51203, Aug. 14, 1945; 6 Op. Off. Legal Counsel 541, 550 (1982). The fact situation in the 1909 Attorney General opinion, 27 Op. Att'y Gen. 432, is a good example. The War Department then, as does the Army Corps of Engineers now, performed a variety of civil works functions. Incident to one of them, Congress directed that the work not injure "the scenic grandeur of Niagara Falls." The Department pointed out that it did not have on its payroll experts in "scenic grandeur," and when it had received similar mandates in the past, it went out and contracted for the necessary expertise, often in the form of a committee. This was sufficiently "authorized by law" for purposes of the 1909 prohibition. Similarly sufficient was the situation in 40 Comp. Gen. 478 (1961). The Interior Department had specific authority to consult with various private parties on certain forest matters. For decades, it had done this by the use of advisory bodies. In view of this longstanding practice, the Comptroller General found that the consultation statute could be viewed as furnishing the necessary authority.

[9] Another decision stated the principle with a minor change in language:

> "[The 1909 law] does not necessarily require that commissions, councils, boards, and other such bodies be specifically established by statute. . . . General or specific authority to perform functions or duties is sufficient to allow payment of the expenses of boards, commissions, *etc.*, if such duties or functions can be performed only by such a group or if it is generally accepted that such duties can be performed best by such a group."

40 Comp. Gen. 478, 479 (1961) (citations omitted).

In contrast, where an agency was authorized to conduct certain investigations and to employ experts and others for carrying out agency functions, and where the agency had in fact conducted the investigations for many years without an advisory body, there was no basis to find the body authorized by law, even in a "general way." 31 Comp. Gen. 454 (1952).

The "authorized in a general way" standard is also met if a department includes a board or commission in its budget justification materials and Congress enacts a lump-sum appropriation without prohibiting the item. B-38047, Nov. 8, 1943. *See also* B-116975, Apr. 27, 1954.

However, 31 U.S.C. § 1346(a)(1) does not override 31 U.S.C. § 1301(a), the purpose statute, discussed in Chapter 4. B-182398(1), Mar. 29, 1976. Nor is it affected in any way by 5 U.S.C. § 5703, the "invitational travel" statute. 27 Comp. Gen. 630 (1948). Of course, if the "authorized in a general way" standard is legitimately met, there should be no problem under either statute.

Applying section 1346(a)(1) to a given entity requires analysis of the entity's nature and functions. What it happens to be named is not the controlling factor. 27 Op. Att'y Gen. 406, 409 (1909); A-16348, Dec. 8, 1926. The Justice Department has also cautioned that adding diverse functions could cause a board or commission to lose its "authorized in a general way" status. 6 Op. Off. Legal Counsel 541, 550 (1982).

Finally, cases under the 1909 statute continue to recognize the individual *versus* unit distinction first noted in connection with the 1842 law. The circumstances in B-116975, Apr. 27, 1954, involved three people inspecting coffee for the Army. It was significant that, although the three conducted their inspections independently, a majority vote determined acceptance or rejection. Thus, the inspectors acted as a unit and the statute applied. The same reasoning applied to tea inspectors for the Navy in 6 Comp. Gen. 140 (1926).[10]

Setting aside subsequent developments for the moment, the combined effect of the 1842 and 1909 enactments—31 U.S.C. §§ 1346(a) and (c)—was that boards and committees created by executive action could be funded

[10] 6 Comp. Gen. 140 is one of the "specific authority" cases and to that extent has been modified by 22 Comp. Gen. 140. This, however, has no bearing on the point noted in the text.

either if their creation was authorized ("in a general way"), or if Congress appropriated funds for that purpose.

c. 1944: The Russell Amendment

Peace prevailed between the branches over the use of boards and committees for a few decades, but ended in 1944 when congressional concern over some of Franklin D. Roosevelt's creations prompted another piece of legislation, forming a "veritable Maginot Line of barriers to funding commissions."[11] This third attempt at congressional control was the so-called Russell Amendment, Pub. L. No. 78-358, § 213, 58 Stat. 361, 387 (June 27, 1944). Now codified at 31 U.S.C. § 1347, it provides:

> "(a) An agency in existence for more than one year may not use amounts otherwise available for obligation to pay its expenses without a specific appropriation or specific authorization by law. If the principal duties and powers of the agency are substantially the same as or similar to the duties and powers of an agency established by executive order, the agency established later is deemed to have been in existence from the date the agency established by the order came into existence.
>
> "(b) Except as specifically authorized by law, another agency may not use amounts available for obligation to pay expenses to carry out duties and powers substantially the same as or similar to the principal duties and powers of an agency that is prohibited from using amounts under this section."

The amendment's sponsor, Senator Russell, stated its purpose as follows:

> "[T]he purpose of the committee amendment, which is apparent from a reading thereof, is to retain in the Congress the power of legislating and creating bureaus and departments of the Government, and of giving to Congress the right to know what the bureaus and departments of the Government which have been created by Executive order, are doing.

[11] Thomas R. Wolanin, *Presidential Advisory Commissions—Truman to Nixon*, 66 (1975).

> "Regardless of what agencies might be affected, the purpose of this amendment is to require them all to come to Congress for their appropriations after they have been in existence for more than a year."

90 Cong. Rec. 3119 (1944), *quoted in* 24 Comp. Gen. 241, 243 (1944).

The original language makes this intent a little clearer. "Agency" in section 1347(a) originally read "any agency or instrumentality including those established by Executive order," and "specific authorization by law" originally read specific authorization for "the expenditure of funds" by the body. Pub. L. No. 78-358, § 213.

As had happened with its predecessors, administrative interpretations have narrowed the Russell Amendment's scope and impact. In 3 Op. Off. Legal Counsel 263 (1979), the Justice Department's Office of Legal Counsel concluded that the Russell Amendment does not apply to boards or committees that are purely advisory, stating the test as follows:

> "Mere advisors are not 'agencies' or 'instrumentalities' of Government for purposes of the Russell amendment. They do not become 'agencies' or 'instrumentalities' merely because they meet and advise collectively. They become 'agencies' or 'instrumentalities' for Russell amendment purposes only if the officer to whom they report seeks to invest them with actual authority to take substantive action on his or the Government's behalf."

Id. at 265. *See also* B-152583, Nov. 7, 1963 (finding the Russell Amendment not applicable to President's Committee on Equal Opportunity in the Armed Forces, which was purely advisory). Justice took this a step further a few years later, concluding that a council under the United States Information Agency (USIA) whose functions were both advisory and operational (in this case, solicitation of contributions) was subject to the Russell Amendment because "it would discharge responsibilities vested by law in the USIA and would not be purely advisory." 6 Op. Off. Legal Counsel 541, 551 (1982). The operational aspect does not have to amount to "substantive action"; the law applies if the body "acts on behalf of the government or exerts any governmental power." *Id*.

3. Interagency Funding

a. Joint Funding of Common-Interest Project

It is necessary at the outset to distinguish between joint funding of a project and joint funding of a board, committee, or similar group. While statutes address the latter, the former is governed by the normal rules regarding the obligation and expenditure of appropriated funds. If a project will benefit more than one agency, and as long as it is not something one of the agencies is required to do as part of its mission without reimbursement, then there is nothing that prohibits the agencies from funding the project in proportion to their benefit.

This point was made in an early case, A-7571, May 14, 1925. Several agencies, along with state and local bodies, were interested in development of the Colorado River and sponsored the construction and maintenance of three "gauging stations" along the river, under the supervision of the Interior Department's Geological Survey. Once it was determined that this was not something the Geological Survey was required to do anyway as part of its job—that is, that there was no augmentation problem—it was fairly easy to conclude that "there appears no legal objection to the allocation of Federal Power Commission funds to pay for its proper share of the expenses incident to the maintenance of the stations from which it derives a corresponding benefit." *Id.* at 3. *See also* B-111199, Aug. 20, 1952; B-51145, Sept. 11, 1945.

A more recent decision dealt with joint funding of mutually beneficial research and demonstration projects by use of interagency agreements. Several environmental statutes authorize or direct the Environmental Protection Agency to cooperate with other federal and nonfederal entities. These statutes were viewed as sufficient authority for interagency agreements, to be funded by transfers to the contracting agency from the other participating agencies. 52 Comp. Gen. 128 (1972). The decision pointed out the distinction between this type of interagency agreement—in which the participating agencies all had an interest—and an Economy Act agreement, in which the performing agency has "no specific interest apart from the provision of a routine service." *Id.* at 133. In view of the statutory provisions involved, there was no need to consider what EPA could or could not have done without those statutes.

In any joint funding case—project, board or commission, interagency agreement, *etc.*—the threshold question is purpose availability. Joint funding cannot be used if the source appropriation is not otherwise available for the object in question. B-182398, Mar. 29, 1976. In other words, joint or interagency funding may not be used to expand the availability of any of the participating appropriations. Once this threshold is crossed, use of a working fund as a financing device is permissible, but the money "must be obligated and expended in accordance with the statutes appropriating such funds and within the period of availability of the original appropriations." B-111199, Aug. 20, 1952.

b. 1945: The First Interagency Funding Statute

Earlier in this section, we described the Russell Amendment, 31 U.S.C. § 1347. In 1945, less than a year after the Russell Amendment, Congress enacted section 214 of Pub. L. No. 79-49, 59 Stat. 106, 134 (May 3, 1945). Now codified at 31 U.S.C. § 1346(b), section 214 authorizes interagency funding of groups engaging in activities of common interest.

Section 214's legislative history indicates that it was intended as an amendment to the Russell Amendment. Therefore, to the extent of its terms, it overrides the Russell Amendment's requirement to seek congressional appropriations after one year. B-75669, June 16, 1948. Also, because it specifically makes appropriations available, it overrides, again to the extent of its terms, the prohibition of 31 U.S.C. § 1346(a)(1) (the 1909 statute). 49 Comp. Gen. 305, 307 (1969);[12] 26 Comp. Gen. 354 (1946).

The current version of 31 U.S.C. § 1346(b), stemming from the 1982 recodification of title 31, makes appropriations available for interagency groups "conducting activities of interest common to executive agencies when the group includes a representative of the agency." The original language, which governs in a case like this,[13] was "authorized activities of common interest to such departments and establishments and composed in whole or in part of representatives thereof." Pub. L. No. 79-49, § 214. It is clear from the original language ("in whole or in part") that the interagency group can include private parties in addition to the government representatives. 26 Comp. Gen. at 358.

It also would seem that the current language requires the group to include at least one representative from every agency participating in the funding.

[12] The decision in 49 Comp. Gen. 305 was erroneously overruled in part by 54 Comp. Gen. 1055 (1975), and was reinstated by 56 Comp. Gen. 572 (1977).

[13] *See, e.g.*, *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227 (1957).

The original (governing) language did not necessarily say this, and in fact a 1962 decision stated:

> "We do not read the language of [section 214] as making agency membership on an interagency board or committee a requisite to the availability of appropriations for meeting the expenses of such interagency groups. Nor have we found anything in the legislative history of the statute which would dictate that such membership is required. Thus in a proper case we would not be required to object to contribution by a nonmember agency toward the expenses of an interagency group, on the sole ground of nonmembership."

B-150511, Dec. 28, 1962, at 2. Accordingly, the controlling factor is not membership, but "whether the interagency groups are 'engaged in authorized activities of common interest' to the contributing agencies." B-150511, Jan. 9, 1963, at 1.

A device commonly used in interagency funding situations is a working fund. While there is nothing wrong with establishing a working fund as an accounting device, the Comptroller General has emphasized that this does not alter the availability of the amounts contributed. The funds advanced to a common fund by a participating agency remain available only for their original purposes, and only during the source appropriation's period of obligational availability. 28 Comp. Gen. 365 (1948); B-150963, July 9, 1963; B-51203, Nov. 14, 1945. A working fund established to implement 31 U.S.C. § 1346(b) is not an Economy Act working fund. *See* 35 Comp. Gen. 201, 202 (1955).

Following are some examples of the application of 31 U.S.C. § 1346(b):

- The Federal Communications Commission, upon making the standard "necessary expense" determination, could use its appropriated funds to finance its share of something called the Radio Technical Commission for Aeronautics (RTCA), an advisory group on aeronautical radio, even though the RTCA had never been authorized by statute or executive order. Payment would have been barred under 31 U.S.C. § 1346(a), but was permissible under 31 U.S.C. § 1346(b). 26 Comp. Gen. 354 (1946).

- The Defense Department could participate in funding an interagency group called the National Inventors Council because one of the

Council's functions was to encourage and screen inventions which might be useful in national defense as well as industry. 35 Comp. Gen. 201 (1955).

- The National Service Corps Study Group was established in 1962 to study the feasibility of a national service program patterned after the Peace Corps. It consisted of the Attorney General, Secretaries of Agriculture, Interior, Commerce, Labor, and Health, Education and Welfare, plus some smaller agencies. Because the study extended into such fields as health, education, labor, housing, *etc.*, it could fairly be regarded as being of interest to the agencies asked to participate in the funding. B-150963, July 9, 1963.

- The Defense Department could contribute to the funding of the President's Committee on Equal Employment Opportunity. B-148247, Mar. 5, 1962.

- Agencies could pay "dues" to the Federal Automatic Data Processing Council, as long as the Council was using the money only for the kinds of expenses for which the source appropriations would be available. B-161214-O.M., Apr. 24, 1967.

- The Federal Trade Commission could continue to pay the salary of an employee sent to Japan as part of an interagency trade mission. B-54464, Dec. 14, 1945.

c. Appropriation Act Provisions

Each of the title 31, United States Code, provisions discussed thus far in this section entered the scene in the form of a permanent general provision contained in an appropriation act. Appropriation acts also may contain other relevant provisions, which may vary from agency to agency or year to year.

One such governmentwide provision is of particular importance. In the 1960s, Congress became increasingly concerned over the proliferation of miscellaneous interagency bodies, created under the apparent *carte blanche* authority of 31 U.S.C. § 1346(b). At the time, the executive could use section 1346(b) to create an interagency body and, assuming compliance with the membership and common interest requirements, fund it indefinitely by "passing the hat." Congress once again began feeling left out.

The result was legislation that effectively modified 31 U.S.C. § 1346(b) by prohibiting the use of appropriated funds for interagency financing without prior and specific congressional approval for that type of financing. The provision first appeared in several appropriation acts for 1969. In 1972, the prohibition was inserted in the Treasury-General Government Appropriation Act and made governmentwide ("this or any other act"). This history is outlined in B-147637-O.M., Dec. 12, 1974.

The original version applied only to interagency groups under 31 U.S.C. § 1346(b). Eventually, Congress realized that this was narrower than it had intended, and dropped the specific reference to section 1346(b), as well as changed "congressional approval" to "statutory approval." The provision for fiscal year 2006 states:

> "No part of any appropriation contained in this or any other Act shall be available for interagency financing of boards (except Federal Executive Boards), commissions, councils, committees, or similar groups (whether or not they are interagency entities) which do not have a prior and specific statutory approval to receive financial support from more than one agency or instrumentality."

Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, div. A, title VIII, § 810, 119 Stat. 2396, 2497 (Nov. 30, 2005). Note that the group itself may or may not be an interagency group; the statute is directed solely at the method of funding. The exemption for Federal Executive Boards first appeared in 1996.[14]

This provision, which for ease of discussion we shall refer to as section 810, its designation in the statute for fiscal year 2006, does not apply to a government corporation statutorily authorized to determine the nature and character of its expenditures. B-174571, Jan. 5, 1972 (Federal Deposit Insurance Corporation). Nor does it apply to the Comptroller of the Currency, whose funds, by statute, are not to be construed as appropriated funds. *Id.* Thus, as the cited decision concluded, section 810 would not inhibit contributions by either body to the President's Commission on Financial Structure and Regulation.

[14] Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 613, 110 Stat. 3009, 3009-356 (Sept. 30, 1996).

GAO's first encounter with the language in section 810 was 49 Comp. Gen. 305 (1969). The Veterans Administration wanted to contract with an individual to serve as director of the Interagency Institutes for Federal Hospital Administrators, the contract cost to be shared by the participating agencies. To start with, because 31 U.S.C. § 1346(b) partially superseded 31 U.S.C. § 1346(a) with respect to certain interagency groups, there was no need to determine whether this particular group was authorized by law. This was the good news. The bad news was that 31 U.S.C. § 1346(b) was itself partially overridden by section 810. Interagency funding would require prior and specific legislative approval. 49 Comp. Gen. at 307. Similarly, as we have already noted, 31 U.S.C. § 1346(b), to the extent of certain interagency bodies, also partially supersedes the 1-year requirement of the Russell Amendment. Thus, the President could lawfully create an interagency Radiation Policy Council for a duration in excess of 1 year, but interagency funding would require compliance with section 810. B-196841-O.M., Dec. 18, 1980. Section 810 also has been applied to a proposal to purchase solicitation services for the Combined Federal Campaign from an interagency entity. 67 Comp. Gen. 254 (1988).

The "prior and specific" approval can take different forms. One approach is section 829 of Public Law 109-115: "Notwithstanding section 1346 of title 31, United States Code, or section 810 of this Act, funds made available for the current fiscal year by this or any other Act shall be available for the interagency funding of specific projects, workshops, studies, and similar efforts to carry out the purposes of the National Science and Technology Council (authorized by Executive Order No. 12881), which benefit multiple Federal departments, agencies, or entities . . ." Because the statute authorizes the concept but not the precise method, there would presumably be some discretion in this regard—for example, periodic reimbursement, advances to a working fund, *etc.*

Another approach is illustrated by the Federal Accounting Standards Advisory Board (FASAB). FASAB was created administratively in 1990 as an advisory committee to the Comptroller General of the United States, the Secretary of the Treasury, and the Director of the Office of Management and Budget (OMB). FASAB recommends accounting standards and principles for the federal government that are issued by GAO and OMB. Further information is available at www.fasab.com (last visited Nov. 28, 2007). GAO covers FASAB's expenses (*e.g.*, executive director and staff salaries) with GAO's appropriation and then bills the other sponsors and the Congressional Budget Office, which also participates on the Board, equal shares of the costs. This funding method is expressly authorized by a proviso in the general governmentwide provisions of the annual Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations acts. *See*, *e.g.*, Pub. L. No. 109-115, § 826.

Perhaps the best illustration of the import and impact of the section 810 language is the saga of the Federal Executive Boards. In 1961, President Kennedy created interagency groups called Federal Executive Boards (FEBs) to better coordinate federal activities outside of Washington. Their number has increased over the years.[15] From the outset, the FEBs were funded from the appropriations of the member agencies rather than by direct appropriations. The enactment of the section 810 language in the 1969 appropriation acts gave the agencies something of a jolt because they had been supporting the FEBs up to that point under 31 U.S.C. § 1346(b),[16] entirely legitimately, and now all of a sudden learned that they no longer had the authority to do so.

GAO's first written encounter with the problem came in 1973, when GAO's own field managers asked why they were being asked to pay FEB assessments from personal funds and whether there was any way GAO could pick up the tab. GAO reviewed the history of the section 810 language and concluded that there was no way around the statute:

> "We see no possible alternative in the instant case to concluding the language of section [810] . . . prohibits the GAO and all other Federal agencies from using their appropriated funds to provide administrative support, salaries, and reimbursement or payment of a member's assessments for Federal Executive Board activities."

B-147637-O.M., Dec. 12, 1974, at 6. The solution, of course, was to seek specific authorization from Congress. *Id.*

In 1986, the Veterans Administration and the Small Business Administration came to the conclusion that the section 810 language barred interagency financing of the FEB, and sought GAO's concurrence. They got

[15] GAO, *Standardized Federal Regions—Little Effect on Agency Management of Personnel*, FPCD-77-39 (Washington, D.C.: Aug. 17, 1977), at 2.

[16] This fact may help suggest why Congress wanted to reinsert itself in the process.

it. 65 Comp. Gen. 689 (1986). There was one possible—although probably not very feasible—way out. The decision added, "we see nothing to prevent a single entity with a primary interest in the success of the interagency venture, from picking up the entire costs." *Id.* at 692. Thus, if one agency could be said to have a "primary interest" in a particular Board activity, and if that agency were willing to pay the entire cost without hope of reimbursement, it could do so. The next question, expectedly, was what does primary interest mean? It means that "an agency must have a substantial stake in the outcome of the interagency endeavor and the success of the interagency venture must further the agency's own mission, programs or functions." 67 Comp. Gen. 27, 29 (1987). This latter decision also reiterated that section 810 barred in-kind as well as cash support. Mere attendance at meetings or functions, however, does not constitute support. *Id.*

One of the things FEBs do is give awards. Absent the requisite statutory approval, an agency may not pay a pro-rata share of the expenses of an FEB awards banquet. B-219795, Sept. 29, 1986. It can, however, pay or reimburse the fee charged to its own nominees, award recipients, and supervisors, under authority of the Incentive Awards Act. 70 Comp. Gen. 16 (1990). Under the Incentive Awards Act, it also can make awards to its own employees for services rendered to an FEB. B-240316, Mar. 15, 1991. Similarly, an agency may pay a reasonable registration fee for attendance of its employees at an FEB training seminar. 71 Comp. Gen. 120 (1991).

Why this situation persisted for so many years is not clear. GAO had recommended as early as 1977 that the executive branch present the problem of FEB funding to Congress.[17] In any event, as noted above, the section 810 language was amended in 1996 to exempt the FEBs.

Another general provision which has been around for about 20 years is section 815 of the 2006 appropriations act, Pub. L. No. 109-115:

> "Notwithstanding section 1346 of title 31, United States Code, or section 810 of this Act, funds made available for fiscal year 1998 by this or any other Act shall be available for the interagency funding of national security and emergency preparedness telecommunications initiatives which benefit

[17] FPCD-77-39, at 24.

> multiple Federal departments, agencies, or entities, as provided by Executive Order No. 12472 (April 3, 1984)."

This provision first appeared as section 629 of the Treasury, Postal Service and General Government Appropriations Act, 1988, Pub. L. No. 100-202, 101 Stat. 1329, 1329-431 (Dec. 22, 1987).

If an instance of unauthorized interagency funding does occur, the appropriate remedy is an adjustment of accounts, that is, the recipient gives the donor back its money. B-182398-O.M., Sept. 3, 1976. If the period of obligational availability has expired, the adjustment might not serve any useful purpose, even if the recipient entity has or can restore sufficient unobligated balances, because the donor agency could not use the money for new obligations. *Id.* It also would be inappropriate to pursue action against the certifying officers involved because, while there may have been a loss to a particular agency, there is no loss to the government, assuming the money was used for some authorized purpose of the recipient. *Id.*

4. The Federal Advisory Committee Act

a. Overview and Applicability

As we have noted, in the world of miscellaneous boards and committees, advisory committees are by far the largest single group. There are several types: general advisory committees, scientific and technical advisory committees, special clientele (industry) advisory committees, specific task (or action) advisory committees, research committees, and public conferences.[18] They are popular because they represent a relatively inexpensive way for the government to get expert advice, or at least advice from different perspectives; they are criticized because many tend to outlast their usefulness.

If reining in the proliferation of advisory committees is the measure, the century-plus series of fiscal statutes must be said to have met with very limited success. In the report of a 1970 study conducted by the Special Studies Subcommittee of the House Committee on Government

[18] David S. Brown, *The Management of Advisory Committees: An Assignment for the '70's*, 32 Pub. Ad. Rev. 334, 335 (1972); Richard O. Levine, *Comment*, *The Federal Advisory Committee Act*, 10 Harv. J. on Legis. 217, 217–18 (1973).

Operations, Subcommittee Chairman John Monagan described the committees in the following terms: "Sort of like satellites, I think of them in that way . . . They go out into outer space but they keep circling around, you know, and no one really knows how many there are or what direction they are going in, or what duplication there is."[19]

In 1972, Congress made its first attempt to comprehensively regulate advisory committees—the Federal Advisory Committee Act (FACA), Pub. L. No. 92-463, 86 Stat. 770 (Oct. 6, 1972), codified in the appendix to title 5 of the United States Code, sections 1–16, as amended. FACA's purposes are "to eliminate unnecessary committees; to govern the administration of those that remain; and to inform the public about [their] membership and . . . activities."[20] It does this by regulating the creation, operation, and termination of executive branch advisory committees. The theory, in plain English, is to start when you are needed and quit when you are done. The General Services Administration (GSA) is given the job of prescribing "administrative guidelines and management controls applicable to advisory committees." 5 U.S.C. app. § 7(c). GSA's regulations are found in 41 C.F.R. part 102-3.[21]

The key issue under FACA, and certainly the most hotly litigated, is how to determine whether or not the statute applies to a particular body. As discussed later, this determination has fiscal consequences. In addition,

[19] House Committee on Government Operations, *The Role and Effectiveness of Federal Advisory Committees*, H.R. Rep. No. 91-1731, at 2 (1970) (quoting a statement made in committee hearings).

[20] Michael H. Cardozo, *The Federal Advisory Committee Act in Operation*, 33 Admin. L. Rev. 1, 10 (1981). The quoted passage is distilled from 5 U.S.C. app. § 2 (*Findings and purpose*). With respect to the objective of eliminating useless committees, see *Carpenter v. Morton*, 424 F. Supp. 603 (D. Nev. 1976); GAO, *Better Evaluations Needed to Weed Out Useless Federal Advisory Committees*, GGD-76-104 (Washington, D.C.: Apr. 7, 1977).

[21] The Supreme Court has said that the GSA regulations merit "diminished deference" because they were not issued contemporaneous with the statute and because 5 U.S.C. app. § 7(c), the statutory authority pursuant to which the GSA regulations were promulgated, does not impose liability for violation of the GSA regulations nor has Congress otherwise declared that such regulations shall have the force of law. *Public Citizen v. Department of Justice*, 491 U.S. 440, 463–65 n.12 (1989). The D.C. Circuit accords them no deference because FACA is "applicable to all agencies." *Association of American Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993). *See also Collins v. National Transportation Safety Board*, 351 F.3d 1246 (D.C. Cir. 2003) (noting that for generic statutes like FACA, their broad applicability undermines any basis for deference and courts, therefore, must review interpretive questions *de novo*).

wholly apart from fiscal matters, a determination that FACA applies means that, among other things: the committee must prepare a detailed charter and file it with appropriate officials before it can meet or take any action (5 U.S.C. app. § 9(c)); its meetings must be open to the public (5 U.S.C. app. § 10(a)(1)); notice of each meeting must be published in the Federal Register (5 U.S.C. app. § 10(a)(2)); it must keep detailed minutes of each meeting (5 U.S.C. app. § 10(c)); a designated officer or employee of the federal government must call or approve each meeting, and an officer or employee of the federal government must chair or attend each meeting (5 U.S.C. app. §§ 10(e), (f)); and it must make transcripts of meetings available to the public at actual duplication cost (5 U.S.C. app. § 11(a)). Advisory committees also must "be fairly balanced in terms of the points of view represented and the functions to be performed." 5 U.S.C. app. §§ 5(b)(2) and (c); 41 C.F.R. §§ 102-3.30(c) and 102-3.60(b)(3). *See also National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1073 n.1 (D.C. Cir. 1983).

Courts have held that no private cause of action exists under FACA. This is because neither FACA's text nor its structure "evinces a congressional intent to confer on private litigants a right to enforce the statute's requirements." *International Brominated Solvents Ass'n v. American Conference of Governmental Industrial Hygienists, Inc.*, 393 F. Supp. 2d 1362, 1377–78 (M.D. Ga. 2005). *See also Cheney v. United States District Court*, 542 U.S. 367, 374–75 (2004) (acknowledging district court's holding that FACA does not create a private cause of action); *Natural Resources Defense Council v. Abraham*, 223 F. Supp. 2d 162, 176 (D.D.C. 2002), *vacated in part on other grounds*, 353 F.2d 40 (D.C. Cir. 2004) (courts may not imply the existence of a private cause of action under a statute such as FACA where the plain intent of that statute does not create a cause of action). Further, FACA does not prescribe remedies or penalties for violations. *See* B-278940, Jan. 13, 1998. Thus, assuming a plaintiff can establish standing and then establish some violation, it is up to the court, within the limits of judicial power, to devise an appropriate remedy that is tailored to further FACA's goals of public accountability and reduction of economic waste. *See California Forestry Ass'n v. United States Forest Service*, 102 F.3d 609 (D.C. Cir. 1996) (citing *Public Citizen*, 491 U.S. at 459); *Akzo-Nobel, Inc. v. United States*, No. 00-30834 (5th Cir. 2001). One court, after finding FACA violations, permanently enjoined the agency from using the advisory body's report, "the product of a tainted procedure." *Alabama-Tombigbee Rivers Coalition v. Department of Interior*, 26 F.3d 1103, 1107 (11th Cir. 1994). Another potential form of relief is the declaratory judgment. *E.g.*, *National Nutritional Foods Association v. Califano*, 603 F.2d 327, 336 (2nd Cir. 1979). The Second Circuit further noted in *Califano* that, at least as of 1979, no court had used a FACA violation to "invalidate a regulation adopted under otherwise appropriate procedures." *Id.* Other forms of relief might include orders to open future meetings to the public, produce documents, or comply with any of FACA's other procedural requirements, depending on the precise violation. As far as we are aware, no court has yet to suggest that it could award a judgment for money damages.

(1) Definition and specific exemptions

The Federal Advisory Committee Act (FACA), as amended by the Federal Advisory Committee Act Amendments of 1997,[22] defines "advisory committee" as follows:

> "The term 'advisory committee' means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is—
>
> (A) established by statute or reorganization plan, or
>
> (B) established or utilized by the President, or
>
> (C) established or utilized by one or more agencies,
>
> in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration."

5 U.S.C. app. § 3(2).

[22] Pub. L. No. 105-153, § 2(a), 111 Stat. 2689 (Dec. 17, 1997).

In assessing the scope of section 3(2), the first (and easiest) step is to exclude those entities FACA itself expressly exempts. Of the exemptions in section 3(2), the exemption for committees composed wholly of government officials is the most important. For the most part, this is relatively straightforward and easy to apply, but not always. One issue in *Association of American Physicians & Surgeons (AAPS) v. Clinton*, 997 F.2d 898 (D.C. Cir. 1993), was the status of the President's spouse. President Clinton had asked the First Lady to chair his Task Force on National Health Care Reform. If she could be regarded as a government official, FACA would not apply because everyone else on the task force was unquestionably a government official. While the court believed the question far from easy, *id.* at 906, it found persuasive the suggestion that "Congress itself has recognized that the President's spouse acts as the functional equivalent of an assistant to the President." *Id.* at 904 (emphasis omitted). The First Lady could therefore be deemed a *de facto* officer of the government for FACA purposes. *Id.* at 905.

Also at issue in *AAPS* was whether the interdepartmental working group established by the President (separate from the task force) for the purpose of gathering information and developing options on health care reform for the task force was an advisory committee subject to FACA. The working group allegedly consisted of both federal employees and private consultants who attended at least some working group meetings. *Id.* at 914–15. The court stated that if a consultant's involvement and role in an advisory committee is indistinguishable from other members, for example, the consultant regularly attends and fully participates in committee meetings as if he were a member, he is a *de facto* member of the committee and "his status as a private citizen would disqualify the working group from the section 3(2) exemption for meetings of full-time government employees." *Id.* at 915.

The analysis can also be complicated when there are separation of powers concerns. For example, in 2001, President Bush created the National Energy Policy Development Group (NEPDG) to advise and make recommendations to him regarding energy policy. Although the only officially named members of the NEPDG were the Vice President, several cabinet officers, and other high level federal officials, private sector representatives were alleged to have had extensive participation in NEPDG meetings and activities as well. Public interest groups filed suit under FACA against the NEPDG and its individual members, seeking access to NEPDG records. They argued, among other things, that the private individuals had played such a substantial role in the group's activities that under *AAPS*, they became *de facto* members.

In response, the government filed a petition seeking to modify or dissolve plaintiff's discovery order, among other things, which made its way to the Supreme Court. The Court was sympathetic to the Vice President's argument that applying FACA would violate separation-of-powers principles and interfere with the executive's constitutional prerogatives. According to the Court, the separation-of-powers considerations include giving "recognition to the paramount necessity of protecting the Executive Branch from vexatious litigation that might distract it from the energetic performance of its constitutional duties." *Cheney v. United States District Court*, 542 U.S. 367, 382 (2004). The Supreme Court remanded the case to the D.C. Circuit Court of Appeals for "reexamin[ation of] . . . whether [FACA] embodies the *de facto* membership doctrine." *Id.* at 371.

On remand, the D.C. Circuit ruled that the private individuals were not *de facto* members and thus that the NEPDG was not subject to FACA. *In re Cheney*, 406 F.3d 723 (D.C. Cir. 2005). The court reasoned that "[i]n light of the severe separation-of-powers problems in applying FACA on the basis that private parties participated in, or influenced, or were otherwise involved with a committee in the Executive Office of the President," strict construction of the statute is required. *Id.* at 728. Accordingly, the court held that, "if the President has given no one other than a federal official a vote in or, if the committee acts by consensus, a veto over the committee's decisions," an advisory committee is deemed composed wholly of federal officials, and thereby qualifies for the section 3(2) FACA exemption. *Id.* Thus, under *In re Cheney*, an individual would have to have an official vote or veto to qualify as a *de facto* member.

The exemption for committees created by the National Academy of Sciences or the National Academy of Public Administration was added in the 1997 amendment.[23] While exempt from the section 3(2) definition, they

[23] The original version of section 3(2), until the 1997 amendment, exempted the Commission on Government Procurement and the Advisory Committee on Intergovernmental Relations (ACIR). The Procurement Commission finished its job in 1973. The ACIR was terminated in 1995, but extended the following year for the sole and limited purpose of performing a contract with the National Gambling Impact Study Commission. Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, title IV, 109 Stat. 468, 480 (Nov. 19, 1995) (termination); Pub. L. No. 104-328, 110 Stat. 4004 (Oct. 19, 1996) (extension).

are nevertheless subject to a set of procedures included in the 1997 legislation. 5 U.S.C. app. § 15. Section 4 of FACA further exempts committees whose enabling legislation specifically provides otherwise (this would be the case in any event); committees established or utilized by the Central Intelligence Agency or the Federal Reserve System; and certain state and local bodies.

Exemptions, of course, may appear in other statutes. For example, section 204(b) of the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48, 65–66 (Mar. 22, 1995), codified at 2 U.S.C. § 1534(b), renders FACA inapplicable to meetings between federal and state, local, or tribal officials, if they deal solely with federal programs “that explicitly or inherently share intergovernmental responsibilities or administration.” *See also* 41 C.F.R. § 102-3.40(g) (intergovernmental committees not covered). Similarly, section 3112 of the National Defense Authorization Act for Fiscal Year 2004 permits an officer or employee of a management and operating contractor of the Department of Energy to be treated as an officer or employee of the Department for purposes of determining whether the group is an advisory committee within the meaning of section 3 of FACA.[24] Pub. L. No. 108-136, div. C, title XXXI, 117 Stat. 1392, 1743 (Nov. 24, 2003), 42 U.S.C. § 7234 note.

Other exemptions have been recognized administratively or derive from case law. For example, the Justice Department has concluded that FACA does not apply to a body created jointly by the United States and another nation. 3 Op. Off. Legal Counsel 321 (1979). The Justice Department also concluded in 1988 that the Smithsonian Institution is not a FACA “agency.” It reasoned that because FACA incorporates the definition of agency under the Administrative Procedure Act (APA), 5 U.S.C. § 551(1), and the Smithsonian does not meet the terms of the APA’s definition, the Smithsonian and any of its advisory bodies are not covered by FACA. 12 Op. Off. Legal Counsel 122 (1988). The D.C. Circuit has since buttressed this conclusion by confirming that the Smithsonian is not an APA agency.

[24] This provision was enacted following the district court’s decision in *Natural Resources Defense Council v. Abraham*, 223 F. Supp. 2d 162 (D.D.C. 2002). The court held that FACA applied to a committee that consisted of federal employees and employees of contractors who managed and operated Department of Energy-owned laboratories, where the contractors were providing advice on a project that lay outside of their specific contract. *Id.* at 192. As a result of the enactment of the statute, the district court order pertaining to the FACA violation was set aside in *Natural Resources Defense Council v. Department of Energy*, 353 F.3d 40 (D.C. Cir. 2004).

Dong v. Smithsonian Institution, 125 F.3d 877 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 922 (1998).

If the specific exemptions do not resolve the question, there are several principles that are relevant in assessing applicability. They are, unfortunately, often difficult to apply, and we do little more than note them and allude to the problem areas.[25]

(2) Advisory *versus* operational

By its terms, the Federal Advisory Committee Act (FACA) applies to committees which are purely advisory. In general, it does not apply to bodies that are "operational." *See* 5 U.S.C. app. § 9(b) ("[u]nless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions"); § 2(b)(6) ("the function of advisory committees should be advisory only"). With respect to these provisions, as one court has said, "Congress intended that federal decision makers, not their advisers or delegatees, execute federal policy." *Consumers Union v. Department of Health, Education and Welfare*, 409 F. Supp. 473, 477 (D.D.C. 1976), *aff'd*, 551 F.2d 466 (1977). The Justice Department has offered a useful test: does the body make or implement decisions itself, or does it offer advice to federal officials who themselves will then make the decisions? 5 Op. Off. Legal Counsel 283, 285 (1981).

Illustrative cases include *Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996) (the Low Back Panel, although established by the government, was charged with developing guidelines for health care practitioners rather than providing advice to the federal government, and was therefore operational); *Public Citizen v. Commission on the Bicentennial of the United States Constitution*, 622 F. Supp. 753 (D.D.C. 1985) (Bicentennial Commission primarily operational and therefore exempt); 57 Comp. Gen. 51 (1977) (same result for National Commission on the Observance of International Women's Year); B-222831-O.M., May 30, 1986 (Statue of Liberty-Ellis Island Foundation). The fact that the commission may be required to submit reports to the President and/or Congress when it has finished its work does

[25] Good references are Stephen P. Croley, *Practical Guidance on the Applicability of the Federal Advisory Committee Act*, 10 Admin. L.J. 111 (1996); Stephen P. Croley and William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 Yale J. on Reg. 451 (1997).

not change the result. *Public Citizen*, 622 F. Supp. at 758. These cases, by the way (except for *Sofamor*), point to one type of body which is almost always operational—the commemorative or memorial commission. Their role is usually to plan, coordinate, and implement a particular celebration. Further examples of this type are the Christopher Columbus Quincentenary Jubilee Commission, Pub. L. No. 98-375, 98 Stat. 1257 (Aug. 7, 1984); the Civil War Centennial Commission, Pub. L. No. 85-305, 71 Stat. 626 (Sept. 7, 1957); and the National Capital Sesquicentennial Commission, Pub. L. No. 80-203, 61 Stat. 396 (July 18, 1947).

The more difficult situation arises when a body has both advisory and operational functions. FACA clearly anticipates its applicability to committees with some operational functions. For example, a covered committee's charter must specify "a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions." 5 U.S.C. app. § 9(c)(F). Also, the fragment of section 9(b) of FACA quoted above explicitly recognizes the inclusion of nonadvisory functions if specifically provided by statute or Presidential directive. The General Services Administration (GSA) regulations implement these distinctions by exempting committees which are "established to perform primarily operational as opposed to advisory functions." 41 C.F.R. § 102-3.40(k). An illustrative case is *Natural Resources Defense Council v. EPA*, 806 F. Supp. 275 (D.D.C. 1992) (the Environmental Protection Agency's (EPA) Governors' Forum on Environmental Management primarily operational because participating state governors acted as independent chief executives in partnership with EPA in implementing pertinent legislation). GSA's regulation provides further, however, that a primarily operational committee can become subject to FACA "if it becomes primarily advisory in nature." 41 C.F.R. § 102-3.40(k).

(3) <u>Who is being advised?</u>

The definition of an advisory committee in section 3(2) of the Federal Advisory Committee Act (FACA), 5 U.S.C. app. § 3(2) quoted above, refers to bodies established or utilized "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." Section 3(3) of FACA expressly incorporates the Administrative Procedure Act definition of "agency," 5 U.S.C. § 551(1), which specifically excludes Congress. *See also* 5 U.S.C. app. § 2(a). Thus, assuming the absence of any other disqualifying factors, an advisory committee will be subject to FACA if it advises the President and/or an executive agency, but not if it advises Congress. *E.g.*, B-135945, Mar. 29, 1973 (National Study Commission established by Federal Water Pollution Control Act exempt from FACA because it advises Congress). As that decision points out, language to specifically include Congress was contained in earlier versions of FACA but was deleted prior to enactment. Similarly, a body established to advise the Comptroller General, an official of the legislative branch, is for that reason not subject to FACA. B-130961-O.M., Feb. 12, 1974.

What if an advisory body is required to report both to Congress and to the President and/or an executive agency? An early decision espoused the view that merely including Congress on the list of recipients is enough to invoke the exemption. B-178395, Apr. 26, 1973. However, this essentially "form over substance" approach has not been followed, and later opinions by GAO and the Justice Department stress the need to examine the committee's nature and essence. For example, the legislation establishing the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research directed the commission to report to the President, the Congress, and the Secretary of the then Department of Health, Education, and Welfare. Considering all relevant factors—the legislative scheme in its entirety, the legislative history, and the real essence of the commission's functions—GAO concluded that the commission was "viewed by Congress as a body intended primarily to provide assistance to the Secretary," and therefore subject to FACA. B-143181, Oct. 9, 1975. Similarly, the Justice Department concluded that the Native Hawaiians Study Commission was established primarily to advise Congress and was accordingly exempt from FACA, even though it was required to report as well to the President. 6 Op. Off. Legal Counsel 39 (1982).

Justice has applied the same type of approach where an advisory committee reports to several executive branch recipients, some of which are covered by FACA and some of which are exempt. *See* 12 Op. Off. Legal Counsel 11 (1988) (Presidential Task Force on Market Mechanisms exempt from FACA because of its relationship to the Federal Reserve Board, notwithstanding that it also reports to the President and Secretary of the Treasury).

(4) "Established or utilized"

A key portion of section 3(2) of the Federal Advisory Committee Act's (FACA) definition of advisory committee is that the group be "established or utilized" by the President or by one or more agencies "in the interest of obtaining advice or recommendations for the President or one or more agencies." Of the two words, "established" tends to be the easier to apply. It generally means created directly by a statute, the President, or a federal agency. "Established by statute" requires that the statute at least directly authorize the creation of advisory committees, if not the specific committee in question; committees "which merely can be said to owe their existence to legislation" do not meet the standard. *Lombardo v. Handler*, 397 F. Supp. 792, 796 (D.D.C. 1975), *aff'd mem.*, 546 F.2d 1043 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 932 (1977). A group established by a government contractor is not, for FACA purposes, established by the government. *E.g.*, *Food Chemical News v. Young*, 900 F.2d 328 (D.C. Cir.), *cert. denied*, 498 U.S. 846 (1990).

Also, since section 3(3) of FACA defines agency by incorporating the Administrative Procedure Act definition, 5 U.S.C. § 551(1), FACA will not apply to a body, however advisory it may be, created by a government entity not covered by the APA definition. For example, an advisory body established by the United States Sentencing Commission, an agency in the judicial branch, was found exempt from FACA in *Washington Legal Foundation v. United States Sentencing Commission*, 17 F.3d 1446 (D.C. Cir. 1994). The reason is that the APA definition excludes "the courts" and "the Congress," and the courts have broadly construed this as excluding basically the entire judicial and legislative branches. *Id.* at 1449. *See also Aluminum Company of America v. National Marine Fisheries Service*, 92 F.3d 902 (9th Cir. 1996) (group formed by federal and nonfederal litigants to advise on compliance with court order was prompted, if by any single agency, by the district court and therefore exempt from FACA).

The word "utilized" is much more difficult. Prior to 1989 at least, there was no universally accepted approach to its application. The problem is that giving "utilized" its ordinary meaning, "make use of," would bring in a variety of private bodies seemingly beyond the scope of FACA's intended reach. Some courts applied a fairly straightforward approach. *E.g.*, *Food Chemical News*, *Inc. v. Davis*, 378 F. Supp. 1048 (D.D.C. 1974) (agency which solicited comments from private industry group incident to considering change to regulations indisputably utilized that group to obtain advice). Others, viewing the term "utilized" as ambiguous, were guided more by legislative history. *E.g.*, *Lombardo*, 397 F. Supp. at 800.

The Supreme Court confronted the issue in *Public Citizen v. United States Department of Justice*, 491 U.S. 440 (1989). The question was whether

FACA applied to consultations between the Justice Department and a standing committee of the American Bar Association regarding potential nominees for federal judgeships. Clearly, the standing committee was not established by the President or by the Justice Department. Equally clearly, if "utilized" were given its ordinary meaning, then the ABA committee was utilized by Justice.

However, the Court realized that a literal reading of section 3(2) would expand FACA's coverage far beyond what Congress had in mind, and would also implicate constitutional concerns. In what may become the most quoted judicial statement since "I know it when I see it," the Court called the word "utilize" a "woolly verb, its contours left undefined by the statute itself." *Public Citizen*, 491 U.S. at 452. This being the case, the Court looked to legislative history to shear the wool, and found that Congress seemed concerned mostly with "groups organized by, or closely tied to, the Federal Government, and thus enjoying quasi-public status." *Id.* at 461. The Court continued:

> "The phrase 'or utilized' . . . appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations . . . 'for' public agencies as well as 'by' such agencies themselves."

Id. at 462. Under this approach, the ABA committee—privately formed and "in receipt of no federal funds and not amenable to . . . strict management by agency officials" (*id.* at 457–58)—was clearly excluded.

Several lower courts have suggested that *Public Citizen* treated "utilize" essentially as a form of "established." *E.g.*, *Aluminum Company of America*, 92 F.3d at 905. While there is some truth to this and the distinction surely has been blurred, the fact remains that the statute uses the word "or" and that therefore they are two separate and exclusive concepts. *Huron Environmental Activist League v. EPA*, 917 F. Supp. 34, 40 n.6 (D.D.C. 1996). "Established" refers to a government-formed body while "utilized" refers to a group formed by nongovernment sources but which is nevertheless sufficiently close to an agency as to be amenable to management or control by that agency. *Food Chemical News*, 900 F.2d at 332–33. As the D.C. Circuit phrased it in *Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996), in light of the *Public Citizen's* interpretation of "utilize," "FACA can only apply if the committee is established, managed, or controlled for the purpose of obtaining advice or recommendations for the federal government." *Sofamor*, 61 F.3d at 936.

If one point emerges from *Public Citizen* and its progeny, it is that FACA will be difficult to apply to a body not established by the government. To cite a few examples, the courts have found that the following entities were not subject to FACA because they were not utilized in the *Public Citizen* sense:

- Working groups created to aid in implementing a court order regarding the protection of an endangered species. The groups were not funded by the government, nor were they subject to federal management. *Aluminum Company of America*, 92 F.3d 902.

- A group of experts established by a contractor to advise on food and cosmetic safety issues. Not only did the contractor, a private organization, not enjoy "quasi-public status," it set the group's agenda, scheduled its meetings, and reviewed its work. *Food Chemical News*, 900 F.2d at 333.

- A cement industry group that met with EPA. Although EPA determined the schedule and made other logistical arrangements for meetings with the cement industry group, there was no showing that the group was subject to EPA's management or control or that it was "so closely tied to the executive branch of the government as to render it a functionary thereof." *Huron Environmental Activist League*, 917 F. Supp. at 40.

- An advisory committee to the Sentencing Commission was not utilized by the Justice Department because, as a judicial branch entity, it was not, and could not be, managed or controlled by Justice. Minority membership on the committee (in this case, 2 Justice officials out of 16 members) is not control. *Washington Legal Foundation*, 17 F.3d at 1450–51.

As noted above, all of these cases involved the interpretation of the term "utilized" in section 3(2) of FACA. However, the term is also used in section 4(b) of FACA, which expressly exempts from FACA requirements advisory committees that are "established or utilized" by the Central Intelligence Agency (CIA): "Nothing in this Act shall be construed to apply to any advisory committee established or utilized by—(1) the Central Intelligence Agency." The use of the term "utilized" in the section 4(b) sense was addressed in *Center for Arms Control and Non-Proliferation v. Lago*, Civ. A. No. 05-682(RMC) (D.D.C. Nov. 15, 2006). By Executive Order No. 13328, Feb. 6, 2004, the President established the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction (Commission) to investigate the intelligence communities' prior assessments of and current capabilities to confront weapons of mass destruction in Iraq, and submit a report on its findings and recommendations by March 31, 2005. The Executive Order also provided that the "Central Intelligence Agency and other components of the Intelligence Community shall utilize the Commission and its resulting report." Exec. Order No. 13328, ¶ 2(d). The Center for Arms Control and Non-Proliferation (Center)[26] sought the materials used in developing the Commission's report, and in the process the Center brought suit complaining that the Commission had failed to comply with certain of FACA's requirements, such as keeping detailed minutes of each meeting and making records available for public inspection. *See* 5 U.S.C. app. §§ 10(b), (c), and 11(a).

In determining whether the Commission was an advisory committee under FACA, the court considered the cases such as *Public Citizen* and its progeny, which addressed the definition of "utilized" in the context of FACA section 3(2), and summarized the definitions in those circumstances: "[A] committee is 'established' when it is formed by a Government agency, and 'utilized' when it is organized by a non-governmental entity 'but nonetheless so closely tied to an agency as to be amendable to strict management by agency officials.'" *Center for Arms Control and Non-Proliferation*, slip op. at 6 (citations omitted). The court found these definitions did not apply to the concept of "utilized" as used in FACA section 4(b), which should be read more broadly to ensure that FACA's requirements "would not interfere with or jeopardize the confidentiality of the workings of the CIA." *Id.* at 8. The court instead read the word "utilized" in section 4(b) in light of its common meaning "to put to use." *Id.* In this case, although the CIA did not have any particular management role *vis-à-vis* the Commission's work, the fact that the CIA could "utilize" or, using the court's definition, "put to use" the Commission and its report was sufficient to trigger the FACA exemption in section 4(b). *Id.*

[26] The Center is a private, nonprofit policy organization that seeks the reduction and eventual elimination of all weapons of mass destruction as a significant tool of U.S. national security policy. More information is available at the Center's Web site, www.armscontrolcenter.org (last visited Nov. 28, 2007).

(5) <u>Other factors</u>

The Federal Advisory Committee Act (FACA) applies to a group acting as a group; it does not apply to individuals acting as individuals just because they happen to be in the same place while they are doing it. *Association of American Physicians & Surgeons (AAPS) v. Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993) (court opined that FACA does not apply to a "collection of individuals who do not significantly interact with each other"); *Aluminum Company of America v. National Marine Fisheries Service*, 92 F.3d 902, 907 (9th Cir. 1996) (*quoting AAPS*). The GSA regulations reflect this point. *See* 41 C.F.R. § 102-3.40 (formerly 41 C.F.R. § 101-6.1004), discussed in B-202455, Aug. 30, 1984, and B-202455, Mar. 21, 1985. As the Justice Department has put it:

> "FACA applies by its terms to 'advisory committees.' 'Advisory committee' is a term that connotes a body that deliberates together to provide advice. Therefore, as a matter of statutory construction, we believe that FACA does not apply to a group which simply acts as a forum to collect individual views rather than to bring a collective judgment to bear."

14 Op. Off. Legal Counsel 53, 55 (1990). The requirement that a committee act as a committee does not mean that it must give "consensus advice." *AAPS*, 997 F.2d at 913.

Consensus or not, the advice must relate directly to governmental policy issues. *Judicial Watch, Inc. v. Clinton*, 76 F.3d 1232, 1233 (D.C. Cir. 1996) (Presidential legal expense trust, established to help defray personal legal fees, not subject to FACA); *Grigsby Brandford & Co. v. United States*, 869 F. Supp. 984, 1001 (D.D.C. 1994); 41 C.F.R. § 102-3.25 (the General Services Administration's definition of advisory committee).

An important, although not in and of itself necessarily conclusive, factor is the degree of formality attaching to the group. An early and often-cited FACA case held the statute inapplicable to a group whose "meetings are unstructured, informal and not conducted for the purpose of obtaining advice on specific subjects indicated in advance." *Nader v. Baroody*, 396 F. Supp. 1231, 1234–35 (D.D.C. 1975). Other cases, however, have applied FACA to informal meetings. *E.g.*, *National Nutritional Foods Ass'n v. Califano*, 603 F.2d 327 (2nd Cir. 1979); *Food Chemical News, Inc. v. Davis*, 378 F. Supp. 1048 (D.D.C. 1974). The more recent trend seems to be to follow the approach of *Baroody*. Thus, the D.C. Circuit has stated: "In order to implicate FACA, the President, or his subordinates, must create an advisory group that has, in large measure, an organized structure, a fixed membership, and a specific purpose." *AAPS*, 997 F.2d at 914, *cited in Aluminum Company of America*, 92 F.3d at 906 ("existence of a formal and structured group leans toward a finding of FACA applicability"). *See also Huron Environmental Activist League v. EPA*, 917 F. Supp. 34, 42 (D.D.C. 1996); *Grigsby Brandford & Co.*, 869 F. Supp. at 1001.

A group's funding is also relevant but not conclusive. One of the factors the Supreme Court noted in holding FACA inapplicable to the American Bar Association's committee on federal judgeships was that it was "in receipt of no federal funds." *Public Citizen v. Department of Justice*, 491 U.S. 440, 457 (1989). *See also Aluminum Company of America*, 92 F.3d at 906. Thus, the absence of federal funding is a factor supporting a conclusion of nonapplicability. In view of all the other ways to fall outside the statute, the presence of federal funding would not appear to be particularly revealing one way or the other. While the mere existence of federal funding may not tell you very much, its precise source may. For example, in determining that a particular committee was designed primarily to advise Congress rather than the President, the Justice Department found it relevant that the committee was originally funded from the contingent fund of the Senate. 6 Op. Off. Legal Counsel 39, 41–42 (1982). *See also* 13 Op. Off. Legal Counsel 285, 290 n.11 (1989) for a case in which no clear inferences could be drawn.

The status of subcommittees or subgroups is not entirely clear. The FACA definition expressly includes boards, committees, *etc.*, "or any subcommittee or other subgroup thereof." 5 U.S.C. app. § 3(2). One court has found that task forces of the President's Private Sector Survey on Cost Control were not subject to FACA because "[t]hey do not directly advise the President or any federal agency, but rather provide information and recommendations for consideration to the Committee." *National Anti-Hunger Coalition v. Executive Committee*, 557 F. Supp. 524, 529 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983). Under this approach, the subgroup operates essentially as staff of the parent committee. GAO questioned whether this is really what Congress had in mind:

> "One would expect most subcommittees or subgroups to report to their parent committee, rather than bypassing the parent committee and reporting directly to a Federal official. . . . There is no reason to presume that Congress

intended subcommittees or subgroups to be included only in those unusual circumstances where they side-step their parent committees."

B-199008-O.M., June 14, 1983, at 9.

As discussed earlier, the D.C. Circuit revisited the issue in the 1993 case, *Association of American Physicians & Surgeons v. Clinton*, 997 F.2d 898, where the court examined the status of a working group set up to assist the President's Task Force on National Health Care Reform. Although not expressly repudiating the *Anti-Hunger* reasoning in all cases, the court now pointed out that "we did not explicitly approve the judge's reasoning relating to the supposed staff groups." *AAPS*, 997 F.2d at 912. While the court did not have sufficient information to decide the issue, it hinted strongly that subgroups would be subject to different degrees of stringency depending on whether the parent group was (as in *Anti-Hunger*) or was not (as in *AAPS*) itself subject to FACA.

> "In contrast to the situation here, in *Anti-Hunger* the top levels of the *outside* advisory groups were covered by FACA. . . . In that scenario, there is less reason to focus on subordinate advisers or consultants who are presumably under the control of the superior groups. . . . But when the Task Force itself is considered part of the government—due to the government officials exemption—we must consider more closely FACA's relevance to the working group. For it is the working group that now is the point of contact between the public and the government."

AAPS, 997 F.2d at 913 (emphasis in original). The court did not address the extent to which the distinction would be relevant, if at all, where the parent body is exempt from FACA for some reason other than the government officials' exemption.

b. Creation and Funding

Funding of a federal advisory committee depends largely on how it was created. Creation is addressed in section 9(a) of the Federal Advisory Committee Act:

> "(a) No advisory committee shall be established unless such establishment is—

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record by the head of the agency involved after consultation with the Administrator [of General Services] with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law."

5 U.S.C. app. § 9(a). As this provision indicates, and as the GSA regulations reflect (41 C.F.R. § 102-3.50), there are several ways to create an advisory committee:

- by statute;
- by the President, usually by executive order;
- by the President pursuant to statutory authorization;
- by an agency head.

Indeed, one of the significant features of section 9(a) is its explicit recognition of the nonstatutory creation of advisory committees by the executive branch.

(1) <u>Statutory committees: creation</u>

Congress, of course, can legislatively create committees or other groups, advisory and/or operational. Therefore, the discussion under this heading is not limited to advisory bodies. Statutes creating a board, commission, committee, or similar group may include the following elements:

It may prescribe the group's functions and duties. Unless otherwise provided, this description will determine whether the group is "primarily operational" and thus exempt from the Federal Advisory Committee Act (FACA). If the group's functions include holding hearings or taking testimony, the statute may address such topics as the expenses of witnesses and the treatment of subpoenas. *E.g.*, Pub. L. No. 104-169, § 5(a), 110 Stat. 1482, 1484–85 (Aug. 3, 1996) (National Gambling Impact Study Commission).

It may address the group's status under FACA. The statute may expressly provide that the group is subject to FACA. *E.g.*, 20 U.S.C. § 9252(e)(3)

(National Institute for Literacy Advisory Board). It may render the group wholly exempt from FACA. *E.g.*, Pub. L. No. 98-399, § 5(c), 98 Stat. 1473, 1474 (Aug. 27, 1984) (Martin Luther King, Jr. Federal Holiday Commission). Or, it may exempt the group from certain portions of FACA. *E.g.*, Pub. L. No. 93-348, § 211(a), 88 Stat. 342, 351–52 (July 12, 1974) (stating that section 14 of FACA—termination and renewal—shall not be applicable to the National Advisory Council for the Protection of Subjects of Biomedical and Behavioral Research).

It may prescribe the group's membership and composition. To the extent the group will include or consist of private members, it will prescribe who is to appoint them. *E.g.*, Pub. L. No. 86-380, § 3, 73 Stat. 703, 704 (Sept. 24, 1959) (Advisory Commission on Intergovernmental Relations members shall be appointed by the President, the President of the Senate, or the Speaker of the House); Pub. L. No. 93-348, § 211(a) (members shall be appointed by the department head). The statute may prohibit members from holding any other position as an officer or employee of the United States during their period of service.[27] *E.g.*, Pub. L. No. 90-515, § 2(b), 82 Stat. 868 (Sept. 26, 1968) (National Water Commission). Absent a provision of this nature, nothing prohibits a private individual from serving on more than one committee. Similarly, a government official may serve on more than one body as long as "the person receives only one salary, the positions are not 'incompatible' from the standpoint of public policy, and there is no augmentation of relevant appropriations." 14 Op. Off. Legal Counsel 157, 160 (1990). *See also* 8 Op. Off. Legal Counsel 200, 205–06 (1984).

It may address the compensation of members and, if applicable, the hiring of staff. Members may or may not be compensated for their services, and members serving without compensation may nevertheless be allowed travel expenses. An example is Pub. L. No. 98-399, § 4(d) (Martin Luther King, Jr. Federal Holiday Commission). Enabling statutes frequently provide that members who are officers or employees of the government or Members of Congress may not receive compensation for their service as members (because of the dual compensation laws, primarily 5 U.S.C. § 5533), but may be allowed travel expenses. *E.g.*,

[27] *See* 50 Comp. Gen. 736 (1971) (holding that membership on an advisory council was a position as an officer or employee of the United States for purposes of such a provision). For similar holdings in other contexts, see 24 Comp. Gen. 498, 500 (1945); 16 Comp. Gen. 495, 497 (1936); 23 Comp. Dec. 372, 374 (1917); 3 Op. Off. Legal Counsel 321, 322–23 (1979).

Pub. L. No. 91-129, § 5(a), 83 Stat. 269, 271 (Nov. 26, 1969) (Commission on Government Procurement).

Payment of a *per diem* amount in lieu of subsistence is available only where authorized by statute. 20 Comp. Gen. 361, 363 (1941) (Commission on Fine Arts); 10 Comp. Gen. 239, 240 (1930) (George Washington Bicentennial Commission). For committees subject to it, FACA provides the necessary authority. 5 U.S.C. app. § 7(d)(1)(B). For other groups, the authority must be found elsewhere. *E.g.*, 36 U.S.C. § 2303(a) (Holocaust Memorial Council).

In most cases, compensation is provided in one of two ways: (1) the "daily equivalent" of a specified grade/level of the General Schedule or Executive Schedule, or (2) a *per diem* basis, that is, a fixed number of dollars per day. In either case, compensation is payable only for days the member actually performs duties. The compensation is payable in full regardless of how much or how little the person works on any given day. 45 Comp. Gen. 131, 133 (1965) (addressing *per diem* payments); 28 Comp. Gen. 211–12 (1948) (same). (Of course, to trigger the entitlement at all, the "little" must exceed zero.)

Another type of compensation provision authorizes compensation in accordance with 5 U.S.C. § 3109, the expert and consultant statute. This will limit compensation to the highest rate for a GS-15 unless a higher rate is expressly provided by statute. 51 Comp. Gen. 224, 226 (1971); 43 Comp. Gen. 509 (1964); 29 Comp. Gen. 267, 268–69 (1949).

For advisory committees under FACA, the statute imposes a compensation ceiling of the rate specified for level IV of the Executive Schedule. 5 U.S.C. app. § 7(d); 5 U.S.C. §§ 5315, 5376 note. However, GSA's FACA regulations require the agency head to personally authorize any rate higher than GS-15. 41 C.F.R. § 102-3.130. Both the statute and regulations authorize the payment of travel expenses for duties performed away from home or regular place of business. 5 U.S.C. app. § 7(d); 41 C.F.R. § 102-3.130.

A common provision exempts members and/or staff from the so-called civil service laws. GAO has held that the phrase "civil service laws" refers to the statutes and regulations governing appointments, and does not include the provisions, now also in title 5, United States Code, addressing salary rates. 53 Comp. Gen. 531, 532 (1974). A more precise version of this language is "without regard to the provisions of [5 U.S.C.] governing appointments in the competitive service." Pub. L. No. 93-348, § 211(a). If exemption from both is desired, the modern language is "without regard to the provisions of [5 U.S.C.] governing appointments in the competitive service, and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates." *E.g.*, Pub. L. No. 108-458, § 1061(g)(1), 116 Stat. 3638, 3687–88 (Dec. 17, 2004) (Privacy and Civil Liberties Oversight Board); Pub. L. No. 100-94, § 5, 101 Stat. 700, 701 (Aug. 18, 1987) (Christopher Columbus Quincentenary Jubilee Commission).

It may make some provision for support services. The committee may need office space, office equipment, staff, *etc.* Especially if the committee is tied in by subject matter to some existing department, the legislation may direct that department to provide support services. Such support services may or may not be reimbursable. For example, the Interior Department is authorized to provide services and support to the Holocaust Memorial Council "on a reimbursable basis." 36 U.S.C. § 2304(d). In contrast, support services provided to the National Commission on Restructuring the Internal Revenue Service by the General Services Administration or the Treasury Department are to be "on a nonreimbursable basis." Pub. L. No. 104-52, § 637(d)(4), 109 Stat. 468, 511 (Nov. 19, 1995). Still another variation leaves it to the parties to fight it out. *E.g.*, Pub. L. No. 93-556, § 7(b), 88 Stat. 1788, 1792 (Dec. 27, 1974) (Commission on Federal Paperwork may obtain services from any government agency, "reimbursable or otherwise, as may be agreed" by the Commission and the agency).

It may prescribe applicable reporting requirements. (See section A.4.a(3) of this chapter.)

It may provide for the group's termination, at least for groups intended to have a short duration or single-project groups. A common provision mandates termination a specified number of days or months after submission of required reports. *E.g.*, Pub. L. No. 88-606, § 4(b), 78 Stat. 982, 983 (Sept. 19, 1964) (Public Land Law Review Commission shall terminate on the earlier of a fixed date or 6 months after submission of its report). Some entities may simply terminate on a fixed date, an approach suitable for memorial commissions, for example. *E.g.* Pub. L. No. 98-101, § 7, 97 Stat. 719, 722 (Sept. 29, 1983) (Commission on the Bicentennial of the Constitution "shall terminate on December 31, 1989").

For groups subject to it, FACA addresses termination if the establishing legislation is otherwise silent. An advisory committee will terminate two years after its date of establishment unless its duration is "otherwise provided for by law." 5 U.S.C. app. § 14(a)(2)(B). The Justice Department has concluded that the nature of a group's functions may exempt it from the automatic termination of section 14. Specifically:

> "In our view, the duration of a statutorily created advisory committee may be 'otherwise provided for by law' either expressly or by implication. Such duration is provided for by implication if the statute that creates or assigns functions to an advisory committee provides for it a specific function that is continuing in nature and is an integral part of the implementation of a statutory scheme."

3 Op. Off. Legal Counsel 170, 171 (1979). The requirement to make "periodic reports and recommendations" meets this test. *Id.* at 173–74.

(2) Statutory committees: funding

A board or committee created by Congress is generally funded under the standard two-step procedure: "first the program is authorized and, subsequently, appropriations are made available to carry out the program." B-39995-O.M., Apr. 28, 1983, at 2 (referring to the Cost Accounting Standards Board). The Federal Advisory Committee Act (FACA), 5 U.S.C. app. §§ 5(b)(4) and (5), contains provisions dealing with authorization of appropriations and the assurance that the advisory body will have funds available for its necessary expenses (although no precise mechanism is prescribed).

The authorization of appropriations may be indefinite, that is, such sums "as may be necessary."[28] Others may include a monetary ceiling.[29] Still others may cover multiple year periods either year-by-year or in the

[28] Examples are the Glass Ceiling Commission, Pub. L. No. 102-166, § 209, 105 Stat. 1071, 1087 (Nov. 21, 1991); the Commission on Government Procurement, Pub. L. No. 91-129, § 9, 83 Stat. 269, 272 (Nov. 2, 1969), and the Commission on Organization of the Executive Branch of the Government (the so-called Second Hoover Commission), Pub. L. No. 83-108, § 8, 67 Stat. 142, 144 (July 10, 1953).

[29] *E.g.*, Civil War Centennial Commission, Pub. L. No. 85-305, § 9, 71 Stat. 626, 628 (Sept. 7, 1957).

aggregate.[30] A variation provides a specific dollar authorization for the first year and "such sums as may be necessary" thereafter.[31] There appear to be no significant consequences flowing from which form is used, nor are we able to generalize as to when a particular form may be regarded as more appropriate.

The authorization is sometimes combined with language prohibiting expenditures except to the extent provided in advance in appropriation acts. *E.g.*, 36 U.S.C. § 2310 (Holocaust Memorial Council); Pub. L. No. 104-169, § 9(b), 110 Stat. 1482, 1488 (Aug. 3, 1996) (National Gambling Impact Study Commission). Even without language of this sort, an appropriation would still be necessary to carry out the authorization.

The next step is the actual appropriation. It can be an appropriation made directly to the entity; it can be an appropriation to an existing agency to be funneled to the entity; or it can be included in a lump-sum appropriation to a department or agency related in subject matter. The authorization of appropriations may influence this choice. Some authorizing provisions, for example, expressly authorize funds to be directly appropriated to the board or commission while others use more discretionary language (funds appropriated "for the activities of" the particular commission or simply "to carry out this act").

Whichever form is used, there is nothing particularly exotic about an appropriation for a miscellaneous board or commission. It is essentially no different from an appropriation for any other entity, and is governed by the same rules of purpose, time, and amount. The following paragraphs illustrate the application of some of these rules.

A board, committee, or other such entity must use an appropriation only for its intended purposes. This means the purposes stated in the appropriation and other pertinent legislation, as amplified by the "necessary expense" doctrine expounded in Chapter 4, section B. *E.g.*, B-211149, June 22, 1983 (because Holocaust Memorial Council had specific

[30] *E.g.*, Christopher Columbus Quincentenary Jubilee Commission, Pub. L. No. 98-375, § 11(a), 98 Stat. 1257, 1262 (Aug. 7, 1984) (year-by-year); Commission on Merchant Marine and Defense, Pub. L. No. 98-525, § 1536(i), 98 Stat. 2492, 2635 (Oct. 19, 1984) (aggregate).

[31] Commission on the Bicentennial of the Constitution, Pub. L. No. 98-101, § 8, 97 Stat. 719, 723 (Sept. 29, 1983).

authority to solicit donations, it could pay employees or consultants who engage in fund-raising).

Entertainment is not a proper expenditure unless Congress has authorized it. One way Congress does this is to appropriate part of a lump sum for "official reception and representation expenses." While this is the device most commonly used for larger agencies, it works just as well for a small board or commission. *E.g.*, Pub. L. No. 98-411, 98 Stat. 1545, 1568 (Aug. 30, 1984) (1985 appropriation for the Japan-United States Friendship Commission). Another device Congress has used—primarily with celebration/memorial commissions—is to include in the enabling statute authority to act "without regard to the laws and procedures applicable to Federal agencies." A commission with this authority can expend public funds for food and entertainment virtually at will. B-138969, Apr. 16, 1959 (Lincoln Sesquicentennial Commission); B-138925, Apr. 15, 1959 (Civil War Centennial Commission); B-129102, Oct. 2, 1956 (Woodrow Wilson Centennial Celebration Commission).

In making expenditures from a lump-sum appropriation, an agency's discretion is not legally limited by restrictions expressed in legislative history that are not carried into the statute itself. *E.g.*, 31 Comp. Gen. 412 (1952) (National Capital Sesquicentennial Commission could spend its appropriation on authorized activities and was not bound to follow instructions contained only in a committee report).

Money received for the use of the government, in accordance with the so-called miscellaneous receipts statute, 31 U.S.C. § 3302(b), must be deposited in the general fund of the Treasury, subject to exceptions discussed in detail in Chapter 6, section E.2.a. For the most part, a body which is purely advisory should not be in a position to generate receipts. Operational bodies, on the other hand, are more likely to be involved in activities that generate receipts and must therefore contend with the miscellaneous receipts statute.

Specific authority to credit receipts to its operating appropriation makes those funds available for expenditure without further congressional action, at least during the appropriation's period of obligational availability. B-90476, June 14, 1950 (charges for admission to exhibits, plays, and dramatic productions by the National Capital Sesquicentennial Commission). As noted above, language authorizing an agency to act without regard to the laws applicable to federal agencies is sufficient to remove the restriction on entertainment expenditures. Such language is equally sufficient to overcome the miscellaneous receipts statute. B-136051, Aug. 27, 1959 (concerning the sale of publications and commemorative medals by Civil War Centennial Commission). If the board or commission does not have specific authority to charge fees, it must rely on the so-called User Fee Statute, 31 U.S.C. § 9701, in which case the fees are fully subject to the miscellaneous receipts requirement.

In a 1936 case, the Northwest Territory Celebration Commission found itself in a dilemma. As part of the celebration, it wanted to print and sell cartographic maps of the Northwest Territory and to produce a "moving pageant." The states formed from the Northwest Territory, with whom the Commission was statutorily charged to cooperate, would each order, and pay for, the desired number of maps and performances. While the states were perfectly willing to pay their proportionate shares, the problem was that the Commission lacked authority to retain the receipts, and thus would have depleted its appropriation without reimbursement. The solution was to somehow furnish the goods and services without charge to the Commission's appropriation. The way to do this was for each participating state to advance its estimated share, which would be held in the Treasury in a trust fund account, from which expenditures could be made. If this approach were followed, it would be necessary to account for each state's funds separately so that any remaining unexpended balances could be refunded. A-51645, Nov. 6, 1936.

In the case of a small celebration/memorial commissions, GAO recommended that the statute authorize payment of the appropriation to the commission in one lump sum, at least where the statute does not otherwise address the handling of the commission's finances:

> "It is the view of this office that in cases of small appropriations for sectional celebrations, memorials, etc., where the authorizing resolution does not provide for the administrative handling of obligations and expenditures from such appropriations by an existing Government agency, it is preferable that the money be appropriated for payment as a gift in one lump sum to an established local body without any further accounting to the Federal accounting officers. [This procedure] . . . would remove the task of attempting at considerable cost to inform the inexperienced local person or body of persons in the field of the regulations, forms, and procedures required in accounting for public funds."

B-8474, Feb. 19, 1940, at 2. The subject of that discussion was the Benjamin Harrison Memorial Commission, established by statute. Pub. L. No. 76-352, 53 Stat. 1274 (Aug. 9, 1939). Shortly after GAO's opinion, the authorized amount was appropriated "to be paid to the Commission for expenditure within its discretion" for authorized purposes. First Deficiency Appropriation Act, 1940, Pub. L. No. 76-447, 54 Stat. 82, 83 (Apr. 6, 1940). However, it is not free money and the commission did have a record-keeping responsibility: "[I]t is felt desirable that [the commission] maintain an adequate record of such funds and of the expenditure thereof." A-84233, June 3, 1937, at 2 (Charles Carroll of Carrollton Bicentenary Commission).

Thus far, we have been talking about the fairly straightforward situation where Congress creates a body, authorizes the appropriation of funds, and then makes the appropriation. There are variations. Instead of creating the commission directly, Congress can authorize or direct the President to create it. *E.g.*, Pub. Res. No. 106, 74th Cong., ch. 556, 49 Stat. 1516 (June 15, 1936) (President authorized to establish Charles Carroll of Carrollton Bicentenary Commission); Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1511, 98 Stat. 2492, 2626 (Oct. 19, 1984) (President directed to establish Chemical Warfare Review Commission). Congress can fund the body by a direct appropriation (*e.g.*, First Deficiency Appropriation Act, Fiscal Year 1937, Pub. L. No. 75-4, 50 Stat. 8, 10 (Feb. 9, 1937)—Carroll Bicentenary Commission), or it can tell the President, in effect, to go hunt for the money. *See*, *e.g.*, 15 U.S.C. § 1022f(b) (describing compensation for advisory boards on national economic programs and policies). These statutes tend to be less detailed than their direct-creation siblings, the detail being filled in by the implementing executive order. *E.g.*, Exec. Order No. 12502, *Chemical Warfare Review Commission*, 50 Fed. Reg. 4,195 (Jan. 28, 1985).

Congress also, either in conjunction with a direct appropriation or without it, may require an existing department or agency to provide financial support services. For example, the law creating the Civil War Centennial Commission provided: "Expenditures of the Commission shall be paid by the National Park Service as general administrative agent, which shall keep complete records of such expenditures and shall account also for all funds received by the Commission." Pub. L. No. 85-305, § 6(b)(1), 71 Stat. 626, 627 (Sept. 7, 1957). Section 201 of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, 939 (Dec. 29, 1995), codified at 49 U.S.C. § 726(d)(2), authorizes the Secretary of Transportation or the Chairman of the Surface Transportation Board to "pay the reasonable and necessary expenses incurred by" the Railroad-Shipper Transportation Advisory

Council. Another variation is to appropriate money to an existing agency, to be transferred to the board or commission when it is legally capable of receiving them. *E.g.*, 2 Op. Off. Legal Counsel 366 (1977).[32]

Still another variation is found in the law establishing the National Commission on Restructuring the Internal Revenue Service: "The Secretary of the Treasury is authorized on a nonreimbursable basis to provide the Commission with administrative services, *funds*, facilities, staff, and other support services for the performance of the Commission's functions." Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, § 637(d)(4), 109 Stat. 468, 511 (Nov. 19, 1995) (emphasis added). Absent a direct appropriation, this would appear to be sufficient authority for Treasury to fund the Commission. However, if Congress had been making direct appropriations and then stopped, a provision of this sort would enable the supporting agency to provide various kinds of stopgap or perhaps even supplemental financial assistance, but would not permit funding of the commission's entire operations. B-39995-O.M., Apr. 28, 1983 (Cost Accounting Standards Board).

A provision for a designated agency to provide support services to a board or commission would normally imply that the board or commission is not authorized to obtain the services directly. 61 Comp. Gen. 69, 75 (1981). However, in the cited case, the United States Advisory Commission on Public Diplomacy was able to bypass its support agency and contract directly for certain services because it also had specific authority to hire experts and consultants in accordance with 5 U.S.C. § 3109.

For bodies created and funded by Congress, advisory or nonadvisory, FACA or non-FACA, the various funding restrictions described earlier in this section would not apply, except for the requirement for specific approval of interagency funding. One could concoct a scenario in which the Russell Amendment, 31 U.S.C. § 1347, might come into play (*e.g.*, a nonadvisory body created by statute, with no appropriations of its own but funded by an existing agency), but it would be rare.

To sum up, when Congress statutorily creates a board or commission, or authorizes or directs the executive branch to do so, it can fund the entity

[32] Although not germane to the result or to the point made in the text, the "appropriation" cited in the Office of Legal Counsel opinion was merely an authorization.

through the traditional authorization-appropriation process used for larger agencies, or it can resort to techniques which are perhaps regarded as more suitable for certain small entities. Whether the body is advisory subject to FACA, advisory but not subject to FACA, operational, or mixed, would not appear to make any significant difference except that operational bodies are more likely to be funded by direct appropriations. Legislation establishing a FACA committee will almost surely make some provision for support services, possibly including some funding, but Congress has used this device in non-FACA bodies as well.

(3) Committees established by the executive branch

The Justice Department has concluded that, with the possible exception of performing constitutional responsibilities in an emergency, the President lacks the power to create a new operational agency in the executive branch: legislation is required. 9 Op. Off. Legal Counsel 76, 78 (1985). However, this inhibition on creating agencies does not exist in the case of an advisory committee. As we have seen, the Federal Advisory Committee Act (FACA) explicitly recognizes, in 5 U.S.C. app. §§ 3(2) and 9(b), the inherent authority of the President, and of agency heads, to establish purely advisory bodies.[33]

A President creating an advisory body typically does so by issuing an executive order. The executive order may basically include the same elements that can be found in an enabling statute as outlined above. The executive order may establish the body, prescribe its functions, and address membership and composition, compensation, support services, and any reporting requirements. It may also address termination and the applicability of FACA.

As one court has noted, “FACA provides very little guidance as to the manner in which advisory committees are to be funded.” *Metcalf v. National Petroleum Council*, 553 F.2d 176, 180 (D.C. Cir. 1977). Be that as it may, the executive order must also provide for funding. While most of the committee’s needs will be met by the agency assigned to provide support services, it will still need some money for such things as travel

[33] *Cf., e.g., Association of American Physicians & Surgeons v. Clinton*, 997 F.2d 898, 908 (D.C. Cir. 1993) (court refuses to apply FACA in a way that would interfere with “the President’s capacity to solicit direct advice on any subject related to his duties from a group of private citizens, separate from or together with his closest governmental associates”).

expenses and printing of reports. The President, lacking the authority to authorize or appropriate funds, must look to some existing source. The most common approach is to designate an existing agency to provide funding, subject to the availability of appropriations. The funding agency must be sufficiently related in subject matter to the advisory body so as to pass muster from the perspective of purpose availability. Some examples, which will also provide some indication of the range of advisory bodies that are created, follow:

- Exec. Order No. 13398, § 6(b), 71 Fed. Reg. 20,519 (Apr. 18, 2006): National Mathematics Advisory Panel, funded by Department of Education.

- Exec. Order No. 13353, § 6, 69 Fed. Reg. 53,585 (Aug. 27, 2004): President's Board on Safeguarding American Civil Liberties, funded by Department of Justice.

- Exec. Order No. 13256, § 10(b), 67 Fed. Reg. 6,823 (Feb. 12, 2002): President's Board of Advisors on Historically Black Colleges and Universities, funded by Department of Education.

- Exec. Order No. 13037, § 4(b), 62 Fed. Reg. 10,185 (Mar. 3, 1997): Commission to Study Capital Budgeting, funded by Treasury Department.

- Exec. Order No. 13015, § 3(b), 61 Fed. Reg. 43,937 (Aug. 22, 1996): White House Commission on Aviation Safety and Security, funded by Department of Transportation.

- Exec. Order No. 12961, § 3(c), 60 Fed. Reg. 28,507 (May 26, 1995): Presidential Advisory Committee on Gulf War Veterans' Illnesses, funded by Department of Defense.

- Exec. Order No. 12546, § 3(c), 51 Fed. Reg. 4,475 (Feb. 3, 1986): Presidential Commission on the Space Shuttle Challenger Accident, funded by the National Aeronautics and Space Administration.

- Exec. Order No. 12367, § 3(b), 47 Fed. Reg. 26,119 (June 15, 1982): President's Committee on the Arts and the Humanities, funded by the National Endowment for the Arts.

- Exec. Order No. 12345, § 4(d), 47 Fed. Reg. 5,189 (Feb. 2, 1982): President's Council on Physical Fitness and Sports, funded by Department of Health and Human Services. (This was originally created by President Eisenhower in 1956, and has been renewed by successive Presidents.)

- Exec. Order No. 12229, § 1-301, 45 Fed. Reg. 50,699 (July 29, 1980): White House Coal Advisory Council, funded by Department of Labor.

The pertinent provisions of FACA are 5 U.S.C. app. §§ 5(b)(5), 5(c), 12, and 14. Section 5(b)(5) advises that support services and funding should be included in any legislation creating an advisory committee. Section 5(c) makes this applicable to the President or any other federal official creating an advisory committee.[34] Section 12(a) requires each agency to keep sufficient records to "fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities." The General Services Administration does this for Presidential committees. Section 12(b) directs each agency to be "responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise." Section 14 directs each advisory committee to terminate not later than 2 years after its creation, except that it can be renewed by the establishing authority for successive 2-year periods.[35] Thus, FACA clearly condones the practice of using existing agency appropriations to fund advisory committees. *See* 63 Comp. Gen. 110, 111 (1983) (President's Commission on Executive Exchange funded by Office of Personnel Management's Salaries and Expenses appropriation); 61 Comp. Gen. 69 (1981) (United States Advisory Commission on Public Diplomacy funded by United States Information Agency).

If the agency providing funding has several appropriations, as in the case of cabinet departments, it must select the one most closely related to the committee's functions, applying the principle that the specific prevails over

[34] *National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control*, 711 F.2d 1071, 1073 & n.1 (D.C. Cir. 1983); *Metcalf*, 553 F.2d at 179 n.35.

[35] A FACA committee can be terminated by its establishing authority or by operation of law. The General Services Administration cannot abolish another agency's committee or refuse to recharter it. 5 U.S.C. app. § 7; B-127685-O.M., Apr. 5, 1976. (To our knowledge, GSA has never tried to do so; the GAO memorandum refers to the Office of Management and Budget, whose FACA functions were later transferred to GSA.)

the general. *See* B-202362, Mar. 24, 1981 (funding for United States-Japan Economic Relations Group, provided by State Department, is chargeable to appropriation for "International Conferences and Contingencies" rather than Salaries and Expenses).

Of course, any expenditure by the committee must be for an authorized purpose. *E.g.*, 61 Comp. Gen. 69 (1981) (committee could procure outside legal advice on the extent of its independence). Restrictions in the funding agency's appropriation act applicable to all funds appropriated in that act must be followed. B-222758, June 25, 1986 (Chemical Warfare Review Commission violated anti-lobbying provision in Defense Department appropriation act). In addition, lobbying is not an advisory function. *Id.*

Most committees are funded in the manner described above—from the appropriations of a designated agency. Some are funded from one of the discretionary appropriations available to the President. For example, the so-called Warren Commission (Commission to Report Upon the Assassination of President John F. Kennedy) was funded from the "Emergency Fund for the President." Exec. Order No. 11130, 28 Fed. Reg. 12,789 (Nov. 29, 1963). So was an earlier body, the Missouri Basin Survey Commission. Exec. Order No. 10318, 17 Fed. Reg. 133 (Jan. 3, 1952). (The Emergency Fund was later redesignated "Unanticipated Needs.")

Some committees have mixed public-private funding. For example, the President's Commission on Executive Exchange received funding support from the Office of Personnel Management, and was also statutorily authorized to impose certain fees and to place them in a revolving fund in the Treasury. This made it necessary to determine whether a given expenditure was direct support or a general administrative expense. GAO concluded in one such case that a word processor and a postage machine were "direct support" expenses and therefore could be charged to the private-sector account, whereas reupholstering furniture and procuring commercial insurance for loaned works of art were administrative expenses chargeable to OPM funds. 63 Comp. Gen. at 112.

A final funding approach should be noted, although it is not common. Congress can always choose to appropriate funds for a board or commission created by executive action, as it did, for example, in the case of the National Commission on the Observance of International Women's Year. *See* B-182398, Mar. 29, 1976.

The Justice Department has concluded that a funding agency may not delegate the authority to obligate funds to an advisory committee, the obligation of funds being a nonadvisory function. Memorandum Opinion for the Executive Director, National Committee on Libraries and Information Science, *Relationship Between National Commission on Libraries and Information Science and Advisory Committee to White House Conference on Library and Information Services*, OLC Opinion, Feb. 12, 1990. (The committee in that case was statutory, but the point is more general.) This led to the question of the potential liability of the committee chairman, as an accountable officer, for the unauthorized expenditure. Because, under the particular facts of that case, the government incurred no loss, it was not necessary to address this issue. B-241668, Feb. 19, 1991.

As in the case of Presidential committees, Congress may authorize a particular agency to create advisory committees, either specifically or in general terms. *E.g.*, 10 U.S.C. § 5024 (authorizing Secretary of Navy to appoint Naval Research Advisory Committee); 42 U.S.C. § 7234 (authorizing Department of Energy to establish advisory committees). Alternatively, an agency head can establish an advisory committee without express statutory authority. The "establishing document" will vary with the agency's own system of internal directives. For example, the Attorney General has a numbered series of "Attorney General Orders," and used one of these to establish Law Enforcement Coordinating Committees. *See* 5 Op. Off. Legal Counsel 283 n.2 (1981). Whatever the precise mechanism, the establishment must be "determined as a matter of formal record" and published in the Federal Register. 5 U.S.C. app. § 9(a)(2). Other procedures are found in the GSA regulations. The committees are fully subject to the termination/renewal provisions of FACA, 5 U.S.C. app. § 14.

If Congress has the greatest latitude in funding options and the President has somewhat less, the individual agency has least of all. When an agency creates an advisory committee, it has only one way to fund it—from its own pocket. An Energy Policy Task Force, for example, was created by the Department of Energy in the 1980s under its statutory authority in what was then 15 U.S.C. § 776 (now in 42 U.S.C. § 7234). GAO found it legitimate to pay the expenses of a task force meeting—specifically expenses of travel and recording a transcript—from the Secretary's salaries and expenses account. 60 Comp. Gen. 386, 397 (1981). As with Presidential bodies, the agency with more than one appropriation should choose the one most closely related to the committee's work, and expenditures may be made only for authorized purposes. It may be possible in some cases to obtain private funding. *See*, *e.g.*, *Metcalf*, 553 F.2d at 180 (noting that the National Petroleum Council, established by the Secretary of the Interior, was, apart from support services, "financed entirely from funds provided by the petroleum industry").

An advisory committee, presidential or agency, subject to FACA will generally not have to concern itself with the funding restrictions of 31 U.S.C. § 1346 (which is set out in section A.2 of this chapter). A non-FACA body still must contend with them. Also, the Russell Amendment, 31 U.S.C. § 1347, does not apply to a FACA committee (see section A.2 of this chapter). In this connection, the Justice Department has said:

> "Whether or not one assumes that the Russell amendment was originally intended to apply to nonstatutory advisers or advisory groups, [FACA] has intervened. It has specifically authorized the creation of purely advisory committees; it has provided that they may have a 2-year life; and it has contemplated, and made provision for, the practice of using agency funds to support advisory committees. Accordingly, if indeed agency funds may otherwise be lawfully expended for such a purpose, there is no longer any reason, under the Russell amendment, to bar an expenditure of funds in support of an advisory committee merely because the committee has been in existence for more than 1 year."

3 Op. Off. Legal Counsel 263, 266–67 (1979). That opinion also supports the conclusion that the Russell Amendment does not apply to purely advisory bodies, FACA or non-FACA. Of the various funding restrictions discussed earlier, the only one that would apply to a FACA committee (and alike to non-FACA bodies), as long as it remains in effect, is the requirement for specific approval for interagency funding.

In addition to the general funding statutes, there may be agency-specific laws which authorize or restrict agency activity in this area. For example, 22 U.S.C. § 2672 authorizes the State Department to fund the United States' participation in certain international activities. This was one of the statutes State relied on—properly, GAO found—to participate in funding the National Commission on the Observance of International Women's Year in the mid-1970s. *See* GAO, *Activities of the National Commission on the Observance of International Women's Year*, HRD-77-26 (Washington, D.C.: Jan. 13, 1977), at 5–6. Section 2672(a) includes its own 1-year restriction similar to the Russell Amendment. *See* B-202362, Mar. 24, 1981.

(4) Donations

Given the ever-present pressure on Congress to hold down the costs of boards and committees, it is not uncommon for an enabling statute to authorize some level of private funding. Just as with any larger agency, a board or commission needs statutory authority to accept and use gifts or contributions. The reason, discussed in Chapter 6, section E.3, is that without such authority the funds would have to be deposited in the general fund of the Treasury.

The statute will prescribe exactly what can be accepted. A common version in statutes creating boards or committees is the authority to "accept donations of money, property, or personal services." *E.g.*, Pub. L. No. 98-375, § 7(a), 98 Stat. 1257, 1260 (Aug. 7, 1984) (Christopher Columbus Quincentenary Jubilee Commission); Pub. L. No. 85-305, § 5(a), 71 Stat. 626, 627 (Sept. 7, 1957) (Civil War Centennial Commission). The statute may go a step farther and set a monetary limit on what can be accepted in a given year. *E.g.*, Pub. L. No. 98-375, *as amended by* Pub. L. No. 100-94, § 4, 101 Stat. 700, 701 (Aug. 18, 1987); Pub. L. No. 98-101, § 5(h)(2), 97 Stat. 719, 721 (Sept. 29, 1983) (Commission on the Bicentennial of the U.S. Constitution). Both of these laws prescribe separate limits, one on gifts from individuals and a somewhat higher one on gifts from others such as corporations, partnerships, and foreign governments.

The statute will normally not define who can make the contributions, but there are exceptions, such as: "The Commission is authorized to receive funds through grants, contracts, and contributions from State and local governments and organizations thereof, and from nonprofit organizations." Pub. L. No. 89-733, § 6, 80 Stat. 1162 (Nov. 2, 1966). The "Commission" refers to the Advisory Commission on Intergovernmental Relations (ACIR). This provision was not so much a deliberate attempt to exclude individuals, but a desire to foster increased participation by those most directly affected by ACIR's work.

It should be apparent from the above statutory references that the authority to accept gifts occurs most often in statutes establishing operational bodies, most typically celebration/memorial commissions. As the ACIR provision shows, however, it can also appear with entities that are advisory.

The authority to accept gifts does not inherently include the authority to solicit them, especially since solicitation will almost invariably involve the use of other government funds, either for staff salaries and expenses or the procurement of some fund-raising capacity. *E.g.*, B-211149, June 22, 1983. When Congress wants an entity to engage in solicitation, it specifically so provides in the gift acceptance provision. *E.g.*, 36 U.S.C. § 2307 (Holocaust Memorial Council); Pub. L. No. 98-101, § 5(h)(1) (Commission on the Bicentennial of the United States Constitution). In order to preclude questions of interpretation, it is always preferable for the statute to use the word "solicit" if that is desired. However, something less may suffice. For example, a statute which provided that nongovernment sources "shall be encouraged to participate to the maximum extent feasible . . . and to make contributions" has been construed as authorizing solicitation. 6 Op. Off. Legal Counsel 541, 544–46 (1982).

In most cases, donated funds are seen merely as an authorized supplementation of the commission's other funding sources. In some cases, however, there is a clear intent that the commission be funded in its entirety, or as close thereto as possible, from donated funds. For example, the statute creating the Martin Luther King, Jr. Federal Holiday Commission specified that "[a]ll expenditures of the Commission shall be made from donated funds." Pub. L. No. 98-399, § 7, 98 Stat. 1473, 1474 (Aug. 27, 1984). Similarly, the executive order creating the so-called Grace Commission directed that it be funded "to the extent practicable and permitted by law, by the private sector without cost to the Federal Government." Exec. Order No. 12369, § 3(e), 47 Fed. Reg. 28,899 (June 30, 1982). The requirement may be limited to certain of the commission's functions. *E.g.*, 36 U.S.C. § 2307 (Holocaust Memorial Council may use only donated funds to operate and maintain the museum). An interesting variation is the Railroad-Shipper Transportation Advisory Council, which is authorized to receive government funds and to solicit and use donations, but must "undertake best efforts to fund [its] activities privately" before making a request for federal money. Pub. L. No. 104-88, § 201(a), 109 Stat. 803, 939 (Dec. 29, 1995), *codified at* 49 U.S.C. § 726(d)(4).

Absent statutory authority to the contrary, donated funds must be deposited in the Treasury in a trust account, and are permanently appropriated for authorized uses. 31 U.S.C. § 1323(c). This means that they are available for expenditure without further legislation. B-90476, June 14, 1950. The fiscal and budgetary issues associated with federal "trust" funds are discussed in detail later in this chapter. It is important here to distinguish a trust account for donated funds from the more traditional fiduciary trust concept. *See* B-274855, Jan. 23, 1997. Funds "held in trust," as those words are commonly used to describe a fiduciary relationship, are held for the benefit of another. By comparison, placing donated funds in a "trust account" is largely, although not necessarily, an accounting device to distinguish the funds from general funds and to assure that their use will be limited to the purposes for which they were given. *Id.*

The governing legislation may authorize a different treatment. The Holocaust Memorial Council provides one illustration. In response to a request from a congressional committee, GAO reviewed the legislative history of the Council's enabling statute and determined that, although the statute itself was silent, Congress intended a "no strings" treatment of donated funds. Accordingly, the Council could place donated funds in interest-bearing investments outside of the Treasury. B-211149, Dec. 12, 1985. This case was applied and followed a few years later with respect to the Christopher Columbus Quincentenary Jubilee Commission. 68 Comp. Gen. 237, 238–39 (1989). In the Holocaust Memorial Council decision (B-211149), GAO recommended that the statute be amended to explicitly recognize the apparent intent. It was later amended to provide that the Council's donated funds "are not to be regarded as appropriated funds and are not subject to any requirements or restrictions applicable to appropriated funds." *See* B-275959, May 5, 1998, at 4 (quoting the amendment, 36 U.S.C. § 1407, in confirming the earlier conclusion). A similar amendment was not so important for the Columbus Commission because it was a temporary body with a specified termination date, whereas the Council's duration is permanent, or at least indefinite.

Authority broad enough to permit investing donated funds outside of the Treasury is also broad enough to authorize operations without regard to the statutes and regulations governing procurement by federal agencies. 68 Comp. Gen. at 239; B-211149, Dec. 12, 1985, at 4. However, GAO declined to apply these cases to the American Battle Monuments Commission, a permanent entity, because it could find no comparable authority. B-275669.2, July 30, 1997.

Because title under a legal gift passes to the government, the donor has no claim for the refund of any unexpended balances upon termination of the board or commission. B-274855, Jan. 23, 1997. Unless otherwise provided for by statute, the balances must be deposited in the Treasury as miscellaneous receipts. *Id.* A situation clearly warranting an exception is found in 36 Comp. Gen. 771 (1957). The Alexander Hamilton Bicentennial Commission thought it would be a good idea to use private funds to award scholarships to high school and college students, but it lacked the authority to accept donations. With this proposal in mind, Congress amended the Commission's enabling statute to authorize the acceptance of donations. The problem was that the Commission would almost surely go out of existence before the disbursement of funds could be completed. Under these circumstances, GAO concurred with the Commission's proposal to transfer, prior to its expiration, the balance of its donated funds to a "responsible private organization" in order to complete the administration of the scholarship awards. *Id.* Short of extending the Commission's life for the sole purpose of disbursing the rest of the funds, this was the best way to comply with the requirement of 31 U.S.C. § 1323(c) that the funds be disbursed in accordance with the terms of the "trust."

B. Government Use of Corporate Entities

1. Introduction

The federal government has created entities using a corporate device, in various forms and contexts, for a long time. With respect to the basic rationale for government corporate entities, the Supreme Court observed in a 1927 case:

> "[A]n important, if not the chief, reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the treasury under its established procedure of audit and control over the financial transactions of the United States."

United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 8 (1927).

This points to two key features associated with the use of government-created corporate entities, at least in theory: commercial activities and freedom, to a greater or lesser extent, from the laws that govern accountability to the Treasury of traditional government agencies.

Twenty years after the *Skinner & Eddy* decision, President Truman's 1948 Budget Message, presented views on the proper standards for using the corporate device. A corporate form of organization, according to President

Truman, is appropriate for the administration of governmental programs that—

- are predominantly of a business nature,
- produce revenue and are potentially self-sustaining,
- involve a large number of business-type transactions with the public, and
- require greater flexibility than the customary type of appropriations budget ordinarily permits.[36]

We see, again, commercial activities and autonomy from Treasury controls. President Truman proposed, in addition, that government-created corporate entities be “potentially self-sustaining.” Today, many, but not all, corporate entities operate using revolving funds.

Although there are no clear and universally accepted standards for using the corporate model, it is something the government has often turned to when it wants to do something that, for the most part, resembles a business enterprise. The practice has, however, engendered some controversy. As a matter of fact, one commentator in the 1950s called the government corporation “one of the most controversial institutional innovations of our time.”[37] At one extreme are advocates of the government corporation who view it “with almost religious devotion” and regard it “as a desirable end in itself, regardless of the purpose which it serves.”[38] These advocates may be driven by what a more recent writer terms a “cultural norm” that anything the private sector does is automatically and inherently “better” than anything the public sector does.[39] On the other end of the spectrum, one early critic went so far as to write that “there is no place in our

[36] *Budget Message of the President*, H.R. Doc. No. 80-19, at M61 (1948), *cited in*, *e.g.*, Ronald C. Moe, Congressional Research Service, *Managing the Public's Business: Federal Government Corporations*, S. Prt. No. 104-18, at 7–8 (1995) (Moe 1995).

[37] Harold Seidman, *The Theory of the Autonomous Government Corporation: A Critical Appraisal*, 12 Pub. Admin. Rev. 89, 90 (1952) (Seidman 1952).

[38] *Id.*

[39] Francis J. Leazes, Jr., *Accountability and the Business State: The Structure of Federal Corporation*, 4 (1987) (Leazes).

constitutional government for the performance of governmental function by means of corporations."[40] And, one more factor cannot, or at least should not, be ignored:

> "Public funds (tax dollars), after all, are not freely given in voluntary market exchanges for goods and services; . . . At this level . . . the private and governmental sectors are fundamentally different. It is for this reason that the standards for governmental control and enforced adherence to prescribed processes and procedures are—and have to be—so much higher than those of the private sector."[41]

In 1980, the Office of Management and Budget contracted with the National Academy of Public Administration (NAPA) to produce a report on existing government corporations and to make policy recommendations for future creation of corporations. Breaking out "enterprises" as a separate category, and mindful of the imprecision of definitional attempts, the report broadly defined "government corporation" as "a government entity created as a separate legal person by, or pursuant to, legislation," with the powers to "sue and be sued, use and reuse revenues, and own assets."[42]

The fact that "[n]o two Federal Government corporations are completely alike"[43] underscores the importance of the enabling legislation. A statutorily created entity, whether it be an agency or embody some form of the corporate model, "possesses only those powers which are enumerated in the act of Congress creating it."[44] This of course includes any other legislation specifically made applicable. The governing legislation

[40] O.R. McGuire, *Government by Corporations*, 14 Va. L. Rev. 182, 186 (1928).

[41] Ronald C. Moe and Robert S. Gilmour, *Rediscovering Principles of Public Administration: The Neglected Foundation of Public Law*, 55 Pub. Admin. Rev. 135, 143 (1995).

[42] National Academy of Public Administration, I *Report on Government Corporations* 21 (1981) (NAPA 1981). For a more recent publication along these general lines, see Library of Congress, Congressional Research Service, *Federal Government Corporations: An Overview*, No. RL30365 (Mar. 23, 2006). This report notes that while the number of federal corporations "is in moderate flux" (*id.* at 2), the corporate model seems to hold ever-enhanced appeal to federal policymakers.

[43] Moe 1995, at 47.

[44] Seidman 1952, at 93.

determines the body's powers and functions, its financial arrangements, and its degree of operating flexibility. As one commentator has stated: "Because there is no general incorporation law defining government corporations, Congress is free to call any entity a 'corporation' and assign to this corporation whatever characteristics it chooses."[45] Or, as the court put it in *United States v. Nowak*, 448 F.2d 134, 138 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972): "If it chooses to make use of a 'corporation,' Congress is not limited by traditional notions of corporate powers and organization but may mold its vehicle in any way which appears useful to the accomplishment of the legislative purpose."

Some of these variations can be illustrated by looking at the objectives, degrees of ownership and control, and the extent to which the corporate entity acts as an agent of the federal government for three corporate entities: Amtrak, the Boy Scouts of America, and the Pension Benefit Guarantee Corporation.

(a) *Objectives.*

- Congress formed Amtrak as a private corporation to ensure profitability of the failing, but critical, passenger rail service.

- Congress chartered the Boy Scouts of America to help promote the patriotic and community service objectives of that organization.

- Congress created the Pension Benefit Guaranty Corporation to insure workers against defaulting pension plans.

(b) *Degree of ownership and control by the federal government.*

- Congress exercises nearly complete control over Amtrak's assets and liabilities (and provides substantial annual funding) and its operations through the presidential appointment of members of its board of directors.

- The federal government has no ownership in nor does it control the operations of the Boy Scouts of America. However, Congress by law established the Boy Scouts of America and the scope of its authorities.

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[45] Ronald C. Moe, *Administering Public Functions at the Margin of Government: The Case of Federal Corporations*, CRS No. 83-236GOV, 33 (1983).

- Congress exercises control over the Pension Benefit Guaranty Corporation by appointing the board of directors and management officers, treating its employees like those of the federal government, and limiting its use of funds for administrative expenses.

(c) *Extent to which the corporate entity acts as the agent of the federal government.*

- Congress declared Amtrak to be a private corporation, but specified in law, for example, that Amtrak is an agency of the government for purposes of sharing information with the public (*i.e.*, the Freedom of Information Act).
- The Boy Scouts of America in no way represent or act on behalf of the U.S. government.
- By law, Congress declared that the Pension Benefit Guaranty Corporation's liabilities are not liabilities of the U.S. government.

As you can see, depending upon the needs or the circumstances, the government has been creative in its use of the corporate form.

2. The Problem of Definition

As noted in the prior section, largely because each corporate entity is the creature of its enabling legislation, and given the different forms that such entities can take, it is difficult to have a general definition applicable to the relationships between the federal government and the many corporate entities. As one commentator put it:

> "Federal corporations should not be treated as if they constitute a single class of organizations type. Virtually all are unique creatures, and . . . what is distinctive about them as a group is that each embodies its own calculated mixture of public and private elements and of financing and controls, and each is a result of a particular congressional enactment after extensive controversy over rival policies and interests."[46]

[46] Francis J. Leazes, Jr., *Accountability and the Business State: The Structure of Federal Corporation*, 7 (1987).

Without a single definition covering the universe of corporate bodies, the better approach may be to examine the common elements of particular kinds of entities. Therefore, in this section we will attempt to provide some definitional construct by the consideration of four types of corporate entities: government corporations; government-sponsored enterprises (referred to as GSEs); patriotic, fraternal, or charitable entities designated in title 36 of the United States Code (commonly referred to as "federally chartered corporations"); and federally funded research and development centers (FFRDCs).

a. Government Corporations

"There is at present no universally accepted definition of what constitutes a government corporation, hence there are several listings of government corporations, each different and based upon the definition employed by the compiler," according to one commentator.[47] GAO has also pointed out the lack of a uniform definition. GAO, *Congress Should Consider Revising Basic Corporate Control Laws*, GAO/PAD-83-3 (Washington, D.C.: Apr. 6, 1983), at 8. Definitions found in the United States Code serve only limited purposes. For example, 5 U.S.C. § 103(1) defines the term "government corporation," but only for purposes of title 5 of the United States Code, as "a corporation owned or controlled by the Government of the United States." However, in 5 U.S.C. § 103(2), a "government controlled corporation" is defined as *not* including a corporation owned by the government. Noting that government corporations are operationally defined in 31 U.S.C. § 9101(1) (section 201 of the Government Corporation Control Act, which will be addressed in detail in section 4.a of this chapter) as either wholly owned or mixed-ownership government corporations, GAO has concluded that the term "government controlled corporation" used in title 5 refers to mixed-ownership government corporations, such as those listed in 31 U.S.C. § 9101(2) (but not exclusively). B-221677, July 21, 1986. Therefore, when considering the various laws codified in title 5, it is necessary to check any separate definitional provisions to determine if a specific chapter is applicable to both wholly owned and mixed-ownership corporations. For example, the relocation allowance provisions in title 5 are covered by the definitional provisions in 5 U.S.C. § 5721, which specifically excludes government controlled corporations. Thus, wholly

[47] Ronald C. Moe, Congressional Research Service, *Managing the Public's Business: Federal Government Corporations*, S. Prt. No. 104-18 (1995), at xii. For similar comments, see John T. Tierney, *Government Corporations and Managing the Public's Business*, 99 Pol. Sci. Q. 73, 76 n.6 (1984), and Ronald C. Moe, Congressional Research Service, *Administering Public Functions at the Margin of Government: The Case of Federal Corporations*, No. 83-236GOV (1983), at 5.

owned corporations are subject to the personnel provisions of title 5 but mixed-ownership government corporations are not. B-221677, July 21, 1986 (Federal Deposit Insurance Corporation, as a mixed-ownership government corporation, is excluded from coverage under the title 5 relocation provisions). Further discussion of the various title 5 provisions is in section B.7.a of this chapter.

Also, "executive agency" in 40 U.S.C. § 102(4)(B) expressly includes "a wholly owned Government corporation" although without further defining the latter term. Thus, wholly owned government corporations are subject to much of title 40 of the United States Code as well as the procurement provisions of 41 U.S.C. §§ 251–266a. They are also subject to GAO's bid protest jurisdiction under 31 U.S.C. § 3551(3), which references the 40 U.S.C. § 102 definition of agency. *See* B-295737.2, Apr. 19, 2005. While these specialized definitions apply for certain purposes, the chief (and only) regulatory statute with some general application, chapter 91 of title 31 of the United States Code (commonly known as the Government Corporation Control Act), discussed in detail below, fails to include a specific definition but merely lists the entities it covers as either wholly owned or mixed-ownership.

The lack of a uniform, governmentwide statutory definition is not the only complication in determining the status of a corporate-type entity in relation to federal powers and obligations. Even when Congress has been quite specific in declaring that a corporation is not a federal instrumentality, it may still take on that status for constitutional purposes. This was the holding in *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 387, 395 (1995).

In *Lebron*, an artist sued the National Rail Passenger Corporation, better known as Amtrak, for violating his First Amendment rights by rejecting a billboard display. Amtrak claimed that it was not a federal entity for First

Amendment purposes since its statutory charter declared that it "will not be an agency or establishment of the United States Government."[48]

The Supreme Court concluded, however, that Amtrak's reliance on this statutory disclaimer language was "misplaced":

> "[The statutory disclaimer] is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress's control—for example, whether it is subject to statutes that impose obligations or confer powers upon Government entities . . . And even beyond that, we think [the disclaimer] can suffice to deprive Amtrak of all those inherent powers and immunities of Government agencies that it is within the power of Congress to eliminate . . . But it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions. If Amtrak is, by its very nature, what the Constitution regards as the Government, congressional pronouncement that it is not such can no more relieve it of its First Amendment restrictions than a similar pronouncement could exempt the Federal Bureau of Investigation from the Fourth Amendment. The Constitution constrains governmental action 'by whatever instruments or in whatever modes that action may be taken.' *Ex parte Virginia*, 100 U.S. 339, 346–347, 25 L. Ed. 676 (1880). And under whatever congressional label."

Lebron, 513 U.S. at 392–93. The Court went on to hold that Amtrak was "an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution," a conclusion it viewed as "in accord with public and judicial understanding

[48] Rail Passenger Service Act of 1970, Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330 (Oct. 30, 1970). The current version of this language, codified at 49 U.S.C. § 24301(a)(3), provides that Amtrak "is not a department, agency, or instrumentality of the United States Government, and shall not be subject to title 31 [of the United States Code]." Over the years, Congress has continued to put distance between Amtrak and federal control for statutory purposes. For example, while Amtrak was originally designated a mixed-ownership government corporation, that designation was later dropped. For a discussion of the evolution of the statutory provisions affecting Amtrak, see *United States v. Bombardier Corp.*, 286 F.3d 542, 545 (D.C. Cir. 2002); see also *United States v. Bombardier Corp.*, 380 F.3d 488, 491–92 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005).

of the nature of Government-created and -controlled corporations over the years." *Id.* at 394. In this regard, the Court noted that Amtrak was "established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees." *Id.* at 398.[49]

The Justice Department's Office of Legal Counsel (OLC) has taken the *Lebron* analysis considerably farther. In a memorandum opinion, OLC held that if a corporate entity would fall within the government for constitutional purposes, it has the same status for statutory purposes absent an explicit statutory provision to the contrary. In concluding that the National Veterans Business Development Corporation (NVBDC) was a government corporation within the definition of 5 U.S.C. § 103(1), the Office of Legal Counsel stated:

> "Although the opinion in *Lebron* does not state that, if a corporation is part of the United States Government for constitutional purposes, it must also be considered an agency of the United States unless Congress (as in the case of Amtrak) expressly provides otherwise, we believe that when Congress has created a corporation after the decision in *Lebron*—as it has here—and, through the corporation's structure and purpose, has placed it within the government for constitutional purposes, there is a strong presumption that the corporation is also part of the government for purposes of title 5 [of the United States Code], which deals with the internal organization of federal government agencies."[50]

The opinion then observed that the statute creating the NVBDC lacked an Amtrak-type disclaimer and contained features suggesting that NVBDC was a federal instrumentality. Specifically, it was federally chartered, received federal appropriations, and its fiscal operations were subject to

[49] The Supreme Court remanded the case for consideration of the First Amendment claims. On remand, the district court held that Amtrak had exercised its right to reject proposed advertising in good faith, given the artist/advertiser's deception in concealing the political nature of the billboard display. *Lebron v. National Railroad Passenger Corp.*, 981 F. Supp. 279 (S.D.N.Y. 1997).

[50] Memorandum Opinion for the General Counsel, Office of Management and Budget, *Status of National Veterans Business Development Corporation*, OLC Opinion, Mar. 19, 2004.

congressional oversight and regulation. However, shortly after OLC issued this opinion, Congress amended NVBDC's statute by adding the following language: "Notwithstanding any other provision of law, the Corporation is a private entity and is not an agency, instrumentality, authority, entity, or establishment of the United States Government."[51]

Given the absence of a definitive legal definition of what constitutes a government corporation, we need to resort to other sources. As we have seen, one approach is to try to identify common attributes. One analyst identifies some of these attributes as "a public purpose, a federal government charter, some form of government supervision, and a public subsidy."[52] While this is useful in establishing a conceptual framework, it suffers when you break it down to the working level. If, for example, one equates "charter" with "enabling legislation"—and it is beyond question that the charter of a government corporation is its enabling legislation—the attributes apply equally to any government agency. Similarly, we previously noted a statement from a GAO report that government corporations "are generally federally chartered entities created to serve a public function of a predominantly business nature." GAO, *Government Corporations: Profiles of Existing Government Corporations*, GAO/GGD-96-14 (Washington, D.C.: Dec. 13, 1995), at 1. This again shows the hazard of generalization, saved by the fortunate inclusion of the word "generally," since some government corporations may perform primarily governmental functions (*e.g.*, the Commodity Credit Corporation, which stabilizes and protects farm income and prices).

Neither is it useful to construct a classification based on the mere presence or absence of the word "corporation" in the entity's name. An old state court case, considering the application of sovereign immunity to a state-created corporation, put it this way: "It is not necessary that the thing created by the legislature should be named by it a corporation. Its character depends upon the powers given it, and not upon the name by

[51] 15 U.S.C. § 657c(a). Congress drove its point home, perhaps unintentionally, since it actually added the quoted language twice in the same appropriation act. Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, div. B, title VI, § 636 *and* div. K, title I, § 146, 118 Stat. 2809, 2922, 3455 (Dec. 8, 2004).

[52] Francis J. Leazes, Jr., *Accountability and the Business State: The Structure of Federal Corporations*, 18 (1987). Leazes also adopts the definitional approach of the Government Corporation Control Act by specifically identifying, by name, the entities he includes under his government corporation aegis. *Id.* at 9–10.

which the legislature may call it." *Gross v. Kentucky Board of Managers*, 49 S.W. 458, 459 (Ky. Ct. App. 1899).

Acknowledging that any classification is imperfect and open to debate (in fact, some corporations may fall in more than one category), we are concerned primarily with the following categories for purposes of this discussion:

- Entities subject to the Government Corporation Control Act. We say "entities" because they may or may not be in actual corporate form, although they usually are, and their names may or may not include the word corporation. The Control Act subdivides covered entities into two groups discussed in detail later—wholly owned government corporations and mixed-ownership government corporations.

- Entities created and fully or substantially funded by the United States Government, but not subject to the Control Act. Examples include the Legal Services Corporation, the Corporation for Public Broadcasting, and the State Justice Institute.[53]

- Entities created and at least partially funded by the federal government which are not designated as corporations but which have comparable powers, and are also at least partially exempt from the Control Act. Examples include the U.S. Postal Service, the Smithsonian Institution,

[53] The Corporation for Public Broadcasting has strenuously objected to being included under any "government corporation" umbrella. *See* National Academy of Public Administration, I *Report on Government Corporations* app. 3 (1981). We include it under our umbrella listing because (1) it was statutorily created as a corporation and (2) it receives and spends federal money. *See generally* GAO, *Telecommunications: Issues Related to Federal Funding for Public Television by the Corporation for Public Broadcasting*, GAO-04-284 (Washington, D.C.: Apr. 30, 2004). For information about the Legal Services Corporation and the State Justice Institute, see B-308037, Sept. 14, 2006, and B-307317, Sept. 13, 2006, respectively.

and the Bonneville Power Administration.[54] (The main difference between this group and the second group is that the legislation creating an entity in this group does not confer corporate status on it. Of course, other differences flow from that distinction.)

The above groups, taken together, comprise our working "definition" for purposes of this discussion.

b. Government-Sponsored Enterprises

The term government-sponsored enterprise (GSE) refers to a "privately owned and operated federally chartered financial institution that facilitates the flow of investment funds to specific economic sectors."[55] A conceptually similar but more detailed definition is found in the Congressional Budget Act, 2 U.S.C. § 622(8). GSEs are, largely but not exclusively, those entities with names that "sound like those of aging singers or the latest fast-food sandwich"[56]—Fannie Mae, Farmer Mac, *etc*. However, the Government National Mortgage Association (Ginnie Mae) is a wholly owned government corporation. 31 U.S.C. § 9101(3)(G).

Legislation creating GSEs has not used consistent terminology. The Federal Agricultural Mortgage Corporation (Farmer Mac) is a "federally chartered instrumentality of the United States." 12 U.S.C. § 2279aa-1(a)(1). So is the Financial Assistance Corporation. 12 U.S.C. § 2278b. The Federal National Mortgage Association (Fannie Mae) is a "government-sponsored private corporation." 12 U.S.C. § 1716b. The Federal Home Loan Mortgage Corporation (Freddie Mac) is simply a "body corporate." 12 U.S.C. § 1452(a).

[54] The Bonneville Power Administration (BPA) is a true hybrid. It is not a government corporation although it has many of the powers of one and operates from a revolving fund. The office of the Administrator of BPA is an office in the Department of Energy and is under the jurisdiction and control of the Secretary of the department, although BPA is subject to many but not all of the provisions of the Government Corporation Control Act. *See* 16 U.S.C. §§ 832a(a), 838i(c) and (d). Also, the Administration's contracting activities are governed by its own unique statutory and regulatory requirements. *See* B-291642.2, July 16, 2003, at n.1. Our discussion does not further address the Smithsonian, which the Supreme Court has called "the oldest surviving government corporation." *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 391 (1939).

[55] GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 59.

[56] Lori Nitschke, *Private Enterprise With Official Advantages*, 56 Cong. Q. Wkly. 1578 (1998).

For purposes of comparing GSEs to other forms of government-created corporate entities, the important points are that (1) GSEs are regarded as privately owned (which, in some cases and depending on how one frames one's definition, may be only partially true); (2) they are financial institutions; and (3) they are supervised but not directly managed by the government. Summary information on a number of GSEs may be found in GAO's *Budget Issues: Profiles of Government-Sponsored Enterprises*, GAO/AFMD-91-17 (Washington, D.C.: Feb. 1991). For a more recent description, see Library of Congress, Congressional Research Service, *Government-Sponsored Enterprises (GSEs): An Institutional Overview*, No. RS21663 (Dec. 20, 2005). GSEs are subject to audit by GAO only if specifically provided by statute. B-114828, Nov. 25, 1975, at 2, 4.

While a GSE is, except as expressly provided, not subject to the laws governing federal agencies, it is nevertheless a creature of statute and exists to perform only those functions assigned to it in its enabling legislation. Any activity it undertakes must directly relate to the performance of one or more of those specified functions. *Association of Data Processing Service Organizations, Inc. v. Federal Home Loan Bank Board*, 568 F.2d 478 (6th Cir. 1977) (federal home loan banks not authorized to sell on-line data processing services to member institutions); *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972) (national bank may not operate a full-scale travel agency); 71 Comp. Gen. 49 (1991) (Farmer Mac is authorized to guarantee the timely payment of principal and interest on certain mortgage-backed securities but is not authorized to purchase those securities). The GAO decision stressed that a statute's purpose clause is not an independent grant of authority. 71 Comp. Gen. at 52.

c. Title 36 Patriotic, Fraternal, or Charitable Corporate Entities

This group consists of the 80-plus corporate entities whose charters comprise title 36 of the United States Code, subtitles II and III.[57] Among the best-known examples are the American Red Cross,[58] American Legion, and the United States Olympic Committee. Each entity occupies its own chapter in title 36, and each is designated a "body corporate and politic" or a "federally chartered corporation." In addition, a provision no longer in

[57] All but one of these entities can be found in subtitle II, which consists of 36 U.S.C. §§ 10101 through 240112. Subtitle III, 36 U.S.C. §§ 300101–300111, is devoted entirely to the Red Cross.

[58] While commonly known as the American Red Cross, or more simply as the Red Cross, this organization's proper name is really "The American National Red Cross." 36 U.S.C. § 300101(b).

the Code used the term “private corporations established under Federal law.”[59] Of course this terminology can apply equally to GSEs. The difference is that the title 36 corporations are not business corporations; they are patriotic, fraternal, or charitable associations. The granting of a federal charter is viewed as a mark of prestige. Thus, the purpose of granting a federal charter to the Girl Scouts was “to bestow public honor and recognition on the works of the organization.” *Girl Scouts v. Personality Posters Mfg., Co.*, 304 F. Supp. 1228, 1232 (S.D.N.Y. 1969).

Although there is variation, the statutory charters “follow a common pattern.”[60] The typical charter starts by identifying the incorporators by name and declaring their corporate status. The incorporators range from a few to several dozen. *See, e.g.*, Pub. L. No. 86-680, 74 Stat. 572 (Aug. 31, 1960) (Agricultural Hall of Fame). The statute may be creating a new organization (*e.g.*, 36 U.S.C. § 152301—National Music Council), it may merely be giving a federal charter to an organization already chartered under state law (*e.g.*, 36 U.S.C. § 20902—American Ex-Prisoners of War), or it may direct that a corporation be incorporated in a state or the District of Columbia (*e.g.*, 36 U.S.C. § 20301—American Academy of Arts and Letters). The statute will then state the corporation’s purposes and outline its general powers. A typical “powers” provision will include such things as to sue and be sued, adopt and use a corporate seal, adopt by-laws, hold and convey property, and enter into contracts. *E.g.*, 36 U.S.C. § 152305 (National Music Council).[61]

Most have perpetual succession, a feature common to private business corporations. *E.g.*, 36 U.S.C. § 30502 (c) (Blue Star Mothers of America). A relatively few have limited duration. For example, the Grand Army of the Republic, chartered in 1924 but in existence long before, consisted of those who had served in the United States armed forces during the Civil War and

[59] 36 U.S.C. § 1101 (1994). Title 36 was recodified in 1998 by Pub. L. No. 105-225, 112 Stat. 1253 (Aug. 12, 1998). The former section 1101 was omitted as unnecessary. In addition, the American Red Cross was given its own subtitle, as indicated in note 58.

[60] Wesley A. Sturges, *The Legal Status of the Red Cross*, 56 Mich. L. Rev. 1, 23 (1957).

[61] Our choice of examples is intended to convey some idea of the types and range of organizations title 36 encompasses. By the way, in case you find our citation to 36 U.S.C. § 152305 for the National Music Council (as well as those for the other organizations in this discussion) a bit odd, rest assured that it is correct. The section numbers in title 36 of the United States Code go rather higher than seems normal for the Code—up to section 300111 at the writing of this chapter, to be precise.

were honorably discharged. The charter provided that the corporation would terminate when the last of its members died. Pub. L. No. 68-184, § 6, 43 Stat. 358, 360 (June 3, 1924). This of course happened some time ago, and the charter is no longer carried in the United States Code.

A common provision prohibits the corporation from issuing stock or paying dividends. *E.g.*, 36 U.S.C. § 22307(a) (American Symphony Orchestra League). Some go a step further and explicitly prohibit activities for pecuniary profit. *E.g.*, 36 U.S.C. § 152307(a) (National Music Council). Although this language is infrequent, it seems clear based on the stated purposes of these corporations[62] that they are not designed with profit-making in mind. Several charters require the corporation to maintain its tax-exempt status under the Internal Revenue Code. *E.g.*, 36 U.S.C. § 70108(b) (Fleet Reserve Association).

Another common provision prohibits the corporation or its officers or members from engaging in political activities. *E.g.*, 36 U.S.C. § 23106(b) (Aviation Hall of Fame). At least one variation includes a prohibition on attempting to influence legislation. 36 U.S.C. § 150108(b) (National Academy of Public Administration).

The charter will typically give the corporation the sole and exclusive use of its name. *E.g.*, 36 U.S.C. § 50305 (Disabled American Veterans). The exclusivity may extend to other symbols and emblems as well. *E.g.*, 36 U.S.C. § 220506(a)(2) (Olympic symbol of five interlocking rings).

For the most part, title 36 corporations do not receive federal appropriations. A few do or, at least, are explicitly authorized to seek federal grants, reimbursements, or other kinds of "support." The National Film Preservation Foundation, for example, is authorized to receive up to $530,000 for each of the fiscal years 2005 through 2009 from the Library of Congress, to be used only to match private contributions and not for administrative expenses. 36 U.S.C. § 151711. The National Academy of Public Administration is required to study and report on "any subject of government" when requested by the federal government, to be paid for

[62] *E.g.*, 36 U.S.C. §§ 20302 (American Academy of Arts and Letters—furthering the interests of literature and the fine arts); 20903 (American Ex-prisoners of War—encouraging fraternity, fostering patriotism, maintaining historical records); 21302 (American Historical Association—promoting historical studies collecting and preserving historical manuscripts); 21003 (American GI Forum of the United States—educational, patriotic, civic, historical, and research organization).

from appropriated funds available to the requestor. 36 U.S.C. § 150104. *See also* 36 U.S.C. § 150303 (similar provision for National Academy of Sciences). Even in these instances, the federal funds are only a portion, substantial though it may be, of the corporation's revenue. In a few instances, federal agencies are authorized to provide logistical support. *E.g.*, 36 U.S.C. § 70909 (Department of Education authorized to make available "personnel, services, and facilities" to the Future Farmers of America); 36 U.S.C. § 220107 (Defense Department authorized to make its resources available to United Service Organizations).

Most of the revenue of these corporations comes from donations and, in some cases, membership fees. Some of the corporations are expressly authorized to engage in income-producing activities. *E.g.*, 36 U.S.C. § 220305(7) (United States Capitol Historical Society may sell commemorative medals and other souvenir items); 36 U.S.C. §§ 40703(5), 40732 (Corporation for the Promotion of Rifle Practice and Firearms Safety may charge user fees and may sell surplus rifles).

Some title 36 charters include their own audit requirements. The American Red Cross, for example, must prepare an annual itemized report of receipts and expenditures, which is audited by the Department of Defense, and must reimburse the expenses Defense incurs in conducting these audits. 36 U.S.C. § 300110. Title 36 corporations whose charters do not include audit provisions are subject to the general requirements of 36 U.S.C. § 10101, subsection (a) of which requires an annual audit "in accordance with generally accepted auditing standards" by independent accountants. GAO does not audit these corporations. It does, upon request, conduct a limited "report audit" or "desk review," including a review of the corporation's financial statements, to determine whether the audit report complies with the financial reporting requirements of the statutory charter or 36 U.S.C. § 10101. GAO's report of this review is very brief and, if no problems are found, concludes simply that "[w]e did not identify any instance of noncompliance with the . . . financial reporting requirements of" 36 U.S.C. § 10101. *E.g.*, GAO, *Federally Chartered Corporation: Financial Statement Audit Report for the National Fallen Firefighters Foundation for Fiscal Years 2003 and 2002*, GAO-06-691R (Washington, D.C.: May 12, 2006), at 1.

The relationship of a title 36 corporation to the federal government cannot be summarized in a simple statement. Several charters provide that the corporation "may not claim congressional approval or the authority of the United States Government for any of its activities." *E.g.*, 36 U.S.C.

§ 154708(d) (Non-Commissioned Officers Association of America). Others include an explicit disclaimer of federal financial liability: "The United States Government is not liable for any debts, defaults, acts, or omissions of the corporation. The full faith and credit of the Government does not extend to any obligation of the corporation." 36 U.S.C. § 151310 (National Fallen Firefighters Foundation). For another example, see 36 U.S.C. §§ 151710 (National Film Preservation Foundation).

Absent an explicit disclaimer provision, the question becomes whether the corporation can be deemed a "federal actor" or an instrumentality of the United States, and if so, for what purposes. The starting point in this analysis is the established proposition that the mere fact that Congress has conferred a federal charter does not make the corporation a government agent. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 543–44 (1987); *Stearns v. Veterans of Foreign Wars*, 394 F. Supp. 138, 141 (D.D.C. 1975), *aff'd mem.*, 527 F.2d 1387 (D.C. Cir.), *cert. denied*, 429 U.S. 822 (1976). In many cases this will provide the answer if there is no, or at least no significant, federal involvement beyond the granting of the charter and the requirement to submit annual reports to Congress. If this does not do the job, it becomes necessary to undertake "further examination of the nexus between the [corporation] and the Government." *Stearns v. Veterans of Foreign Wars*, 500 F.2d 788, 790 (D.C. Cir. 1974). Unfortunately, "there is no simple test" for doing this. *Department of Employment v. United States*, 385 U.S. 355, 358 (1966).

If the corporation with no federal involvement beyond its charter is one extreme, the American Red Cross is arguably the other. It has certainly generated the lion's share of cases. The Supreme Court has held that the Red Cross is an instrumentality of the United States, at least for purposes of immunity from state taxation of its operations. *Department of Employment*, 385 U.S. at 358–59. Among the factors the Court found relevant are (1) the provision for audit by the Defense Department, (2) presidential appointment of the principal officer and several governors, and (3) the receipt of "substantial material assistance"—not the least of which is a permanent headquarters building—from the federal government. *Id.* at 359.

The lower courts have considered the "instrumentality" status of the Red Cross in a variety of contexts. For example, the Red Cross cannot be required to pay state or local taxes on authorized gambling activities (such as bingo games). *United States v. City of Spokane*, 918 F.2d 84 (9th Cir. 1990), *cert. denied*, 501 U.S. 1250 (1991). Its employees share federal employees' limited immunity from personal liability. *Barton v. American Red Cross*, 829 F. Supp. 1290 (M.D. Ala. 1993), *aff'd mem.*, 43 F.3d 678 (11th Cir. 1994), *cert. denied*, 516 U.S. 822 (1995). However, the Red Cross is not an agency of the government for purposes of the Freedom of Information Act, 5 U.S.C. § 552. *Irwin Memorial Blood Bank v. American National Red Cross*, 640 F.2d 1051 (9th Cir. 1981). Nor is it an instrumentality for purposes of the Religious Freedom Restoration Act of 1993.[63] *Hall v. American National Red Cross*, 86 F.3d 919 (9th Cir. 1996). Nor is it covered by the Federal Tort Claims Act (see section B.8.a(2) of this chapter).

On some issues regarding the Red Cross, the courts are in disagreement. One is the right to trial by jury. Some courts, treating the Red Cross more like a private party, have held that parties in civil litigation against the Red Cross are entitled to a jury trial. *E.g.*, *Marcella v. Brandywine Hospital*, 47 F.3d 618 (3rd Cir. 1995); *Doe v. American National Red Cross*, 847 F. Supp. 643 (W.D. Wis. 1994). Others, placing the Red Cross more on the instrumentality side of the ledger, have found jury trial unavailable. *E.g.*, *Barton v. American Red Cross*, 826 F. Supp. 412 (M.D. Ala. 1993), *aff'd mem.*, 43 F.3d 678 (11th Cir. 1994), *cert. denied*, 516 U.S. 822 (1995). Another issue is the award against the Red Cross of punitive damages (available against private litigants but not the United States). Some courts have said "yes" to such awards. *Doe v. American National Red Cross*, 845 F. Supp. 1152 (S.D. W.Va. 1994). Others have held that the Red Cross shares the government's immunity from punitive damage awards. *Barton v. American Red Cross*, 826 F. Supp. 407 (M.D. Ala. 1993), *aff'd mem.*, 43 F.3d 678 (11th Cir. 1994), *cert. denied*, 516 U.S. 822 (1995); *Doe v. American National Red Cross*, 847 F. Supp. at 648–49; *Doe v. American National Red Cross*, 837 F. Supp. 121 (E.D.N.C. 1992).

There are relatively few cases involving title 36 corporations other than the Red Cross. The court in *United States v. District of Columbia*, 558 F. Supp. 213 (D.D.C. 1982), *vacated as moot*, 709 F.2d 1521 (D.C. Cir. 1983), followed the Red Cross precedent and found the U.S. Capitol Historical Society to be an instrumentality of the United States for purposes of tax immunity. Among the facts the court thought relevant were that the Society receives rent-free space in the Capitol to operate a visitor's center (see 2 U.S.C. § 2165), and that its charter expressly prohibits

[63] 42 U.S.C. §§ 2000bb–2000bb-4. This act was held to be unconstitutional as applied to state and local governments. *See City of Boerne v. Flores*, 521 U.S. 507 (1987).

any of the Society's funds from inuring to the benefit of its members (36 U.S.C. § 220308(b)). The judgment was vacated on appeal because Congress passed legislation explicitly giving the Society tax-exempt status with respect to activities conducted within or on the grounds of the Capitol Building. *See* 36 U.S.C. § 220307.

In the *Stearns* litigation cited above, the court held that the Veterans of Foreign Wars was not a "government actor" for purposes of the antidiscrimination protections of the Fifth Amendment.[64] The Supreme Court reached the same conclusion (although far from unanimously) with respect to the United States Olympic Committee. *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987). Reaffirming that the mere fact of federal incorporation is not enough, the Court further emphasized that "[e]ven extensive regulation by the government" or the existence of a federal subsidy may not be enough. *Id.* at 544.

A charitable and benevolent corporation which operates without assistance or interference from the government is not a government agency for purposes of the dual compensation laws, even though government officials may be involved it its administration. 26 Comp. Gen. 192 (1946). Similarly, travel for the benefit of such a corporation is not "official travel" and hence not compensable from appropriated funds, unless it can be shown that the travel also reasonably relates to some official duty of the traveler. B-56268, June 20, 1946.

Another area in which the relationship of title 36 corporations to the federal government arises is the applicability of the Federal Tort Claims Act (FTCA), which expressly applies to "corporations primarily acting as instrumentalities or agencies of the United States." 28 U.S.C. § 2671. Under this standard, the Red Cross is not an agency or instrumentality for FTCA purposes. *Rayzor v. United States*, 937 F. Supp. 115 (D.P.R. 1996), *aff'd*

[64] The *Stearns* litigation originated with a district court decision, *Stearns v. Veterans of Foreign Wars*, 353 F. Supp. 473 (D.D.C. 1972), which dismissed the suit on the ground that the Veterans of Foreign Wars' federal charter alone did not constitute governmental action. The D.C. Circuit reversed this decision in *Stearns v. Veterans of Foreign Wars*, 500 F.2d 788 (D.C. Cir. 1974), suggesting that while the charter alone probably was not sufficient, there might be other factors to establish enough governmental action to support the suit. On remand, the district court found in *Stearns v. Veterans of Foreign Wars*, 394 F. Supp. 138 (D.D.C. 1975), that additional factors were not sufficient in this regard. That decision was summarily affirmed on appeal. *Stearns v. Veterans of Foreign Wars*, 527 F.2d 1387 (D.C. Cir.), *cert. denied*, 429 U.S. 822 (1976).

mem., 121 F.3d 695 (1[st] Cir. 1997). Nor is the Civil Air Patrol, another title 36 corporation. *Pearl v. United States*, 230 F.2d 243 (10[th] Cir. 1956); *Kiker v. Estep*, 444 F. Supp. 563 (N.D. Ga. 1978). *See also Nazarro v. United States*, 304 F. Supp. 2d 605 (D.N.J. 2004) (Civil Air Patrol is a charitable organization entitled to tort immunity under New Jersey's charitable immunity statute); *Campbell v. Civil Air Patrol*, 131 F. Supp. 2d 1303 (M.D. Ala. 2001) (Civil Air Patrol is not a "federal actor" subject to a lawsuit for violation of constitutional rights "under color of federal law").

It is no accident that the issue has been raised against these two corporations. Much of what they do seems like "government work." One of the purposes of the Red Cross is to furnish volunteer aid to sick and wounded members of the armed forces in time of war. 36 U.S.C. § 300102(1). A purpose of the Civil Air Patrol is to encourage citizen efforts "in maintaining air supremacy," 36 U.S.C § 40302(1)(a), a governmental purpose if there ever was one. Be that as it may, the corporation's "chameleon-like existence" or the argument that it amounts to a "part-time federal agency" is not enough to make the FTCA applicable. *Estep*, 444 F. Supp. at 565. The test is whether the government controls its day-to-day operations. *Rayzor*, 937 F. Supp. at 119, *citing United States v. Orleans*, 425 U.S. 807, 815 (1976).

Still another area of controversy is the application of 28 U.S.C. § 1349, which prohibits federal courts from taking jurisdiction of a suit by or against a corporation solely because "it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock." The typical title 36 corporation being a nonstock corporation, some courts have applied section 1349 by using a "government control" test. Thus, for example, the American Red Cross "functions independently and is in no way controlled by the Government" for purposes of 28 U.S.C. § 1349, one reason being that the president appoints only 8 of its 50 governors. *C.H. v. American Red Cross*, 684 F. Supp. 1018, 1022 (E.D. Mo. 1987), *followed in*, *e.g.*, *Collins v. American Red Cross*, 724 F. Supp. 353 (E.D. Pa. 1989). In *Burton v. United States Olympic Committee*, 574 F. Supp. 517, 524 (C.D. Cal. 1983), the court reached the same result for the United States Olympic Committee because (1) the Olympic Committee was the legal owner of its property, (2) any surplus funds do not revert to the U.S. Treasury, (3) it is self-governing and operates independent of federal control, and (4) it is not included in the Government Corporation Control Act.

Other courts have applied the stock ownership requirement literally and held that section 1349 can never form the basis of federal jurisdiction of a nonstock corporation because the government cannot own half of what does not exist. *E.g.*, *Burton*, 574 F. Supp. at 523; *Stop the Olympic Prison v. United States Olympic Committee*, 489 F. Supp. 1112, 1117 (S.D.N.Y. 1980). The Supreme Court noted the split, but did not resolve it in *American National Red Cross v. S.G.*, 505 U.S. 247, 251 and n.3 (1992). Rather, the Court held in this case that the sue-and-be-sued provision of the Red Cross charter was sufficient in itself to confer federal jurisdiction. *Id.*

d. Federally Funded Research and Development Centers

A Federally Funded Research and Development Center (FFRDC) is a privately owned but government-funded entity which has a long-term contractual relationship with one or more federal agencies to perform research and development and related tasks.[65] One authority refers to them as "'captive corporations' which are legally private, but are almost entirely government financed."[66] The Federal Acquisition Regulation (FAR) states: "FFRDC's are operated, managed, and/or administered by either a university or consortium of universities, other not-for-profit or nonprofit organization, or an industrial firm, as an autonomous organization or as an identifiable separate operating unit of a parent organization." 48 C.F.R. § 35.017(a)(3).

The federal executive agency which manages, administers, monitors, funds, and is responsible for the overall use of the FFRDC, is called the sponsor.[67] 48 C.F.R. § 35.017(b). The FFRDC may be permitted to accept work from parties other than the sponsor if and to the extent specified in the sponsoring agreement. 48 C.F.R. § 35.017-1(c)(5). A sponsoring agreement may not exceed 5 years, but is renewable in 5-year increments. 48 C.F.R § 35.017-1(e). The FAR tells agencies to phase out FFRDCs which are no longer needed. 48 C.F.R § 35.017-5. Some better known FFRDCs are the Rand Corporation and the Massachusetts Institute of Technology's

[65] *See* 71 Comp. Gen. 155 (1992). Apart from this overview treatment, our discussion does not further address these entities.

[66] Harold Seidman, *Government Corporations in the United States*, 22 Optimum 40, 43 (1991) (Seidman 1991).

[67] Under 48 C.F.R. § 35.017(b), it is possible for an FFRDC to have multiple federal agency sponsorship. The regulation calls for a lead agency to be designated as primary sponsor.

Lincoln Laboratory, both sponsored by the Department of the Air Force.[68] FFRDCs originated in the World War II era[69] and have proliferated in subsequent decades. The 1972 report of the Commission on Government Procurement, although expressing concern over the potential pitfalls of single-agency funding,[70] recommended that agencies continue to have "the option to organize and use FFRDCs to satisfy needs that cannot be satisfied effectively by other organizational resources."[71] The Office of Management and Budget's Office of Federal Procurement Policy implemented the Commission's recommendation by issuing Policy Letter No. 84-1, 49 Fed. Reg. 14462, 14464 (Apr. 11, 1984), which was in turn implemented by the subsequent inclusion of coverage in the FAR at 48 C.F.R. § 35.017. *See* 48 C.F.R. § 35.017(a)(2) ("An FFRDC meets some special long-term research or development need which cannot be met as effectively by existing in-house or contractor services.").

There is no requirement that the creation of an FFRDC be specifically authorized by statute. 71 Comp. Gen. 155 (1992) (Government Corporation Control Act requirement for specific authority not applicable to FFRDCs); B-145898-O.M., June 30, 1961 (same). The authority to establish and sponsor FFRDCs is viewed as incident to the agency's authority to enter into contracts. 71 Comp. Gen. at 157. Although arguably unnecessary under this theory, in some cases Congress has specifically authorized agencies to establish FFRDCs, perhaps because of the amounts involved. For example, the 1991 appropriation for the Internal Revenue Service (IRS) authorized the IRS to spend up to $15 million to establish an FFRDC as part of its tax systems modernization program. Pub. L. No. 101-509, 104 Stat. 1389, 1395 (Nov. 5, 1990). Legislation enacted in 1987 authorized the Secretary of Defense to establish an FFRDC to provide support to the Strategic Defense Initiative program. Pub. L. No. 100-180, § 227, 101 Stat. 1019, 1057–59 (Dec. 4, 1987), 10 U.S.C. § 2431 note.

While there is no governmentwide statutory guidance on the creation and use of FFRDCs, there is legislation applicable to the military departments.

[68] The National Science Foundation provides a list of FFRDCs as of February 2005 on its Web site at www.nsf.gov/statistics/nsf05306 (last visited Nov. 28, 2007).

[69] 2 *Report of the Commission on Government Procurement* 17 (1972).

[70] *Id.* at 18.

[71] *Id.* at 64 (app. E., Recommendation No. 5).

Before obligating or expending funds to operate an FFRDC, the sponsoring department must report to Congress on the "purpose, mission, and general scope of effort" of the proposed FFRDC, and must observe a 60-day waiting period. 10 U.S.C. § 2367(c)(1). An FFRDC generally may be used only for work that is within the center's purpose, mission, and general scope of effort, as set forth in the sponsoring agreement. 10 U.S.C. § 2367(a).[72] Defense is to report to designated congressional committees "the actual obligations and the actual man-years of effort expended at each" FFRDC for each fiscal year. 10 U.S.C. § 2367(d).

The FFRDC is not an arm's length contractor. By virtue of its access to government data, employees, and facilities, it is said to have a "special relationship" with the government. 48 C.F.R. § 35.017(a)(2). As one might suspect, the FFRDC concept is not free from controversy. One commentator states:

> "The first FFRDCs were able to provide a research environment, capable of attracting and retaining the best scientists, which it was difficult to reproduce within the government structure. It is now claimed that establishment of FFRDCs sometimes is motivated more by the desire to evade government personnel and procurement regulations than by desire to create a research environment. It is alleged that some are little more than job shops for their government sponsors. Industry is unhappy because of what it sees as unfair competition."[73]

The "job shop" allegation stems in part from the practice of granting "fringe benefits" which, although reimbursed directly from appropriated funds, exceed those of regular government employees, sometimes by a very wide margin. One example is discussed in a GAO report whose title is very revealing: *University Research: U.S. Reimbursement of Tuition Costs for University Employee Family Members*, GAO/NSIAD-95-19 (Washington, D.C.: Feb. 15, 1995). The Office of Management and Budget subsequently inserted language in OMB Circular No. A-21, *Cost Principles for*

[72] This limitation does not apply to an FFRDC that performs applied scientific research under laboratory conditions. 10 U.S.C. § 2367(b).

[73] Seidman 1991, at 43–44. For further discussion of the competition aspects, see GAO, *Competition: Issues on Establishing and Using Federally Funded Research and Development Centers*, GAO/NSIAD-88-22 (Washington, D.C.: Mar. 7, 1988).

Educational Institutions, § J.10.f(2) (May 10, 2004), to make tuition benefits allowable only for the employees themselves.

To help ameliorate industry's concerns, the FAR requires each sponsoring agreement to prohibit the FFRDC from competing with any non-FFRDC for government contracts. 48 C.F.R. § 35.017-1(c)(4). This is not limited to the FFRDC as prime contractor. In a bid protest decision, for example, GAO found the regulation violated where an agency accepted a proposal in which an FFRDC would team with the awardee to perform a substantial amount of the work. B-243650.2, Nov. 18, 1991, *aff'd on reconsideration*, B-243650.3, May 11, 1992. GAO explained:

> "[The FAR] does not make a distinction between an FFRDC's role as a prime contractor or subcontractor. We think that the determination whether an FFRDC is in fact competing with a private firm in violation of the regulation depends not upon whether the FFRDC has submitted a proposal in its own name but upon the impact of its participation, both from a technical and a cost standpoint, upon the procurement."

Id. at 5.

Similarly, where the contracting agency discovered the relationship after it had awarded the contract, it properly terminated the contract for the convenience of the government. B-276240 *et al.*, May 23, 1997.

Even though it may be funded entirely, or nearly so, from federal funds, an FFRDC is regarded as a contractor and not an agency or instrumentality of the United States. 71 Comp. Gen. 155, 158 (1992). For example, in deciding a 1981 dispute over reimbursement of costs, the Armed Services Board of Contract Appeals treated an FFRDC no differently than any other contractor, notwithstanding that it was "100 percent funded by the government." *Massachusetts Institute of Technology*, ASBCA No. 23079, 81-2 B.C.A. ¶ 15,451 (1981) (cited in 71 Comp. Gen. at 157 n.2). Similarly, GAO analyzed the Mitre Corporation, an FFRDC, as follows:

> "While the MITRE Corporation was established . . . for the purpose of engaging in and procuring services to or for the United States Government or any department or agency thereof, the company may not be said to be in any respect an agency or instrumentality of the United States. The

> affairs of the company are in the hands of private persons, no element of control being vested in the United States; and no provision is made for distributing corporate assets to the United States upon dissolution of the company. Such interest as the United States might have in MITRE would arise solely under contracts entered into with the company in the same manner as under contracts with any other corporation."

B-145898-O.M., June 30, 1961, at 5–6.

The relationship of FFRDCs to the government also comes into play in protests against the award of subcontracts by FFRDCs. GAO will review a subcontract award if the subcontract is "by or for a Federal agency." 4 C.F.R. § 21.13(a). The protester invariably argues that the FFRDC's contracts are, by virtue of its status, "for the government." GAO will not draw a conclusion either way solely from the contractor's status as an FFRDC, but will examine the specific contractual relationship. The "by or for" standard contemplates situations in which the FFRDC is effectively acting as the government's agent or is largely a conduit between the government and the subcontractor. This could happen, for example, where the FFRDC is operating and/or managing a government facility (as opposed to simply using government-furnished facilities), or otherwise providing large-scale management services. 69 Comp. Gen. 334 (1990); B-244711, Oct. 16, 1991.

Along the same lines, the court in *Vallier v. Jet Propulsion Laboratory*, 120 F. Supp. 2d 887 (C.D. Cal. 2000), *aff'd*, 23 Fed. Appx. 803 (9th Cir. 2001), held that the United States had no tort liability for alleged negligence in the California Institute of Technology's (Caltech) operation of the laboratory's waste disposal facilities because Caltech was not an "employee" of the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671–2680. The court found that, although Caltech was subject to detailed federal regulations and inspections, the federal government did not control Caltech's day-to-day operation of the laboratory's waste disposal activities. *Vallier*, 120 F. Supp. 2d at 908. The court also observed that, unlike the contracts governing some FFRDCs, there was nothing in Caltech's contract for operation of the laboratory making Caltech a government "employee" for purposes of the FTCA. *Id.* at 908–09. The court distinguished Caltech's contract from others that specifically stated that the FFRDCs were "agents" of the government for purposes of the activities in question. *Id.* at 909.

A variation on the FFRDC theme is the so-called "GOCO"—a government-owned, contractor-operated facility. See, for example, *United States v. Anderson County, Tennessee*, 705 F.2d 184 (6th Cir. 1983), *cert. denied*, 464 U.S. 1017 (1983), describing a GOCO used by the Department of Energy. Energy also funds a group of GOCO research laboratories. A useful report on these is GAO, *Department of Energy: Uncertain Progress in Implementing National Laboratory Reforms*, GAO/RCED-98-197 (Washington, D.C.: Sept. 10, 1998). *See also* GAO, *Department of Energy: Additional Opportunities Exist for Reducing Laboratory Contractors Support Costs*, GAO-05-897 (Washington, D.C.: Sept. 9, 2005); *National Laboratories: Better Performance Reporting Could Aid Oversight of Laboratory-Directed R&D Program*, GAO-01-927 (Washington, D.C.: Sept. 28, 2001).

e. Summing Up

> "Developments in the last 20 years might make one suspect that the U.S. government is going quasi."[74]

The categories we have described make up the primary ways the government has used the corporate device. They are, however, by no means exclusive. Other agency-specific or program-specific examples dot the federal landscape. One is the Production Credit Association (PCA). PCAs are corporate financial institutions chartered by the Farm Credit Administration under statutory authority. 12 U.S.C. §§ 2071–2077. *See also* 12 C.F.R. § 614.4040. They are statutorily designated as instrumentalities of the United States. 12 U.S.C. § 2071(a). As such, they have been held immune from awards of punitive damages. *Smith v. Russellville Production Credit Ass'n*, 777 F.2d 1544 (11th Cir. 1985); *Rohweder v. Aberdeen Production Credit Ass'n*, 765 F.2d 109 (8th Cir. 1985); *Matter of Sparkman*, 703 F.2d 1097 (9th Cir. 1983). However, they are not "primarily acting as instrumentalities of the United States" for purposes of the Federal Tort Claims Act. *South Central Iowa Production Credit Ass'n v. Scanlan*, 380 N.W.2d 699 (Iowa 1986); *Waldschmidt v. Iowa Lakes Production Credit Ass'n*, 380 N.W.2d 704 (Iowa 1986). Also, they are sufficiently independent of the federal government so as not to share the government's exemption from 28 U.S.C. § 1341, which bars federal jurisdiction of state tax cases in favor of remedies under the state courts. *Arkansas v. Farm Credit Services*, 520 U.S. 821 (1997). One court analogized them to national banks in the Federal Reserve System. *United States v. Haynes*,

[74] Harold Seidman, *The Quasi World of the Federal Government*, 6 Brookings Rev. 23 (1988) (Seidman 1988).

620 F. Supp. 474, 477 (M.D. Tenn. 1985) (holding that they were not independent agencies for purposes of 18 U.S.C. § 208, the criminal conflict of interest statute).[75]

Another example is the entity addressed in *Varicon International v. OPM*, 934 F. Supp. 440 (D.D.C. 1996), a corporation formed by former Office of Personnel Management (OPM) employees, with OPM's encouragement. OPM awarded it a sole-source contract to conduct background investigations previously conducted by the agency itself. The court viewed this as nothing more than "a private corporation which was awarded a government contract" (*id.* at 447), and thus not subject to the Government Corporation Control Act's requirement for statutory authority. *See also* 53 Comp. Gen. 86 (1973).

Some analysts believe that an increasing portion of the government's business is being done outside the traditional structure. They also suggest that "[t]he line between what is 'public' and what is 'private' has become indistinct."[76] The literature uses terms like "quasi-private," "quasi-government," and "hybrid organizations."[77] Leazes calls them "twilight-zone corporations."[78] Moe regards them as "relatively unaccountable units at the margin of government."[79] Seidman consigns them to a "*terra incognita*, somewhere between the public and private sectors."[80] The National Academy of Public Administration (itself a title 36 corporation) has reported that "[t]he boundary between the public and private sectors

[75] For cases reaching similar results with respect to other corporations under an earlier version of the statute, see *United States v. Chemical Foundation, Inc.*, 272 U.S. 1 (1926), and 16 Comp. Gen. 613 (1936).

[76] Ronald C. Moe and Thomas H. Stanton, *Government-Sponsored Enterprises as Federal Instrumentalities: Reconciling Private Management with Public Accountability*, 49 Pub. Admin. Rev. 321 (1989); Lloyd D. Musolf and Harold Seidman, *The Blurred Boundaries of Public Administration*, 40 Pub. Admin. Rev. 124, 125 (1980). Adding those purely private entities whose doors would close in a matter of weeks if the federal money stopped flowing further emphasizes the point.

[77] *See* Musolf and Seidman, at 124.

[78] Francis J. Leazes, Jr., *Accountability and the Business State: The Structure of Federal Corporations*, 36 (1987).

[79] Ronald C. Moe, *Administering Public Functions at the Margin of Government: The Case of Federal Corporations*, 3 (1983).

[80] Seidman 1988, at 25.

has been blurred so that one cannot say with assurance to which sector many corporations belong or to whom they are accountable."[81]

Students of public administration disagree over whether this blurring is good or bad.[82] Whether it is good, bad, or somewhere in between, it is here, likely to remain, and must be included in any consideration of federal spending issues.

3. Creation

To create a private business corporation, the incorporators file articles of incorporation with a designated office in the jurisdiction—state or District of Columbia—in which they wish to incorporate. Each state, as well as the District of Columbia, has an incorporation statute that details these procedures and addresses other aspects of the corporation's existence, such as corporate powers, liability of officers, and issuance of stock. For example, the D.C. law is the District of Columbia Business Corporation Act, 29 D.C. Code §§ 29.101.01–29.101.170.

There is no such thing as a federal incorporation statute. Rather, Congress ordinarily provides a charter for a government corporation[83] by specific legislation that sets out its purposes, powers, structure, obligations, and sources of funding. The statute may also require the government corporation to incorporate in a particular state or the District of Columbia. The corporation may be specifically designated an agency or instrumentality of the United States government, or it may be specifically designated not to be such entities, which can be important when it comes

[81] National Academy of Public Administration, I *Report on Government Corporations* 4 (1981). If this passage is evocative of Moe and Seidman, it may be because both were members of the panel which conducted the NAPA study. *Id.* at app. 1.

[82] *See*, *e.g.*, Benjamin A. Templin, *Comment on Neil H. Buchanan's Social Security and Government Deficits: When Should We Worry?*, 92 Cornell L. Rev. 291, 295–96 (2007); Richard Scott Carnell, *Handling the Failure of a Government-Sponsored Enterprise*, 80 Washington L. Rev. 565 (2005); Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB (Public Company Accounting Oversight Board) and Its Public/Private Status*, 80 Notre Dame L. Rev. 975 (2005); Seidman 1988, at 23–24. For an examination of the hybrid nature of Amtrak, see Arnold Adams, *The National Railroad Passenger Corporation [Amtrak]—A Modern Hybrid Corporation Neither Private Nor Public*, 31 Bus. Law. 601 (1976).

[83] For ease of discussion in this section, we will use the term "government corporation" to refer generically to the various corporate devices discussed in section B.2 of this chapter unless a more specific term is warranted.

to determining whether particular federal statutes apply to the corporation (discussed in detail in section B.7 of this chapter). Congress may also charter a government corporation by delegating the power to the executive branch or to another government corporation. Either way, the creation of a government corporation must be explicit; it cannot be implied.

a. Historical Background and Purpose

While the proliferation of government corporations largely occurred during the twentieth century, the federal government has created or used government corporations since the beginning of the republic. The earliest examples were banking institutions. The first, predating even the adoption of the Constitution, occurred when the Continental Congress authorized the Bank of North America in 1781 and the Superintendent of Finance purchased approximately five-eighths of the capital stock in the name of the government, making the United States the majority owner.[84] In 1791, Congress created and incorporated the (First) Bank of the United States, authorizing the United States to subscribe 20 percent of the corporation's stock.[85] Act of February 25, 1791, ch. 10, 1 Stat. 191. Initial governmental participation in this and other banking enterprises consisted of investment in stock as opposed to management of the corporation.

The Second Bank of the United States was incorporated by the Act of April 10, 1816, ch. 44, 3 Stat. 266, in which the United States would subscribe 20 percent of the Bank's capital stock and the President would appoint, by and with the consent of the Senate, 5 of the Bank's 25 directors, the rest to be elected annually by shareholders other than the United States. The legality of the Second Bank was challenged, resulting in the landmark case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819). In that decision, the Supreme Court upheld the constitutionality of the Second Bank of the United States and the federal government's authority to create or involve itself in commercial enterprises. The Court held that although the Constitution did not specify creating corporations as one of the federal government's enumerated powers, the Necessary and Proper Clause of the Constitution (art. I, § 8, cl. 18) allowed Congress to charter and use a corporation for the public purpose of banking. Chief Justice Marshall stated:

[84] John McDiarmid, *Government Corporations and Federal Funds*, 21 (1938).

[85] A capsule history starting with the 1791 act may be found in *Lebron v. National Railroad Passenger Corporation*, 513 U.S. 374, 386–91 (1995).

> "The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished."

Id. at 411.

Later in the opinion, the Chief Justice wrote what has become one of the most famous statements in American constitutional law: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist[ent] with the letter and spirit of the constitution, are constitutional." *Id.* at 421.

The courts have never seriously questioned Congress's power to create or employ corporate entities as a means of carrying into effect the substantive powers granted to it by the Constitution. For example, in *Luxton v. North River Bridge Co.*, 153 U.S. 525 (1894), the Supreme Court held that Congress, in exercising its power to regulate interstate commerce, indisputably has the power to create a corporation to construct a bridge across navigable water between two states.[86] Congress is not restricted to creating a new corporation, but can acquire or employ an existing private corporation to carry out its substantive constitutional powers. *New York ex rel. Rogers v. Graves*, 299 U.S. 401 (1937). Here, Congress acquired the entire capital stock of a private corporation and elected its board of directors to carry out constitutional powers of regulating commerce and providing for national defense in maintaining, operating, and protecting the Panama Canal.

Congress has created or employed corporations to carry out varied purposes. Turning again to Chief Justice Marshall's words, "[t]he power of

[86] Other cases upholding the constitutionality of various government corporations include *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) (federal land banks); *Doherty v. United States*, 94 F.2d 495 (8th Cir.), *cert. denied*, 303 U.S. 658 (1938) (Federal Deposit Insurance Corporation); *Weir v. United States*, 92 F.2d 634 (7th Cir.), *cert. denied*, 302 U.S. 761 (1937) (same); *Langer v. United States*, 76 F.2d 817 (8th Cir. 1935) (Reconstruction Finance Corporation).

creating a corporation is never used for its own sake, but for the purpose of effecting something else." *McCulloch*, 17 U.S. at 411. One analyst has noted that "[g]overnment-sponsored corporations are simply a means of securing governmental objectives."[87] Some government corporations are charged with developing projects or functions not adaptable to private industry while others are responsible for meeting needs in the market that are unmet by private industry. Those purposes include governance, as well as social and educational programs. Government corporations have also been created, usually in bunches, to meet war or economic emergencies. The twentieth century saw three such surges: World War I, the Great Depression, and World War II.

First, during World War I, government corporations were created to mobilize the war effort by transacting business in the same manner as private commercial firms. These included the War Finance Corporation,[88] the United States Shipping Board Emergency Fleet Corporation,[89] and the United States Spruce Production Corporation,[90] among others. After the war, many of the corporations were liquidated since they were intended to be temporary and had fulfilled their missions to support the war effort.

It was not long after World War I that another crisis erupted and led to the next surge of government corporations. The role of the federal government changed dramatically in response to the Great Depression, even more than it changed as a result of World Wars I and II. During the Depression, the federal government used government corporations extensively to stabilize

[87] Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 Mich. L. Rev. 302, 312 (1995).

[88] The War Finance Corporation was organized under Pub. L. No. 65-121, 40 Stat. 506 (Apr. 5, 1918), to provide financial assistance to industries important to the successful prosecution of the war.

[89] The Emergency Fleet Corporation was organized on April 16, 1917 to purchase, construct, and operate merchant vessels under the authority of the original Shipping Board Act, Pub. L. No. 64-260, § 11, 39 Stat. 728, 731 (Sept. 7, 1916). *See* John McDiarmid, *Government Corporations and Federal Funds*, 21, 24–25 (1938).

[90] Public Law No. 65-193, 40 Stat. 845, 888 (July 9, 1918), authorized the War Department's Director of Aircraft Production to form corporations to aid the government's production of aircraft and related equipment. Under this authority, the United States Spruce Production Corporation was created on August 20, 1918, to make available aircraft lumber for war use.

the economy and encourage economic growth.[91] For example, the Reconstruction Finance Corporation had a central role in planning and financing recovery programs by providing loans to banks, railroads, business enterprises, mining interests, public agencies, agricultural marketing organizations, and purchasing stock in banks, insurance companies, mortgage corporations, and corporations engaged in defense activities.[92] The Federal Deposit Insurance Corporation was created to promote and preserve public confidence in banks and protect the money supply by insuring deposits, periodically examining insured banks, and regulating certain securities, mergers, consolidations, acquisitions and assumption transactions of the banking sector.[93] The Commodity Credit Corporation (CCC) was created for the purpose of "stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities . . . and of facilitating the orderly distribution of agricultural commodities."[94] The primary method the CCC uses to achieve its purpose is providing loans. The Federal Housing Administration (FHA) was established to encourage improvement in housing standards and conditions, to provide an adequate home financing system by insurance of housing mortgages and credit, and to exert a stabilizing influence on the mortgage market.[95] The primary method used by FHA to fulfill its purpose is providing mortgage insurance.

World War II provided the impetus for the third major surge in twentieth century government corporations. Over 20 government corporations were

[91] Francis J. Leazes, Jr., *Accountability and the Business State: The Structure of Federal Corporations*, 21 (1987).

[92] Pub. L. No. 72-2, 47 Stat. 5 (Jan. 22, 1932). *See also* Pub. L. No. 76-664, § 6, 54 Stat. 572, 574 (June 25, 1940).

[93] Banking Act of 1933, Pub. L. No. 73-66, § 8, 48 Stat. 162, 168 (June 16, 1933), *superseded by* Federal Deposit Insurance Act, Pub. L. No. 81-797, 64 Stat. 873 (Sept. 21, 1950), *codified as amended at* 12 U.S.C. §§ 1811–1831z.

[94] 15 U.S.C. § 714. The Commodity Credit Corporation was given a statutory charter in 1948 by Public Law No. 80-806, 62 Stat. 1070 (June 29, 1948).

[95] National Housing Act, Pub. L. No. 73-479, § 1, 48 Stat. 1246 (June 27, 1934). Its provisions now appear primarily at 12 U.S.C. §§ 1707–1715z-22a. The Federal Housing Administration is now part of the Department of Housing and Urban Development. Some interesting statutory phrasing provides that " 'wholly owned Government corporation' means . . . the Secretary of Housing and Urban Development when carrying out duties and powers related to the Federal Housing Administration Fund." 31 U.S.C. § 9101(3)(M).

created to meet the wartime production needs of World War II. These included the War Damage Corporation[96] (to provide insurance and reasonable protection against loss or damage to property, real or personal, resulting from enemy attack, including any action taken by the military, naval, or air forces of the United States in resisting enemy attack), the Smaller War Plants Corporation[97] (to aid in mobilizing the productive facilities of small business in the interest of successful prosecution of the war), and the Defense Plant Corporation[98] (to aid the Government in its national defense by financing or engaging in the construction, extension, and operation of plants engaged in war production).

Of course, the end of World War II did not end the practice of creating and using government corporations. Since then, government corporations have continued to be created to address myriad economic, social, and other issues affecting the nation. For example, Congress created the Government National Mortgage Association (Ginnie Mae) in 1968 to provide the means of transferring funds from the nation's securities markets into the residential housing mortgage market. 12 U.S.C. §§ 1716b, 1717. The Pension Benefit Guaranty Corporation was created in 1974 to administer the pension plan termination insurance program created under the Employee Retirement Income Security Act of 1974 (ERISA) by encouraging the continuation and maintenance of voluntary private pension plans, providing uninterrupted payment of pension benefits to beneficiaries under plans covered by ERISA and maintaining premiums at the lowest level consistent with carrying out its obligations under ERISA. 29 U.S.C. § 1302. The Resolution Trust Corporation was established in 1989, in response to the savings and loan crisis, to manage and resolve all cases involving failed depository institutions insured by the Federal Savings and Loan Insurance Corporation before the enactment of the

[96] The War Damage Corporation was actually created by the Reconstruction Finance Corporation under statutory authority. *See* 15 U.S.C. § 606b (1946).

[97] The Smaller War Plants Corporation was created by Public Law No. 77-603, § 4, 56 Stat. 351, 353 (June 11, 1942).

[98] The Defense Plant Corporation was created by the Reconstruction Finance Corporation on August 22, 1940, under the same statutory authority as the War Damage Corporation. *See* GAO, *Reference Manual of Government Corporations*, S. Doc. No. 79-86, at 32 (1945).

Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) of 1989. 12 U.S.C. § 1441a(b).[99]

At any given time, it seems, several new corporations are being proposed or studied. *See*, *e.g.*, GAO, *Government Corporations: Profiles of Recent Proposals*, GAO/GGD-95-57FS (Washington, D.C.: Mar. 30, 1995). The Office of Management and Budget (OMB) issued a document in 1995 entitled *Specifications for Creating Government Corporations* (OMB Memorandum M-96-05, (Dec. 8, 1995)). This presents OMB's standards and approach for evaluating proposals for new corporations. The OMB paper incorporates many of the principles of the 1981 National Academy of Public Administration report noted in section B.1 of this chapter.

Congress has categorized or designated some government corporations as nonprofit (*e.g.*, Legal Services Corporation, 42 U.S.C. § 2996b(a)) while others are designated as for-profit. For example, the United States Enrichment Corporation (USEC) was created to operate as a business enterprise on a profitable and efficient basis by marketing and selling enriched uranium, and uranium enrichment and related services, primarily for use by electric utilities worldwide. 42 U.S.C. §§ 2297b, 2297b-2 (1994).[100] Another example is Amtrak, whose organic legislation currently specifies that it "shall be operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a)(2). Originally, Amtrak's statute simply declared it to be a "for profit corporation" (Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330 (Oct. 30, 1970)), but the language was changed to recognize the realities of the situation. For a history of Amtrak's legislation *vis-à-vis* corporate status, see *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 388–89 (1995).

[99] The Resolution Trust Corporation has terminated and its remaining responsibilities were transferred to the Federal Deposit Insurance Corporation. *See* 12 U.S.C. § 1441a(m).

[100] Congress enacted legislation in 1996 to "privatize" USEC. *See* USEC Privatization Act, enacted as part of the massive Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, title III, ch. 1, subch. A, 110 Stat. 1321, 1321-335 (Apr. 26, 1996). For background, see B-307137, July 12, 2006; B-286661, Jan. 19, 2001; GAO, *U.S. Enrichment Corporation Privatization: USEC's Delays in Providing Data Hinder DOE's Oversight of the Uranium Decontamination Agreement*, GAO-06-723 (Washington, D.C.: June 16, 2006); *Uranium Enrichment: Observations on the Privatization of the United States Enrichment Corporation*, GAO/T-RCED-95-116 (Washington, D.C.: Feb. 24, 1995). The "omnibus" act is itself a fascinating document. Its publication in Statutes at Large begins with a footnote stating that the act's "original hand enrollment as signed by the President . . . is printed without corrections. Footnotes indicate missing or illegible text in the original."

b. Need for Statutory Authority

Prior to 1946, government corporations came into being in one of three ways. They were (1) specifically created by statute, (2) created by an executive branch department or another government corporation under statutory authorization or delegation, or (3) created by the executive branch through purely administrative action, with no specific statutory authorization. *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 388–89 (1995). The power of Congress to create government corporations, either directly or by delegation, had been settled since *McCulloch v. Maryland*[101] in 1819. The issue of executive authority to create corporations came to a head in the 1940s. The lines of battle were formed when the Farm Security Administration, which wanted to purchase land but lacked the requisite statutory authority, created several corporations whose officers and directors were Department of Agriculture employees. The Department then made loans to the corporations, which in turn bought the land. Not surprisingly, the legality of this arrangement was questioned. On the issue of whether the Department could create corporations without statutory authority, the parties split along predictable lines. The Comptroller General said "No." B-23881, Mar. 5, 1942. *See also* 21 Comp. Gen. 892, 893 (1942). The Attorney General said "Yes." 40 Op. Att'y Gen. 193 (1942). *See also* 37 Op. Att'y Gen. 288 (1933).

GAO's conclusion was based partially on considerations of sovereign immunity. The power to sue and be sued is an important power of any corporation. The Supreme Court had recently decided *Federal Housing Administration v. Burr*, 309 U.S. 242 (1940), and *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381 (1939), which strongly implied that this power could be granted only by Congress. B-23881, Mar. 5, 1942, at 18. It was not necessary for the Court to directly address the question because neither case dealt with a corporation created purely by executive action, but it would seem fundamental that an agency could not confer powers, authorities, or exemptions it did not have, unless of course it was operating under express statutory authority.[102]

Of course, as the sue-and-be-sued point suggests, the heart of the question was never the creation of corporate entities *per se*. Rather, the issue centered on the powers that could be given to them. One decision stated

[101] 17 U.S. (4 Wheat.) 316 (1819). See the discussion in section B.3.a of this chapter.

[102] The Attorney General's opinion did not address this point, but did remind GAO that GAO had at least implicitly condoned the practice by issuing decisions concerning nonstatutory corporations—without questioning the legality of their creation. 40 Op. Att'y Gen. at 201.

that "the Virgin Islands Co. was created without specific Congressional authorization and . . . therefore, the corporate character of the company did not serve to free its funds from the provisions of law to which they would have been subject if administered by an unincorporated Government agency." 21 Comp. Gen. 928, 930 (1942).

After its creation, however, Congress had given the corporation statutory recognition. In light of this, GAO concluded that the corporation could, if reasonably necessary to corporate business, go beyond certain use limitations imposed as a matter of policy on funds available to other agencies, and advised that the corporation could use its funds to buy insurance on its property. *Id.* at 931. A 1934 decision contained a stronger statement:

> "There is a clear and vital difference between a corporation created pursuant to statutory direction with clear statutory grant to remove its transactions from the safeguards surrounding appropriations and to avoid not only Executive direction but accountability for the public moneys entrusted to it, and a corporation created within the Government [without such specific authority]. . . . In some instances, it is true, the laws creating corporations have been so broad as to exclude Executive control and permit escape from accountability. A corporation of the other class, however, created as an additional administrative agency, can have no such status or uncontrolled authority. It can exercise no wider authority than as though operating as an unincorporated unit in the Executive branch. By the act of incorporating Executive responsibility is not shifted, Executive control avoided, nor accountability escaped."

A-53085, Jan. 11, 1934, at 5.

The idea of a legislative requirement was not new. Interestingly, opposition to government corporations in the 1930s stemmed not so much from the accountability perspective as from the fact that they competed with the private sector. As a congressional report put it, "[g]overnment corporations to a great degree do business in competition with private enterprise. They encroach upon and compete with business, which is under serious disadvantage [while the government corporation's advantages, like tax exemptions and cheap credit, make it] an invincible competitor."[103]

The idea of a legislative charter became law several years later as section 304(a) of the Government Corporation Control Act, Pub. L. No. 79-248, 59 Stat. 597, 602 (Dec. 6, 1945). Now codified at 31 U.S.C. § 9102, it provides: "An agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action."

The legislative history of the Government Corporation Control Act noted the existence of several government corporations created without legislative authority and the potential for problems arising when such corporations were created under state law.[104] The House Report accompanying the legislation stated:

> "The committee does not consider the practices of chartering wholly owned Government corporations without prior authorization by the Congress or under State charters to be desirable. It believes that all such corporations should be authorized and chartered under Federal statute. The bill provides that in the future all corporations which are to be established for the purpose of acting as agencies or instrumentalities of the United States must be established by act of Congress or pursuant to an act of Congress specifically authorizing such action."

H.R. Rep. No. 79-856, at 11 (1945).

Section 9102 by its terms applies to acquisition as well as creation of corporations. With respect to existing nonstatutory corporations, the statute directed them to either seek a legislative charter or liquidate. Pub. L. No. 79-248, § 304(b).

[103] Joint Committee on Reduction of Nonessential Federal Expenditures, *Reduction of Nonessential Federal Expenditures—Government Corporations*, S. Doc. No. 78-227, at 25 (1944).

[104] S. Rep. No. 79-694, at 13 (1945).

There is little case law, administrative or judicial, invoking the requirements of 31 U.S.C. § 9102. However, a number of cases have found section 9102 inapplicable. We have previously noted two of these: 71 Comp. Gen. 155 (1992) (federally funded research and development centers) and *Varicon International v. OPM*, 934 F. Supp. 440 (D.D.C. 1996) (corporation formed by former government employees to do the same work they did when they were on the payroll). A 1975 GAO opinion to a committee chairman also found the statute inapplicable to so-called "proprietaries" of the Central Intelligence Agency (CIA)—corporations formed by CIA largely to provide "cover" for CIA activities. GAO found "irreconcilable conflict" between the public accountability requirements of section 9102 and CIA's need to keep these corporations "covert." This being the case, GAO concluded that CIA's mandate had to "prevail . . . over the general requirements otherwise applicable to Government corporations, in the absence of any indication that Congress intended to curtail or control the use of corporations for covert purposes incident to accomplishment of [CIA's] mission." B-179296, Dec. 10, 1975, at 3–4. A later opinion found the statute inapplicable to the creation of subsidiaries by a federally chartered private institution which had been converted from a mixed-ownership government corporation. B-219801, Oct. 10, 1986. Had the institution still been a mixed-ownership government corporation, section 9102 would have applied. *Id.*

A 1970 GAO case dealt with grants by the old Office of Economic Opportunity (OEO) to a nonprofit corporation established for the purpose of carrying out OEO programs by hopefully generating closer private-sector involvement. The question was whether the nonprofit was a legitimate grantee or merely an agent of the OEO. GAO's review showed that the nonprofit was wholly independent of the OEO and was not a disguised government corporation. Therefore, there was no violation of 31 U.S.C. § 9102. B-130515, Aug. 11, 1970. The analysis was very similar to that employed in B-145898-O.M., June 30, 1961, with respect to the MITRE Corporation.

An example of what GAO regarded as a clear violation of the statute is found in B-278820, Feb. 10, 1998. The question was whether the Federal Communications Commission (FCC) was authorized to establish two not-for-profit corporations to administer certain functions of the universal service program for schools, libraries, and rural health care providers.[105] The FCC argued that it did not establish or acquire the corporations, but had directed the National Exchange Carrier Association, Inc. to create them. While it was true that the Association and not the FCC was the incorporator, an examination of the FCC's role showed that it was involved in approving the proposed articles of incorporation and bylaws, approving the chief executive officers of the corporations, determining the size, composition, and term of office of the boards of directors, as well as selecting or approving the directors themselves. In GAO's view, the corporations were created to carry out governmental functions (specifically, the implementation of a statutory mandate), and the Association had simply acted as the incorporator for the convenience of the FCC. Under these circumstances, although the FCC did not directly establish or acquire the corporations, GAO held that section 9102 applied. The identity of the incorporator was not the determinant of section 9102's applicability; the prohibition would be meaningless if agencies could avoid it simply by using another party to act as incorporator. Thus, for purposes of 31 U.S.C. § 9102, an agency may not cause, directly or indirectly, a corporation to be created to carry out government functions without specific statutory authority.

Once GAO determined that the FCC had "established" a corporation within the meaning of section 9102, the next issue was whether the FCC had the requisite statutory authority. The FCC suggested that it was authorized to establish the corporations pursuant to sections 254 and 4(i) of the Communications Act. Section 254, 47 U.S.C. § 254, assigns the FCC a variety of universal service program functions, such as defining universal service, developing specific and predictable support mechanisms, and providing for equitable contributions by service providers. However, nowhere does it authorize the creation of corporations. Section 4(i), 47 U.S.C. § 154(i), provides: "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter [the Communications Act], as may be necessary in the execution of its functions."

[105] The statutory mandate for this program is section 254(h) of the Communications Act of 1934, as added by the Telecommunications Act of 1996, 47 U.S.C. § 254(h). The two not-for-profit corporations at issue were the Schools and Libraries Corporation and the Rural Health Care Corporation.

GAO held that this admittedly broad but nevertheless general authority was not sufficient to satisfy the specific requirement of section 9102. GAO concluded that the FCC exceeded its authority and violated section 9102 when it directed the creation of the corporations in question. In reaching this conclusion, GAO noted a line of judicial decisions treating section 4(i), part of the FCC's 1934 organic legislation, as the agency's "necessary and proper" clause. None of them, however, stands for the proposition that the FCC may invoke section 4(i) to disregard specific requirements of later-enacted statutes. Citing *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 396 (1995), GAO noted that the Supreme Court had described section 9102 as "evidently intended to restrict the creation of *all* Government-controlled policy-implementing corporations, and not just some of them." B-278820, at 7. The FCC not unexpectedly disagreed. The two corporations in question were subsequently merged into a larger entity.

Another skirmish involved creation of the now-defunct Federal Asset Disposition Association (FADA). In a series of assignments relating to the Federal Home Loan Bank Board, GAO reviewed the Board's authority to create various entities operating under its direction. One of those entities was FADA, created pursuant to statutory authority to organize new federal savings and loan associations. Problem was, GAO reasoned that an entity created under that authority should bear some resemblance to a federal savings and loan association. FADA, on the contrary, exercised none of the basic functions of a savings and loan association. Most tellingly, it did not accept savings and it did not make loans. B-226708.4, Mar. 15, 1989 (Enclosure at 4). In fact, GAO found that the Federal Savings and Loan Insurance Corporation (FSLIC) held all of FADA's stock, the Bank Board appointed its board of directors, and FADA's self-described sole purpose was to assist FSLIC in managing and disposing of assets. It was hard to escape the conclusion that FADA was a federal savings and loan association "only on paper." *Id.* at 3–4. Accordingly, GAO concluded that FADA was in fact a corporation wholly owned and controlled by the federal government and engaged in the performance of federal functions, and that its creation exceeded the Bank Board's authority.[106] In addition to B-226708.4 cited above, see B-226708.3, Dec. 12, 1988, B-226708.2, Sept. 29, 1988, B-226708, Sept. 6, 1988, and GAO, *Failed Thrifts: No Compelling Evidence of a Need for the Federal Asset Disposition Association*, GAO/GGD-89-26 (Washington, D.C.: Dec. 12, 1988).

The Justice Department's Office of Legal Counsel (OLC) addressed 31 U.S.C. § 9102 in the Memorandum Opinion for the General Counsel, Office of Management and Budget, *Status of National Veterans Business Development Corporation*, OLC Opinion, Mar. 19, 2004, which held that the National Veterans Business Development Corporation (NVBDC) was a government corporation for purposes of title 5, United States Code. For essentially the same reasons that the opinion viewed NVBDC as a government corporation, it also concluded that NVBDC was an agency for purposes of 31 U.S.C. § 9102. NVBDC was created by the government to perform federal functions and received federal funding. Thus, NVBDC could not establish or acquire other corporations without specific statutory authority.

A corporation created without legislative authority can be, in effect, "ratified" by subsequent legislation. An example is 21 Comp. Gen. 928 (1942), the Virgin Islands case discussed earlier in this section. Although the corporation in that case had been created without statutory authority, subsequent legislation made it clear that "Congress has recognized . . . the corporate existence and status." *Id.* at 930. See 17 Comp. Gen. 50 (1937) for another example. Subsequent legislation was also involved in the FADA case, but GAO did not regard it as rising to the level of congressional ratification. B-226708, Sept. 6, 1988.

As noted previously, Congress may create a corporation directly or it may authorize another agency or government corporation to do the creating. This is the reason for the "by or under" language in 31 U.S.C. § 9102. Of course this was true even prior to the Government Corporation Control

[106] FADA was dissolved under the provisions of the Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA). Pub. L. No. 101-73, 103 Stat. 183 (Aug. 9, 1989). FIRREA also abolished both the Federal Home Loan Bank Board and the FSLIC. *Id.* § 401. Thus, all of the principal entities discussed in the GAO materials cited in the text are gone. The case remains useful, however, to illustrate the proposition that a goose does not become a swan merely because someone calls it one. For more on the FADA saga, see Ronald C. Moe, *Managing the Public's Business: Federal Government Corporations*, S. Prt. No. 104-18, at 22–26 (1995); and Harold Seidman, *The Quasi World of the Federal Government*, 6 Brookings Rev. 23, 26 (1988).

Act. For example, the Reconstruction Finance Corporation (RFC), described briefly earlier, was so authorized and did in fact create several other government corporations.[107] For a more recent example, the Farm Credit System banks, which include the federal land banks, federal intermediate credit banks, and banks for cooperatives, are mixed-ownership government corporations listed in 31 U.S.C. § 9101(2) and are therefore governed by the restriction contained in 31 U.S.C. § 9102. Thus, when it became desirable for Farm Credit System banks to be able to organize subsidiary corporations to perform certain functions the banks were authorized to perform, Congress enacted that specific statutory authority.[108]

Where Congress authorizes or delegates the creation of a corporation to some existing agency, the statute necessarily implies the authority for the creating agency to use its funds for the expenses of incorporation. 21 Comp. Gen. 892 (1942). This can include subscription to initial capital stock where required. 37 Op. Att'y Gen. 437 (1934). Logically enough, incorporation expenses of a corporation whose creation is not statutorily authorized are improper. A-90344, Sept. 30, 1938; A-71172, Feb. 26, 1936.

4. Management

a. Government Corporation Control Act

(1) Origin

Many of the government corporations[109] created to meet production needs during World War I were liquidated promptly after the war. As a result, before the 1930s, "there was not a pressing need for general procedures to

[107] Section 5d of the Reconstruction Finance Corporation Act, as amended by Pub. L. No. 76-664, § 5, 54 Stat. 572, 573 (June 25, 1940). The RFC seized the opportunity "with gusto." *Lebron*, 513 U.S. at 389. Some of the government corporations the RFC created are the Defense Plant Corporation, Defense Supplies Corporation, Rubber Reserve Company, Metals Reserve Company, War Damage Corporation, United States Commercial Company, Petroleum Reserves Corporation, and the Rubber Development Corporation. *See* S. Doc. No. 78-227, at 10–14.

[108] 12 U.S.C. §§ 2211 and 2212; H.R. Rep. No. 96-1287, at 23, 42 (1980) (accompanying report of House Agriculture Committee).

[109] For ease of discussion in this section, we will use the term "government corporation" to refer generically to the various corporate devices discussed in section B.2 of this chapter unless a more specific term is warranted.

govern the management of government corporations." GAO, *Congress Should Consider Revising Basic Corporate Control Laws*, GAO/PAD-83-3 (Washington, D.C.: Apr. 6, 1983), at 3. *See also* B-103455, May 21, 1951. During the Depression and New Deal eras, many corporations were formed to serve various economic needs, and others were created to meet the production needs of World War II. These were not so quick to go away. By the mid-1940s, "there were 63 wholly owned and 38 partly owned Federal corporations." GAO/PAD-83-3, at 3. Government corporations "had gotten out of hand, in both their number and their lack of accountability." *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 389 (1995). Control procedures, such as they were, were developed through piecemeal administrative action that was not necessarily consistent and did not include all government corporations.

The initial congressional response was a 2-year study by the Joint Committee on Reduction of Nonessential Federal Expenditures. Noting the lack of overall control, the resulting report recommended the prompt enactment of legislation to (1) require government corporations to prepare business-type budgets for inclusion in the President's budget submitted to Congress; (2) provide for a measure of Treasury control over a corporation's accounts; and (3) require GAO audits.[110] This became the blueprint for what was to become the Government Corporation Control Act.

The first legislative step to implement these recommendations was the so-called George Act, Pub. L. No. 79-4, § 5, 59 Stat. 5, 6 (Feb. 24, 1945). This statute required GAO to audit the financial transactions of all government corporations annually, in accordance with the principles and procedures applicable to commercial corporate transactions and under rules prescribed by GAO. The law further required that each audit report "shall also show specifically every program, expenditure, or other financial transaction or undertaking, which, in the opinion of the Comptroller General, has been carried on or made without authority of law." *Id.* § 5(b). Because the statute used the words "all Government corporations," it applied to mixed-ownership as well as wholly owned corporations. 25 Comp. Gen. 7 (1945). Under section 5(c) of the George Act, the cost of the audits was to be borne by GAO's own appropriations, but a corporation

[110] Joint Committee on Reduction of Nonessential Federal Expenditures, *Reduction of Nonessential Federal Expenditures—Government Corporations*, S. Doc. No. 78-227, at 30 (1944).

could agree to pick up the audit tab. (Why it might want to do so is not clear.)

When Congress enacted the Government Corporation Control Act (GCCA), Pub. L. No. 79-248, 59 Stat. 597, (Dec. 6, 1945) (now codified at 31 U.S.C. §§ 9101–9110), the audit requirements of the George Act were essentially incorporated into the GCCA. The new law was designed to provide an overall control of government corporations by making them more accountable to Congress for their operations while allowing them the flexibility and autonomy needed for their commercial activities.[111] The declared congressional policy was "to bring Government corporations and their transactions and operations under annual scrutiny by the Congress and provide current financial control thereof."[112] The GCCA addresses budget controls, financial controls, and audit controls.

(2) Definitions

As noted earlier, the Government Corporation Control Act (GCCA) made no attempt to define the term "government corporation." Instead, it merely declared that there were two types of corporations subject to its provisions—the wholly owned government corporation and the mixed-ownership government corporation. *See* 31 U.S.C. § 9101(1). The GCCA lists the entities covered under each type. Wholly owned government corporations include the Commodity Credit Corporation, Export-Import Bank, Federal Prison Industries, Government National Mortgage Association, Overseas Private Investment Corporation, Pension Benefit Guaranty Corporation, Saint Lawrence Seaway Development Corporation, and the Tennessee Valley Authority, plus several others. 31 U.S.C. § 9101(3). Examples of mixed-ownership government corporations are the Federal Deposit Insurance Corporation, Federal Home Loan Banks, Federal Land Banks, and the Central Liquidity Facility of the National Credit Union Administration. 31 U.S.C. § 9101(2).

In trying to understand the two types of GCCA corporations, the plain meaning of the law's language is the proper starting point, although in this instance it does not help very much. The House report accompanying the

[111] H.R. Rep. No. 79-856, at 3 (1945). An unimpressed Dr. Seidman has called the law the "government corporation de-control act." Harold Seidman, *Government Corporations in the United States*, 22 Optimum 40, 41 (1991).

[112] Pub. L. No. 79-248 § 2.

original GCCA legislation stated: "The bill distinguishes between wholly owned Government corporations, in which the Government holds all the stock or other capital interests, and mixed-ownership Government corporations, in which the Government has only a partial interest." H.R. Rep. No. 79-856, at 5 (1945).

The 1981 report of the National Academy of Public Administration followed suit. Wholly owned corporations "pursue a governmental mission assigned in their enabling statute and are financed by appropriations. Their assets are owned by the government and managed by board members or an administrator appointed by the President or Secretary of a Department." On the other hand, mixed-ownership corporations "have a combination of governmental and private equity; hence their assets are owned and managed by board members selected by both the President and private stockholders. They are usually intended for transition to the private sector."[113]

Thus, one might conceptualize the two types as corporations owned in their entirety by the federal government and corporations with some nonfederal ownership or joint financial participation. This, however, is not always the case. For example, the now-defunct United States Railway Association was designated as a mixed-ownership government corporation when in fact it operated solely and exclusively under direct annual appropriations from Congress, the same as a typical federal agency.[114]

The only safe generalization is that a wholly owned government corporation is one listed in 31 U.S.C. § 9101(3) or so designated in its enabling legislation; a mixed-ownership government corporation is one listed in 31 U.S.C. § 9101(2) or so designated in its enabling legislation.[115] Of course, Congress remains free to create corporations wholly outside the

[113] National Academy of Public Administration, I *Report on Government Corporations*, 21 (1981). An example of such a transition is discussed in B-219801, Oct. 10, 1986 (National Consumer Cooperative Bank).

[114] GAO, *Is the Administrative Flexibility Originally Provided to the U.S. Railway Association Still Needed?*, CED-78-19 (Washington, D.C.: Feb. 22, 1978), at 2. The U.S. Railway Association was created by Pub. L. No. 93-236, title II, 87 Stat. 985, 988 (Jan. 2, 1974). The mixed-ownership designation was in section 202(g). A typical appropriation was Pub. L. No. 94-134, 89 Stat. 695, 709 (Nov. 24, 1975). The association was abolished in 1987. *See* 45 U.S.C. § 1341(a).

[115] *See also* GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 67, 101.

GCCA structure. Examples are the Legal Services Corporation and the Corporation for Public Broadcasting. Accordingly, the wholly owned/mixed-ownership classification is relevant only for purposes of applying the rest of the GCCA.

The express language of the GCCA underscores this point. The lead to 31 U.S.C. § 9101 is "[i]n this chapter." (The original language, 59 Stat. at 597, was "[a]s used in this Act.") Applying this limitation, GAO concluded in 38 Comp. Gen. 565 (1959), that the Federal National Mortgage Association (Fannie Mae) was a wholly owned corporation for some purposes and a mixed-ownership corporation for others, both at the same time. Fannie Mae had originally been chartered as a wholly owned corporation. It was rechartered in 1954 as a mixed-ownership corporation, but kept its place on the GCCA's list of wholly owned corporations, apparently out of a desire to remain subject to the wholly owned provisions of the GCCA. (It subsequently became a government-sponsored enterprise.) The question in 38 Comp. Gen. 565 was whether Fannie Mae was authorized to lease space independent of the General Services Administration (GSA). Wholly owned corporations have to utilize GSA, mixed-ownership corporations do not. GAO concluded that the proper approach was to look at what the corporation was in reality—mixed-ownership—especially since the GCCA designations do not purport to apply to other laws.

The GCCA did not attempt to address corporations created after its enactment—nor could it, since one Congress cannot bind a subsequent Congress. There is evidence in the legislative history, however, of an expectation that the act would be made applicable to future corporations. In this connection, the report of the Senate Committee on Banking and Currency stated: "The committee contemplates that any new corporation so created or authorized hereafter will be made subject to the appropriate provisions of this bill by the creating or authorizing legislation." S. Rep. No. 79-694, at 14 (1945).

This expectation has met with limited success. Of the 30 corporations created by Congress from the mid-1960s to the mid-1980s, 17 were not made subject to the GCCA. GAO, *Congress Should Consider Revising Basic Corporate Control Laws*, GAO/PAD-83-3 (Washington, D.C.: Apr. 6, 1983), at 5; Harold Seidman and Robert Gilmour, *Politics, Position, and Power*, 285 (1986).

(3) Budget provisions

A key feature of the Government Corporation Control Act (GCCA) is the imposition of budgetary controls on wholly owned government corporations. Under 31 U.S.C. § 9103, each wholly owned government corporation must submit a "business-type budget" to the President each year. Neither the statute nor its legislative history attempts to define "business-type budget," but the law sets forth minimum requirements. These, set forth in 31 U.S.C. § 9103(b), include the following:

- Estimates of the financial condition and operations of the corporation for the current and following fiscal years and the condition and results of operations in the last fiscal year.
- Statements of financial condition, income and expense, and sources and use of money as well as information regarding its financial condition and operation.
- Estimates of administrative expenses (similarly not defined), borrowing, the amount of United States Government capital that will be returned to the Treasury during the fiscal year, and the appropriations needed to restore capital impairments.
- Provision for emergencies and contingencies.

Apart from these minimum requirements, the President, acting through the Office of Management and Budget, has broad discretion to determine the form and content of the corporate budgets. 31 U.S.C. § 9103(a).[116] The President may revise a corporation's budget program. 31 U.S.C. § 9103(c). The President then must include it as part of the budget submitted to Congress under 31 U.S.C. § 1105. *Id.* For examples of what this all looks like in real life, see *Budget of the United States Government for Fiscal Year 2008—Appendix*, at 89–90 (Federal Crop Insurance Corporation), 98–104 (Commodity Credit Corporation), 690–91 (Pension Benefit Guaranty Corporation), and 1132–34 (Tennessee Valley Authority).[117]

[116] The source provision is more explicit on this point. *See* Pub. L. No. 79-248, § 102, 59 Stat. 597, 598 (Dec. 6, 1945) ("[t]he budget program shall be a business-type budget, or plan of operations").

[117] This budget material is available at www.omb.gov/budget/fy2008/appendix.html (last visited Nov. 28, 2007).

Congress then considers the budget programs for wholly owned government corporations along with the rest of the federal budget, which may include making appropriations as authorized by law; making corporate financial resources available for operating and administrative expenses; and providing for repaying capital and the payment of dividends. 31 U.S.C. § 9104. Section 9104 does not prevent a corporation from carrying out or financing its activities as authorized by some other law, nor does it affect the corporation's authority to make commitments without fiscal year limitation. 31 U.S.C. § 9104(b). An example of a budget approval provision is the following from the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006, Pub. L. No. 109-115, 119 Stat. 2396, 2421 (Nov. 30, 2005):

> "The Saint Lawrence Seaway Development Corporation is hereby authorized to make such expenditures, within the limits of funds and borrowing authority available to the Corporation, and in accord with law, and to make such contracts and commitments without regard to fiscal year limitations as provided by [31 U.S.C. § 9104], as may be necessary in carrying out the programs set forth in the Corporation's budget for the current fiscal year."

The statute then goes on to appropriate funds to the Corporation from the Harbor Maintenance Trust Fund. *Id.*

The President may include with the budget submission a recommendation that a wholly owned corporation be treated as an agency for fiscal purposes. If Congress approves, the corporation retains its corporate identity, but is thereafter subject to the laws governing budgets, appropriations, expenditures, receipts, accounting, and other fiscal matters in the same manner as agencies. 31 U.S.C. § 9109.

In addition to 31 U.S.C. § 9109, sections 9103 (GCCA's budget provisions) and 9104 (congressional action on budgets) apply only to wholly owned corporations. The exclusion of mixed-ownership corporations was deliberate. The legislative history explains the rationale: "The budget provisions of the bill do not apply to the mixed-ownership corporations in which private stockholders have an interest in the net worth and in the profits or losses of the corporations." S. Rep. No. 79-694, at 7 (1945). *See also* H.R. Rep. No. 79-856, at 7 (1945). Although subsequent changes in the nature of government corporations have made this premise inapplicable in many cases, the fact remains that the budget provisions apply only to wholly owned corporations.

The only budget-related provision of the Government Corporation Control Act applicable to mixed-ownership corporations was relocated as part of the 1982 recodification of title 31 and is now found at 31 U.S.C. § 1105(a)(24). It provides that the President's budget submission to the Congress may include "recommendations on the return of Government capital to the Treasury by a mixed-ownership corporation (as defined in section 9101(2) of this title) that the President decides are desirable."

(4) Other financial controls

While the corporation control legislation was being considered, the Treasury Department was urging that all government funds should be kept in the Treasury. The statute addressed this concern in what is now 31 U.S.C. §§ 9107(b) and (c). Subsection (b) requires that the accounts of all government corporations, both wholly owned and mixed-ownership, be kept in the Treasury. However, if the Secretary of the Treasury approves, they may be kept in a Federal Reserve Bank or a bank designated as a depositary or fiscal agent of the United States. Treasury is authorized to waive these requirements. Such an account might include, for example, a corporate checking account whose checks would be signed by authorized corporation officials accountable directly to the board of directors. *E.g.*, B-68830, Oct. 6, 1947.

Section 9107(c) exempts the following from the requirements of section 9107(b):

- A temporary account of not more than $50,000 in one bank.

- A mixed-ownership corporation from which government capital has been entirely withdrawn, during the period it remains without government capital.

- Certain specified farm credit institutions, which are nevertheless required to report to Treasury annually the names of depositaries in which their accounts are kept.

Congress regarded these provisions as "both practical and desirable as a matter of fiscal policy" (S. Rep. No. 79-694, at 11 (1945)), and felt that they would "contribute toward a unification of the [government's] depositary system" (H.R. Rep. No. 79-856, at 10 (1945)).

Three years later, in 1949, Congress added to the Government Corporation Control Act what is now 31 U.S.C. § 9107(a), which authorizes government corporations, with the Comptroller General's concurrence, to consolidate their cash, from whatever source, including appropriations, into one or more accounts for banking and checking purposes.[118] Of course, the funds are to be used only for authorized purposes. In reviewing proposals under this provision, GAO's concern is to avoid the diminution of internal controls. *E.g.*, B-58312, Nov. 14, 1950 (approving an unspecified proposal by the Tennessee Valley Authority because it would simplify procedures without lessening internal control).

Unless specifically authorized by statute, a corporation maintaining an account in the Treasury under 31 U.S.C. § 9107(b) is not entitled to receive interest on those funds, directly or indirectly. B-114839-O.M., Jan. 9, 1976. The law also includes provisions, which we will address later, dealing with Treasury control over the debt obligations of government corporations.

(5) <u>Audit</u>

In the 1940s, any discussion of government auditing meant auditing by GAO. The original Government Corporation Control Act (GCCA) essentially incorporated the audit provisions of the George Act, which had been enacted less than a year earlier. Under these provisions, GAO was to audit annually every wholly owned government corporation and every mixed-ownership government corporation for any period in which government capital was invested in it, and report the results to Congress. Pub. L. No. 79-248, §§ 105, 106, 202, 203, 59 Stat. 597, 599–600 (Dec. 6, 1945).

The audit was to be a "commercial-type audit" rather than the customary governmental audit. The customary governmental audit principally included examining and passing upon each voucher prepared by the agencies' clerks and each account maintained by the agencies and their accountable officers. The legislative history explained:

[118] Independent Offices Appropriation Act, 1950, Pub. L. No. 81-266, § 309, 63 Stat. 631, 662 (Aug. 24, 1949).

> "The Comptroller General and the Congress have recognized that the regular governmental type of audit may not be suitable to the operations of a Government corporation. In general, the purpose of the governmental type of audit is to determine the validity of expenditures under appropriations made by the Congress in the light of restrictions and limitations placed by the Congress generally upon expenditures from appropriated funds. . . . On the other hand, the commercial type of audit, as applied to a business corporation, is separate and distinct from the accounting system and internal financial controls of the corporation, and is designed to determine the financial condition of the corporation as of a given date and the results of its financial operations during the period under audit, and to establish whether the corporate funds have been regularly expended in accordance with corporate authorization."

H.R. Rep. No. 79-856, at 7–8 (1945). For further elaboration, see pages 95–96 of the House report and S. Rep. No. 79-694, at 8–9 (1945). In 1975, the audit requirement was reduced from every year to at least once every 3 years.[119] GAO's auditing of government corporations, first under the George Act and then under the GCCA, is widely credited with providing the stimulus for GAO to modernize its audit concepts and practices from the old "voucher auditing" system.[120]

The GCCA's audit and reporting provisions were completely overhauled by sections 305 and 306 of the Chief Financial Officers Act of 1990, Pub. L. No. 101-576, 104 Stat. 2838, 2853–54, (Nov. 15, 1990), amending 31 U.S.C. §§ 9105 (audits) and 9106 (management reports). Under these amendments, an audit of the financial statements required under 31 U.S.C. § 9106 is now to be conducted by the corporation's Inspector General or by an independent external auditor chosen by the inspector general. For a corporation that does not have an inspector general, the head of the corporation selects the independent auditor. 31 U.S.C. § 9105(a)(1). The

[119] General Accounting Office Act of 1974, Pub. L. No. 93-604, § 601, 88 Stat. 1959, 1962 (Jan. 2, 1975).

[120] *See* Frederick C. Mosher, *The GAO: The Quest for Accountability in American Government*, 105–08 (1979); Ellsworth H. Morse, Jr., *The Government Corporation Control Legislation of 1945*, 10 GAO Rev. 11 (No. 4, 1975).

audit is to be conducted "in accordance with applicable generally accepted government auditing standards." 31 U.S.C. § 9105(a)(2). This means the standards set forth in GAO's so-called "Yellow Book," *Government Auditing Standards*, GAO-07-162G (Washington, D.C.: Jan. 2007). These differ from the more commonly known "generally accepted auditing standards" in that the government auditing standards require reporting on internal controls and compliance with laws and regulations. GAO, *Government Corporations: CFO Act Management Reporting Could Be Enhanced*, GAO/AIMD-94-73 (Washington, D.C.: Sept. 19, 1994), at 4 n.2. Audit reports are to be submitted to the head of the corporation and to the Senate Committee on Homeland Security and Governmental Affairs and the House Committee on Government Reform. 31 U.S.C. § 9105(a)(3).

The revised 31 U.S.C. § 9106 requires each government corporation to submit a management report each fiscal year to Congress, with copies to the President, the Director of OMB and the Comptroller General. The management report must include statements of financial position, operations, cash flows, a reconciliation to the corporation's budget report where applicable, a statement on internal accounting and administrative control systems, the report regarding the audit of the corporation's financial statements, and any other comments and information necessary to inform Congress about the operations and financial condition of the corporation. The Office of Management and Budget issues instructions to government corporations on the submission of annual management reports. OMB Cir. No. A-136, *Financial Reporting Requirements*, §§ I.5–I.6 (June 29, 2007).

Nothing in 31 U.S.C. § 9105 specifies the timing of the audits, but, as noted, section 9106 requires the annual management report to include the report of the audit conducted under section 9105. Thus, audit frequency returned to annual, and in this sense the 1990 legislation can be said to have strengthened the audit requirement. *See* GAO/AIMD-94-73, at 3. Sections 9105 and 9106 do not distinguish between wholly owned and mixed-ownership corporations.

While the 1990 revision of 31 U.S.C. § 9105 shifted primary responsibility for auditing government corporations from GAO to the inspectors general, GAO continues to have a role. GAO (1) may review any audit conducted under section 9105(a)(1), reporting its results to Congress, the Office of Management and Budget, and the head of the corporation, and (2) may conduct its own financial statement audit at the discretion of the

Comptroller General or at the request of a congressional committee. 31 U.S.C. § 9105(a)(4).

The original GCCA generally prohibited government corporations from using their funds to pay for private audits. Pub. L. No. 79-248, § 301(d). This was intended to prevent duplication of efforts during the time that the law required GAO to conduct the audits. B-205488-O.M., Jan. 19, 1982. Since the statute now explicitly permits the use of external auditors, this prohibition was dropped. However, the concern over duplication is reflected in 31 U.S.C. §§ 9105(a)(4) and (c). Section 9105(a)(4) provides that an audit by GAO under that subsection will be in lieu of the otherwise required inspector general audit.

Section 9105(c) recognizes that other laws include specific audit requirements for GAO to carry out. It provides that Comptroller General audits made under section 9105 are "in lieu of" any audit of a government corporation's financial transactions that is required by another law. *Id.* Reconciling GCCA audits with other statutory audits is largely an exercise in common sense. For example, where other legislation requires GAO to conduct annual audits of a corporation's financial statements, the audits serve the purposes of section 9105 as well, obviating the need for the inspector general audit. B-239201.3, July 25, 1991 (finding that an audit of the Federal Deposit Insurance Corporation conducted by GAO under the requirements of 12 U.S.C. § 1827(d) would satisfy the audit requirements of 31 U.S.C. § 9105). An enabling act provision authorizing or directing GAO to audit the "operations" of a corporation gives GAO broad discretion over how to conduct that audit. While such a requirement can be satisfied by a financial audit, it can also extend to a full program audit. B-200951-O.M., Dec. 24, 1980, *as clarified by* B-200951-O.M., May 11, 1981.

A GAO audit under the GCCA is financed initially from GAO's own appropriations, but its "full cost . . . as determined by the Comptroller General" must be reimbursed by the corporation.[121] 31 U.S.C. § 9105(a)(5). The purpose of the reimbursement requirement is to prevent government corporations from receiving a hidden subsidy from the taxpayers. B-207203-O.M., June 4, 1982. "Full cost," GAO has determined, includes both direct costs (employee salaries and travel expenses, for example) and

[121] Mandatory reimbursement originated with language in GAO's appropriation in the First Deficiency Appropriation Act for 1945, Pub. L. No. 79-40, 59 Stat. 77, 81 (Apr. 25, 1945), enacted just 2 months after the George Act.

indirect costs, including overhead. *Id. See also* B-96792, Aug. 10, 1950 (GAO billed Federal Prison Industries for every last penny in its administrative expense allocation). Section 9105(a)(5) further requires that the reimbursements be deposited as miscellaneous receipts. However, this requirement was superseded by the following proviso attached to GAO's appropriation in the Legislative Branch Appropriations Act, 1995, Pub. L. No. 103-283, 108 Stat. 1423, 1440 (July 22, 1994):

> "[N]otwithstanding 31 U.S.C. 9105 hereafter amounts reimbursed to the Comptroller General pursuant to that section shall be deposited to the appropriation of the [GAO] then available and remain available until expended, and not more than $6,000,000 of such funds shall be available for use in fiscal year 1995."

This language provides permanent authority for GAO to credit the reimbursements to its then-current appropriation, to remain available until expended. Congress can then, as it did in Public Law 103-283, appropriate a specific sum from the "no-year" account for use during the current fiscal year.

The original GCCA authorized GAO's audit reports to include essentially the items now included by the corporations in their management reports, plus several other things, such as any impairments of capital, any recommendations for the return of government capital, and any transactions or expenditures believed to be illegal. Pub. L. No. 79-248, §§ 106 and 203. That reporting requirement displaced GAO's authority to disallow corporate expenditures. 37 Comp. Gen. 666, 668–69 (1958); B-58302, Apr. 29, 1947. The current reporting language, codified at 31 U.S.C. § 9105(a)(4)(B), is more general, providing that GAO shall report "the results of the review and make any recommendation [it] considers appropriate." This language certainly is broad enough to include the elements that the original GCCA specified.

When GAO makes an audit recommendation to the head of an agency, the agency head must, within specified time limits, submit a written report on the action taken on the recommendation to certain congressional committees. 31 U.S.C. § 720(b). For purposes of this requirement, "agency" includes wholly owned but not mixed-ownership government corporations. 31 U.S.C. § 720(a); B-114831-O.M., July 28, 1975 (requirement for compliance report not applicable to Federal Deposit Insurance Corporation).

b. Appointment and Control of Directors

A government corporation's management, like its other key features, is determined by its enabling legislation. For the great majority of corporations, this means a board of directors. However, there is no statutory model for government corporations, nor is there any legal requirement for a board of directors.

The need for a board of directors has been questioned from the managerial perspective, as well. For example, one commentator wrote:

> "Even the use of the term 'corporation' is unfortunate because it tends to encourage improper borrowing of concepts from the private sector. For instance, there is no particular reason for government corporations to have boards of directors, yet this feature is found in most proposals for new corporations apparently because corporations in the private sector have boards of directors."[122]

Another commentator agreed, quoting a Brookings Institution report to the effect that "there appears to be nothing inherent in the corporate form of organization to require a board instead of a single administrator."[123] Be that as it may, if a government corporation does have a board of directors it should, of course, be a good one. According to Marshall Dimock, an early observer of government corporations, "[a]n effective board of directors is the key to program success."[124]

The federal government's involvement in the selection or appointment of directors has evolved along with the development of government corporations. As we have seen, the United States' initial participation in the creation of government corporations involved chartering of the entity and ownership of stock. However, with the creation of the Second Bank of the United States in 1816, the President was authorized to appoint, by and

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[122] Ronald C. Moe, Congressional Research Service, *Administering Public Functions at the Margin of Government: The Case of Federal Corporations*, No. 83-236GOV (Dec. 1, 1983), at 3–4.

[123] Harold Seidman, *The Theory of the Autonomous Government Corporation: A Critical Appraisal*, 12 Pub. Admin. Rev. 89, 92 (1952).

[124] Marshall E. Dimock, *Government Corporations; A Focus of Policy and Administration (Part I)*, 43 Am. Pol. Sci. Rev. 899, 915 (1949).

with the consent of the Senate, 5 of the Bank's 25 directors. The rest were to be elected annually by shareholders other than the United States. During the nineteenth century, the federal government "continued to charter private corporations . . . but only once participated in such a venture itself," that being the Union Pacific Railroad. *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 387 (1995). The Union Pacific Railroad was chartered in 1862 with the President appointing two of its directors. Act of July 1, 1862, ch. 120, § 1, 12 Stat. 489.

The twentieth century saw considerable variation in the managerial structure of corporations, mostly within a framework of increased government involvement. In 1902, as part of the statute providing for construction of the Panama Canal, Congress authorized the President to purchase all stock and property of the Panama Railroad Company, making the government the sole shareholder. Pub. L. No. 57-183, 32 Stat. 481 (June 28, 1902). The Secretary of War, as holder of the stock, appointed all of the company's directors. According to *Lebron*, 513 U.S. at 387, this was the first instance in which the government appointed a majority of directors.

The most common management system, at least with respect to corporations subject to the GCCA, is a board of directors appointed entirely by the President. The typical statutory provision will (1) vest the corporation's management and control in the board of directors, (2) prescribe the number of directors and how they are to be appointed, (3) specify what will constitute a quorum, (4) set forth the powers and duties of the directors, and (5) address their compensation. *E.g.*, 22 U.S.C. § 2193(b) (Overseas Private Investment Corporation). In addition, the statute may (1) specify the number of directors to come from various sources (government, industry, *etc.*), or prescribe other qualifications, (2) designate certain government officials to serve *ex officio*, and (3) address the board's political composition. Additional examples of government corporations all of whose directors are appointed by the President are the African Development Foundation,[125] Commodity Credit

[125] The African Development Foundation is not listed in the GCCA, but its enabling legislation makes it subject to the act's provisions for wholly owned corporations. *See* 22 U.S.C. § 290h-6.

Corporation, Export-Import Bank, and the Tennessee Valley Authority.[126] In at least one instance, certain directors are appointed by a department head. *See* 7 U.S.C. § 1505(a) (Federal Crop Insurance Corporation's private sector directors appointed by Secretary of Agriculture). The Tennessee Valley Authority legislation includes an interesting qualification: directors must "affirm support for the objectives and missions of the Corporation." 16 U.S.C. § 831a(b)(5).

When Congress wants the federal government to participate more actively in the management of a government corporation and to ensure that the government's views and interests are represented, the enabling statute designates specified officials to serve as directors *ex officio*. These are usually heads of departments or agencies with a logical subject-matter relationship to the corporation. For example, two of the five directors of the Federal Deposit Insurance Corporation are the Comptroller of the Currency and the Director of the Office of Thrift Supervision. 12 U.S.C. § 1812. *See also* 7 U.S.C. § 1505(a) (certain Agriculture Department officials are *ex officio* directors of the Federal Crop Insurance Corporation). Sometimes Congress also takes the next step and makes all of the directors government officials. *E.g.*, 29 U.S.C. § 1302(d) (directors of the Pension Benefit Guaranty Corporation are the Secretaries of Labor, Treasury, and Commerce).

Cabinet members serving *ex officio* may delegate their functions as directors even if the enabling statute does not expressly authorize it. 6 Op. Off. Legal Counsel 257 (1982). This follows from the nature of *ex officio* service. Such appointments are made "based not on individual personal attributes, but on the contribution Congress believed each one's agency could make to the [corporation's] operations." *Id.* at 260.

Another way the government can exert management influence or control is to designate a corporation as an entity within a particular department or agency and under the control of the head of that department or agency. For example—

[126] Our source for these examples is GAO, *Government Corporations: Profiles of Existing Government Corporations*, GAO/GGD-96-14 (Washington, D.C.: Dec. 13, 1995). The information for each corporation includes a "management structure" summary and a citation to the corporation's enabling legislation.

- the Commodity Credit Corporation is "an agency and instrumentality of the United States, within the Department of Agriculture" (15 U.S.C. § 714);
- the Saint Lawrence Seaway Development Corporation is "subject to the direction and supervision of the Secretary of Transportation" (33 U.S.C. § 981);
- the Overseas Private Investment Corporation is "an agency of the United States under the policy guidance of the Secretary of State" (22 U.S.C. § 2191);
- Federal Prison Industries, Inc. is in the Department of Justice (Reorg. Plan No. 2 of 1939, § 3(a), 53 Stat. 1431, *noted at* 5 U.S.C. app. I.).

The enabling legislation will also provide for officers of the corporation. In many instances, the officers are appointed by the President. *E.g.*, 22 U.S.C. § 2193 (Overseas Private Investment Corporation). In other instances, the board of directors appoints the officers. *E.g.*, 16 U.S.C. § 831b (Tennessee Valley Authority). Whether the board of directors or the "chief executive officer" is the "head" of the corporation depends on the statutory powers given to each. If the enabling legislation vests management and control in the board of directors, the head of that corporation, unless the statute provides differently, is the board of directors acting as a body. 25 Comp. Gen. 467 (1945). An example of a different statutory model is the Corporation for National and Community Service. It has a board of directors, 42 U.S.C. § 12651a, but the law specifies that the Corporation "shall be headed by . . . [a] Chief Executive Officer . . . appointed by the President, by and with the advice and consent of the Senate." 42 U.S.C. § 12651c. A few government corporations (*e.g.*, Amtrak and the Legal Services Corporation) are subject to the Inspector General Act, discussed in section B.7.c(1) of this chapter, which assigns certain duties to the head of the entity. For purposes of the act, the Office and Management and Budget annually identifies the heads of these entities and publishes them in the Federal Register. *See*, *e.g.*, OMB, *Revised 2006 List of Designated Federal Entities and Federal Entities*, 71 Fed. Reg. 39690 (July 13, 2006).

A board of directors can delegate power to an executive committee, but this has been construed to apply to ordinary and routine matters, not radical departures from corporate policy. B-58302-O.M., Sept. 14, 1949. This device cannot be used, however, to avoid a statutory quorum requirement. *See* B-197710-O.M., Jan. 14, 1983. In that case, a government corporation had only two directors out of five, and the statute designated a majority of the board as a quorum. Under the circumstances, GAO thought it unlikely that a court would support treating those two directors as an executive committee. The answer would have been different if the statute permitted a majority of board members currently in office to constitute a quorum. *Id.*

As noted earlier, while most government corporations have boards of directors, a few do not. One commentator identified three which, at the time he wrote, did not have boards of directors—the Government National Mortgage Association, Resolution Trust Corporation (since terminated), and the Saint Lawrence Seaway Development Corporation.[127] Another such corporation that was later created is the Community Development Financial Institutions Fund, which is not subject to GCCA. 12 U.S.C. § 4703(f). Its management consists of a presidentially appointed administrator and an advisory board. 12 U.S.C. § 4703.[128]

The appointment of most or all of a board of directors by federal officials is most appropriate for corporations owned or controlled by the United States. As you move farther away from federal ownership or control, the government's managerial involvement usually diminishes as well. For example, in the typical government-sponsored enterprise, the government will appoint some directors to make sure its voice will be heard, but the majority is appointed by nongovernment sources. Thus, the President appoints 5 out of 18 of Fannie Mae's directors (12 U.S.C. § 1723(b)), 5 out of 18 for Freddie Mac (12 U.S.C. § 1452(a)(2)(A)), and 5 out of 15 for Farmer Mac (12 U.S.C. § 2279aa-2(b)(2)).

One would expect a minimal federal managerial role in a federally chartered corporation expressly designated as not an agency or instrumentality of the United States. However, this is not always the case. Both the Corporation for Public Broadcasting and the Legal Services Corporation are chartered as nonprofit corporations and are not to be

[127] Ronald C. Moe, *Managing the Public's Business: Federal Government Corporations*, S. Prt. No. 104-18, at 58 (1995).

[128] For several years in the mid-1990s, this provision was overridden by an appropriation act proviso which made the Secretary of the Treasury the Administrator and placed the Fund in the Treasury Department. *E.g.*, Pub. L. No. 104-134, 110 Stat. 1321, 1321-294 (Apr. 26, 1996) (fiscal year 1996). The proviso was dropped in fiscal year 1997. *See* Pub. L. No. 104-204, 110 Stat. 2874, 2907 (Sept. 26, 1996).

regarded as agencies or establishments of the United States. See, respectively, 47 U.S.C. § 396(b), 42 U.S.C. §§ 2996b and 2996d(e)(1). Neither is subject to the GCCA. Nevertheless, perhaps because both are federally funded as well as federally created and perform essentially public service rather than commercial functions, their entire boards of directors are appointed by the President and subject to Senate confirmation. 47 U.S.C. § 396(c); 42 U.S.C. § 2996c.

5. Sources of Funds and Financing

There is no single model for the funding structure of a government corporation.[129] The corporate form alone does not dictate any particular type of funding. Just as with the corporation's organization and powers, its funding structure varies according to its purpose and activities as reflected in the enabling legislation. As one court has noted, "Congress is not limited by traditional notions of corporate powers and organization" and it "need not capitalize corporate instrumentalities of the United States in any rigidly prescribed manner."[130] *United States v. Nowak*, 448 F.2d 134, 138 (7th Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972). In fact, Congress has funded government corporations using a variety of sources and methods: direct appropriations of funds, federal borrowing, authorizing user fees or other charges for services provided to the public, federal ownership of stock, private investment or financing (*e.g.*, sale of debt securities) with actual or implied backing by the United States, or some combination of these methods.

a. Types of Financing: Government

(1) Direct appropriations

One funding option is the direct appropriation of funds from the general fund of the Treasury, the same method used for most federal agencies. In its 1995 study, GAO found that, out of 24 corporations then listed in the Government Corporation Control Act (GCCA), 15 had received federal appropriations in fiscal year 1994. GAO, *Government Corporations: Profiles of Existing Government Corporations*, GAO/GGD-96-14 (Washington, D.C.: Dec. 13, 1995), at 21–22. As a general proposition,

[129] For ease of discussion in this section, we will use the term "government corporation" to refer generically to the various corporate devices discussed in section B.2 of this chapter unless a more specific term is warranted.

[130] "Capitalize" in this context means simply "to furnish with capital, to provide capital for the [corporation's] operation." B-24827, Apr. 3, 1942, at 11.

wholly owned corporations were more likely to receive direct appropriations than mixed-ownership corporations. However, some mixed-ownership corporations received appropriations while some wholly owned corporations did not. In addition, several corporate entities not subject to the GCCA received appropriations. *Id.*

Direct appropriations may provide all or part of a corporation's funding. Examples of government-created corporations substantially funded by congressional appropriations are the Corporation for National and Community Service and the Legal Services Corporation.[131] Fully funded corporations tend to be those with noncommercial functions. There is no nexus between full funding status and inclusion in the GCCA. For example, the Corporation for National and Community Service is subject to the GCCA, while Legal Services is not. An example of partial funding by direct appropriations is the Commodity Credit Corporation (CCC). Largely because the CCC administers a variety of relatively high-risk programs, the typical year produces nonrecoverable losses which are funded from a "net realized losses" appropriation.[132] Congress may provide appropriations for certain start-up costs, with the expectation that private financing will then take over. An example is discussed in 69 Comp. Gen. 289 (1990) (Pennsylvania Avenue Development Corporation could amortize construction consultants' fees as a cost of construction because they were not the kind of start-up costs for which Congress had provided appropriations).

Congress can structure a corporation's appropriation however it wishes. For example, the appropriation cited above for the Legal Services Corporation is relatively brief and consists of five major line items.[133] By contrast, the appropriation for the Corporation for National and

[131] See, respectively, the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-149, 119 Stat. 2833, 2871–73 (Dec. 30, 2005) ("For expenses necessary for the Corporation for National and Community Service to carry out the provisions of the Domestic Volunteer Service Act of 1973, as amended, $316,212,000 . . ."), and the Science, State, Justice, Commerce, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-108, 119 Stat, 2290, 2330–31 (Nov. 22, 2005) ("For payment to the Legal Services Corporation to carry out the purposes of the Legal Services Corporation Act of 1974, $330,803,000 . . .).

[132] *E.g.*, Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2006, Pub. L. No. 109-97, 119 Stat. 2120, 2133 (Nov. 10, 2005).

[133] Pub. L. No. 109-108.

Community Service takes up several pages of the appropriation act and contains numerous line items and other specifications.[134]

Most corporate appropriations are definite in amount; some are not. For example, the Federal Crop Insurance Corporation's (FCIC) 2006 appropriation to the FCIC Fund was "such sums as may be necessary, to remain available until expended," that is, an indefinite, no-year appropriation.[135] The CCC is authorized to receive its "net realized losses" appropriation on a "current, indefinite" basis. 15 U.S.C. § 713a-11. This is merely an authorization, however, and Congress remains free to structure the appropriation some other way. 67 Comp. Gen. 332 (1988). The CCC's 2006 appropriation was "[f]or the current fiscal year, such sums as may be necessary," but subject to a monetary ceiling.[136] Since the CCC receives a direct appropriation for net losses, it is logical that net gains, should they ever occur, would be deposited in the Treasury as miscellaneous receipts, and this is what the law requires. 15 U.S.C. § 713a-12. *Cf. Knowles v. War Damage Corp.*, 171 F.2d 15, 19–20 (D.C. Cir. 1948), *cert. denied*, 336 U.S. 914 (1949) (not "invalid" for a statute to require a government corporation to pay its surplus funds into the Treasury).

(2) Federal borrowing

Another method of funding for government corporations is borrowing authority, also known as public debt financing. This means the authority to borrow money from the Treasury and to issue obligations to the Treasury to evidence the indebtedness. This authority must be conferred by statute. Examples include 29 U.S.C. § 1305(c) (Pension Benefit Guaranty Corporation (PBGC)), 15 U.S.C. § 713a-4 (Commodity Credit Corporation), and 7 U.S.C. § 947 (Rural Telephone Bank). The PBGC provision is fairly typical:

> "The [PBGC] is authorized to issue to the Secretary of the Treasury notes or other obligations in an aggregate amount of not to exceed $100,000,000, in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be prescribed by the Secretary

[134] Pub. L. No. 109-149.

[135] Pub. L. No. 109-97.

[136] Pub. L. No. 109-97.

> of the Treasury. Such notes or other obligations shall bear interest at a rate determined by the Secretary of the Treasury . . . . The Secretary of the Treasury is authorized and directed to purchase any notes or other obligations issued by the [PBGC] under this subsection . . . ."

29 U.S.C. § 1305(c). Some borrowing provisions, like the PBGC statute, have a fixed dollar ceiling. Others have a variable ceiling, like 7 U.S.C. § 947(a) (amount borrowed by Rural Telephone Bank which is outstanding at any one time "shall not exceed twenty times the paid-in capital and retained earnings" of the Bank). In determining the amount of unused borrowing authority, a corporation may exclude interest on outstanding obligations already held by the Treasury. B-89366-O.M., Sept. 9, 1964. If a contrary congressional intent can be established, however, the answer will be different. *See* B-125007, B-127378, July 20, 1956.

Treasury may be required to purchase the obligations, as in the PBGC provision quoted above, or may have discretion in the matter as is the case for the Commodity Credit Corporation and the Rural Telephone Bank (15 U.S.C. § 713a-4, 7 U.S.C. § 947(b), respectively). Congress may specify the time period within which the borrowing authority must be used. If it does not, the authority remains available until used or repealed. *See Nowak*, 448 F.2d at 138 n.4.

In lieu of direct borrowing from the Treasury, a corporation's borrowing may go through an intermediary, the Federal Financing Bank (FFB). The FFB was created in 1973 to coordinate federal and federally assisted borrowings in order to reduce their costs. 12 U.S.C. § 2281. The FFB is itself a corporate entity under the general direction and supervision of the Secretary of the Treasury, and an instrumentality of the United States. 12 U.S.C. § 2283. While not listed in the GCCA, the FFB is subject to the GCCA's budget and audit provisions for wholly owned government corporations. 12 U.S.C. § 2293. For present purposes, two provisions of the act creating the FFB are relevant. Under 12 U.S.C. § 2285(a), "[a]ny Federal agency which is authorized to issue, sell, or guarantee any obligation is authorized to issue or sell such obligations directly to the [FFB]." "Federal agency" includes "a corporation or other entity established by the Congress which is owned in whole or in part by the United States." 12 U.S.C. § 2282(1). Thus, at least certain corporations with statutory borrowing authority can issue their obligations directly to the FFB, which can then issue its own securities either in the private market or, more likely, to the Treasury. 12 U.S.C. § 2288. For information on the background of the FFB, see GAO, *Federal Financing Bank: The Government Incurred a Cost of $2 Billion on Loan Prepayments*, GAO/AFMD-89-59 (Washington, D.C.: Aug. 22, 1989); *The Federal Financing Bank*, No. 121084 (Washington, D.C.: Apr. 5, 1983) (GAO testimony before the Senate Subcommittee on Federal Credit Programs).

In 14 Op. Off. Legal Counsel 20 (1990), the Justice Department's Office of Legal Counsel (OLC) tackled the question of how to determine which corporations could avail themselves of the FFB. A detailed analysis led the OLC to conclude that Congress intended to include corporations "that receive substantial funding from the government, that are subject to significant federal control, and that issue obligations guaranteed by the federal government." *Id.* at 26. This being the case, corporations "that are wholly privately funded, that have a significant measure of independence in their management, and that issue obligations not backed by the full faith and credit" of the United States are excluded. *Id.* OLC recognized that a given corporation may not have all of the principal characteristics of either the included or excluded corporations, or may have a mix. The approach in such a case is to determine "whether the corporation's principal characteristics render it most analogous to those corporations that were intended to be covered by the [law creating the FFB] or to those that were not." *Id.* at 26 n.14. Applying this analysis, OLC concluded that the former Resolution Trust Corporation was a federal agency for purposes of 12 U.S.C. § 2282(1), and could therefore issue promissory notes directly to the FFB.

In two opinions to Members of Congress, GAO reviewed the financing arrangements for building construction at the government-owned Federal Triangle site in the District of Columbia. The former Pennsylvania Avenue Development Corporation, a wholly owned government corporation, was responsible for the planning, development, and construction oversight of the project. The original plan was to obtain private financing for the construction. It was later decided, however, that financing through the FFB would save the government interest costs. The project's trustee obtained the financing through a promissory note issued to the FFB, and secured by the trustee's assignment to the FFB of the trustee's rights to receive statutorily required rental payments from the General Services Administration. GAO concluded that the FFB was an appropriate source of financing because the Federal Triangle building—designated the Ronald Reagan Federal Building—was fundamentally a project being constructed by the federal government. Several factors supported this conclusion. The federal government, by statute, bore the full risks of developing and owning the project; the land on which the project was being built belonged to the United States; and the government carried the principal rights and obligations associated with ownership of the project, including the project's design and specifications for construction. The Pennsylvania Avenue Development Corporation most likely would have met the Justice Department's eligibility criteria, except that there was no need to apply that test because, under the Federal Triangle legislation, the promissory note issued for financing purposes was in effect an obligation of GSA rather than the Corporation. B-248647, Dec. 28, 1992; B-248647.2, Apr. 24, 1995.

As the 1995 opinion pointed out, a corporation (or agency, for that matter) with statutory borrowing authority does not need further specific authority to use the FFB. The provisions of the law creating the FFB noted above supply the necessary authority. B-248647.2, Apr. 24, 1995.

(3) Federal ownership of stock

The federal government has also funded government corporations by subscribing to part or all of a corporation's capital stock. As we saw in our historical summary above, the government's early involvement in government corporations consisted of purchasing stock in the name of the United States. In the case of the Panama Railroad Company, the government acquired the entire capital stock of a private corporation, elected its board of directors, and used it to carry out commerce and defense functions in the Panama Canal. *See New York ex rel. Rogers v. Graves*, 299 U.S. 401 (1937).

Of the modern (post-Government Corporation Control Act) government corporations, some issue stock, many do not. A government corporation issues stock if it is authorized to do so in its enabling legislation. The statute will specify the amount of stock that may be issued and who may or must subscribe to it. For example, the federal government owns 100 percent of the capital stock of the Commodity Credit Corporation (15 U.S.C. § 714e), the Export-Import Bank (12 U.S.C. § 635b), and the Federal Crop Insurance Corporation (7 U.S.C. § 1504(a)). The Rural Telephone Bank is authorized to issue three classes of stock, one owned by the government, one by loan recipients, and one by specified classes of purchasers. 7 U.S.C. § 946.

b. Types of Financing: Private

(1) Sources of private financing

Private financing can take one of three forms: fees and charges, stock ownership, and borrowing. For the most part, authority to assess fees and charges will be spelled out in the pertinent legislation. The kinds of receipts vary with the type of program being administered. The Tennessee Valley Authority receives income from the sale of electric power (including sales to government agencies, 44 Comp. Gen. 683 (1965)). The Pension Benefit Guaranty Corporation collects premiums from sponsors of covered pension plans. 29 U.S.C. § 1306. The Saint Lawrence Seaway Development Corporation for many years received its income from tolls (33 U.S.C. § 988; 35 Comp. Gen. 267 (1955)), but Congress suspended this authority with respect to commercial vessels in 1994 (33 U.S.C. § 988a), and began funding the Corporation from the Harbor Maintenance Trust Fund. *See* 33 U.S.C. § 2238; 26 U.S.C. § 9505. Before its termination on October 1, 2004, the Panama Canal Commission's revolving fund received toll receipts and was authorized to retain interest generated by amounts deposited in financial institutions outside the Treasury. 22 U.S.C. § 3712(c).

If there is no express authority, it may nevertheless be possible for a corporation to assess fees under 31 U.S.C. § 9701, the so-called "user charge statute," covered in detail in Chapter 12, section D. Section 9701 by its terms applies to wholly owned, but not mixed-ownership, government corporations. The limitation to wholly owned corporations is because they are the closest to regular government agencies. This does not mean that other types of government-created corporations may not charge fees, merely that they must find the authority elsewhere.

A government-created corporation designated as private may also find itself on the other end of the transaction—having to pay government agencies for services rendered to it. For example, the Communications Satellite Act authorized certain services to be provided to Comsat on a reimbursable basis, but did not further address how the charges were to be determined. Absent anything to the contrary in the law or its legislative history, GAO found it legitimate to determine the charges in accordance with the standards under 31 U.S.C. § 9701. B-168707-O.M., May 11, 1970.

Of course, statutory authorizations to charge fees have their limitations. The Export-Import Bank, for example, is authorized to charge fees for conferences, seminars, and publications. 12 U.S.C. § 635(a)(1). Then, similar to authority given to the executive branch generally, the statute authorizes the Bank to accept voluntary contributions for travel and subsistence expenses incurred by its officers or employees. Such amounts received are credited to the fund which initially paid for such activities and are to be offset against the expenses of the Bank for such activities. *Id.* However, GAO found that this statute did not go so far as to authorize the Bank to *require* its customers to pay its travel and subsistence expenses. B-272254, Mar. 5, 1997. The decision reasoned that the statute was not intended to sanction what would clearly amount to an augmentation of the Bank's appropriations.

The second form of private financing is private subscription to stock. Naturally, one would not expect to find this in the case of a wholly owned government corporation, but it is a theoretical option for Congress to consider for mixed-ownership corporations and it is commonly found in government-sponsored enterprises (GSE). Statutory provisions for GSEs may prescribe classes of common stock, voting and nonvoting stock, preferred stock, and may address institutional *versus* general subscription. Examples are 12 U.S.C. § 1453 (Freddie Mac); 12 U.S.C. § 2124 (banks for cooperatives); and 12 U.S.C. § 2279aa-4 (Farmer Mac). The Justice Department has concluded that, as long as no statute prohibits it, a corporation can use preferred stock as a dividend to its shareholders of common stock. 9 Op. Off. Legal Counsel 19 (1985). (This case involved Freddie Mac, whose legislation later changed, but the point is still good.)

The third type of private financing is borrowing—the issuance of promissory notes, bonds, or other debt obligations to the public. An example is 7 U.S.C. § 947, which authorizes the Rural Telephone Bank to borrow from the public as well as from the Treasury. The Commodity Credit Corporation has comparable authority in 15 U.S.C. § 713a-4.

The obligations may be expressly guaranteed by the United States. Commodity Credit Corporation obligations, for example, "shall be fully and unconditionally guaranteed both as to interest and principal by the United States." *Id.* A question given much attention has been the extent to which obligations of government corporations are backed by the "full faith and credit" of the United States in the absence of express statutory provision to that effect. Attorney General opinions addressing whether a bond or other obligation is a valid obligation of the United States, even in the absence of full faith and credit language, are set forth and discussed in more detail in Chapter 11, section D.1. It is sufficient here to note that two of the Attorney General's opinions concerned government corporations—42 Op. Att'y Gen. 21 (1961) (Development Loan Fund) and 42 Op. Att'y Gen. 327 (1966) (Export-Import Bank). In both cases the Attorney General concluded that Congress's choice of the corporate form did not alter the status of its obligations. Thus, if the underlying statutory provisions are sufficient to authorize the creation of obligations of the United States, it is immaterial that this authority is vested in a corporate entity. GAO adopted the Attorney General's position in 68 Comp. Gen. 14 (1988) (promissory notes and assistance guarantees issued by the now-defunct Federal Savings and Loan Insurance Corporation were obligations of the United States).

Congress can include express disclaimer language in the statute, which will then of course control. *E.g.*, 12 U.S.C. § 1721(b) (Ginnie Mae's obligations "are not guaranteed by the United States and do not constitute a debt or obligation of the United States or of any agency or instrumentality thereof" other than Ginnie Mae). If, however, the test for an obligation of the United States (as set out in the Attorney General's opinions) is met, disclaimer language found only in legislative history is not enough. 68 Comp. Gen. at 18–19.

As with borrowing from the Treasury, borrowing from the public can also be handled through the Federal Financing Bank. Indeed, individual agency offerings to the public were the main focus of the law creating the Federal Financing Bank. See, in this regard, 12 U.S.C. § 2281. *See also* H.R. Rep. No. 93-299, at 2 (1973).

(2) Market perception of implied backing by United States

> "As one wag puts it: With GSEs, you privatize the profits and socialize the risk."[137]

The preceding discussion outlines when a government corporation's obligations may be backed by the full faith and credit of the United States. Government-sponsored enterprises (GSEs), introduced in section B.2.b of this chapter, are generally regarded as one step further removed from "government status" and, therefore, further removed from government backing, at least official backing. Of course, Congress is free to provide federal backing whenever it wishes. *E.g.*, 12 U.S.C. § 2278b-6(d)(4)(A) (if Financial Assistance Corporation is unable to pay principal or interest on its obligations, Treasury is required to pay and try to recover from the defaulting bank). More often than not in the case of GSEs, however,

[137] Ronald C. Moe, *The "Reinventing Government" Exercise: Misinterpreting the Problem, Misjudging the Consequences*, 54 Public Administration Review 111, 113 (1994).

Congress has enacted express disclaimers. For example, 12 U.S.C. § 4503 disclaims any federal guarantee of the obligations or liability of the Federal National Mortgage Association (Fannie Mae), the Federal Home Loan Mortgage Corporation (Freddie Mac), and the Federal Home Loan Banks, and any implication that they are backed by the full faith and credit of the United States. (The Home Loan Banks are mixed-ownership government corporations; the other two are GSEs.)

Even in the presence of a statutory disclaimer, many commentators who have examined GSEs emphasized the existence of a market perception of implied backing by the United States because, presumably, the GSE will not be allowed to fail. As one commentator stated, very simply, "[t]he Federal Government implicitly guarantees the value of GSE obligations and mortgage-backed securities."[138] This implied guarantee has been called the "single most distinguishing characteristic"[139] of GSEs and their "most valuable perk."[140] Another writer suggests that in the event of GSE failure, the government would have "no real alternative but to deliver on the implicit guarantee" in order to avoid disruption in the credit markets.[141]

The perception of an implied guarantee arises because GSEs are regarded as instrumentalities of the United States, and their obligations have many of the characteristics of Treasury obligations.[142] As another commentator has pointed out, some of the most prominent private credit-rating agencies

[138] Ronald C. Moe, *Managing the Public's Business: Federal Government Corporations*, S. Prt. No. 104-18, at 38 (1995) (Moe 1995).

[139] Ronald C. Moe and Thomas H. Stanton, *Government-Sponsored Enterprises as Federal Instrumentalities: Reconciling Private Management with Public Accountability*, 49 Pub. Admin. Rev. 321, 322 (1989); Ronald C. Moe, *Liabilities of the Quasi Government*, 20 Government Executive 47, 49 (1988). Moe and Stanton, at 321, go so far as to include the implicit guarantee as an element of the definition of a GSE. *See also* Moe 1995, at 38.

[140] Lori Nitschke, *Private Enterprise With Official Advantages*, 56 Cong. Q. Wkly. 1578, 1580 (1998).

[141] A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. Ill. L. Rev. 543, 580 (1995).

[142] The common characteristics are listed in Thomas H. Stanton, *Federal Supervision of Safety and Soundness of Government-Sponsored Enterprises*, 5 Admin. L.J. 395, 404–05 (1991).

"have rated enterprise securities based on the strength of this implied government guarantee, in spite of the knowledge that no actual guarantee exists."[143]

This market perception of a federal guarantee confers significant economic benefits on GSEs. Primarily, it enables them to borrow money at rates much lower than private corporate obligations, and almost as low as the rates Treasury itself pays on its borrowings.[144]

GAO has issued detailed reports on the government's exposure to risks stemming from its use of GSEs. *See* GAO, *Government-Sponsored Enterprises: The Government's Exposure to Risks*, GAO/GGD-90-97 (Washington, D.C.: Aug. 15, 1990); *Government-Sponsored Enterprises: A Framework for Limiting the Government's Exposure to Risks*, GAO/GGD-91-90 (Washington, D.C.: May 22, 1991). In 1992, Congress enacted the Federal Housing Enterprises Financial Safety and Soundness Act,[145] 12 U.S.C. §§ 4501–4641, to provide a measure of federal supervision and regulation over Fannie Mae and Freddie Mac. The law established an Office of Federal Housing Enterprise Oversight (OFHEO) whose job it is to see that Fannie and Freddie are adequately capitalized and operating safely. 12 U.S.C. §§ 4502(6), 4511, 4513(a).

Nevertheless, the risks associated with the GSEs have become more severe in recent years as both their financial exposure and questions about their management have increased dramatically. The combined obligations of five GSEs was $4.4 trillion as of September 30, 2003.[146] *See* GAO, *Government-Sponsored Enterprises: A Framework for Strengthening GSE Governance and Management*, GAO-04-269T (Washington, D.C.: Feb. 10, 2004), at 1. The GSEs also pose risks to the stability of the United States financial system. Because the financial markets expect that the

[143] Carrie Stradley Lavargna, *Government-Sponsored Enterprises Are 'Too Big to Fail': Balancing Public and Private Interests*, 44 Hastings L.J. 991, 1011 (1993).

[144] *See*, *e,g.*, GAO, *Budget Issues: Profiles of Government-Sponsored Enterprises*, GAO/AFMD-91-17 (Washington, D.C.: Feb. 1991), at 7; Lavargna, at 1010–11; Thomas H. Stanton, *Federal Supervision of Safety and Soundness of Government-Sponsored Enterprises*, 5 Admin. L.J. 395, 404 (1991).

[145] Pub. L. No. 102-550, title XIII, 106 Stat. 3672, 3941 (Oct. 28, 1992).

[146] The five GSEs examined in the cited GAO testimony were Fannie Mae, Freddie Mac, Farmer Mac, the Federal Home Loan Banks (FHLBanks), and the Farm Credit System (FCS).

United States will be unwilling to permit GSE obligations to fail, the volume of GSE obligations, potentially, may have consequences for the federal taxpayer. *See* GAO-04-269T, at 5–6. Unfortunately, there are serious concerns over the management of the GSEs and federal oversight of their operations. By way of summary, GAO's 2004 testimony observed in this regard:

> "[T]o ensure that the GSEs operate in a safe and sound manner, it is essential that effective governance, reasonable transparency, and effective oversight systems are established and maintained. In particular, the GSEs should lead by example in the area of corporate governance; GSE regulators must be strong, independent, and have necessary expertise; and GSE mission definitions and benefit measures need to be established. However, our work found that GSE corporate governance does not always reflect best practices . . . Furthermore, the regulatory structure for the housing GSEs is fragmented and serious questions exist as to the capacity of GSE regulators to fulfill their responsibilities."

Id. at 2. Among other remedial measures, GAO recommended that Congress establish a single federal regulator for the housing GSEs and equip it with the necessary authorities to carry out its mission.

GAO is far from alone in identifying problems with the GSEs. One commentator described Fannie Mae and Freddie Mac as "huge, fast-growing, highly leveraged, lightly regulated, and susceptible to failure." Richard Scott Carnell, *Handling the Failure of a Government-Sponsored Enterprise*, 80 Wash. L. Rev. 565, 567 (2005). Another said:

> "GSEs are completely excluded from the presidential budget and the congressional budget resolution; they simply are not reported in either the on-budget or the off-budget figures. Although GSEs were originally designed to serve a public purpose, they can easily be used as a budget accounting gimmick to reduce the size of apparent deficits."

Cheryl D. Block, *Congress and Accounting Scandals: Is the Pot Calling the Kettle Black?*, 82 Neb. L. Rev. 365, 438–39 (2003) (footnotes omitted).

In May 2006, Fannie Mae agreed to pay a $400 million penalty to settle charges brought against it by the Securities and Exchange Commission relating to misstatements in its financial statements from at least 1998 through 2004 that gave its shareholders and the public the false impression of stable and predictable earnings. In announcing the settlement, the Commission observed:

> "In its settlement with the Commission, the company agreed, without admitting or denying the allegations, to the entry of a final judgment that permanently enjoins the company from violations of the anti-fraud, reporting, books and records and internal controls provisions of the federal securities laws. The root cause of the accounting fraud described in the Commission's Complaint, was a corporate culture that placed significant emphasis on stable earnings growth and avoidance of income statement volatility, and insufficient emphasis on ensuring compliance with applicable accounting regulations and federal securities laws. The company's misconduct took various forms. For example: At the end of 1998, senior management manipulated the company's earnings in order to obtain bonuses they otherwise would not have received."[147]

(3) Statutory controls

In addition to the budget, audit, and accounting controls previously described, the Government Corporation Control Act (GCCA), 31 U.S.C. § 9108, addresses the debt obligations of all government corporations, wholly owned and mixed-ownership, covered by the act (see discussion of GCCA in section B.4.a of this chapter). Under section 9108(a), a GCCA government corporation may not issue or offer obligations to the public unless the Secretary of the Treasury has prescribed the form, denomination, maturity, and interest rate of the obligations and the

[147] Securities and Exchange Commission, *SEC and OFHEO Announce Resolution of Investigation and Special Examination of Fannie Mae: Fannie Mae Agrees to Pay $400 Million Penalty,* Press Release No. 2006-80 (May 23, 2006), *available at* www.sec.gov/news/press.shtml (last visited Nov. 28, 2007). *See also* OFHEO, *Report to Congress 2007* (Mar. 30, 2007), *available at* www.ofheo.gov/media/annual reports/OFHEOReporttoCongress07.pdf (last visited Nov. 28, 2007) (annual examination of Fannie Mae and Freddie Mac revealed inadequacies in the areas of accounting systems, internal controls, risk management, human resources, and corporate governance).

conditions to which they will be subject; the manner and times of their issuance; and the price for which they will be sold.

Under section 9108(b), a GCCA government corporation must get the Secretary of the Treasury's approval (or waiver) before buying or selling either a direct obligation of the United States or an obligation whose principal, interest, or both is guaranteed by the United States, if the obligations aggregate over $100,000.

Section 9108(c) authorizes the Secretary of the Treasury to delegate functions under sections 9108(a) and (b) to any officer or employee of any federal agency.

Section 9108(d) contains the exemptions. The approval requirements of sections 9108(a) and (b) do not apply to certain named mixed-ownership government corporations, nor to any mixed-ownership corporation when the corporation has no government capital.

Finally, a provision added to the GCCA in 1986 directs the Secretary of the Treasury to issue standards for depositary institutions concerning the safeguarding and use of GSE securities that they hold for their customers. 31 U.S.C. § 9110.

6. Fiscal Autonomy

a. Account Settlement

GAO's "account settlement" authority refers to the first portion of 31 U.S.C. § 3526(a)—"The Comptroller General shall settle all accounts of the United States Government." During the pre-World War II period and for a while thereafter, this meant that all accounts had to be physically transmitted to GAO, where GAO auditors scrutinized them, line by line, "disallowing" or "taking an exception to" expenditures found to be illegal. Subsequently, GAO's application of this authority underwent major evolution. Now, agencies retain their own accounts, keeping them available for audit,[148] and an account is regarded as "settled" by operation of law after 3 years except for unresolved items. *See* 31 U.S.C. § 3526(c). Nevertheless account settlement remains relevant in determining such things as (1) the kinds of audit GAO is authorized to perform, (2) who may

[148] GAO advised government corporations to this effect in 27 Comp. Gen. 429 (1948).

request a legal decision from GAO, and (3) the application of the accountable officer relief statutes. *See* 31 U.S.C. §§ 3523, 3526, 3527, 3528, 3529.

During the decades preceding enactment of the Government Corporation Control Act, 31 U.S.C. §§ 9101–9110, the relationship of GAO to government corporations was a major battlefield. The corporations argued that they should be exempt from GAO's account settlement authority; GAO argued the opposite.[149] In 1927, the Supreme Court decided the case of *United States ex rel. Skinner & Eddy Corp. v. McCarl*, 275 U.S. 1 (1927). A contractor sought a writ of mandamus to compel GAO to consider its claim against the United States Shipping Board Emergency Fleet Corporation. The Supreme Court affirmed the determination of the lower court that the claim was not within GAO's *claims* settlement jurisdiction,[150] which was separate from GAO's *account* settlement authority. The executive branch cited this case to support a blanket proposition that GAO's account settlement authority did not extend to government-owned corporations. *E.g.*, 40 Op. Att'y Gen. 84 (1941). While this was certainly an arguable position, GAO's initial reaction was to distinguish *Skinner & Eddy*, pointing out that the Court had not directly ruled on the question of GAO's account settlement authority over government corporations. B-29072, Nov. 16, 1943. GAO tried to reconcile the conflicting views, holding that accountable officers still had to render their accounts, but that GAO, in performing its settlement audit, would recognize the corporations' exemption from various laws. B-24827, May 22, 1942.

Two developments have largely resolved the issue. First was the enactment of the Government Corporation Control Act (GCCA), which mandated a commercial-type audit—as opposed to the traditional governmental audit—and told GAO to include in its audit reports anything it believed to be illegal (see discussion of GCCA in section B.4.a of this chapter). 31 U.S.C. § 9105. Although some decisions reflect

[149] Many of the squabbles are recorded in John McDiarmid, *Government Corporations and Federal Funds* (1938).

[150] This claims settlement authority is discussed in detail in Chapter 14, section B.

ambivalence,[151] GAO tended to view the GCCA requirements as supplanting its account settlement authority with respect to the corporations. *E.g.*, B-150556, May 29, 1968 (Commodity Credit Corporation); B-146820, June 2, 1967 (Commodity Credit Corporation); B-152534-O.M., Dec. 4, 1963 (Panama Canal Company); B-58302, Apr. 29, 1947 (former Reconstruction Finance Corporation).

The second development was the refinement of certain charter provisions and a trend toward standardization. Congress has authorized most post-Government Corporation Control Act corporations to determine the character and necessity of their expenditures. For example, the Federal Crop Insurance Corporation provision states:

> "The Corporation shall determine the character and necessity for its expenditures . . . and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other laws governing the expenditure of public funds and such determinations shall be final and conclusive upon all other officers of the Government."

7 U.S.C. § 1506(i).

There are variations in language. GAO views the "character and necessity" provision as precluding its account settlement authority. *E.g.*, B-226708.3, Dec. 12, 1988 (then Federal Savings and Loan Insurance Corporation); B-200103, Mar. 5, 1981 (Commodity Credit Corporation); B-34706, Dec. 5, 1947 (government corporations in general). Some decisions also mention other corporate powers like the power to sue and be sued or to conclusively settle claims, but the "character and necessity" power is the crucial element.

The first step in the analysis is to examine a corporation's particular legislation. If Congress has addressed the matter one way or the other, there is no need to go further. Congress is always free to make a particular corporation subject to GAO's account settlement. *E.g.*, B-123943-O.M.,

[151] The ambivalence of the accounting officers did not start with GAO. For example, in 24 Comp. Dec. 118 (1917), the Comptroller of the Treasury held that the United States Shipping Board Emergency Fleet Corporation was not required to account to the Treasury for the use of its funds, yet held in later decisions that the corporation had violated laws governing the purchase of typewriters (27 Comp. Dec. 140 (1920)) and prohibiting advance payments (27 Comp. Dec. 311 (1920)).

July 1, 1955. An example is Federal Prison Industries, whose legislation provides: "Accounts of all receipts and disbursements of the corporation shall be rendered to the Government Accountability Office for settlement and adjustment, as required by the Comptroller General." 18 U.S.C. § 4126(d). *See* B-98983-O.M., Dec. 18, 1950. The Tennessee Valley Authority (TVA) has an interesting structure. The TVA is expressly made subject to the account settlement laws, but a determination of necessity by the TVA Board of Directors will override a GAO finding to the contrary. 16 U.S.C. § 831h(b). *See*, *e.g.*, B-209585, Jan. 26, 1983; B-114850-O.M., Sept. 21, 1977.

If a corporation's enabling legislation does not address account settlement, then, for the two reasons noted above, GAO will conclude that the authority does not exist. Most of the cases cited in the preceding paragraphs have involved wholly owned corporations.[152] However, the same is true for mixed-ownership corporations like the Federal Deposit Insurance Corporation (B-210496, Feb. 1, 1983), and for corporations created and funded by the government but designated as "private," like the Legal Services Corporation (B-241591, Mar. 1, 1991; B-203901, July 9, 1982; B-204886, Oct. 21, 1981).[153]

If the account settlement laws do not apply to a particular corporation, neither do the laws providing for the relief of accountable officers. In such a case, any accountability of officers or employees of the corporation is up to the corporation itself to determine; accountability would be to the corporation, not the United States.[154] B-88578-O.M., Aug. 21, 1951. *See also* B-83360-O.M., Apr. 8, 1949 (Certifying Officers' Act, ch. 641, 55 Stat. 875 (Dec. 29, 1941), not applicable to Federal Crop Insurance Corporation).

[152] For example, under 31 U.S.C. § 9101(3)(M), the Secretary of the Department of Housing and Urban Development (HUD) is considered to be acting as a wholly owned government corporation when carrying out duties and powers related to the Federal Housing Administration Fund. For a discussion of GAO's limited authority with respect to this HUD program, see B-182653, Jan. 16, 1975; B-181961, B-182280, Nov. 26, 1974; B-99262-O.M., Jan. 11, 1951.

[153] Several of the cases cited in this paragraph are bid protest decisions. Prior to the 1984 enactment of the Competition in Contracting Act, account settlement authority was the basis for GAO bid protest jurisdiction.

[154] GAO did not always feel this way. Earlier decisions purporting to grant or deny relief to certifying officers of the Federal Crop Insurance Corporation, such as B-44435, Oct. 5, 1944 (or for that matter any government corporation with the "character and necessity" authority), have been effectively superseded and should be disregarded to that extent.

b. Status of Funds Received by Corporate Entities

If money received by a government agency must be deposited in the Treasury and an appropriation is needed to get it back out, logic would seem to dictate that statutory authority for an agency to retain specified receipts and to spend them for specified purposes is a permanent or continuing appropriation of those receipts. GAO has consistently applied this principle to a variety of revolving funds, user fee accounts, proceeds from sales of goods or services, *etc.* This principle is explored in more detail, with case citations, in Chapter 2, section B.1. Further support is found in the title 31, United States Code, definition of "appropriations," which is not limited to direct appropriations from the general fund of the Treasury but includes "other authority making amounts available for obligation or expenditure." 31 U.S.C. §§ 701(2)(C), 1101(2)(C).

Viewing the principle in the abstract, that is, setting aside for the moment the question of the consequences of the status determination, there is no reason the principle should not apply to government corporations as well as unincorporated agencies. Thus, GAO has applied the principle and found that there was a statute which authorized the deposits of receipts in a specific fund, and made the fund available for carrying out specific purposes without needing further congressional action, which constituted a permanent or continuing appropriation, in the following situations:

- Tolls assessed and collected by the Saint Lawrence Seaway Development Corporation. B-193573, Jan. 8, 1979, *modified and aff'd*, B-193573, Dec. 19, 1979, *restated in* B-217578, Oct. 16, 1986. (The Corporation stopped being funded from tolls in the mid-1990s.)

- The Prison Industries Fund operated by Federal Prison Industries, Inc. (FPI), the receipts of which consist primarily of proceeds from the sale of FPI products and services. 60 Comp. Gen. 323 (1981); B-230304, Mar. 18, 1988.[155]

[155] No less a supporter of corporate autonomy than John McDiarmid has referred to the Prison Industries Fund as a "permanent appropriation." *See* John M. McDiarmid, *Government Corporations and Federal Funds*, 55 (1938). On the other hand, the U.S. Court of Appeals for the Federal Circuit, discussing 60 Comp. Gen. 323, declined to adopt GAO's characterization of the Prison Industries Fund as an appropriation for the purpose of determining whether jurisdiction exists under the Tucker Act. *Core Concepts of Florida, Inc. v. United States*, 327 F.3d 1331, 1337-38 (Fed. Cir. 2003). See the discussion of these decisions in section B.1 of Chapter 2.

- Revolving funds of the Pension Benefit Guaranty Corporation in its capacity as insurer of private pension plans. B-223146, Oct. 7, 1986; B-217281-O.M., Mar. 27, 1985; GAO, *Pension Benefit Guaranty Corporation: Statutory Limitation on Administrative Expenses Does Not Provide Meaningful Control*, GAO-03-301 (Washington, D.C.: Feb. 28, 2003), at app. II. *Compare* B-307849, Mar. 1, 2007 (since PBGC did not have authority to retain reimbursements for financial analysis services, amounts received must be deposited into the general fund of the Treasury).

- Power program funds (revenue and bonds) of the Tennessee Valley Authority. 64 Comp. Gen. 756, 761–62 (1985).

- Bonneville Power Administration Fund, a revolving fund consisting of all receipts of the Bonneville Power Administration, proceeds from the sale of its bonds, and appropriations Congress may make (16 U.S.C. § 838i). 67 Comp. Gen. 8, 10 (1987).

- Capitalization obtained from the United States Treasury under borrowing authority. B-223857, Feb. 27, 1987 (Commodity Credit Corporation); B-193573, Dec. 19, 1979 (Saint Lawrence Seaway Development Corporation).

- Filing fees collected under 28 U.S.C. § 1931 collected and retained for the operation and maintenance of the courts of the United States. 73 Comp. Gen. 321 (1994).

It makes no difference whether the statutory language authorizing retention and use is found in an appropriation act or in other legislation. B-193573, Dec. 19, 1979. The fact that the fund has repaid its initial capitalization to the Treasury and has become self-supporting is also immaterial. 60 Comp. Gen. 323, 326 (1981).

These cases have one important thing in common—they all involve wholly owned government corporations (plus Bonneville, the functional equivalent of one). This should not seem strange because, considering the various types of government-created corporations (wholly owned, mixed-ownership, GSEs, so-called “private,” *etc.*), the wholly owned government corporation is closest to an agency.

This being the case, application of the principle to a mixed-ownership government corporation, although possible in theory and perhaps even desirable in some instances, would seem less appropriate. Thus, assessments levied on insured banks by the Federal Deposit Insurance Corporation (FDIC) and used to pay the FDIC's operating expenses are not regarded as "appropriated funds." 23 Comp. Gen. 83 (1943); B-20892, Dec. 11, 1941; B-214157-O.M., Apr. 2, 1984, at 8–9. *See also* A-91137, Apr. 11, 1938 (FDIC's assessment-derived funds, while not an appropriation, are the equivalent of an appropriation for purposes of availability for necessary expenses). (None of these cases use the term "mixed-ownership" corporation because they all predate the explicit legislative recognition of that term in the Government Corporation Control Act.)

The Pension Benefit Guaranty Corporation (PBGC) illustrates a situation in which funds in the hands of a wholly owned corporation are not regarded as appropriated funds. The PBGC has two very different functions: it insures certain private pension plans, and it is authorized to serve as trustee for terminated plans. In B-217281-O.M., Mar. 27, 1985, the issue was whether the PBGC had to follow the federal procurement regulations in obtaining investment manager services for (1) excess capital in its revolving funds and (2) assets of terminated plans in its hands as trustee. As noted above, when the PBGC is acting in its capacity as pension plan insurer, its revolving funds are treated as appropriated funds. Accordingly, the procurement regulations applied to PBGC when procuring services for the revolving funds. However, when serving in its trustee capacity, the PBGC is treated as a private fiduciary and its powers include collecting amounts due the plan, paying plan benefits, liquidating plan assets, and recapturing prior payments. 29 U.S.C. § 1342(d)(1)(B).[156] The funds of terminated plans PBGC administers are trust funds, privately created and privately funded, and are not appropriated funds. Therefore, the PBGC is not bound by the federal procurement regulations when procuring services for its trust funds. Similarly, when using trust funds in its trustee capacity, the PBGC could modify existing contracts and could enter into a contingent-fee arrangement with outside counsel for litigation, without regard to the laws governing the expenditure of appropriated funds. B-223146, Oct. 7, 1986; GAO-03-301, at app. II.

In the case of an unincorporated agency, the question of whether certain funds are appropriated funds has very significant consequences. Appropriated funds, unlike nonappropriated or private funds held by

[156] An illustrative case of the Corporation's activities under this authority is *Pension Benefit Guaranty Corp. v. Carter & Tillery Enterprises*, 133 F.3d 1183 (9th Cir. 1998).

agencies for the benefit of others, "are subject to the various restrictions and limitations on the uses of appropriated moneys." 35 Comp. Gen. 615, 618 (1956). In the case of a government corporation, the result is still to subject the corporation to certain laws governing appropriated funds (or to determine the scope of exemptions for "nonappropriated funds"), but, as discussed next, the range of applicable laws is much narrower and varies depending on the precise terms of a given corporation's governing legislation.

c. Application of Fiscal Laws

As we have seen, fiscal autonomy is one of the key features of government corporations, and, in some cases, the primary impetus for their creation. "Government corporations," GAO conceded long ago, "are conceived not for the purpose of limiting the Government prerogative . . . but of accelerating and enlarging it and of making it more flexible." B-37981, June 1, 1944, at 52. The earliest battles, centering on the effect of corporate status *per se*, were inconclusive.[157] Changes in the law since that time now provide a framework.

(1) "Character and necessity" provision

GAO has often stated that the funds of "regular" agencies, including the various forms of authority to retain and use receipts, are, absent statutory provision to the contrary, "subject to the statutory controls and restrictions applicable to appropriated funds." *E.g.*, 63 Comp. Gen. 285, 287 (1984). In the corporate context, however, this statement is too broad and must be qualified. B-193573, Dec. 19, 1979, *restated*, B-217578, Oct. 16, 1986. The reason, and perhaps the most significant element in the fiscal autonomy of a government corporation, is what we will call the "character and necessity" provision appearing in many, if not most, legislative charters. The provision seems to have originated in the 1930s and there are several variations. An example of the simplest form is 15 U.S.C. § 714b(j), which provides that the Commodity Credit Corporation "[s]hall determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid." A variation is 33 U.S.C. § 984(a)(9), providing that the Saint Lawrence Seaway Development Corporation "shall determine the character of and the

[157] "[M]y attention has never been drawn to an act of Congress specifying that the laws of the land do not apply to Government corporations merely because they are Government corporations." B-34706, Dec. 5, 1947, at 4 (letter from Comptroller General to committee chairman).

necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid, subject to provisions of law specifically applicable to Government corporations." There is no material difference between these versions.

As we discussed throughout Chapter 4, the so-called purpose statute, 31 U.S.C. § 1301(a), prohibits the use of appropriations for other than their intended purpose, although purposes are stated in appropriations acts with varying degrees of specificity, leaving room for administrative discretion. When you add "character and necessity" authority to the discretion already inherent under 31 U.S.C. § 1301(a), the result is that a government corporation has much more spending discretion than agencies do. In addition, it has the power to make its own final and conclusive decisions. However, it is still subject to the overall limitation that its discretion be exercised "within the limitations and for the purposes of the statutes providing [its] funds and prescribing [its] activities." 14 Comp. Gen. 698, 700 (1935). In this sense, the concept of purpose—using the standards of corporate autonomy—along with the public policy concerns noted earlier, may be said to define the outer limits of a corporation's discretion. There is a further discussion of this with specific corporate case studies in the section on program implementation in section B.6.d of this chapter.

Another thing a "character and necessity" provision does is it permits the corporation to avoid various rules established in case law that result from application of the "necessary expense" rule to an agency's appropriation. *See* Chapter 4, section C.5. The one that comes immediately to mind is entertainment. A corporation empowered to determine the character and necessity of its expenditures can spend its money on the range of items discussed in Chapter 4, section C.5, subject of course to any applicable statutory restrictions. B-127549, May 18, 1956; B-35062, July 28, 1943. Accordingly, a corporation operating with appropriated funds but without the "character and necessity" provision, is subject to the same entertainment rules agencies are. B-270199, Aug. 6, 1996. (The decision does not mention the lack of "character and necessity" authority, but that was in fact the case and indeed the essential prerequisite to applying the rules.)[158]

[158] As is probably obvious from the case law applying "character and necessity" provisions, a "character and necessity" provision limits the Comptroller General's role in settling the accounts of the corporate entity. *See*, *e.g.*, 64 Comp. Gen. 124 (1984); B-209585, Jan. 26, 1983; B-200103, Mar. 5, 1981.

A corporation statutorily designated as "private," even though government-created and government-financed, does not need the "character and necessity" language, and may spend money on entertainment unless statutorily restricted. B-131935, July 16, 1975 (Corporation for Public Broadcasting). Congress subsequently amended the Corporation for Public Broadcasting's enabling legislation to prohibit the use of appropriated funds for the entertainment of federal, state, or local officials. 47 U.S.C. § 396(k)(2)(A).

Another category of expenditures legally unobjectionable under "character and necessity" authority are items discussed in Chapter 4, section C.13. Examples are:

- Physical examinations for certain employees of the Saint Lawrence Seaway Development Corporation. 41 Comp. Gen. 531 (1962).

- Expenses necessary to qualify an employee to do his or her job. B-2835, Apr. 18, 1939 (qualification as notary).

- Payment of travel expenses for chairman's spouse; installing storm windows and door and window locks on chairman's house; paying for his membership in a private tennis club. GAO, FOD-77-14 (Washington, D.C.: Nov. 29, 1977) (untitled letter report).

Hazard insurance on various types of property is another type of expenditure that is permissible under a corporations "character and necessity" provision but is generally not available to agencies (*see* Chapter 4, section 10). 16 Comp. Gen. 453 (1936) (Federal Housing Administrator can insure property acquired in exchange for debentures); B-200103, Mar. 5, 1981 (Commodity Credit Corporation (CCC) can pay for hazard insurance on CCC-owned and stored commodities). *See also* B-290162, Oct. 22, 2002; B-287209, June 3, 2002; 55 Comp. Gen. 1321 (1976); 11 Comp. Gen. 59 (1931). This applies as well to creating a reserve for fire, theft, and similar losses. B-123709-O.M., June 29, 1955.

Another major consequence of "character and necessity" authority is to permit the corporation to avoid general statutory restrictions (as opposed to restrictions specifically applicable to government corporations). As GAO put it in B-34706, Dec. 5, 1947, at 3:

> "Where [character and necessity] language appears in the act chartering the corporation, there can be no question but

> that Congress has determined that the Congressional or statutory rules otherwise directing how the public monies shall be spent are not of their own force to apply to the corporation, but rather that the corporation shall determine for itself what methods, procedures, *etc*. should be employed."

One example of a general statutory provision that corporations with "character and necessity" language need not follow is 44 U.S.C. § 501, requiring the Government Printing Office to do all printing and binding for the government. (This provision is discussed in more detail in section B.7.f of this chapter.) Two additional examples, noted in B-193573, Dec. 19, 1979, are 5 U.S.C. § 3107 (prohibiting use of appropriated funds to pay publicity experts) and 31 U.S.C. § 1345[159] (prohibiting use of appropriated funds to pay lodging or feeding of nongovernment persons at meetings or conventions). *See also* B-7067, July 10, 1940; B-3163, Apr. 24, 1939 (both decisions examined now-obsolete portions of predecessor of 5 U.S.C. § 3106 restricting hiring of attorneys).

A formulation GAO has often used is that a wholly owned government corporation with the power to determine the character and necessity of its expenditures is subject to (1) its own charter (*i.e.*, enabling legislation); (2) the Government Corporation Control Act, if and to the extent applicable; (3) applicable restrictions contained in annual appropriation acts; and (4) statutes expressly applicable to wholly owned corporations. *E.g.*, B-58305-O.M., Apr. 10, 1951 (Federal Intermediate Credit Banks, subsequently converted to mixed-ownership but listed as wholly owned in the original Government Corporation Control Act); B-58305-O.M., Mar. 8, 1951 (then Production Credit Corporation); B-58306(2)-O.M., Nov. 14, 1950 (Commodity Credit Corporation); B-58318-O.M., Oct. 27, 1950 (Export-Import Bank); B-90250-O.M., Mar. 28, 1950 (corporate functions of Federal Housing Administration).[160] Similar statements appear in a number of more recent decisions. *E.g.*, B-289219, Oct. 29, 2002; B-217578, Oct. 16, 1986.

[159] A 1935 decision, 14 Comp. Gen. 638, seemed to say the opposite with respect to this statute, but it apparently overlooked the significance of the "character and necessity" power, although it was mentioned in the request for decision, and for that reason and to that extent should be disregarded.

[160] These examples are from a series of internal GAO memoranda dated shortly after enactment of the Government Corporation Control Act, when GAO was refining its conduct of corporate audits.

A mixed-ownership corporation is subject to its own statutory charter, the Government Corporation Control Act, if and to the extent applicable, and applicable provisions in appropriation act. In addition, it is subject to laws enacted after its enabling statute that are specifically applicable to mixed-ownership corporations. *See* B-58300-O.M., Nov. 30, 1950 (Federal Deposit Insurance Corporation (FDIC)). Some earlier mixed-ownership corporations included the "character and necessity" authority or its functional equivalent in their enabling legislation. *E.g.*, 12 U.S.C. § 1820(a) (FDIC "shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid"). Later legislation may not have such language. *E.g.*, Pub. L. No. 93-236, title II, 87 Stat. 985, 990 (Jan. 2, 1974) (the now-defunct U.S. Railway Association). For a mixed-ownership corporation, at least one not receiving a direct appropriation, this specific language is probably not necessary. Our review of cases involving the FDIC indicates that its autonomy is abetted by the "character and necessity" clause, but that it would most likely have the same degree of autonomy without it, by virtue of its mixed-ownership status and the source of its funding. For example, the FDIC is not required to follow the obligation recording statute, 31 U.S.C. § 1501 (B-121541, Dec. 30, 1954); the statutory restrictions on the purchase of motor vehicles and aircraft, 31 U.S.C. § 1343 (B-94685-O.M., May 8, 1950); or the statutory provision restricting the funding of interagency groups, 31 U.S.C. § 1346 (B-174571, Jan. 5, 1972).

(2) <u>"Without regard" clause</u>

In addition to the various minor linguistic variations, there is one major variety of the "character and necessity" clause, illustrated by the Federal Crop Insurance Corporation statute quoted above in section 6.a of this chapter. It confers the "character and necessity" power, "without regard to the provisions of any other laws governing the expenditure of public funds." 7 U.S.C. § 1506(i). Clearly, as a matter of basic statutory construction (or reading the English language), this version confers more than the basic "character and necessity" clause that does not include the "without regard" language. For example, in B-94115, Nov. 15, 1950, GAO reviewed the "without regard" clause of the Reconstruction Finance Corporation (RFC). GAO determined that the clause permitted the RFC to avoid laws existing on May 25, 1948, the date of the clause's enactment, even laws expressly applicable to government corporations. However, the broad latitude of the "without regard" clause had been modified by the enactment after 1948 of legislation expressly applicable to government corporations. *Id.* Several months earlier, the Comptroller General had told

GAO's auditors essentially the same thing with respect to the corporate functions of the Federal Housing Administration. B-90250-O.M., Mar. 28, 1950. The "without regard" language, then, gives the corporation, in addition to everything it gets under the basic "character and necessity" clause, the further ability to avoid laws expressly applicable to government corporations (but not, of course, specifically applicable to the particular corporation), provided the laws are on the books at the time the "without regard" language was enacted.[161]

While a government corporation with a "character and necessity" provision which includes the "without regard" clause has considerable discretion, the discretion is not unlimited. It is "a legal discretion to be exercised within the limitations and for the purposes of the statutes providing the funds and prescribing the activities of the [corporation]." 14 Comp. Gen. 698, 700 (1935). Nor does the "without regard" clause place the corporation "beyond all law or accountability with respect to its expenditures." 14 Comp. Gen. 755, 758 (1935). GAO has not attempted to draw the outer limits of this discretion, other than to suggest a broad "public policy" limitation. The practice GAO found illegal in 14 Comp. Gen. 755 was permitting attorneys employed by a government corporation to represent, on a fee basis, private parties in their dealings with the corporation. "The permitting of employees to practice before the public agency by which employed would seem so improper and so out of line with sound public policy as to suggest no need for a prohibiting statute." *Id.* at 758.

The corporation's discretion must be exercised in accordance with the corporation's established decision-making machinery and procedures. Rubber-stamping an expenditure already made—merely because it was made—"does not constitute the exercise of discretion . . . but a condoning of what has already been done." 14 Comp. Gen. 698, 700. *See also* 18 Comp. Gen. 479 (1938); B-56550, Mar. 28, 1946. This does not mean that the decision-making machinery must be invoked for each individual transaction. In some cases, the exercise of discretion on a categorical basis is legitimate, as long as it is done under the established procedures and documented. *E.g.*, A-98289, A-60495, Jan. 18, 1939 (corporation's board issued the requisite formal board resolution stating that the requirement to

[161] We are aware of the seemingly inconsistent discussion in 65 Comp. Gen. 226 (1986). While that case was correctly decided, some of the discussion appears to misinterpret earlier decisions. The matter is covered in more detail in section B.7.f of this chapter.

have printing done at Government Printing Office is not applicable to the corporation).

(3) Laws expressly applicable

It is clear at this point that it is important to know what laws are expressly applicable to government corporations. GAO prepared a list many years ago which is still useful (B-34706, B-56550-O.M., Nov. 9, 1949), but amendments, recodifications, and inter-title transfers, *etc.*, over the years have in many cases separated the substantive and definitional provisions. Consider, for example, the Administrative Expenses Act of 1946, ch. 744, 60 Stat. 806 (Aug. 2, 1946). After the first 17 sections set out substantive provisions, section 18 provided the following definitions: "The word 'department' as used in this Act shall be construed to include wholly owned Government corporations. . . . The word 'appropriation' shall be construed as including funds made available by legislation under . . . the Government Corporation Control Act." *Id.*

Thus, any of the first 17 provisions containing the word "department" or the word "appropriation" is expressly applicable to wholly owned government corporations. *E.g.*, 27 Comp. Gen. 757, 758 (1948) (Tennessee Valley Authority may avail itself of authority in section 1 of Administrative Expenses Act, now found in 5 U.S.C. § 5724, to pay travel expenses incident to permanent change of station). The provisions of the Administrative Expenses Act ended up in various locations in the United States Code. Some of the provisions that found their way into title 5 of the United States Code have retained the appropriate definitional language. *E.g.*, 5 U.S.C. §§ 3109 (employment of experts and consultants), 7903 (purchase of special clothing or protective equipment). As we noted in section B.2.a of this chapter, sometimes it is necessary to look beyond the provision itself. For example, for purposes of title 5, the term "executive agency" includes government corporations (5 U.S.C. § 105), which in turn means corporations "owned or controlled by the government of the United States" (5 U.S.C § 103(1)). Under 5 U.S.C. § 103(2), the term "government controlled corporation" does not include "a corporation owned by the government of the United States," and, as we noted in section B.2.a. of this chapter, refers to mixed-ownership government corporations such as those listed in 31 U.S.C. § 9101(2).

The travel expense authority of 5 U.S.C. § 5724 requires this kind of analysis. Section 5724(a) of title 5 of the United States Code refers to "agency." Section 5701(1) of title 5 defines agency as including "executive agency" (which includes wholly owned corporations) but not "government controlled corporation." *See* 5 U.S.C. § 5701 note. Applying 5 U.S.C. § 103 again, section 5724 is applicable to wholly owned government corporations but not mixed-ownership corporations.

Some of the provisions of the Administrative Expenses Act are now in title 31 of the United States Code. For example, section 11 amended the first sentence of the advance payment statute to read, "No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law." *See* 31 U.S.C. § 3324. The 1982 recodification of title 31 was not intended to make substantive changes. Therefore, applying the definitions contained in section 18, the advance payment statute applies to wholly owned corporations. GAO applied the identical reasoning to conclude that statutory restrictions on home-to-work transportation, 31 U.S.C. § 1344 (whose source is section 16 of the Administrative Expenses Act) apply expressly to wholly owned government corporations. B-210555.11, Apr. 1, 1986. However, that home-to-work statute was completely overhauled later in 1986. The revised statute expressly applies to government corporations and government controlled corporations as defined in 5 U.S.C. § 103 (31 U.S.C. §§ 1344(h)(2)(D) and (E)) and specifically includes mixed-ownership corporations subject to the Government Corporation Control Act in 31 U.S.C. §§ 9101–9110 (31 U.S.C. § 1344(h)(2)(F)), thus covering all the terminology.

Still another provision of the Administrative Expenses Act, section 9, amended the statutory requirement for advertising proposals for purchases and contracts for supplies and services now found in 41 U.S.C. § 5. That provision specifically applies only to the administrative transactions of wholly owned corporations.

A similar situation occurs in the apportionment requirement of 31 U.S.C. § 1512. The apportionment provisions were substantially overhauled in 1950. The revision included language making these provisions applicable to "any corporation wholly or partly owned by the United States which is an instrumentality of the United States" (Act of September 6, 1950, ch. 896, § 1211, 64 Stat. 595, 766). The 1982 recodification of title 31, United States Code, dropped this definitional language. The former Federal Savings and Loan Insurance Corporation, chartered in the 1930s, argued that its nonadministrative funds should not be subject to apportionment because it was empowered to determine the character and necessity of its expenditures without regard to any other provision of law governing the expenditure of public funds. Upon a detailed analysis, the Justice Department's Office of Legal Counsel concluded that the "specifically crafted, later-enacted" apportionment law applied to all of the corporation's funds, administrative and nonadministrative. 7 Op. Off. Legal Counsel 22, 26 (1983). GAO had reached the same conclusion in 43 Comp. Gen. 759 (1964). (Apparently, the FSLIC never tried to argue in either case that its "without regard" power should affect the applicability of the later-enacted apportionment provisions to its administrative funds.) A statutory exception is 12 U.S.C. § 1817(d) (funds of Federal Deposit Insurance Corporation, however derived, not subject to apportionment).

(4) Appropriation act provisions

Another source of expressly applicable laws is appropriation acts. Worthy of note is section 808 of the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriation Act, 2006, Pub. L. No. 109-115, title VIII, § 808, 119 Stat. 2396, 2497 (Oct. 30, 2005) (emphasis added):

> "Funds made available by this or any other Act for administrative expenses in the current fiscal year of the corporations and agencies subject to [the Government Corporation Control Act] shall be available, in addition to objects for which such funds are otherwise available, for rent in the District of Columbia; services in accordance with 5 U.S.C. 3109; and *the objects specified under this head, all the provisions of which shall be applicable to the expenditure of such funds unless otherwise specified* in the Act by which they are made available . . ."

The ancestor of this provision first appeared in the very first Government Corporation Appropriation Act, 1947 (Act of July 20, 1946, ch. 589, § 301, 60 Stat. 586, 595), enacted a short 6 months after the Government Corporation Control Act. Since 1972, this provision has appeared in the Treasury-General Government appropriation acts, now the Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies appropriation acts, in the title containing the governmentwide general provisions, so "this head" refers to that title (*e.g.*, title VIII in Public Law 109-115). Therefore, there may be other laws expressly applicable to government corporations, by virtue of the italicized language above, in the pertinent title each year. Although this provision has been around since 1946, GAO does not appear to have addressed the italicized language in any decision or opinion.

There is no governmentwide definition of "administrative expenses." Generally, the term refers to overhead-type expenses, like certain salaries, office supplies and equipment, payroll taxes, and telephone and other utility expenses. *Leonard v. S.G. Frantz Co.*, 49 N.Y.S.2d 329, 332–33 (N.Y. App. Div. 1944). In contrast, nonadministrative or program expenses are things such as loan guarantee or subsidy payments. GAO has suggested that a fixed definition in other than the most general terms would probably be impossible because the status of a given expense depends on the particular program, the governing legislation, and congressional intent, and what may be an administrative expense under one program or law may not be under another. B-24341, Mar. 12, 1942. Program statutes or regulations may include their own definitions, which of course would control. *E.g.*, 12 U.S.C. § 1702 (National Housing Act). Congress may also address the issue in appropriation acts by providing that specific items of expense shall or shall not be considered administrative expenses for purposes of a statutory limit. *E.g.*, Pub. L. No. 105-78, 111 Stat. 1467, 1472 (Nov. 13, 1997) (Pension Benefit Guaranty Corporation); Pub. L. No. 105-118, 111 Stat. 2386, 2387 (Nov. 26, 1997) (Export-Import Bank).

Another form of language Congress has used is a restriction applicable to "any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency."[162] This language has been held to embrace both wholly owned corporations (B-114823, Dec. 23, 1974, Export-Import Bank) and mixed-ownership corporations (B-164497(5), Mar. 10, 1977, U.S. Railway Association).

(5) Other provisions of title 31, United States Code

The post-recodification title 31 defines "agency" to mean "a department, agency, or instrumentality of the United States Government." 31 U.S.C. § 101. The codification note following 31 U.S.C. § 1511 makes it clear that "instrumentality" is intended to include those government corporations which are instrumentalities of the United States. This applies to all of title 31 unless another more specific provision intervenes, which it does on several occasions. For example, GAO's authority to prescribe accounting principles and standards (31 U.S.C. § 3511) does not apply to government

[162] *See*, *e.g.*, Pub. L. No. 96-74, title VI, § 607(a), 93 Stat. 559, 575 (Sept. 29, 1979).

corporations. B-207435, July 7, 1982. This is because, for purposes of the chapter in which section 3511 appears, the definition of "executive agency" specifically excludes corporations or other entities subject to the Government Corporation Control Act. 31 U.S.C. § 3501. Similarly, 31 U.S.C. §§ 717 (program evaluations) and 720 (agency reports on GAO recommendations) include their own definitions under which they apply to wholly owned, but not mixed-ownership, government corporations.

The Antideficiency Act's prohibition against overobligation and overspending, 31 U.S.C. § 1341, has been applied to wholly owned corporations with "character and necessity" authority (see section B.6.c(1) of this chapter) because the funds used by the corporations to finance their operations were appropriated funds subject to the restrictions imposed by the Antideficiency Act. B-223857, Feb. 27, 1987 (Commodity Credit Corporation); B-135075-O.M., Feb. 14, 1975 (Inter-American Foundation). In B-223857, GAO found also that the Commodity Credit Corporation violated the voluntary services prohibition, 31 U.S.C. § 1342, by directing contractors to continue performance after its borrowing authority had been depleted. A government-created corporation statutorily designated as private or not an agency or instrumentality of the United States is not subject to the Antideficiency Act. B-308037, Sept. 14, 2006 (Legal Services Corporation). Congress, of course, could choose to subject such a corporation to the Antideficiency Act by amending its enabling statute or imposing restrictions specifically when it appropriates funds to the corporation. For an example of a restriction in an annual appropriations act subjecting specific appropriations received by private entities to the restrictions of the Antideficiency Act, see Department of Transportation and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-66, 111 Stat. 1425, 1435 (Oct. 27, 1997) ("any obligation or commitment by [Amtrak] for the purchase of capital improvements with fund appropriated herein which is prohibited by this Act shall be deemed a violation of 31 U.S.C. § 1341").

The statute which prescribes the standards for recording obligations, 31 U.S.C. § 1501, also applies to government corporations which are agencies or instrumentalities of the United States. *E.g.*, 34 Comp. Gen. 825 (1954) (GAO's initial guidance on implementing the then recording statute); B-123943-O.M., July 1, 1955 (Institute of Inter-American Affairs). See also *United States v. American Renaissance Lines, Inc.*, 494 F.2d 1059 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974) (Commodity Credit Corporation), and 37 Comp. Gen. 691 (1958) (Saint Lawrence Seaway Development Corporation), in which the court and GAO, respectively, treated the statute as applicable without directly addressing the issue. The original enactment of 31 U.S.C. § 1501 was section 1311 of the Supplemental Appropriations Act for 1955 (Pub. L. No. 83-663, ch. 935, 68 Stat. 800, 830 (Aug. 26, 1954)).

The Economy Act, Act of June 30, 1932, § 601, 47 Stat. 417, as amended, applies to "independent establishments of the Government," which would include wholly owned government corporations and entities chartered as "instrumentalities of the government." *See* 31 U.S.C. § 1535 note; B-116194, Oct. 5, 1953 (since the Panama Canal Company was created as an instrumentality of the government, it is an independent establishment within the meaning of that term in the Economy Act); B-39199, Jan. 19, 1944 (Rubber Development Corporation, as a wholly owned subsidiary of the Reconstruction Finance Corporation, which in turn is owned by the United States, is an independent establishment under the Economy Act). The corporation can be the requisitioning agency (13 Comp. Gen. 138 (1933); B-27842, Aug. 13, 1942), or the performing agency (B-116194, Oct. 5, 1953; B-39199, Jan. 19, 1944; A-46332, Jan. 9, 1933). If a corporation has specific charter authority to provide goods or services to other government establishments, the specific authority will displace the Economy Act. *E.g.*, 44 Comp. Gen. 683 (1965) (sale of electric power by Tennessee Valley Authority to other government agencies).

The so-called "Stale Check Act," Pub. L. No. 80-171, ch. 222, 61 Stat. 308 (July 11, 1947), codified at 31 U.S.C. § 3328, prescribes requirements for handling Treasury checks. The original language applied expressly to checks "drawn by wholly owned and mixed-ownership Government corporations," except for "transactions regarding the administration of banking and currency laws." Pub. L. No. 80-171, § 1. The 1982 recodification dropped the definitional language as "surplus." *See* 31 U.S.C. § 3328 note. Nevertheless, in view of the original language, the statute still applies to both wholly owned and mixed-ownership government corporations. *Id.*; *see also* B-70248, Nov. 6, 1947; B-100893-O.M., Mar. 27, 1951. The statute also has been held applicable to a government corporation with "character and necessity" power including the "without regard" clause (see sections B.6.c(1) and (2) of this chapter for a discussion of these clauses). B-70248, Sept. 1, 1950.

The decision in B-70248, Sept. 1, 1950, involved the Reconstruction Finance Corporation, which received its "without regard" authority in 1948, a year after enactment of the Stale Check Act. At first glance, therefore, this would appear to contradict our earlier discussion in section B.6.c(2) that a "without regard" clause permits the corporation to avoid expressly applicable laws already in existence. The answer is that it depends on what kind of law you're talking about and whose discretion or responsibility is at issue. The decision stated:

> "[W]here the Corporation has decided a payment should be made, and issued a check drawn on the Treasurer of the United States, it appears that the discretion of the Corporation has then been exercised. . . . The obligation after issuance of the checks . . . appears clearly to be a Treasury obligation, not one of the Reconstruction Finance Corporation. As such, it does not appear to be one over which the Corporation's determination is final and conclusive, but one over which the Treasury Department . . . under the 'Stale Check Act' [has] jurisdiction."

B-70248, Sept. 1, 1950, at 5.

Another provision with relevance to government corporations is 31 U.S.C. § 3301(a)(1), which directs the Secretary of the Treasury to "receive and keep public money." This provision, as reinforced by the Government Corporation Control Act (31 U.S.C. §§ 9107(b) and (c)), applies to the appropriated funds of a government corporation (both wholly owned and mixed-ownership) unless waived pursuant to section 9107(c). Thus, a government corporation is not entitled, solely by virtue of its corporate status, to have its appropriation paid over directly to it "up front" in a lump sum. Rather, like any other agency, the money stays in the Treasury until needed for a valid purpose. 21 Comp. Gen. 489 (1941). Congress can, of course, provide differently. An example is the Corporation for Public Broadcasting, whose appropriations "shall be disbursed by the Secretary of the Treasury on a fiscal year basis." 47 U.S.C. § 396(k)(2)(B).

A final provision we will note is 31 U.S.C. § 3302(b), the miscellaneous receipts statute. If "character and necessity" authority is one major leg upon which the fiscal autonomy of a government corporation rests, user fee or revolving fund-type financing is the second. If a government corporation is realistically expected to perform business-type functions with any efficiency, the requirement to deposit all receipts in the Treasury and await congressional appropriations would be a serious impediment, especially for federally chartered but private, nonprofit entities like the State Justice Institute, which by statute is not to be considered a department, agency, or instrumentality of the government. B-307317, Sept. 13, 2006. Therefore, money received by the State Justice Institute would not be money received "for the government," so the miscellaneous receipts statute does not apply. *Id.* However, other types of government corporate entities, which act as agents of the government would need statutory authority to overcome 31 U.S.C. § 3302(b); corporate status alone is not enough. B-300218, Mar. 17, 2003; 52 Comp. Gen. 54, 55 (1972); 5 Comp. Gen. 1004 (1926). For most corporations, the solution is the charter authority to retain and reuse receipts, the exact type of receipts varying with the particular corporation. These are called "public enterprise revolving funds" and effectively displace 31 U.S.C. § 3302(b).[163] Revolving funds are covered in Chapter 12, section C, and we will not repeat that discussion here, except to emphasize that the legislation creating the fund determines what can go into it and what it can be used for. For example, the statute for the Overseas Private Investment Corporation (OPIC), 22 U.S.C. § 2196, uses very broad language—"all revenues and income . . . from whatever source derived." *See* 52 Comp. Gen. 54 (1972) (interest earned by OPIC on foreign currencies held in designated depositaries pending their sale for dollars may be retained and used).

Along similar lines, a provision in a 1945 appropriation act limited expenditures for long-distance telephone calls to 90 percent of the agency's budget estimate for that purpose. The resulting savings were to be deposited as miscellaneous receipts. GAO interpreted the provision as contemplating "the return of such funds to the source from which made available," and advised the Commodity Credit Corporation that it could retain its savings and did not have to deposit them in the general fund of the Treasury. 24 Comp. Gen. 514, 517 (1945).

d. Program Implementation

Thus far, our discussion of fiscal autonomy has focused on the ability of a government corporation to avoid laws applicable to the rest of the government. There is another dimension, however. The discretion of a government corporation also helps determine the scope of the corporation's program activities, wholly apart from questions of compliance with specific laws.

It would seem hardly open to question that the very common-sense statute, 31 U.S.C. § 1301(a), which prohibits the use of appropriations for other than their intended purposes, applies to the "appropriated funds"—as we

[163] For the distinctions between government corporation revolving funds and those of agencies, see Ronald C. Moe, *Managing the Public's Business: Federal Government Corporations*, S. Prt. No. 104-18, at 62 (1995).

have described that term earlier—of a government corporation. The analytical approach to purpose availability is essentially the same for a corporation as for agencies. The expenditure must bear a logical relationship to furthering some authorized function or activity, and must not be otherwise prohibited or otherwise expressly provided for. For example, it is within the discretion of Federal Prison Industries, Inc., (FPI) to engage in the business of manufacturing envelopes for sale to the rest of the government. B-240914, Aug. 14, 1991. While FPI is generally supposed to seek out more labor-intensive activities, this is not an absolute legal requirement, and the corporation could properly determine that envelope manufacturing would further its objectives. Similarly, the Saint Lawrence Seaway Development Corporation could use its funds for minor work on the Canadian side of the border if closely related and ancillary to its primary works on the United States side. 34 Comp. Gen. 309 (1954).

While the corporations cited in the preceding paragraph are wholly owned, the principle applies equally to funds appropriated to a mixed-ownership corporation. For example, the National Credit Union Administration could not avoid restrictions on paying relocation expenses to one of its officials by transferring the charge to the accounts of the Central Liquidity Facility (CLF) where the official was clearly an employee of, and whose salary was paid entirely by, the Administration and not the CLF. 63 Comp. Gen. 31, 36–37 (1983).

As we noted in section B.6.c(1) of this chapter, when you add "character and necessity" authority to the discretion already inherent under 31 U.S.C. § 1301(a), the result is that a government corporation has much more spending discretion than other agencies, although it is still subject to the overall limitation that its discretion be exercised "within the limitations and for the purposes of the statutes providing [its] funds and prescribing [its] activities." 14 Comp. Gen. 698, 700 (1935).

An illustration of how all this can work is B-48184, Mar. 14, 1945. The Federal Housing Administration (FHA) had acquired title to a rental housing development under its mortgage insurance program. The FHA could retain and operate the development or could, within its discretion, sell it. A major drawback was that, except for a "low grade combination grocery store and beer parlor," there were no shopping facilities in the development or nearby area. After unsuccessfully trying to interest private capital, the FHA proposed using its own funds to provide a shopping center consisting of a food store, drug store, barber shop, beauty shop, shoe repair shop, laundry, gasoline station, and a management office. FHA thought that the shopping center would help significantly to make the development livable during the period of FHA operation, and would enhance its value if and when the FHA decided to sell it. The FHA had statutory authority to "deal with, complete, rent, renovate, modernize . . . or sell" the property, and to determine the necessity of its expenditures. *Id.* at 4. In light of this authority and the FHA's justification, GAO concurred with the proposal, notwithstanding the lack of statutory authority for new construction.

A sampling of cases involving three additional entities—the Commodity Credit Corporation, the Bonneville Power Administration, and Amtrak—further illustrates the role of corporate discretion, and its limitations, in program implementation.

(1) Commodity Credit Corporation

Created in 1933, the Commodity Credit Corporation (CCC) operates a variety of price support programs for agricultural commodities (including such things as direct subsidy payments and loans) and export programs designed to develop foreign markets for American agricultural products. It is a wholly owned government corporation and "an agency and instrumentality of the United States, within the Department of Agriculture." 15 U.S.C. § 714. It is unusual in that it has no employees. It is managed by a presidentially appointed board of directors (15 U.S.C. § 714g), but its day-to-day operations are carried out by Department of Agriculture employees who, in effect, wear two hats. It has the authority to determine the character and necessity of its expenditures. 15 U.S.C. § 714b(j).

In a 1982 case, the Justice Department's Office of Legal Counsel reviewed two programs that CCC had created to promote agricultural exports by guaranteeing exporters or their financing institutions against certain risks. There was no explicit statutory authority for the programs, but CCC is authorized to "use its general powers" to "[e]xport or cause to be exported, or aid in the development of foreign markets for, agricultural commodities." 15 U.S.C. § 714c(f). One of those general powers is the "character and necessity" power discussed in section B.6.c(1) of this chapter. Since the programs were unquestionably designed to promote exports, they had adequate statutory authority. 6 Op. Off. Legal Counsel 233 (1982). The following year, GAO reviewed payments made under these programs to United States banks which had financed exports to the then Polish People's Republic. While the CCC had not strictly complied with its own regulations, the deviations were essentially on matters of procedure, which the CCC could waive. Therefore, GAO found nothing objectionable. B-208610, Sept. 1, 1983.

In B-213761, July 27, 1984, GAO considered aspects of the CCC's tobacco price support program. Specifically, there were differences between the procedures Treasury used in charging interest and crediting repayments against loans to the CCC and the procedures the CCC used in charging interest and crediting repayments on loans it made to tobacco producers. The impact was to increase the amount of the CCC's net losses, for which appropriations are made annually. While GAO felt that the CCC should change its procedures to more closely align with Treasury's procedures, and had made this recommendation on more than one occasion, the CCC was under no legal requirement to do so. The terms and conditions of its loans were within its discretion.

Much of the detail in CCC's programs comes from its regulations. *See generally* 7 C.F.R. subtitle B, ch. XIV. The extent to which it may deviate with impunity from the terms of its regulations suggests another test of the range of the corporation's discretion. A 1965 case involved price support payments to tobacco producers under regulations which made the payments available only for sales within the annual normal marketing season. A temporary funding shortage forced suspension of payments. The question was whether, once the funds became available, the CCC could make payments to producers for sales occurring shortly after the normal marketing season. If legal liability to those producers could be established, the answer of course would be yes. GAO did not think it could, but found the matter sufficiently doubtful, especially in light of prior practice, and therefore advised the CCC that the payments would be unobjectionable. 44 Comp. Gen. 735 (1965). As noted above, the CCC, like any other government agency, can deviate from procedural regulations, at least as long as the action does not prejudice other parties. Its discretion does not extend, however, to retroactively waiving substantive regulations without statutory authority. 53 Comp. Gen. 364 (1973); B-208610, Sept. 1, 1983.

Cases involving the price support program for milk and milk products illustrate a situation in which corporate discretion must be subordinated to the terms of the program statute. The pertinent law provided that price support "shall be provided through loans on, or purchases of, milk and the products of milk and butterfat." Agricultural Act of 1949, Pub. L. No. 81-439, title II, § 201(c), 63 Stat. 1051, 1053 (Oct. 31, 1949), *currently amended and codified at* 7 U.S.C. § 1446(c). Some within Agriculture wanted to make direct price support payments, relying on CCC's broad general powers. Both the Department's Solicitor and the Attorney General agreed that under existing law the CCC is limited to loans on, and purchases of, dairy products "in supporting the price of milk and butterfat to producers." *See* 41 Op. Att'y Gen. 183, 187 (1954). The CCC's general powers "cannot reasonably be deemed to enlarge the specific powers granted in [the price support statute]." *Id.* at 186. Agriculture then proposed to purchase the products at one price and sell them back to the same parties at a lower price, without the products ever moving. GAO determined that this was not a *bona fide* purchase and that the payments were therefore unauthorized. B-124910, Aug. 15, 1955. Upon GAO's determination of unauthorized payments, Justice proceeded to initiate recovery of the amounts improperly paid. This determination has been upheld by at least three courts of appeals, which agreed that the payments were illegal and could be recovered.[164] *See also* B-211462-O.M., Oct. 31, 1983 (statutory payment limitation applies to in-kind payments as well as cash, CCC's broad discretion notwithstanding).

In 1961, CCC made another proposal, strikingly similar on the surface. The CCC would accept grain in satisfaction of loans it had made to the producer, and then sell the grain—which never moved—back to the same producer at current support rates. This case was different, however. The resale back to the producer was under an emergency assistance program, separate and distinct from the program under which the loans had been made. There was no lack of genuineness to the transaction, and selling back to the same producer made sense because it would save money for all concerned by eliminating moving and handling charges. Accordingly, GAO found this proposal to be within the CCC's authority and discretion. 40 Comp. Gen. 571 (1961).

An illustration of an expenditure expressly "otherwise provided for" is B-142011, June 19, 1969, very similar in principle to 63 Comp. Gen. 31 (1983), the Central Liquidity Facility decision summarized earlier in section B.6.d of this chapter. Some had suggested that the Agriculture Department could avoid a limitation in its salaries and expenses appropriation by having certain salaries paid from CCC funds. Agriculture felt this would be improper. GAO agreed:

[164] *Kraft Foods Co. v. Commodity Credit Corporation*, 266 F.2d 254 (7th Cir.), *cert. denied*, 361 U.S. 832 (1959); *Land O'Lakes Creameries, Inc. v. Commodity Credit Corporation*, 265 F.2d 163 (8th Cir. 1959); *Swift & Co. v. United States*, 257 F.2d 787 (4th Cir.), *cert. denied*, 358 U.S. 837 (1958).

> "We see no significant distinction between using an otherwise available general appropriation for a particular object, when there is a specific appropriation for such object, and using corporate funds for a purpose for which a specific appropriation has been made, in order to avoid a limitation pertaining to the specific appropriation."

B-142011, June 19, 1969, at 12.

A case in which the expenditure bore no relationship to a legitimate corporate purpose is B-129650, May 11, 1977. A practice had developed of using the CCC revolving fund to purchase foreign currencies to be used for congressional travel expenses, beyond the limited authority then found in 22 U.S.C. § 1754(b) (1975). Finding no authority for this practice, the decision stated, at page 3:

> "While included among the general powers of the CCC is the authority to determine the character and necessity of its expenditures . . . the broad administrative discretion thereby conferred must be exercised in conformity with the congressional purpose of the CCC . . . and in accordance with the specific powers granted to the CCC [by statute]. . . . Nothing in these provisions . . . suggest[s] a congressional intent to allow conversions of dollar funds to foreign currencies for use for congressional travel."[165]

(2) <u>Bonneville Power Administration</u>

The Bonneville Power Administration is one of the four Department of Energy regional power marketing administrations, which were established to "sell and transmit the power generated at various federal hydroelectric plants."[166] Created in 1937, Bonneville markets and transmits electric

[165] The statute was subsequently amended to give Treasury a permanent indefinite appropriation to purchase the necessary currencies. International Security Assistance Act of 1978, Pub. L. No. 95-384, § 22, 92 Stat. 730, 742 (Sept. 26, 1978); *see also* B-129650, Mar. 27, 1979.

[166] See B-303180, July 26, 2004, for a detailed background description of power marketing administrations. *See also* GAO, *Power Marketing Administrations: Their Ratesetting Practices Compared with Those of Nonfederal Utilities*, GAO/AIMD-00-114 (Washington, D.C.: Mar. 30, 2000), at 6–8.

power in the Pacific Northwest.[167] It is not a government corporation but "an office in the Department of [Energy] . . . under the jurisdiction and control of the Secretary of [Energy]." 16 U.S.C. § 832a(a).[168] Nevertheless, its statutory powers are comparable to those of a wholly owned government corporation. It is financed through a revolving fund,[169] 16 U.S.C. § 838i, and has the following general powers:

> "Subject only to the provisions of this Act, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary."
>
> "The administrator may make such expenditures for offices, vehicles, furnishings, equipment, supplies, and books; for attendance at meetings; and for such other facilities and services as he may find necessary for the proper administration of this Act."

16 U.S.C. §§ 832a(f), 832h(b) (respectively).

[167] Bonneville Project Act of 1937, Pub. L. No. 75-329, 50 Stat. 731 (Aug. 20, 1937), *codified at* 16 U.S.C. §§ 832–832m. As summarized in one opinion, Bonneville's main purposes as set forth in 16 U.S.C. § 832a are "to operate and maintain the Federal electric power transmission system in the Pacific Northwest and to market the electric power generated by the Federal generating plants in that area." 3 Op. Off. Legal Counsel 419 (1979). *See also* 16 U.S.C. § 832a.

[168] Bonneville Power Administration was transferred from the Department of the Interior to the Department of Energy in 1977 when the Department of Energy was created. *See* Pub. L. No. 95-91, title III, § 302(a), 91 Stat. 565, 578 (Aug. 4, 1977), *codified at* 42 U.S.C. § 7152(a)(1)(c). *See also* B-303180, July 26, 2004.

[169] As discussed in more detail in Chapter 6, section E.2.g, a revolving fund is generally a statutorily created fund in which receipts are credited to the fund and are then available for fund purposes without the need for further appropriation. However, BPA's revolving fund is "subject to such limitations as may be prescribed by any applicable appropriation act effective during such period as may elapse between [the funds] transfer and the approval by the Congress of the first subsequent annual budget program of the [BPA] Administrator." 16 U.S.C. § 838i(a).

Although not a corporation, Bonneville is subject to the Government Corporation Control Act provisions for wholly owned corporations. 16 U.S.C. § 838i(c). Thus, Bonneville has essentially the same range of spending discretion as a wholly owned corporation. It is also subject to the same overall purpose limitation which, in addition to 31 U.S.C. § 1301(a) (the purpose statute), is spelled out in 16 U.S.C. § 838i(c) ("Moneys heretofore or hereafter appropriated shall be used only for the purposes for which appropriated").

Before the enactment of 16 U.S.C. § 832a(f), Bonneville's spending discretion was not materially different from that of other government agencies. *E.g.*, B-49169, May 5, 1945 (appropriations unavailable for entertainment). However, the enactment of that provision in October 1945 made a material change:

> "The legislative history of [16 U.S.C. § 832a(f)] indicates that its purpose was to free the Administration from the requirements and restrictions ordinarily applicable to the conduct of Government business and to enable the Administrator to conduct the business of the project with a freedom similar to that which has been conferred on public corporations carrying on similar or comparable activities."

B-105397, Sept. 21, 1951, at 3.

Naturally, anything Bonneville could do before the amendment was unaffected. An example would be 20 Comp. Gen. 566 (1941) (Bonneville's appropriations available for photographic identification cards for its employees). Other examples, validated under 16 U.S.C. § 832h(b), which predated § 832a(f), are 18 Comp. Gen. 843 (1939) (purchase of motion picture equipment to record key aspects of construction program), and B-25800, May 20, 1942 (expenses of attendance at meetings).

The latitude given Bonneville has enabled it to structure its dealings to reflect the nature of the business in which it is involved, the characteristics of the geographical region in which it operates, and changing circumstances. In a 1962 case, for example, Bonneville proposed an agreement with the Washington Public Power Supply System (WPPSS) under which WPPSS would furnish to Bonneville electric power purchased from the Atomic Energy Commission's Hanford reactor, and Bonneville would provide "firm power" (*i.e.*, not subject to interruptions) in exchange. The agreement would terminate if the reactor were discontinued prior to commencement of commercial operations, in which event Bonneville would reimburse WPPSS for certain expenses incurred up to that point. As long as the Atomic Energy Commission's participation received congressional approval, GAO found no problem with Bonneville's authority to enter into the agreement. B-149016, B-149083, July 6, 1962.[170]

In 46 Comp. Gen. 349 (1966), Bonneville was acquiring high-powered circuit breakers, and decided to spread the risk among several manufacturers to minimize risk of major power failure until the circuit breakers had been in service for sufficient time to assure that they were free from defects. Bonneville's discretion permitted it to do this, and to exclude from the solicitation two firms from which it had already purchased circuit breakers.

Bonneville is required to give "preference and priority to public bodies and cooperatives" in disposing of electric energy generated at a Bonneville project. 16 U.S.C. § 832c(a). It is also authorized to sell electric power "either for resale or direct consumption, to public bodies and cooperatives and to private agencies and persons," as well as to other federal agencies. 16 U.S.C. § 832d(a). While Bonneville is thus authorized to sell directly to private consumers, it is not legally required to do so, and is therefore under no obligation to sell power to every applicant. B-158903, July 6, 1966.

A concept frequently arising in the Bonneville cases is the concept of "net billing." This is, in oversimplified terms, a system under which Bonneville, in billing its customers, liquidates certain of its payment obligations by reducing the bill by the amount the customer has paid either to Bonneville under some separate arrangement or to some other party under a variety of complex arrangements. GAO approved the concept as within Bonneville's authority in B-170878, Oct. 21, 1970. (Congress had already recognized the concept in legislation.) A few years later, it became apparent that, in the particular situation addressed in B-170878, net billing would be inadequate to sustain the purchase of sufficient power. Bonneville then proposed to

[170] For more information on the relationship between Bonneville and WPPSS, see GAO, *GAO Products on Bonneville Power Administration*, RCED-93-133R (Washington, D.C.: Mar. 31, 1993), at enclosure VII; *The Bonneville Power Administration's Oversight Activities Related to Washington Public Power Supply System*, No. 123637 (Washington, D.C.: Mar. 12, 1984) (testimony); *Bonneville Power Administration and Rural Electrification Administration Actions and Activities Affecting Utility Participation in Washington Public Power Supply System Plants 4 and 5*, GAO/EMD-82-105 (Washington, D.C.: July 30, 1982).

purchase power for its preference customers under what it called a "trust-agency" agreement. While finding this authorized as well, GAO stressed the purpose limitation on Bonneville's discretion: "While 16 U.S.C. § 832a(f) is intended to confer broad administrative discretion on the Administrator, that discretion must always be exercised in furtherance of the purposes, and subject to the provisions, of the [program legislation]." B-137458, Sept. 13, 1974, at 5.

The financing mechanism of net billing agreements has been judicially approved, as well. In *City of Springfield v. Washington Public Power Supply System*, 564 F. Supp. 90, 95 (D. Ore. 1983), the court described one system as follows.

> "The net billing agreements are contracts between the United States, acting through BPA, WPPSS, and the Northwest utilities. Under these contracts, utilities buy power from BPA. Instead of paying BPA, however, utilities pay WPPSS, which uses the money to retire bonds. . . . Thus BPA 'net-bills' for power and those bills are paid to WPPSS as third party beneficiary of the BPA-utility contracts and in satisfaction of WPPSS' rights under the net billing agreements."

The Ninth Circuit Court of Appeals modified the district court's decision in certain respects, but affirmed its holding that these were essentially contracts for the purchase of electricity and thus within Bonneville's authority. *City of Springfield v. Washington Public Power Supply System*, 752 F.2d 1423 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). One factor both courts noted was that Bonneville had assumed "dry-hole risk," that is, Bonneville would pay even if the generating plants were never completed or never produced saleable power, thus insulating public bodies from having to resort to future taxation. *City of Springfield*, 564 F. Supp. at 93, 95; 752 F.2d at 1429.

The extent to which Bonneville's range of discretion permits it to tailor arrangements to fit specific program needs is illustrated in B-210929, Aug. 2, 1983. As construction of one of the WPPSS plants approached completion, WPPSS found itself unable to obtain further bond financing. Bonneville proposed, and GAO concurred, to pay, by direct disbursement or net billing, to complete construction of the WPPSS project. The argument against direct payment was that Bonneville had not presented this as an option when seeking congressional approval. However, GAO found that direct payment would not be inconsistent with congressional approval of the net billing approach since direct payment funds would be derived at least ultimately from rate adjustments, and the end result—costs borne by Bonneville's ratepayers rather than taxpayers—would be the same. It would amount simply to "[doing] directly what Congress otherwise authorized it to do indirectly." *Id*. at 16.

Still another area in which Bonneville's discretion has been upheld is the Pacific Northwest-Pacific Southwest Intertie, a system of high-voltage transmission lines partially owned by Bonneville and designed to permit the regions to help each other during times of heavy demand. Bonneville is required to first give itself preference and then to make excess capacity available to others. 16 U.S.C. § 837e. The courts have upheld Bonneville's policies for the allocation of excess Intertie capacity as within its discretion, as long as done in a fair and nondiscriminatory manner (16 U.S.C. § 838d). *California Energy Resources Conservation and Development Commission v. Bonneville Power Administration*, 831 F.2d 1467 (9th Cir. 1987); *Department of Water and Power of Los Angeles v. Bonneville Power Administration*, 759 F.2d 684 (9th Cir. 1985).

Rate-making decisions under 16 U.S.C. § 839e have also been accorded deference by the courts, as long as the rates are supported by sound business practices. *See, e.g.*, *Public Power Council, Inc. v. Bonneville Power Administration*, 442 F.3d 1204, 1209 (9th Cir. 2006); *California Energy Commission v. Bonneville Power Administration*, 909 F.2d 1298, 1306 (9th Cir. 1990).

Finally, Bonneville has the discretionary authority to engage in certain energy conservation programs. B-114858, July 10, 1979; 3 Op. Off. Legal Counsel 419 (1979). The question was whether energy conservation is consistent with Bonneville's statutory mandate to encourage widespread use of federally generated power. In other words, is its main job to push the stuff, or save it? Bonneville's argument, successful as it turned out, was that it viewed conservation as an investment in increased production rather than a demand reduction device. Once again, the GAO opinion stressed that Bonneville's discretion, broad though it may be, "must always be exercised in furtherance of the purposes, and subject to the provisions, of BPA's enabling legislation." B-114858, July 10, 1979, at 4.

(3) Amtrak

Amtrak was created by the Rail Passenger Service Act of 1970, Pub. L. No. 91-518, title III, § 301, 84 Stat. 1327, 1330 (Oct. 30, 1970).[171] Its purpose is to provide modern and efficient intercity and commuter rail passenger transportation. 49 U.S.C. § 24101(b). Amtrak was the federal government's response to declining railroad passenger ridership resulting in the railroad companies losing money on a service they were legally required to provide. Congress created Amtrak to ensure a minimum level of intercity passenger rail service for the public while relieving the railroad companies of this financial burden so that they could focus on the more profitable freight services. *See* Library of Congress, Congressional Research Service, *Amtrak Profitability: An Analysis of Congressional Expectations at Amtrak's Creation*, No. RL 31473 (June 26, 2002), at 1–3. Congressional and administration leaders in 1970 predicted that Amtrak would ultimately be profitable as a result of reductions in money-losing routes and federal investment that would yield faster, safer rail travel, neither of which have occurred. *Id.* at 7. *See also* B-277814, Oct. 20, 1997. The current status of Amtrak and passenger rail travel is addressed in GAO, *Intercity Passenger Rail: National Policy and Strategies Needed to Maximize Public Benefits from Federal Expenditures*, GAO-07-15 (Washington, D.C.: Nov. 13, 2006).

Although federally created and receiving substantial federal financial assistance, Amtrak is to be "operated and managed as a for-profit corporation," and is "not a department, agency, or instrumentality of the United States Government, and shall not be subject to title 31 [of the United States Code]." 49 U.S.C. §§ 24301(a)(2) and (3).[172] It was originally

[171] Much of Amtrak's legislation was transferred from title 45 of the United States Code to title 49 as part of a 1994 recodification. While 45 U.S.C. § 1104(1) still defines Amtrak as the National Railroad Passenger Corporation, the recodified provisions in title 49 have dropped that designation and use only "Amtrak." See the codifier's note to 49 U.S.C. § 24101.

[172] The version in effect immediately prior to the 1994 recodification said that Amtrak will not be "an agency, instrumentality, authority, or entity, or establishment" of the United States. 45 U.S.C. § 541 (1988). The Amtrak Reform and Accountability Act of 1997 amended 49 U.S.C. § 24301(a)(3) to specify that Amtrak "shall not be subject to title 31." Pub. L. No. 105-134, § 415(d)(1), 111 Stat. 2570, 2590 (Dec. 2, 1997). That same year, however, the annual appropriation act provided that "any obligation or commitment by [Amtrak] for the purchase of capital improvements with funds appropriated herein which is prohibited by this Act shall be deemed a violation of 31 U.S.C. § 1341," the Antideficiency Act. Department of Transportation and Related Agencies Appropriations Act, 1988, Pub. L. No. 105-66, 111 Stat. 1425, 1435 (Oct. 27, 1997).

designated a mixed-ownership government corporation,[173] but this was dropped in 1997.[174] It is also classed as a railroad carrier for purposes of certain portions of the Interstate Commerce Act (49 U.S.C. § 24301(a)(1)), and is thus subject to the jurisdiction of the Surface Transportation Board, successor to the Interstate Commerce Commission, to that limited extent.[175] GAO is authorized to conduct "performance audits of [Amtrak's] activities and transactions." 49 U.S.C. § 24315(e); B-175155-O.M., Oct. 21, 1981.

The congressional objective is eventual profitability and elimination or at least minimization of federal subsidies. See 49 U.S.C. § 24101(d), as amended by Public Law 105-134, § 201, mandating that Amtrak operate without federal operating grants by fiscal year 2004. Section 301 of Public Law 105-134, codified at 49 U.S.C. § 24104(a), authorized to be appropriated to the Secretary of the Treasury declining amounts ranging from $1.14 billion in fiscal year 1998 to $0.96 billion in fiscal year 2002 to support Amtrak. Nevertheless, federal financial assistance has always been necessary. Despite the goals set out in the 1997 act, fiscal year 2004 has come and gone, and Amtrak still cannot operate without federal subsidies. In fact, GAO reported that between 1971 and 2005, Amtrak received cumulative subsidies of $29 billion. *See* GAO, *Amtrak Management: Systemic Problems Require Actions to Improve Efficiency, Effectiveness, and Accountability*, GAO-06-145 (Washington, D.C.: Oct. 4, 2005), at 2.

This federal financial assistance takes the form of appropriations made to the Secretary of Transportation for the purpose of making grants to Amtrak. For example, in the Department of Transportation appropriations act for 2006, $495 million was made available until expended for Amtrak operational subsidy grants. Pub. L. No. 109-115, 119 Stat. 2396, 2413–15 (Nov. 30, 2005). Congress also appropriated $780 million for capital and debt service grants and $40 million for efficiency incentive grants, both amounts also to be available until expended, for a total of $1.315 billion in

[173] Pub. L. No. 91-518, § 804.

[174] Pub. L. No. 105-134, § 415(d)(2), which amended 31 U.S.C. § 9101 to delete Amtrak from the list of agencies statutorily defined as mixed-ownership government corporations for purposes of title 31 of the United States Code.

[175] Section 24301(a)(1) was amended by Pub. L. No. 105-134, § 401, to clarify Amtrak's relationship to the Interstate Commerce Act. *See* H.R. Rep. No. 105-251, at 36 (1997).

appropriations for fiscal year 2006. *Id.*[176] Amtrak makes its funding requests to the Secretary of Transportation, who in turn includes them as part of Transportation's portion of the President's budget. B-175155, Sept. 26, 1978 (requirement in 31 U.S.C. § 1105(a)(5) for 5-year projection not applicable to Amtrak's funding requests to Secretary). As with the fiscal year 2006 appropriation, the funds are made available until expended, and may include separate amounts for operating losses and capital improvements.

The statutory payout schedule "has virtually assured" that Amtrak will receive more money that it immediately needs for current expenses. B-175155(2), Apr. 22, 1975, at 4. Congress did not restrict the use of these funds but "expects Amtrak to utilize them in accordance with its best business judgment." *Id.* Thus, a line of Comptroller General decisions held that Amtrak could use its grant funds for such things as advances on capital equipment (B-175155(2), Apr. 22, 1975); investment to the extent funds are not currently needed (B-175155, June 11, 1975); payment of operating expenses while funds from other sources are temporarily invested (*id.*); retirement of long-term debt obligations under a since-repealed provision for the Secretary of Transportation to guarantee loans to Amtrak (B-175155(2), July 26, 1976); and installing fire fighting equipment in railroad tunnels in New York City to comply with a safety order of the New York City Fire Department (B-175155, May 22, 1978). When investing excess funds, Amtrak may retain the interest earned notwithstanding their designation as grant funds. B-175155, June 11, 1975.

In surveying decisions and opinions relating to Amtrak, the details are of secondary importance because virtually every provision of Amtrak's legislation has changed, sometimes repeatedly. The cases are intended to illustrate the operational and spending freedom of a noninstrumentality corporation in principle. The Supreme Court has said that Amtrak's noninstrumentality disclaimer "is assuredly dispositive of Amtrak's status . . . for purposes of matters that are within Congress' control." *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 392 (1995). Thus, the answer to the typical question of whether this or that law applicable to government entities applies to Amtrak is "no." *E.g.*, *National Railroad Passenger Corp. v. Commonwealth of Pennsylvania Public*

[176] These are the amounts before an across-the-board rescission that was enacted as part of the Department of Defense Appropriations Act, 2006, Pub. L. No 109-148, § 3801, 119 Stat. 2680, 2791–92 (Dec. 30, 2005).

Utility Commission, No. Civ. A. 86-5357 (E.D. Pa. Sept. 15, 1997) (Amtrak does not share the government's Eleventh Amendment rights in relation to jurisdiction to suit in state courts); *Hill International, Inc. v. National Railroad Passenger Corp.*, 957 F. Supp. 548 (D.N.J. 1996) (Amtrak is not subject to federal procurement regulations); *Sentner v. Amtrak*, 540 F. Supp. 557 (D.N.J. 1982) (Amtrak does not share the government's immunity from awards of punitive damages). *See also* B-277814, Oct. 20, 1997 (U.S. government is not liable for Amtrak's debts in the event of an Amtrak bankruptcy); B-252085, Jan. 26, 1993, and B-215893, Oct. 29, 1984 (GAO does not have jurisdiction to hear a protest of an Amtrak procurement award); B-206638-O.M., Apr. 1, 1982 (Amtrak not required to follow the Federal Acquisition Regulations or the mandatory provisions of the Federal Supply Schedule).

Of course, since we are talking about matters within Congress's control, Congress does have a certain freedom in defining the applicability of laws. For example, Amtrak is not subject to the Antideficiency Act, 31 U.S.C. § 1341. *See* B-175155, July 26, 1976. Yet, as noted above, Amtrak's 1998 appropriation included a proviso that "the incurrence of any obligation or commitment by the Corporation for the purchase of capital improvements with funds appropriated herein which is prohibited by this Act shall be deemed a violation of 31 U.S.C. 1341." Pub. L. No. 105-66. However, this Antideficiency Act proviso expired at the end of fiscal year 1998, and Congress did not include the proviso in the Amtrak appropriation for any subsequent fiscal year, such as fiscal year 2006. *See* Pub. L. No. 109-115. The point is that making the Antideficiency Act applicable, even to the limited extent in Public Law 105-66, required legislation specifically applicable to Amtrak.

Another group of GAO cases deals with compensation issues. The 1970 legislation creating Amtrak placed no limit on the compensation of the corporation's officers. A 1972 amendment limited compensation to level 1 of the Executive Schedule.[177] A question arose as to whether the value of fringe benefits had to be counted in applying the ceiling. Amtrak wanted to provide fringe benefits normal in the rail industry. These included group life insurance, travel accident insurance, long-term disability benefits, hospital surgical and major medical coverage, noncontributory retirement benefits, and free transportation for employees and their dependents on Amtrak trains. Noting that the ceiling was the same as that for cabinet

[177] Pub. L. No. 92-316, § 1(a), 86 Stat. 227 (June 22, 1972).

members, who receive fringe benefits in addition to their statutory compensation, and finding nothing to indicate a contrary intent for Amtrak officers, GAO concluded that the fringe benefits need not be considered compensation for purposes of the ceiling. B-175155, Jan. 7, 1974. The limitation was changed in 1988[178] to prohibit rates of compensation greater than "the general level of pay for officers of rail carriers with comparable responsibility." 49 U.S.C. § 24303(b). While the ceiling is now more amorphous than the fixed-dollar ceiling of 1974, the principle of B-175155, Jan. 7, 1974, should remain valid, unless practices in the private rail industry change so as to include fringe benefits as part of compensation.

Amtrak was also offering its officers separation agreements, under which they would receive an additional payment of up to a year's salary upon termination of their services. If somehow the payments could be regarded as payments for post-termination services, they would be permissible. If, however, they were nothing more than a form of deferred compensation to avoid the statutory limitation, they would violate the statute. B-175155, May 1, 1974; B-175155, Jan. 7, 1974. Amtrak developed an agreement under which the officer agreed to perform whatever services might be necessary, for a period of 6 months, to accomplish an orderly transition of responsibilities to his or her successor, and to complete unfinished assignments. This was sufficient to avoid the "deferred compensation" objection and therefore did not violate the limitation. B-175155, Oct. 3, 1974; B-175155, Sept. 5, 1974.

Another source of Amtrak's powers is the District of Columbia Business Corporation Act, which applies to Amtrak to the extent consistent with the Rail Passenger Service Act. 49 U.S.C. § 24301(e). Thus, Amtrak can sell real property (B-175155, June 14, 1978),[179] and it can make loans provided they serve a corporate purpose (B-207880-O.M., Nov. 5, 1982), because both actions are authorized under the District of Columbia law.

[178] Pub. L. No. 100-342, § 18(c), 102 Stat. 624, 636 (June 22, 1988).

[179] Sometimes, dealing with GAO case law can be a complicated, confusing, and even daunting task. For one thing, in the past GAO sometimes reused "B" file designations for similar subjects—counting on "subnumbers" like (2) and dates to distinguish between different cases. This made proofing this manual difficult and careful reading of it critical. For example, in the preceding textual discussion of Amtrak, how many different GAO items with the B-file designation "B-175155" can you find? (Hint: There are 11.)

7. Application of Other Laws

As discussed in the previous sections, a government corporation's[180] autonomy, while conferring considerable spending discretion, does not remove it from the coverage of various laws of the United States. We set forth here several other laws governing the operations of federal agencies. As one would expect, wholly owned corporations are subject to more of the laws than mixed-ownership corporations, which are in turn subject to more than the so-called noninstrumentality corporations. A summary chart, including some laws not covered here, may be found in GAO, *Government Corporations: Profiles of Existing Government Corporations*, GAO/GGD-96-14 (Washington, D.C.: Dec. 13, 1995), app. III. *See also* Library of Congress, Congressional Research Service, *Federal Government Corporations: An Overview*, No. RL30365 (Mar. 15, 2005), at app. 1; Thomas H. Stanton and Ronald C. Moe, "Government Corporations and Government-Sponsored Enterprises," *in* Lester M. Salaman, *The Tools of Government: A Guide to the New Governance*, 80, 92 table 3-1 (2002).

a. Civil Service Laws

We use the term "civil service laws" to mean the body of laws in title 5 of the United States Code governing the appointment, classification, pay, allowances, and other benefits of federal officers and employees. The applicability of title 5, or portions thereof, to a government corporation depends on (1) the definitions in title 5, and (2) the corporation's own charter.[181] Title 5 includes a few general definitions and a great many specific ones. As discussed in section B.2.a of this chapter, section 105 of title 5 defines "executive agency" to include government corporations. "Government corporation" is defined as "a corporation owned or controlled by the Government of the United States." 5 U.S.C. § 103(1). "Government controlled corporation" does not include a corporation owned by the government of the United States. 5 U.S.C. § 103(2). In addition, 5 U.S.C. § 2105(a) defines "employee" as someone appointed in

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[180] For ease of discussion in this section, we will use the term "government corporation" to refer generically to the various corporate devices discussed in section B.2 of this chapter unless a more specific term is warranted.

[181] GAO observed in 1943 that "there can not be stated any broad generality that persons employed by the Government's corporations are or are not employees of the United States for all purposes." B-37559, Nov. 5, 1943, at 3, *quoted in* 23 Comp. Gen. 815, 816 (1944). A commentator wrote in 1995 that approximately one half of the government corporations were subject to the civil service laws and that the exemptions, "both partial and complete," were "numerous and complex." That statement has retained its veracity. Ronald C. Moe, *Managing the Public's Business: Federal Government Corporations*, S. Prt. No. 104-18, at 56 (1995).

the civil service by, as pertinent here, the President, "an individual who is an employee under this section" (which would include wholly owned corporations), or "the head of a Government controlled corporation." GAO has interpreted the term "government controlled corporation" in these definitions to mean a mixed-ownership government corporation. B-221677, July 21, 1986.

Thus, unless it specifically provides otherwise, a provision in title 5 that applies to an executive agency, a government corporation, or an employee applies to wholly owned and mixed-ownership government corporations. *E.g.*, 5 U.S.C. § 2301(a) (merit system principles apply to "an Executive agency"); 5 U.S.C. §§ 8701(a)(1) and 8901(1)(A) (provisions for group life and group health insurance, respectively, apply to an employee as defined in § 2105).

Some provisions of title 5 do specifically provide otherwise. A provision applicable to an "executive agency" but not a "government controlled corporation" applies to wholly owned, but not mixed-ownership, government corporations. A good example is what is perhaps the heart of the civil service system, the provisions governing classification (5 U.S.C. §§ 5101–5115) and General Schedule pay rates (5 U.S.C. §§ 5331–5338). The classification provisions apply to executive agencies (5 U.S.C. § 5102(a)(1)(A)), but specifically do not apply to government controlled corporations. 5 U.S.C. § 5102(a)(1)(i). The General Schedule pay provisions adopt the definition of section 5102. 5 U.S.C. § 5331(a). Thus, unless specified otherwise, the classification and pay provisions apply to wholly owned, but not mixed-ownership, corporations. An illustrative case containing important discussion is *Dockery v. Federal Deposit Insurance Corp.*, 64 M.S.P.R. 458, 460–62 (1994) (FDIC, as a mixed-ownership corporation, held not subject to the classification provisions).

The following inventory does not purport to be complete:

- *Whistleblower Protection Act*—excludes both wholly owned and mixed-ownership government corporations, except with respect to improper personnel actions resulting from disclosure of information the employee reasonably believes evidences a violation of law, gross mismanagement, gross waste of funds, an abuse of authority, or substantial danger to public health or safety, with certain qualifications. 5 U.S.C. §§ 2302(a)(2)(C), (b)(8).

- *Experts and consultants*—applies to wholly owned, but not mixed-ownership, government corporations. 5 U.S.C. § 3109(a) (incorporating the definition for agency included in 5 U.S.C. § 5721(1), which includes an executive agency but specifically excludes a government controlled corporation).

- *Senior Executive Service*—not applicable to either wholly owned or mixed-ownership government corporations. 5 U.S.C. § 3132(a)(1).

- *Government Employees Training Act*—applies to a "Government corporation subject to chapter 91 of title 31," that is, both wholly owned and mixed-ownership corporations subject to the Government Corporation Control Act (see section B.4.a of this chapter). 5 U.S.C. § 4101(1)(C).

- *Performance appraisal system*—not applicable to either wholly owned or mixed-ownership government corporations. 5 U.S.C. § 4301(1)(i). *E.g.*, B-233528, Dec. 14, 1988 (Overseas Private Investment Corporation not required to submit its performance appraisal system for review by Office of Personnel Management).

- *Government Employees Incentive Awards Act*—applies to both wholly owned and mixed-ownership corporations (5 U.S.C. §§ 4501(1)(A), (2)(A)), except it specifically excludes the Tennessee Valley Authority and the Central Bank for Cooperatives (5 U.S.C. §§ 4501(1)(i), (ii)).

- *Dual compensation laws*—apply to both wholly owned and mixed-ownership government corporations. 5 U.S.C. § 5531(2). *E.g.*, B-238303, B-236399, May 29, 1991 (retired military officer employed by Federal Deposit Insurance Corporation).[182] However, they do not apply to corporations statutorily designated as not agencies or instrumentalities of the United States. B-170582, July 15, 1976. For a corporation subject to the dual compensation laws, using a personal

[182] Under an earlier version of the statute without the explicit definition, the Court of Claims had held that the United States Shipping Board Emergency Fleet Corporation was a private corporation and not part of the government for purposes of the dual compensation laws. *Dalton v. United States*, 71 Ct. Cl. 421 (1931). Apart from the statutory changes, the case can be disregarded, even though not directly overruled, because it was one of the rare instances in which Congress refused to appropriate funds to pay the judgment. *See* First Deficiency Act, 1932, Pub. L. No. 72-5, title II, § 3, 47 Stat. 15, 28 (Feb. 2, 1932); 23 Comp. Gen. 815, 817 (1944).

services contract rather than employment in order to avoid the statutory restrictions is improper. B-222334, June 2, 1986.[183]

- *Severance pay*—applies to both wholly owned and mixed-ownership government corporations. 5 U.S.C. § 5595(a)(1)(A). *E.g.*, B-114839-O.M., Aug. 11, 1978 (former Panama Canal Company). The statute expressly excludes employees, other than members of the Senior Executive Service (SES), paid at or in excess of Executive Schedule levels. 5 U.S.C. § 5595(a)(2)(i). Since the SES does not extend to government corporations, the president of a government corporation who is compensated at an Executive Schedule level is not entitled to severance pay. B-215273, June 28, 1984.

- *Back Pay Act*—applies to both wholly owned and mixed-ownership government corporations. 5 U.S.C. § 5596(a)(1). *E.g.*, *Payne v. Panama Canal Co.*, 607 F.2d 155 (5th Cir. 1979) (former Panama Canal Company subject to Back Pay Act notwithstanding its power to sue and be sued in its own name).

- *Travel and transportation*—The travel and transportation provisions in 5 U.S.C. §§ 5701–5739 apply to wholly owned, but not mixed-ownership, corporations. 5 U.S.C. §§ 5701(1)(A), (i) and 5721(1). *E.g.*, B-214811-O.M., July 25, 1984 (Saint Lawrence Seaway Development Corporation, a wholly owned corporation, should not reimburse travel expenses of official's spouse unless spouse was providing some sort of direct service to government). The Federal Deposit Insurance Corporation, as a mixed-ownership corporation, is not subject to the provisions governing service agreements in return for payment of relocation expenses. However, work for the FDIC qualifies as "government service" for purposes of fulfilling the agreement. B-221677, July 21, 1986.

- *Uniform allowance*—applies to wholly owned government corporations but not mixed-ownership government corporations. 5 U.S.C. § 5901(a).

[183] As noted earlier, a government corporation empowered to determine the character and necessity of its expenditures, as was the Tennessee Valley Authority in this case, is not required to follow the government's policy on personal service contracts. Intimations to the contrary notwithstanding, the contract in B-222334 was objectionable, not because it was a personal services contract *per se*, but because it was used to circumvent the statutory restriction on compensation.

- *Annual and sick leave*—applies to both wholly owned and mixed-ownership government corporations. 5 U.S.C. § 6301(2)(A).

- *Federal Employees Compensation Act*—FECA's definition of employee includes "an officer or employee of an instrumentality wholly owned by the United States." 5 U.S.C. § 8101(1)(A). FECA, where it applies, is the employee's exclusive remedy just as it is for employees of agencies. *Posey v. Tennessee Valley Authority*, 93 F.2d 726 (5th Cir. 1937) (TVA); *Pinto v. Vessel "Santa Isabel,"* 492 F. Supp. 689 (D.C.Z. 1980) (former Panama Canal Company).

- *Retirement*—Both the Civil Service Retirement System (CSRS) and the Federal Employees Retirement System (FERS) apply to employees as defined in 5 U.S.C. § 2105, and therefore apply to both wholly owned and mixed-ownership government corporations. 5 U.S.C. §§ 8331(1)(A) (CSRS), 8401(11)(A) (FERS).

A law related in subject matter to title 5 of the United States Code is the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219, which provides, among other things, for overtime compensation for nonexempted employees for time worked in excess of 40 hours in a week. 29 U.S.C. § 207(a)(1). The FLSA adopts the definition of executive agency of 5 U.S.C. § 105, and therefore includes both wholly owned and mixed-ownership government corporations. 29 U.S.C. § 203(e)(2)(A)(ii). *E.g.*, 54 Comp. Gen. 617 (1975) (FLSA applicable to former Panama Canal Company). Another relevant statute is Title VII of the Civil Rights Act of 1964. Its employment discrimination provisions apply to "executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds)." 42 U.S.C. § 2000e-16(a).

The general and specific title 5 definitions determine the applicability of various provisions to government corporations only in the absence of more specific direction in the legislative charter. Government corporations are commonly empowered to "appoint and fix the compensation of such officers, attorneys, employees, and agents as may be required." *E.g.*, 29 U.S.C. § 1302(b)(6) (Pension Benefit Guaranty Corporation). This alone, while affording some discretion, does little more than authorize appointment and compensation within the civil service structure. A variation specifically makes the authority subject to the civil service laws. *E.g.*, 33 U.S.C. § 984(a)(7) (Saint Lawrence Seaway Development Corporation). The comparable provision for the Inter-American

Foundation limits the total number of employees. 22 U.S.C. § 290f(e)(5). An example of seemingly broader language is section 723 of the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888, 1115–18 (Apr. 4, 1996), providing that officers or employees of the now-defunct Alternative Agricultural Research and Commercialization Corporation "shall be subject to all laws of the United States relating to governmental employment."[184]

An important variation authorizes appointment and compensation "without regard" to the civil service laws applicable to officers and employees of the government. *E.g.*, 16 U.S.C. § 831b (Tennessee Valley Authority (TVA)); 7 U.S.C. § 943(d) (Rural Telephone Bank). The "without regard" authority is not an all or nothing proposition. The corporation, in its discretion, may appoint some employees in accordance with the civil service laws and invoke the exemption for others. 37 Op. Att'y Gen. 7 (1932). Of course, the discretion should be reasoned and not arbitrary. Some charters exempt only a portion of the corporation's employees from the civil service laws. *E.g.*, 22 U.S.C. § 2193(d) (Overseas Private Investment Corporation may hire, pay, and fire up to 20 of its employees without regard to civil service laws). A corporation possessing the "without regard" authority is, to the extent of its coverage, not required to follow, for example, the dual compensation laws (19 Comp. Gen. 926 (1940); B-9113, Apr. 30, 1940),[185] or the laws governing annual and sick leave (A-49652, June 28, 1933). It is free to set up its own parallel system. *See*, *e.g.*, *Tennessee Valley Authority v. Kinzer*, 142 F.2d 833 (6th Cir. 1944), discussing TVA's retirement system. As the Attorney General has pointed out, the inclusion of the "without regard" clause in some charters evidences the congressional understanding that the employees would otherwise be subject to the civil service system, else there would be no need to exempt them. 39 Op. Att'y Gen. 238, 241 (1939). (For more on "without regard" clauses, see section B.6.c(2) of this chapter.)

One thing GAO has been reluctant to sanction is the making of deductions from an employee's salary for payment to private organizations, and has advised that statutory authority should be obtained before making

[184] The Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 6201(a), 116 Stat. 134, 418 (May 13, 2002), repealed the authorization for the Alternative Agricultural Research and Commercialization Corporation, but we include this for illustrative purposes.

[185] Earlier decisions to the contrary, such as 14 Comp. Gen. 527 (1935) and 14 Comp. Gen. 822 (1935), must be regarded as implicitly overruled by the decisions cited in the text. Why this was not done explicitly is not clear.

deductions for union dues (B-105819, Dec. 19, 1951) or a union pension and welfare fund (32 Comp. Gen. 572 (1953)). Both decisions suggest, however, that the corporation could use its power to fix compensation to include these items in the amount of compensation actually paid to the employee, who would then make the contributions, subject to any statutory limits on total compensation payable. *See also* B-82293, Jan. 3, 1949 (similar holding with respect to life and health insurance premiums prior to the enactment of the general legislation now in title 5 of the United States Code). Presumably, had the authority to fix compensation in these cases included the "without regard" clause, there would have been no objection to making the deductions.

The "without regard" authority may itself have qualifications which may extend beneficial provisions and/or impose restrictions. For example, 16 U.S.C. § 831b includes two qualifications for TVA employees: they are covered by the Federal Employees Compensation Act, and their salaries may not exceed that of board members. In GAO's view, the authority to fix compensation, even with the "without regard language," is not sufficient to overcome explicit salary restrictions in TVA's charter, and GAO has found unauthorized payments variously called retention payments, management staffing incentive payments, merit incentive supplemental retirement income payments, *etc.*, although TVA itself has the last word, at least at the administrative level. B-222334, June 2, 1986; B-205284, Nov. 16, 1981.

In addition to charter exemptions, other specific exemptions are scattered throughout title 5. For example, the Government Employees Incentive Awards Act does not apply to TVA or the Central Bank for Cooperatives, 5 U.S.C. § 4501(1)(i), (ii); the severance pay statute does not apply to TVA, 5 U.S.C. § 5595(a)(2)(vii); and the annual and sick leave laws and the group health insurance provisions do not apply to corporations supervised by the Farm Credit Administration "if private interests elect or appoint a member of the board of directors," 5 U.S.C. §§ 6301(2)(vii), 8901(1)(i). The exemption for the farm credit corporations is repeated in 5 U.S.C. § 6308(a), which authorizes the transfer of annual and sick leave balances when an employee transfers to a position under a different leave system without break in service. The exemption was repeated to permit those corporations to make lump-sum payments for leave rather than transferring the balances. *See* B-124592, Dec. 1, 1955.

If a corporation is designated as not an agency or instrumentality of the United States, its employees are not employees of the United States. *Hrubec v. National Railroad Passenger Corp.*, 49 F.3d 1269, 1270 (7th Cir.

1995) (Amtrak). Accordingly, title 5 of the United States Code would not apply. However, Congress may incorporate restrictions in the corporate charter. For example, employees of the Legal Services Corporation are not considered employees of the United States but are subject to title 5 provisions relating to retirement, life insurance, health insurance, and work injuries. 42 U.S.C. §§ 2996d(e), (f). Officers and employees of the Corporation for Public Broadcasting are similarly not officers or employees of the United States, but their annual rate of pay may not exceed the "rate of basic pay in effect from time to time for level I of the Executive Schedule." 47 U.S.C. § 396(e)(1).

b. Procurement Laws and Regulations

In contrast to the civil service laws, the applicability of procurement laws and regulations to government corporations is fairly simple: By statute, they apply, for the most part, to wholly owned government corporations, but not to mixed-ownership corporations and certainly not to noninstrumentalities.

(1) <u>41 U.S.C. § 5</u>

Perhaps the oldest general procurement law still on the books, 41 U.S.C. § 5—the old Revised Statutes § 3709—requires that, unless otherwise provided and with several stated exceptions, "purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals." As noted in our earlier discussion of the applicability of fiscal laws in section B.6.c of this chapter, this statute was revised as part of the Administrative Expenses Act of 1946, Pub. L. No. 79-600, § 9, 60 Stat. 806, 809 (Aug. 2, 1946). It applies to the administrative expenses of wholly owned government corporations. 41 U.S.C. §§ 5 (last sentence), 5a. It does not apply to any transactions of mixed-ownership corporations. *E.g.*, B-138105-O.M., Mar. 4, 1959 (Federal National Mortgage Association).

GAO has not attempted to define "administrative expenses" for this statute. Rather, GAO has followed a case-by-case approach. For example, "[t]he procurement of grain storage structures [by the Commodity Credit Corporation] obviously is not an administrative expense" for purposes of the advertising statute. B-119791, Oct. 22, 1954, at 2. Nor is the construction and equipping of a substation by the former Panama Canal Company. B-122655, Apr. 7, 1955. Nor is the purchase of a generating set for supplying electric power. B-114990, Aug. 19, 1953. *See generally* GAO, *Pension Benefit Guaranty Corporation's Statutory Limitation on Administrative Expenses Does Not Provide Meaningful Control*, GAO-03-

301 (Washington, D.C.: Feb. 28, 2003); *Corporation for Public Broadcasting: Congressional Guidance Needed on Administrative Expenses*, GAO/HRD-90-5 (Washington, D.C.: Jan. 22, 1990).

(2) Federal Property and Administrative Services Act

The primary statute governing the procurement of goods and services by the civilian agencies of the federal government is title III of the Federal Property and Administrative Services Act of 1949 (the Property Act), Pub. L. No. 81-152, §§ 301–310, 63 Stat. 377, 393–97 (June 30, 1949), as amended, codified at 41 U.S.C. §§ 251–266a. Sections 3(a) and (b) of the original Property Act defined "federal agency" to include "executive agency," which in turn includes "any wholly owned Government corporation." Therefore, the procurement provisions of the Property Act, as amended, apply to wholly owned government corporations (but not mixed-ownership corporations) unless exempt under 40 U.S.C. § 113 or comparable statutory authority.[186]

The Property Act applies to the procurement of property and services, but not to every type of contractual arrangement an agency or corporation may enter into. For example, the Overseas Private Investment Corporation is authorized to enter into arrangements with the private insurance industry for risk sharing under its foreign investment insurance program. 22 U.S.C. § 2194(f). GAO reviewed one such pooling proposal and found that it was not the procurement of goods or services, but was more in the nature of a cooperative agreement. Therefore, it was not subject to the procurement laws and regulations. B-173240, June 16, 1975.

The statute also addresses the relationship of the Property Act procurement provisions to 41 U.S.C. § 5. Basically, 41 U.S.C. § 5 does not apply to procurements under the Property Act. An agency or wholly owned corporation which is exempt from the Property Act provisions remains subject to 41 U.S.C. § 5 unless it has specific authority to contract without regard to 41 U.S.C. § 5. An entity with such authority must still follow the Property Act provisions for other than sealed-bid procedures unless exempt from that too. 41 U.S.C. §§ 252(a)(2), 260.

[186] The Property Act addresses property management as well as procurement. The property management portions are located in title 40 of the United States Code, along with the definitions, now found in 40 U.S.C. §§ 102(4) and (5). Placing the operative provisions in more than one title of the United States Code does not change the application of the statutory definitions.

(3) Office of Federal Procurement Policy Act

The Office of Federal Procurement Policy Act, Pub. L. No. 93-400, 88 Stat. 796 (Aug. 30, 1974), established the Office of Federal Procurement Policy in the Office of Management and Budget to "provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies." 41 U.S.C. § 404(a). This Act defines executive agency to include "a wholly owned Government corporation fully subject to the provisions of [the Government Corporation Control Act]." 41 U.S.C. § 403(1)(D). Thus, wholly owned government corporations must comply with governmentwide procurement polices and procedures.

(4) Federal Acquisition Regulation

The Federal Acquisition Regulation (FAR), found in title 48 of the Code of Federal Regulations, is the governmentwide body of procurement regulations which implement the Property Act and the Office of Federal Procurement Policy Act. The FAR defines the term "federal agency" as including an executive agency, and the term "executive agency" as including any wholly owned government corporation listed in the Government Corporation Control Act. 48 C.F.R. § 2.101.

The Pension Benefit Guaranty Corporation, as a wholly owned corporation, is subject to the FAR for purposes of its administrative activities, but not when serving as trustee for terminated pension plans. Of course, as with any exemption, the corporation can, in its discretion, elect to follow the established procedures. B-217281-O.M., Mar. 27, 1985 (procurement of investment manager services in its trustee capacity).

The procurement statutes and the FAR have no application to corporations which are designated as not agencies or instrumentalities of the United States, even though they may be federally created and funded. B-223852, Sept. 9, 1986 (Legal Services Corporation); GAO, *Analysis of Amtrak's Acquisition of Office Copying Equipment*, GAO/CED-82-111 (Washington, D.C.: July 12, 1982).

(5) Competition in Contracting Act

The Competition in Contracting Act (CICA), title VII of the massive Deficit Reduction Act of 1974, Pub. L. No. 98-369, div. B, title VII, 98 Stat. 494, 1175 (July 18, 1984), made a number of revisions in procurement-related provisions. As relevant here, section 2741 of CICA gave a statutory basis to

GAO's bid protest function (31 U.S.C. §§ 3551–3556). Prior to CICA, GAO's bid protest authority was not explicit but was derived from its account settlement authority. *E.g.*, *Wheelabrator Corp. v. Chafee*, 455 F.2d 1306, 1313–14 (D.C. Cir. 1971). CICA divorced the bid protest function from account settlement. CICA applies to procurements by a "federal agency," which it defines by reference to the Federal Property and Administrative Services Act (Property Act), 40 U.S.C. § 102(5). In other words, it expressly includes wholly owned government corporations. *E.g.*, B-295737, B-295737.2, Apr. 19, 2005 (under CICA GAO has jurisdiction over bid protests involving procurements by wholly owned corporations such as the Federal Prison Industries).

Since CICA hinges on the definition of federal agency, account settlement authority is irrelevant, and GAO has CICA jurisdiction over corporations exempt under the pre-CICA system. 64 Comp. Gen. 756 (1985) (Tennessee Valley Authority). As with the pre-CICA system, the jurisdiction does not extend to mixed-ownership corporations. *E.g.*, B-252085, Jan. 26, 1993 (Amtrak); B-220302, Sept. 24, 1985 (Federal Deposit Insurance Corporation).

Also not dispositive is the applicability or nonapplicability of the Property Act and the Federal Acquisition Regulation (FAR). The Bonneville Power Administration, for example, is not subject to the Property Act's procurement provisions or to the FAR. *See* 16 U.S.C. § 832a(f); 40 U.S.C. § 113(e)(18). Nevertheless, it meets the CICA definition of federal agency, and is therefore subject to GAO's bid protest jurisdiction. 68 Comp. Gen. 447 (1989); 67 Comp. Gen. 8 (1987). Naturally, as was done in the two cited cases, GAO will apply Bonneville's own regulations rather than the FAR in evaluating the protest.

(6) <u>Other statutes</u>

The laws listed above are the ones we regard as most important to the procurement function in terms of the breadth of procurement activities. There are, however, several other procurement-related statutes, some of which address their applicability to government corporations. For example, the Walsh-Healey Act (which mandates wage and labor standards for supply or equipment contracts over $10,000) applies to contracts made by "any corporation all the stock of which is beneficially owned by the United States." 41 U.S.C. § 35. Others do not expressly define their applicability as, for example, the Competition in Contracting Act and the Property Act do. One example is the Brooks Architect-Engineers Act, 40 U.S.C. §§ 1101–1104, which establishes procedures for the acquisition of architectural and engineering services. It uses, but does not define, the term "agency." 40 U.S.C. § 1102(1). In an internal memorandum, B-215818-O.M., Aug. 10, 1984, GAO considered whether this act applies to the Federal Deposit Insurance Corporation, and concluded that it does not, consistent with the clear congressional pattern of excluding mixed-ownership corporations from the coverage of procurement laws.

Another example is the Service Contract Act of 1965, 41 U.S.C. § 351, which prescribes minimum standards for wages and working conditions under contracts "the principal purpose of which is to furnish services in the United States through the use of service employees." 41 U.S.C. § 351(a). Like the Brooks Architect-Engineers Act, it does not define its own applicability. It has been held applicable to Federal Reserve banks. 2 Op. Off. Legal Counsel 211 (1978), *approved and followed in Brink's, Inc. v. Board of Governors of the Federal Reserve System*, 466 F. Supp. 116 (D.D.C. 1979). It has also been held applicable to a contract between a personnel referral firm and a federally funded research and development center, even though it would not apply to the contract between the center and its sponsoring agency because the latter would not meet the "principal purpose" qualification quoted above. *Menlo Service Corp. v. United States*, 765 F.2d 805 (9th Cir. 1985).

c. General Management Laws

We have included under this caption the series of laws, enacted during the last quarter of the twentieth century, designed to enhance the management, general and financial, of government entities in the broad sense.

(1) Inspector General Act

The Inspector General Act of 1978 (Pub. L. No. 95-452, 92 Stat. 1101 (Oct. 12, 1978)), as amended, is found in the appendix to title 5 of the United States Code. Its purpose is to create independent and objective units to conduct audits and investigations of the agency's programs and operations. 5 U.S.C. app. § 2.

This Act divides the federal government into three categories—establishments, designated federal entities, and other federal entities. The Act defines "establishment" by listing the agencies and instrumentalities covered, starting with the cabinet departments. 5 U.S.C. app. § 11(2). The listing includes a few government corporations, such as the Federal Deposit Insurance Corporation, the Corporation for National and Community Service, and the Tennessee Valley Authority. *Id.* Each establishment is required to have an Office of Inspector General, the head of which is appointed by the President with the advice and consent of the Senate. 5 U.S.C. app. §§ 2, 3(a).

"Designated federal entity" is similarly defined by listing the entities covered, and includes several more government corporations and several noninstrumentalities—Amtrak,[187] the Corporation for Public Broadcasting, the Legal Services Corporation, and the Pension Benefit Guaranty Corporation. 5 U.S.C. app. § 8G(a)(2). It also includes the Farm Credit Administration and the National Credit Union Administration, which are not themselves government corporations but which supervise government corporations. A designated federal entity must have an Office of Inspector General, whose head is appointed by the head of the entity. 5 U.S.C. app. § 8G(b), (c).

The term "federal entity" includes government corporations as defined in 5 U.S.C. § 103, which means both wholly owned and mixed-ownership, except for corporations already listed as either establishments or designated federal entities, or which are part of an entity in either of those groups. 5 U.S.C. app. § 8G(a)(1). A federal entity is not statutorily required to have an Office of Inspector General, but must report annually on its internal audit structure to the Office of Management and Budget and to the Congress. 5 U.S.C. app. § 8G(h)(2). The corporations selected for "designated federal entity" status are those receiving over $100 million annually in federal funds. *See* H.R. Rep. No. 100-771, at 2 (1988).

(2) Federal Managers' Financial Integrity Act of 1982

The Federal Managers' Financial Integrity Act of 1982 (FMFIA), Pub. L. No. 97-255, 96 Stat. 814 (Sept. 8, 1982),[188] sets out a framework for establishing and evaluating internal controls. Section 2 requires each executive agency to develop, in accordance with standards prescribed by the Comptroller General,[189] a system of internal accounting and

[187] Amtrak will be dropped from the statutory coverage when it is able to operate for a fiscal year without federal subsidy. Pub. L. No. 105-134, § 409, 111 Stat. 2570, 2586 (Dec. 2, 1997).

[188] Actually, the FMFIA was repealed by Public Law 97-452, § 4b, 96 Stat. 2467, 2480 (Jan. 12, 1983), but its operative provisions were codified at 31 U.S.C. §§ 3512(c) and (d).

[189] The Comptroller General's standards are commonly referred to as the "Green Book." GAO, *Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: Nov. 1999).

administrative controls, and to report each year, under Office of Management and Budget guidelines,[190] on the extent of its compliance. The applicable definitional section is 31 U.S.C. § 3501, which excludes "a corporation, agency, or instrumentality subject to [the Government Corporation Control Act (GCCA), 31 U.S.C. §§ 9101–9110]." Therefore, section 2 of FMFIA by its own force has no application to government corporations listed in the GCCA, 31 U.S.C. § 9101. However, because GCCA corporations were specifically excluded from the definition of "executive agency" by 31 U.S.C. § 3501, other non-GCCA corporate entities specifically designated as "agencies or instrumentalities" may be subject to FMFIA, since the general title 31 definition of "executive agency" in 31 U.S.C. § 102 includes agencies and instrumentalities in the executive branch of the government.

Also, the annual management report, added to the Government Corporation Control Act by the Chief Financial Officers Act (see below), requires the inclusion of "a statement on internal accounting and administrative control systems by the head of the management of the corporation, consistent with the requirements for agency statements on internal accounting and administrative control systems under the amendments made by the Federal Managers' Financial Integrity Act of 1982." 31 U.S.C. § 9106(a)(2)(E). Accordingly, while FMFIA does not apply to GCCA corporations by its own terms, the GCCA contains a parallel requirement.

(3) Chief Financial Officers Act

The Chief Financial Officers Act of 1990 (CFO Act), Pub. L. No. 101-576, 104 Stat. 2838 (Nov. 15, 1990), which enacted, among other things, provisions in 31 U.S.C. §§ 901–903, as amended, requires the establishment of Chief Financial Officers in specified agencies, but includes no government corporations. 31 U.S.C. § 901. However, other statutes do require some government corporations to establish Chief Financial Officers. For example, the Corporation for National and Community Service has a presidentially appointed, Senate-confirmed Chief Financial Officer. 42 U.S.C. § 12651e(c). The Federal Deposit Insurance Corporation has an internally appointed Chief Financial Officer. 12 U.S.C. § 1821(a)(6)(E)(vi).

[190] OMB Cir. No. A-123, *Management's Responsibility for Internal Control* (Dec. 21, 2004).

The CFO Act did, however, revise the audit and management reporting provisions of the Government Corporation Control Act, as summarized in our coverage of that act in section B.4.a of this chapter. Section 301 of the CFO Act, 31 U.S.C. § 3512(a), requires the Office of Management and Budget to include information about government corporations in the financial management status reports and governmentwide 5-year financial management plans it must prepare for the Congress.

(4) Government Performance and Results Act

The Government Performance and Results Act of 1993 (GPRA), Pub. L. No. 103-62, 107 Stat. 285 (Aug. 3, 1993), is designed to improve efficiency and effectiveness in the federal government by requiring agencies to set performance goals and to measure results against those goals. Section 3 of GPRA, 5 U.S.C. § 306, requires each agency to submit to Congress, and requires the Office of Management and Budget to update periodically, a strategic plan, which must include a mission statement and the agency's goals and objectives for at least a 5-year period. Section 4 of GPRA, 31 U.S.C. §§ 1115 and 1116, requires agencies to prepare annual performance plans and program performance reports. GPRA's definition of agency is "an Executive agency defined under [5 U.S.C. §] 105," with several exceptions not relevant here. 5 U.S.C. § 306(f); 31 U.S.C. § 1115(g)(1). Therefore, GPRA applies to both wholly owned and mixed-ownership government corporations.

(5) Government Management Reform Act of 1994

The Government Management Reform Act of 1994 requires Treasury to prepare annual consolidated financial statements "covering all accounts and associated activities of the executive branch of the United States Government." Pub. L. No. 103-356, § 405(c), 108 Stat. 3410, 3416 (Oct. 13, 1994), 31 U.S.C. § 331(e)(1). GAO is required to audit these consolidated statements. 31 U.S.C. § 331(e)(2). Since the statements are to cover the entire executive branch, they include those government corporations that are in the executive branch. *See* U.S. Department of Treasury, *2005 Financial Report of the U.S. Government*, *Appendix: Significant Government Entities Included and Excluded from the Financial Statements* (December 2005), at 133–34.[191] In fact, the Office of

[191] This report is available at www.gao.gov/financial/fy2005financialreport.html (last visited Nov. 28, 2007).

Management and Budget and Treasury direct certain government corporations to submit special audit financial information to Treasury for consolidation. OMB Cir. No. A-136, *Financial Reporting Requirements*, § I.3 (June 29, 2007); I TFM 2-4700.

(6) Federal Financial Management Improvement Act of 1996

This law requires agencies to comply with federal accounting standards, financial management system requirements, and the United States Government Standard General Ledger. Pub. L. No. 104-208, div. A, § 101(f) [title VIII, § 803(a)], 110 Stat. 3009, 3009-390–92 (Sept. 30, 1996). It does not apply to government corporations because it defines agency by incorporating the definition in 31 U.S.C. § 901(b), which does not include any government corporations. Pub. L. No. 104-208, § 806(1).

(7) Improper Payments Information Act of 2002

This statute requires agencies to identify programs or activities that are susceptible to significant improper payments, annually estimate the amount of improper payments, and report those estimates and actions taken to reduce improper payments for highly-susceptible programs. Pub. L. No. 107-300, 116 Stat. 2350 (Nov. 26, 2002), 31 U.S.C. § 3321 note. The act uses the broad definition of executive agency in 31 U.S.C. § 102, which includes instrumentalities in the executive branch, meaning that both wholly owned and mixed-ownership government corporations designated as executive branch instrumentalities are covered. Pub. L. No. 107-300, § 2(d)(1).

d. Property Management

The primary law governing the use and disposal of property is the Federal Property and Administrative Services Act of 1949. The pertinent definitions are found in 40 U.S.C. §§ 102(4) and (5), under which the term “federal agency” includes executive agency, and “executive agency” includes any wholly owned government corporation. Naturally, there are exceptions. For example, 40 U.S.C. § 113(c) exempts both wholly owned and mixed-ownership government corporations subject to the Government Corporation Control Act (31 U.S.C. §§ 9101–9110) from the provisions relating to GAO approval of property accounting systems (40 U.S.C. § 121(b)) and GAO audit of property accounts (40 U.S.C. § 506(c)). The Tennessee Valley Authority is partially exempt by virtue of 40 U.S.C. § 113(e)(11). The rule is, therefore, that absent an applicable exemption, provisions of the Property Act applicable to federal agencies or executive agencies apply to wholly owned government corporations.

Section 501 of 40 U.S.C. gives the General Services Administration a variety of responsibilities with respect to the procurement and storage of personal property, including public utility services. This applies to wholly owned corporations by virtue of 40 U.S.C. § 102. The law further directs GSA to provide these services upon request to mixed-ownership corporations as well. 40 U.S.C. § 502(a)(2). This would include such services as the use of federal supply schedules.

The disposition of excess property is covered in 40 U.S.C. §§ 521–529. Reimbursement of fair value is required in the case of a transfer from one agency to another when either the transferring agency or the receiving agency is a corporation under the Government Corporation Control Act. 40 U.S.C. § 522(b). The purpose of this provision is to "maintain the integrity of the corporate accounts; that is, to prevent the impairment of the capital assets of a corporation disposing of excess property or the unjust enrichment of a corporation receiving such excess property." B-119819, Dec. 1, 1954, at 2.

Transfer may be made without reimbursement in situations where it would not impair a corporation's capital structure—uncommon in the case of a government corporation, but possible nevertheless. *Id.*; B-129149, Sept. 28, 1956.

Section 543 of title 40, United States Code, addresses surplus property and is also applicable to wholly owned corporations. Under this provision, the disposing agency may "execute documents to transfer title or other interest in the property and may take other action it considers necessary or proper to dispose of the property." This includes transfers of title to real property from a wholly owned corporation to the United States, as and to the extent required by regulation. 41 Op. Att'y Gen. 15 (1949) (dealing with similar language in a predecessor statute).

Proceeds from the sale of surplus property, as well as reimbursements from the transfer of excess property, are governed by 40 U.S.C. §§ 571–574, which generally direct their deposit as miscellaneous receipts. 40 U.S.C. § 571. However, an exception specified in 40 U.S.C. § 574(a) provides that where the property transferred or disposed of was acquired by the use of funds either not appropriated from the general fund of the Treasury, or appropriated from the general fund but by law reimbursable from assessment, tax, or other revenue or receipts, then the net proceeds of the disposition or transfer shall be credited to the reimbursable fund or paid to the agency that determined the property to be excess.

GSA's leasing authority is found in 40 U.S.C. § 581(d). It, too, applies to wholly owned corporations by virtue of 40 U.S.C. § 102. As with personal property services, GSA may extend its buildings services (operation, maintenance, protection) to a mixed-ownership corporation upon request. 40 U.S.C. § 582(a). An odd situation occurred in 38 Comp. Gen. 565 (1959). The Federal National Mortgage Association (Fannie Mae) started out in life as a wholly owned government corporation, was rechartered as a mixed-ownership government corporation, and is now a government-sponsored enterprise. In 1959, it was a mixed-ownership corporation, but Congress had chosen to retain it in the Government Corporation Control Act as a wholly owned corporation. The question was whether Fannie Mae was required to do its leasing through GSA. The continued listing as a wholly owned corporation, the decision reasoned, was only for purposes of the Control Act. Absent some other definition, the "actual organic structure of the corporation" should determine its status. 38 Comp. Gen. at 567. Therefore, for purposes of leasing authority, Fannie Mae was a mixed-ownership corporation and thus not required to lease office space through GSA. *See also* B-161531, June 29, 1967.

Another pertinent statute is the Public Buildings Act.[192] It applies to wholly owned corporations and to several specified mixed-ownership corporations, one of which is the Federal Deposit Insurance Corporation (FDIC). 40 U.S.C. § 3301(a)(3)(E). Thus, an office building proposed to be constructed by the FDIC would be a "public building" and therefore subject to the Public Buildings Act, except for the prospectus approval requirement. B-143167-O.M., Sept. 27, 1960.

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970,[193] which authorizes relocation assistance to individuals affected by federal projects, also applies to wholly owned government corporations. 42 U.S.C. § 4601(1).

e. Freedom of Information, Privacy Acts

The Administrative Procedure Act defines agency to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," with a list of exceptions not relevant to this discussion. 5 U.S.C. § 551(1). The Freedom of Information Act (FOIA) provides that "'agency' as defined in section 551(1) of this title

[192] Pub. L. No. 86-249, 73 Stat. 479 (Sept. 9, 1959).

[193] Pub. L. No. 91-646, 84 Stat. 1894 (Jan. 2, 1971).

includes any . . . Government corporation [or] Government controlled corporation," which includes both wholly owned and mixed-ownership government corporations. 5 U.S.C. § 552(f)(1). The Privacy Act provides that "the term 'agency' means agency as defined in section 552([f]) of this title." 5 U.S.C. § 552a(a)(1). Thus, the extent to which FOIA and the Privacy Act apply to government corporations should be the same since they use the same definition.

Given the plain statutory language, the traditional types of government corporations—wholly owned and mixed-ownership—do not appear to have presented problems. *E.g.*, *Dean v. Federal Deposit Insurance Corp.*, 389 F. Supp. 2d 780 (E.D. Ky. 2005) (FOIA and Privacy Act held applicable in suit against the Federal Deposit Insurance Corporation); *Stephens v. Tennessee Valley Authority*, 754 F. Supp. 579 (E.D. Tenn. 1990) (Privacy Act suit against the Tennessee Valley Authority with no suggestion of concern over applicability); *Jones v. United States Nuclear Regulatory Commission*, 654 F. Supp. 130, 131 (D.D.C. 1987) (FOIA applies to the Tennessee Valley Authority). If these traditional government corporations are at the "clearly covered" extreme, at the other, "clearly not covered" extreme, are private corporations which receive federal financial assistance, even with a slight amount of federal supervision. *Irwin Memorial Blood Bank v. American National Red Cross*, 640 F.2d 1051 (9th Cir. 1981) (holding FOIA inapplicable to the Red Cross); *Forsham v. Harris*, 445 U.S. 169 (1980) (holding FOIA inapplicable to a private grantee).

The difficult cases occupy the gray area between these poles. The case of *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976), found FOIA applicable to the Federal Home Loan Mortgage Corporation (Freddie Mac), a government-sponsored enterprise. The court listed the factors it found relevant, acknowledging that none of them alone would be sufficient:

> "It is federally chartered, its Board of Directors is Presidentially appointed, it is subject to close governmental supervision and control over its business transactions, and to federal audit and reporting requirements. In addition, the Corporation is expressly designated an 'agency,' and its employees are officers and employees of the United States, for a number of purposes."

Id. at 180.

Taken together, these "federal characteristics dictate the conclusion that it is the kind of federally created and controlled entity" that Congress intended to include under the term government-controlled corporation. *Id.* at 181.[194]

Amtrak is subject to FOIA by virtue of 49 U.S.C. § 24301(e), which makes FOIA applicable for any year in which Amtrak receives a federal subsidy. However, it is not a government-controlled corporation for purposes of the Privacy Act. *United States v. Jackson*, 381 F.3d 984 (10th Cir. 2004), *cert. denied*, 544 U.S. 963 (2005); *Ehm v. National Railroad Passenger Corporation*, 732 F.2d 1250 (5th Cir.), *cert. denied*, 469 U.S. 982 (1984). The issue had become somewhat clouded by some legislative history that could be used to support applicability, as GAO had done in 57 Comp. Gen. 773 (1978). The *Ehm* court reviewed the legislative history, found it inconclusive, and found Amtrak closer to the Corporation for Public Broadcasting, which was indisputably intended to be excluded. *Ehm*, 732 F.2d at 1253–55.

A related statute is the Government in the Sunshine Act, 5 U.S.C. § 552b, which requires, among other things, that every meeting of an agency be announced in advance and open to the public, unless otherwise excepted. It defines agency as an agency (1) within the FOIA/Privacy Act definition, which explicitly includes both wholly owned and mixed-ownership government corporations, and which is (2) "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President." 5 U.S.C. § 552b(a)(1). A corporation's board of directors is a "collegial body." 63 Comp. Gen. 98, 99 (1983); 57 Comp. Gen. at 775. While *Ehm* supersedes these cases insofar as they deal with Amtrak, the general points remain valid, and many government corporations are subject to the Sunshine Act.

Of course, as it did with Amtrak, Congress can exclude or include government corporations under these laws. 1 Op. Off. Legal Counsel 126, 131–32 (1977).

[194] Legislation in 1989 largely privatized Freddie Mac and severed most of its federal ties. We cite *Rocap* merely to illustrate the kinds of factors that influenced the court. The holding is no longer directly applicable. *See American Bankers Mortgage Corp. v. Federal Home Loan Mortgage Corp.*, 75 F.3d 1401, 1408 (9th Cir.), *cert. denied*, 519 U.S. 812 (1996).

Another information-related statute is the Paperwork Reduction Act of 1980 (which replaced the Federal Reports Act of 1942), 44 U.S.C. §§ 3501–3520, which gives the Office of Management and Budget certain oversight and regulatory responsibilities with respect to the collection of information from the public. The statute's definition of agency is essentially the same as that of FOIA and the Privacy Act in that it expressly includes both wholly owned and mixed-ownership government corporations. 44 U.S.C. § 3502(1).

In 2002, Congress passed the E-Government Act to enhance access to government information, to promote electronic government services, and to increase federal information security. Pub. L. No. 107-347, 116 Stat. 2899 (Dec. 17, 2002). The majority of the statute's provisions employ the definition of agency in the Paperwork Reduction Act and thus apply to both wholly owned and mixed-ownership government corporations. Pub. L. No. 107-347, §§ 201, 301. Title II of Public Law 107-347 ensures the acceptance by agencies, government corporations, and government controlled corporations of electronic signatures and requires the development of standards for agency Web sites. Title III of Public Law 107-347, titled the Federal Information Security Management Act, sets security standards for agencies' information systems, which also apply to both wholly owned and mixed-ownership government corporations.

f. Printing and Binding

Subject to a few exceptions, all printing and binding for "every executive department, independent office and establishment of the Government, shall be done at the Government Printing Office." 44 U.S.C. § 501. Title 44 does not further define the applicability of this provision. Although the cases must be approached with some caution, the rule developed in the cases presented below is that a government corporation empowered to determine the character and necessity of its expenditures is not required to comply with 44 U.S.C. § 501.

The earliest decision appears to be A-49652, June 28, 1933, in which GAO advised that the Home Owners' Loan Corporation (HOLC) was not required to have its printing done at the Government Printing Office. Yet in 14 Comp. Gen. 695 (1935), GAO held that the Federal Savings and Loan Insurance Corporation (FSLIC) was subject to the requirement. The difference was that the Home Owners' Loan Corporation had the statutory "character and necessity" power, whereas the FSLIC did not. FSLIC was given that power shortly thereafter, and GAO then confirmed that it, too, was now exempt. A-60495, Oct. 4, 1938. The two corporations subsequently adopted resolutions to serve as their determination of nonapplicability, and GAO concurred. A-98289, Jan. 18, 1939 (HOLC); A-98289, A-60495, Jan. 18, 1939 (FSLIC). *See also* 18 Comp. Gen. 479 (1938); 14 Comp. Gen. 698 (1935). GAO has applied the same result to other government corporations and similar entities. *E.g.*, B-209585, Jan. 26, 1983 (Tennessee Valley Authority); B-114829, July 8, 1975 (U.S. Postal Service). A corporation not subject to 44 U.S.C. § 501 may still elect to follow it. A-49217, June 5, 1933.

By coincidence, all of the government corporations GAO had considered possessed the variety of "character and necessity" authority which included the "without regard to other provisions of law" clause. See sections B.6.c(1) and (2) of this chapter. A 1986 decision, 65 Comp. Gen. 226, misinterpreted this coincidence and treated the "without regard" clause, rather than the basic "character and necessity" provision, as the basis for the exemption. While the actual holding of 65 Comp. Gen. 226 is correct—that a corporation not possessing the "character and necessity" power must follow 44 U.S.C. § 501—the discussion of the "without regard" clause is not. This is because 44 U.S.C. § 501 is a general statute; it does not expressly apply to government corporations. Therefore, as discussed in section B.6.c of this chapter, a "character and necessity" provision is sufficient to permit its avoidance, without the need for the additional "without regard" clause.

As further evidence, in 1949, the Institute of Inter-American Affairs responded to a budget cut by firing all of its auditors. An angered Congress threatened to respond by repealing its "character and necessity" power. *See* B-24827, Mar. 24, 1949. As part of this process, GAO was asked to study which laws would be affected by such a repeal. The resulting statement listed the printing statute as one of the laws that had not previously applied but would in the event of repeal. *See* GAO, *General Accounting Office Statement Concerning Effect of "Determine and Prescribe" Language on Conduct of Business by the Institute of Inter-American Affairs*, June 22, 1949, 334 MS 1805A.[195]

g. Criminal Code

Regardless of a corporation's autonomy, it is within the power of Congress to provide that a crime against a government corporation is a crime against the United States. The Supreme Court has said:

[195] For an explanation of this citation format, see Chapter 1, section E.2.d, n.78.

> "The United States can protect its property by criminal laws, and its constitutional power would not be affected if it saw fit to create a corporation of its own for purposes of the Government, under laws emanating directly or indirectly from itself, and turned the property over to its creature. The creator would not be subordinated to its own machinery."

United States v. Walter, 263 U.S. 15, 17 (1923).

Congress has implemented this power through several provisions of the Criminal Code in title 18 of the United States Code. The definition of agency includes "any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." 18 U.S.C. § 6.

Some statutes in which this definition can come into play are 18 U.S.C. §§ 286 (conspiracy to defraud the United States or agency thereof through a false claim); 287 (presenting a false claim to the United States or agency thereof); and 371 (conspiracy to defraud the United States or agency thereof "in any manner or for any purpose"). An illustrative case is *United States v. Samuel Dunkel & Co.*, 184 F.2d 894 (2nd Cir. 1950), *cert. denied*, 340 U.S. 930 (1951), holding that fraud upon the former Federal Surplus Commodities Corporation was the same as fraud upon the United States for purposes of 18 U.S.C. § 371. This was an easy case since the corporation in question was statutorily designated as an agency of the United States. *Id*. at 898. In view of the language of 18 U.S.C. § 6, however, that designation would not appear to be necessary. *See Walter*, 263 U.S. at 18.

The "proprietary interest" language of 18 U.S.C. § 6 replaced language in prior laws referring to "any corporation in which the United States is a stockholder." *See* 18 U.S.C. §§ 286, 287 (Revision Notes). No minimum proprietary interest is specified to trigger applicability. Thus, the statute would apply to a corporation in which the proprietary interest is slight, the only qualification being that it must be an instrumentality of the government. *Walter*, 263 U.S. at 18. This ensures that the statute is restricted to its intended purpose, government corporations, and eliminates situations in which the United States might, for example, acquire an interest in a private corporation through some sort of forfeiture.

Proprietary interest also includes nonstock government corporations. The Revision Note to 18 U.S.C. § 6 makes clear that this phrase "is intended to include those governmental corporations in which stock is not actually issued." A case applying this concept is *Acron Investments, Inc. v. Federal Savings and Loan Insurance Corporation*, 363 F.2d 236, 239–40 (9th Cir.), *cert. denied*, 385 U.S. 970 (1966), dealing with the identical proprietary interest language in 28 U.S.C. § 451 which was intended to parallel 18 U.S.C. § 6. Another is *Government National Mortgage Association v. Terry*, 608 F.2d 614 (5th Cir. 1979), applying *Acron* to Ginnie Mae.

8. Claims and Lawsuits

a. Administrative Claims

(1) Claims settlement authority

The structure of administrative claims settlement in the federal government consists of (1) a series of statutes, one example being the Federal Tort Claims Act, authorizing the final and conclusive settlement of claims either with or without judicial review, and (2) a general claims settlement statute, 31 U.S.C. § 3702(a), which picks up claims not covered by any of the specific statutes.

Government corporations[196] generally have their own claims settlement authority by virtue of specific charter provisions, and are therefore not subject to 31 U.S.C. § 3702(a). The most direct approach is illustrated by 15 U.S.C. § 714b(k), which provides that the Commodity Credit Corporation may "make final and conclusive settlement and adjustment of any claims by or against the Corporation or the accounts of its fiscal officers."

While often cited in conjunction with a "sue-and-be-sued" clause (see section B.8.c(2) of this chapter) or a "character and necessity" clause (see section B.6.c(1) of this chapter), this provision is sufficient to permit the corporation to administratively settle its own claims. Government

[196] For ease of discussion in this section, we will use the term "government corporation" to refer generically to the various corporate devices discussed in section B.2 of this chapter unless a more specific term is warranted.

corporations with this type of authority include the Tennessee Valley Authority,[197] and the Bonneville Power Administration.[198]

GAO also has held that the power to sue and be sued, combined with the power to determine the character and necessity of expenditures, even without the explicit claims settlement power, is still sufficient to remove the corporation from the scope of 31 U.S.C. § 3702(a). B-179464, Mar. 27, 1974; B-109766, Jan. 20, 1959 (both dealing with the former Panama Canal Company). The Federal Housing Administration has similar authority, from which it derives its claims settlement authority. 12 U.S.C. § 1702; 53 Comp. Gen. 337 (1973); 27 Comp. Gen. 429, 432 (1948); B-156202, Mar. 9, 1965.

(2) Federal Tort Claims Act

Prior to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671–2680, it was somewhat unclear whether government corporations were subject to common-law tort suits. By 1939, the answer became settled in the affirmative. *Keifer & Keifer v. Reconstruction Finance Corporation*, 306 U.S. 381 (1939); *Prato v. Home Owners' Loan Corporation*, 106 F.2d 128 (1st Cir. 1939). *See also* 25 Comp. Gen. 685 (1946). When the FTCA was enacted in 1946 to remove much of the government's tort immunity, it included most, if not all, of the then-existing government corporations in the waiver. The Act defines federal agency as including "corporations primarily acting as instrumentalities or agencies of the United States." 28 U.S.C. § 2671. Far from establishing a black-letter rule, however, the definition raises as many questions as it answers.

At a minimum, the definition should pick up wholly owned government corporations. The following have been found subject to the Act:

[197] 16 U.S.C. § 831h(b); B-124078, June 7, 1955. Naturally, the GAO decisions and opinions we cite involve claims submitted to GAO during the 75-year span that GAO possessed the general claims settlement authority. While GAO is no longer directly involved in the process, the principles themselves remain sound. For details of the transfer of the general claims settlement authority, see B-275605, Mar. 17, 1997, and Chapter 14, section B.

[198] 16 U.S.C. § 832a(f); B-129395, Jan. 22, 1957; B-132855-O.M., Oct. 1, 1957.

- The former Inland Waterways Corporation. *Wickman v. Inland Waterways Corporation*, 78 F. Supp. 284 (D. Minn. 1948). This appears to be the earliest published decision on the applicability of the FTCA to a government corporation.

- The former Federal Savings and Loan Insurance Corporation. *Federal Savings & Loan Insurance Corp. v. Quinn*, 419 F.2d 1014 (7th Cir. 1969); *Kohlbeck v. Kis*, 651 F. Supp. 1233 (D. Mont. 1987); *Colony First Federal Savings and Loan Ass'n v. Federal Savings & Loan Insurance Corp.*, 643 F. Supp. 410 (C.D. Cal. 1986).

- Saint Lawrence Seaway Development Corporation. *Handley v. Tecon Corp.*, 172 F. Supp. 565 (N.D.N.Y. 1959).

- Federal Housing Administration. *Edelman v. Federal Housing Administration*, 382 F.2d 594 (2nd Cir. 1967).

- Federal Prison Industries (FPI). *See United States v. Demko*, 385 U.S. 149 (1966). The Court in that case held that a prisoner injured while working for FPI could not sue under the FTCA because the compensation remedy provided under 18 U.S.C. § 4126 was his exclusive remedy. If the FTCA did not apply to FPI, there would have been no need to tackle the exclusivity question.

Our research has disclosed no case in which the FTCA was found inapplicable to a wholly owned government corporation on the basis of the section 2671 definition.

Turning to mixed-ownership corporations, the situation is less uniform. One court has held a Federal Home Loan Bank is not a federal agency for FTCA purposes. *Rheams v. Bankston, Wright & Greenhill*, 756 F. Supp. 1004 (W.D. Tex. 1991). Another court reached the opposite result for the former Resolution Trust Corporation (RTC), influenced largely by the fact that "the RTC is an organization similar to, and in fact replaces the FSLIC," which, as noted above, was an agency under the FTCA. *Park Club, Inc. v. Resolution Trust [Corporation]*, 742 F. Supp. 395, 398 (S.D. Tex. 1990), *aff'd in part and rev'd in part on other grounds*, 967 F.2d 1053 (5th Cir. 1992).

A sampling of cases involving the Federal Deposit Insurance Corporation (FDIC), another mixed-ownership corporation, indicates some of the consequences of the FTCA's applicability. Numerous cases have held that the FDIC is a federal agency for FTCA purposes. *E.g.*, *Davis v. Federal Deposit Insurance Corp.*, 369 F. Supp. 277 (D. Colo. 1974). This is true regardless of whether the FDIC is acting in its receiver capacity or its corporate capacity. *Federal Deposit Insurance Corp. v. Hartford Insurance Co.*, 877 F.2d 590 (7th Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990); *Federal Deposit Insurance Corp. v. diStefano*, 839 F. Supp. 110, 121 (D.R.I. 1993). One important consequence is that if the tort is subject to one of the exemptions listed in 28 U.S.C. § 2680, recovery is precluded just as if the agency involved were not a corporation, and the corporation's "sue and be sued" power (see section B.8.c(2) of this chapter) cannot be used to get in through the back door. *Federal Deposit Insurance Corp. v. Citizens Bank & Trust Co.*, 592 F.2d 364 (7th Cir.), *cert. denied*, 444 U.S. 829 (1979) (misrepresentation); *Safeway Portland Employees' Federal Credit Union v. Federal Deposit Insurance Corp.*, 506 F.2d 1213 (9th Cir. 1974) (misrepresentation and deceit); *Mill Creek Group, Inc. v. Federal Deposit Insurance Corp.*, 136 F. Supp. 2d 36 (D.Conn. 2001) (misrepresentation, fraud, and breach of fiduciary duty); *Freeling v. Federal Deposit Insurance Corp.*, 221 F. Supp. 955 (W.D. Okla. 1962), *aff'd*, 326 F.2d 971 (10th Cir. 1963) (slander). One possible way around this is a valid recoupment claim, whereby a defendant can reduce a plaintiff's monetary recovery because of a counterclaim arising out of the same transaction. *diStefano*, 839 F. Supp. at 123. Another important consequence of applicability is the requirement to attempt administrative resolution before going to court. *E.g.*, *Federal Deposit Insurance Corp. v. Cheng*, 787 F. Supp. 625, 631 (N.D. Tex. 1991).

If the seemingly uniform application in the case of wholly owned corporations begins to break down with respect to mixed-ownership corporations, it breaks down even further for the government-sponsored enterprise (GSE). For example, the Federal Home Loan Mortgage Corporation (Freddie Mac) has been held not a federal agency under the FTCA. *Mendrala v. Crown Mortgage Co.*, 955 F.2d 1132 (7th Cir. 1992).

The original definitional language, quoted in *Wickman*, 78 F. Supp. at 285 (emphasis added) "corporations whose primary function is to act as, *and while acting as*, instrumentalities or agencies of the United States," suggests an interesting twist.[199] At least in theory, it seems possible for a government corporation or GSE to be subject to the FTCA with respect to

[199] The linguistic change resulting from the 1948 recodification of title 28 presumably works no substantive change.

its primary function, but not subject while performing some ancillary or incidental function.

As to the remaining types of government corporations, applicability of the FTCA would seem quite remote. In our definitional discussion in section B.2.c of this chapter we noted cases refusing to apply the FTCA to the American Red Cross and to the Civil Air Patrol. And, the FTCA does not apply to Amtrak. *Sentner v. Amtrak*, 540 F. Supp. 557, 561 (D.N.J. 1982).

For most government corporations, applicability of the FTCA is determined under the definitional language of 28 U.S.C. § 2671. In a few instances, inclusion or exclusion is the subject of other specific legislation. For example, the Commodity Credit Corporation is subject to the FTCA by virtue of express language in 15 U.S.C. § 714b(c), although it is not clear why the CCC would not qualify under the definitional language in any event. The FTCA itself provides a few exemptions. Under 28 U.S.C. § 2680(n), the law does not apply to claims "arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives."

Another significant exemption is 28 U.S.C. § 2680(l): the FTCA does not apply to "[a]ny claim arising from the activities of the Tennessee Valley Authority." From this, it is clear that the FTCA cannot form the basis of a claim or suit against the Tennessee Valley Authority (TVA). *E.g.*, *Robinson v. United States*, 422 F. Supp. 121 (M.D. Tenn. 1976); *Latch v. Tennessee Valley Authority*, 312 F. Supp. 1069 (N.D. Miss. 1970). However, TVA still can be sued in tort under its "sue and be sued" clause. Courts have held that, subject to public policy limitations, it is "subject to common law liability and may be sued and held liable as may be a private individual." *Brewer v. Sheco Construction Co.*, 327 F. Supp. 1017, 1019 (W.D. Ky. 1971). *See Smith v. Tennessee Valley Authority*, 436 F. Supp. 151, 153–54 (E.D. Tenn. 1977) (following *Brewer*). Well, maybe not exactly like a private individual because TVA is an agency or instrumentality of the United States and the Fifth Circuit has held that it cannot be held liable for punitive damages without statutory authority. *Painter v. Tennessee Valley Authority*, 476 F.2d 943 (5th Cir. 1973).

(3) Contract Disputes Act

The Contract Disputes Act (CDA), 41 U.S.C. §§ 601–613, applies to each executive agency, which includes a wholly owned government corporation as defined by 31 U.S.C. § 9101(3). 41 U.S.C. § 601(2). *See APA, Inc. v. Federal Savings and Loan Insurance Corp.*, 562 F. Supp. 884 (W.D. La. 1983) (CDA applied to former FSLIC because it was listed as a wholly owned government corporation). However, the Federal Circuit has ruled that the Contract Disputes Act does not apply to the Federal Prison Industries (FPI) because the CDA requires judgments rendered against the United States to be paid out of appropriated funds, and FPI is a nonappropriated fund instrumentality. *Core Concepts of Florida, Inc. v. United States*, 327 F.3d 1331, 1338 (Fed. Cir.), *cert. denied*, 540 U.S. 1046 (2003).

As is often the case, the Tennessee Valley Authority (TVA) has its own specific provisions. TVA contracts "for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system" are excluded from the CDA. 41 U.S.C. § 602(b). Other TVA contracts are covered only if they include a disputes clause mandating administrative resolution. 41 U.S.C. §602(b). The TVA is authorized to establish its own board of contract appeals, and has its own direct payment authority. 41 U.S.C. §§ 607(a)(2), 612(d).

(4) Assignment of Claims Act

The Assignment of Claims Act (31 U.S.C. § 3727, 41 U.S.C. § 15) does not explicitly define its applicability. Therefore, absent some charter provision resolving the issue, applicability has been determined through case law.

The first wave of cases involved the U.S. Emergency Fleet Corporation, which seems to have spent as much time litigating as shipping cargo. The Comptroller of the Treasury ruled in 1919 that the statute should apply whenever payment is to be made from appropriated funds, and therefore it was not necessary to determine whether claims against the Corporation were claims against the United States. 25 Comp. Dec. 701, 703 (1919). The courts disagreed, however, and held that the Fleet Corporation, because of its distinct corporate entity, was not subject to the Act. *Rhodes v. United States*, 8 F. Supp. 124 (E.D.N.Y. 1934); *Charles Nelson Co. v. United States*, 11 F.2d 906 (W.D. Wash. 1926); *Providence Engineering Corp. v. Downey Shipbuilding Corp.*, 3 F.2d 154 (E.D.N.Y. 1924).

What was distinct about the Fleet Corporation, although not spelled out in the cases cited, was that the Shipping Board, which had organized the Fleet Corporation under statutory authority, was authorized to sell Fleet Corporation stock to the public as long as the Shipping Board remained majority stockholder. *See* Pub. L. No. 64-260, § 11, 39 Stat. 728, 731 (Sept. 7, 1916). The Corporation had been organized "so that private parties could share stock ownership with the United States." *Rainwater v. United States*, 356 U.S. 590, 593 (1958). While this may never have actually happened,[200] the Corporation was nevertheless legally designed to be more of a mixed-ownership corporation. Accordingly, the *Rainwater* Court noted in another context that enactments dealing with corporations like the Fleet Corporation were "of little value" in assessing "wholly owned and closely controlled" government corporations. *Id.* at 593–94. (A cynic might say that is equally true for case law.)

Later cases involving wholly owned corporations tend to regard the Assignment of Claims Act as applicable. The court in *Federal Insurance Co. v. Hardy*, 222 F. Supp. 68 (E.D. Mo. 1963), found it applicable to the Federal Housing Administration. Other cases have applied the Assignment of Claims Act to the Tennessee Valley Authority (*Sigmon Fuel Co. v. Tennessee Valley Authority*, 709 F.2d 440 (6th Cir. 1983)), and the Export-Import Bank (*Balfour Maclaine International, Ltd. v. Hanson*, 876 F. Supp. 52, 57 (S.D.N.Y. 1995)). *See also In re Sunberg*, 35 B.R. 777 (Bankr. S.D. Iowa 1983), *aff'd*, 729 F.2d 561 (8th Cir. 1984) (Commodity Credit Corporation).

It is also possible for a government corporation or government-sponsored enterprise which qualifies as a "financing institution" to be the *assignee* of the proceeds of a contract between the contractor and some other government agency. For example, in *In re Peoria Consolidated Manufacturers, Inc.*, 286 F.2d 642 (7th Cir. 1961), the court noted that the plaintiff manufacturing company had obtained a loan from the Reconstruction Finance Corporation and, as security assigned, to the corporation money due under a contract with the Army. *Id.* at 644.

(5) Estoppel

The classic case on estoppel against the government, *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947), involved a wholly owned government corporation. The Corporation had denied a claim based on the eligibility criteria in its regulations. The Supreme Court upheld the denial, notwithstanding that the farmer had been misled into believing that his

[200] As of at least 1927, the Shipping Board still held all of the stock. *See United States ex rel. Skinner & Eddy Corp. v. McCarl*, 275 U.S. 1, 5 (1927).

crop would be covered. Speaking through Justice Frankfurter, the Court explained:

> "[W]e assume that recovery could be had against a private insurance company. But the Corporation is not a private insurance company. . . . The Government may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends. . . . Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority."

Id. at 383–84.

The D.C. Circuit has held Freddie Mac—the Federal Home Loan Mortgage Corporation—to be a federal entity for purposes of a promissory estoppel claim. *McCauley v. Thygerson*, 732 F.2d 978 (D.C. Cir. 1984). (This was the preprivatization version of Freddie Mac dealt with in *Rocap v. Indiek*, 539 F.2d 174 (D.C. Cir. 1976), discussed in section B.7.e of this chapter in connection with the Freedom of Information Act.)

(6) <u>Prompt Payment Act</u>

The Prompt Payment Act, 31 U.S.C. §§ 3901–3907, requires the payment of an interest penalty when an agency makes late payment for the acquisition of property or services from a business concern. The definition of agency in 31 U.S.C. § 3901(a)(1) adopts the definition of the Administrative Procedure Act, 5 U.S.C. § 551(1), which is broad enough to include government corporations but does not explicitly apply to them. GAO has regarded this language as clearly applying, for example, to the Commodity Credit Corporation. B-223857, Feb. 27, 1987. Subsection (b) of 31 U.S.C. § 3901 states that the Act applies to the Tennessee Valley Authority (TVA), but that "regulations prescribed under this chapter do not apply" to the TVA, which is authorized to prescribe its own implementing regulations.

Congress amended the Act in 1988 to make it applicable to certain assistance payments to farmers by the Commodity Credit Corporation (CCC) which are not payments for the acquisition of goods or services. Pub. L. No. 100-496, § 3, 102 Stat. 2455, 2456 (Oct. 17, 1988), *codified at* 31 U.S.C. § 3902(h). Under 31 U.S.C. § 3907, a claim for an interest penalty may be brought under the Contract Disputes Act but, since that act has its own interest provision, Prompt Payment Act interest is limited to 1 year. However, by virtue of 31 U.S.C. § 3902(h)(4), section 3907 does not apply to payments owed by the CCC for agricultural commodity pricing and disaster assistance programs. Therefore, the 1-year limitation on interest payments does not apply to those payments. *Doane v. Espy*, 873 F. Supp. 1277 (W.D. Wis. 1995). As with any other statute, and subject, of course, to constitutional restrictions, Congress can expand or restrict the scope or applicability of 31 U.S.C. § 3902(h). See *Huntsman Farms, Inc. v. Espy*, 928 F. Supp. 1451 (E.D. Ark. 1996), *aff'd*, 105 F.3d 662 (8th Cir. 1997), for one example.

(7) <u>False Claims Act</u>

The False Claims Act, 31 U.S.C. §§ 3729–3733, imposes liability for presenting a false claim to, or conspiring to defraud, "the Government." 31 U.S.C. § 3729(a). The question in the present context is whether defrauding a government corporation is the same as defrauding "the Government" for False Claims Act purposes. With respect to wholly owned corporations at least, the answer appears to be "yes."[201]

One line of cases involves the Commodity Credit Corporation (CCC). The Supreme Court has held that a claim against the CCC is a claim against the government under the False Claims Act. *Rainwater v. United States*, 356 U.S. 590 (1958). *See also United States v. McNinch*, 356 U.S. 595 (1958); *United States v. Brown*, 274 F.2d 107 (4th Cir. 1960). As the *Rainwater* Court put it: "In brief, Commodity is simply an administrative device established by Congress for the purpose of carrying out federal farm programs with public funds. . . . In our judgment Commodity is a part of 'the Government of the United States' for purposes of the False Claims Act." *Rainwater*, 356 U.S. at 592.

Another line of cases says essentially the same thing with respect to the Federal Housing Administration (FHA). *McNinch*, 356 U.S. at 598; *United States v. Veneziale*, 268 F.2d 504 (3rd Cir. 1959); *United States v.*

[201] There are cases where *qui tam* plaintiffs attempted to file False Claims Act actions against government corporations, but the courts rejected such claims. For example, the D.C. Circuit rejected a *qui tam* action alleging that the Federal Prison Industries (FPI) was filing false claims against the United States, because the claim was barred by FPI's sovereign immunity. *Galvan v. Federal Prison Industries, Inc.*, 199 F.3d 461 (D.C. Cir. 1999). *See also Wood ex rel. United States v. American Institute in Taiwan*, 286 F.3d 526 (D.C. Cir. 2002).

Globe Remodeling Co., 196 F. Supp. 652 (D. Vt. 1960). However, the *McNinch* Court held that a lending institution's application for credit insurance from the FHA is not a claim under the False Claims Act, because an application for credit insurance is not usually understood as a claim against the government. *McNinch*, 356 U.S. at 598.

Other wholly owned corporations which have been regarded as part of "the Government" under the False Claims Act include the Federal Crop Insurance Corporation (*Kelsoe v. Federal Crop Insurance Corp.*, 724 F. Supp. 448 (E.D. Tex. 1988)), and the former Reconstruction Finance Corporation (*United States v. Borin*, 209 F.2d 145 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954)). Whether there might be any basis for distinguishing these corporations from any other wholly owned corporation does not appear to have been addressed.

The Federal Deposit Insurance Corporation—a mixed-ownership government corporation—has also been treated as part of the government under the False Claims Act. *United States ex rel. Prawer & Co. v. Verrill & Dana*, 946 F. Supp. 87 (D. Maine 1996), *reconsideration denied*, 962 F. Supp. 206 (D. Maine 1997). This case involved the so-called "reverse claim" provision of the False Claims Act, 31 U.S.C. § 3729(a)(7), imposing liability for knowingly making or using a false record or statement "to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government."

In a 2004 decision, the D.C. Circuit held that Amtrak is not part of the government for purposes of the False Claims Act. *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005). The court concluded that Congress had clearly specified that Amtrak is not an agency of the government, and that the False Claims Act requires presentment of a claim to a federal employee, which Amtrak employees are not.

When a government corporation recovers damages under the False Claims Act, it is entitled to retain those funds that represent reimbursement for actual losses and for investigative costs. However, double and treble damages recovered under the Act must be deposited into the Treasury as miscellaneous receipts. B-281064, Feb. 14, 2000 (disposition of damages recovered by the Tennessee Valley Authority under the False Claims Act).

(8) Interagency claims

The conventional wisdom has traditionally been that an agency of the federal government may not sue the United States or another agency because the same person may not be on both ends of the same lawsuit. *E.g.*, *Defense Supplies Corporation v. United States Lines Co.*, 148 F.2d 311 (2nd Cir.), *cert. denied*, 326 U.S. 746 (1945). Based in part on this reasoning, GAO had held that an agency's appropriations were not available to pay a claim for damage to the property of a government corporation. 25 Comp. Gen. 49 (1945). This was a straightforward application of the so-called "interdepartmental waiver doctrine," which prohibits a federal agency or instrumentality from paying for the use or repair of real property controlled by another federal agency or instrumentality unless authorized by statute. *See* Chapter 6, section E.2.c. This doctrine is based on the concept that the property of instrumentalities of the government is not the property of separate entities but rather of the government as a single entity. 71 Comp. Gen. 1 (1991), and cases cited. However, this theory of the government as a single entity, while still true for the most part, is not an absolute. *See*, *e.g.*, *United States v. Interstate Commerce Commission*, 337 U.S. 426 (1949) (suit by the United States to review a decision by the Interstate Commerce Commission); *Tennessee Valley Authority v. EPA*, 278 F.3d 1184 (11th Cir. 2003), *opinion withdrawn in part*, 336 F.3d 1236 (11th Cir. 2003), *cert. denied*, 541 U.S.1030 (2004) (dispute between the Tennessee Valley Authority (TVA) and EPA over the meaning of the Clean Air Act); *Dean v. Herrington*, 668 F. Supp. 646 (E.D. Tenn. 1987) (suit by TVA against the Department of Energy over two long-term power contracts).

Other decisions have recognized the availability of an agency's appropriations to pay damage claims to at least certain government corporations and corporate-like entities. For example, the Bonneville Power Administration could charge the National Weather Service for damage resulting from its use of Bonneville property. 71 Comp. Gen. 1 (1991). Under Bonneville's financing structure, the burden otherwise would have fallen on Bonneville's customers through rate increases caused by unrelated activities. *Id.* at 3–4. The Bonneville decision was followed and applied in B-253613, Dec. 3, 1993, holding that the Federal Highway Administration could pay TVA for damage its construction caused to TVA's electrical transmission towers because the burden would otherwise have fallen on TVA's customers.

The reverse situation—payment by a government corporation to another agency or government corporation—occurred in 26 Comp. Gen. 235 (1946). GAO concluded that the corporation could pay the claim as long as its funds were available for the payment of damages incurred in the course of its operations. In the cited case, the funds of the former Inland Waterways Corporation were available to operate the business of a common carrier by water, and therefore available to pay any lawful claims arising from that activity. The claimant in the 1946 case happened to be another government corporation. Either way, the fact that the agency or corporation suffering the damage may not have a legally enforceable claim does not prevent administrative settlement. Of course, the charter power to make final and conclusive claim settlements provides this authority too.

b. Debt Collection

The United States has inherent authority to recover amounts owed to it and does not need any special statutory authority to do so. *United States v. Wurts*, 303 U.S. 414, 416 (1938). There is no apparent reason this should not apply equally to government corporations. *See Bechtel v. Pension Benefit Guaranty Corporation*, 624 F. Supp. 590 (D.D.C. 1984), *aff'd*, 781 F.2d 906 (D.C. Cir. 1986).

The typical claims settlement charter provision of government corporations applies to debt claims as well as payment claims. For example, 15 U.S.C. § 714b(k) authorizes the Commodity Credit Corporation to "make final and conclusive settlement and adjustment of any claims by or against the Corporation." Just as with payment claims, this authority removes the corporation from the coverage of 31 U.S.C. § 3702(a), the general claims settlement statute. Since most debt collection became statutory during the last third of the twentieth century, this has less significance than it does in the payment context.

Much of the governmentwide debt collection legislation applies expressly to government corporations. The first governmentwide statute, the Federal Claims Collection Act of 1966, defined "agency" as including "government corporations," which in turn includes both wholly owned and mixed-ownership government corporations. Pub. L. No. 89-508, § 2(a), 80 Stat. 308 (July 19, 1966). The provisions which originated in the 1966 Act are the duty to pursue collection action and the compromise, suspension, and termination authorities, all of which are now found in 31 U.S.C. § 3711. The Debt Collection Act of 1982 (Pub. L. No. 97-365, 96 Stat. 1749 (Oct. 25, 1982)) did not include its own definition, but many of its provisions were cast as amendments to the Federal Claims Collection Act, such as sections 10 (31 U.S.C. § 3716, administrative offset), 11 (31 U.S.C. § 3717, interest), and 13 (31 U.S.C. § 3718, contracts for collection services). Thus, these became subject to the 1966 definition.

The 1982 recodification of title 31 of the United States Code dropped the definition as unnecessary. While this made no substantive change, it then required several steps of statutory construction to figure out which provisions applied to government corporations. In 1996, as part of the Debt Collection Improvement Act of 1996, the express reference to government corporations was restored. 31 U.S.C. § 3701(a)(4), as amended by Pub. L. No. 104-134, § 31001(c)(2), 110 Stat. 1321, 1321-359 (Apr. 26, 1996). Thus, for example, the Pension Benefit Guaranty Corporation is subject to 31 U.S.C. § 3718 and may contract for collection services to collect delinquent debts, but not for audit services to identify the debts. B-276628, Aug. 19, 1998.

One authority a government corporation has which a regular agency does not (by virtue of either its specific claims settlement power or its sue-and-be-sued power in conjunction with other charter powers) is the authority to waive indebtedness independent of the waiver statutes applicable to the rest of the government. B-194628, July 3, 1979 (Government National Mortgage Association); B-190806, Apr. 13, 1978 (Pension Benefit Guaranty Corporation). The power to waive includes the power to rescind a previously granted waiver if found to have been obtained under a material mistake of fact, error of law, fraud, or misrepresentation. B-272467.2, Aug. 28, 1998 (Export-Import Bank).

In the majority of cases in which the fact that a government corporation is involved is relevant, the issue is whether a debt owed to the corporation is the same as a debt owed to the United States. The largest group of cases involves 31 U.S.C. § 3713, which gives priority to government claims under certain circumstances, and the earliest of these dealt with the Emergency Fleet Corporation. The courts held that debts owed to the Fleet Corporation were not entitled to the statutory priority. *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549 (1922);[202] *United States v. Wood*, 290 F. 109 (2nd Cir.), *aff'd mem.*, 263 U.S. 680 (1923); *West Virginia Rail Co. v. Jewett Bigelow & Brooks Co.*, 26 F.2d 503 (E.D. Ky. 1928).

[202] The summary treatment in *Sloan*, 258 U.S. at 570, did not cite the priority statute but the lower court opinion, which *Sloan* affirmed, did. *See In re Eastern Shore Shipbuilding Corp.*, 274 F. 893 (2nd Cir. 1921), *aff'd*, 258 U.S. 549 (1922).

As we have seen in section B.8.a(4) of this chapter, Fleet Corporation cases must be applied with great caution, but this is one instance in which the courts have generally reached the same result. Debts to the following corporations have been held not to constitute debts to the United States for purposes of the priority statute: Government National Mortgage Association or "Ginnie Mae" (*United States v. Blumenfeld*, 128 B.R. 918 (E.D. Penn. 1991)); Federal Deposit Insurance Corporation (*Lapadula & Villani, Inc. v. United States*, 563 F. Supp. 782 (S.D.N.Y. 1983)); and the former Reconstruction Finance Corporation (RFC) (*Reconstruction Finance Corporation v. Brady*, 150 S.W.2d 357 (Tex. Civ. App. 1941)). Two cases giving priority to RFC debts are *In re Peoria Consolidated Manufacturers, Inc.*, 286 F.2d 642 (7th Cir. 1961), and *In re Tennessee Central Railway*, 463 F.2d 73 (6th Cir.), *cert. denied*, 409 U.S. 893 (1972). *Peoria* involved a loan program given to the RFC under the Defense Production Act of 1950, the funds for which "were obtained from the Treasury of the United States and did not involve the capital or assets of RFC." *Peoria*, 286 F.2d at 645. The *Tennessee* litigation occurred long after the RFC had been liquidated and its assets transferred to various government agencies. *See* RFC Liquidation Act, Pub. L. No. 83-163, 67 Stat. 230 (July 30, 1953).

Since the fact of corporate identity seems to be the key factor in these cases, the courts have reached a different result with respect to the Federal Housing Administration (FHA), which has corporate powers but is not organized as a corporation. Debts owed to the FHA are debts owed to the United States under 31 U.S.C. § 3713. *Korman v. Federal Housing Administrator*, 113 F.2d 743 (D.C. Cir. 1940). Also, Congress can extend the government's priority to any government corporation by expressly so providing in the charter, as it has done, for example, for the Commodity Credit Corporation, which "shall have all the rights, privileges, and immunities of the United States with respect to the right to priority of payment with respect to debts due from insolvent, deceased, or bankrupt debtors." 15 U.S.C. § 714b(e). *See Engleman v. Commodity Credit Corp.*, 107 F. Supp. 930 (S.D. Cal. 1952) (recognizing the priority but finding the statute inapplicable where the government acquired its claim after an assignment for the benefit of creditors).

In the area of offset, GAO and the courts have mostly recognized the concept of the government as a single entity ("unitary government") and treated debts to government corporations as debts to the United States. Applying the common-law offset inherent under the general settlement authority of 31 U.S.C. § 3702(a), GAO took the position that a refund of certain taxes was subject to offset to collect a debt owed to the Reconstruction Finance Corporation. B-35182, Aug. 16, 1943. The debtor sued, the government filed a counterclaim, and the Supreme Court effectively upheld the offset. *Cherry Cotton Mills*, *Inc. v. United States*, 327 U.S. 536 (1946). The Court said:

> "Every reason that could have prompted Congress to authorize the Government to plead counterclaims for debts owed to any of its other agencies applies with equal force to debts owed to the R.F.C. . . . That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes."

Id. at 539.

While the Court was ruling, strictly speaking, on the propriety of the counterclaim and not the propriety of the administrative action, the rationale clearly fits. *See also* B-35182, Nov. 30, 1945. While there now exists a comprehensive statutory provision for administrative offset, 31 U.S.C. § 3716, which applies to government corporations under 31 U.S.C. § 3701(a)(4), the common-law principles remain relevant in cases in which section 3716 does not apply. *See McBride Cotton & Cattle Corp. v. Veneman*, 296 F. Supp. 2d 1125 (D.Ariz. 2003) (the Commodity Credit Corporation has administrative offset authority outside of 31 U.S.C. § 3716 by virtue of its statutory authority to settle and adjust claims and to determine its obligations and expenditures). Just like an agency, a government corporation cannot use 31 U.S.C. § 3716 unless it has issued implementing regulations. *In re Art Metal U.S.A.*, *Inc.*, 109 B.R. 74, 81 (Bankr. D.N.J. 1989).

The unitary government concept also applies for the most part in setoffs under the Bankruptcy Code. *E.g.*, *In re Turner*, 84 F.3d 1294 (10th Cir. 1996). The bankruptcy law regarding setoff, 11 U.S.C. § 553, preserves any common-law offset arising before commencement of the bankruptcy case. 11 U.S.C. § 553(a). For purposes of this provision, most government corporations are part of the unitary government. This had also been the case under prior versions of the Bankruptcy Code. *Luther v. United States*, 225 F.2d 495, 498 (10th Cir. 1954); B-120801, July 7, 1955. There is an exception, however, for "certain federal agencies such as the Federal Deposit Insurance Corporation [which] are viewed as separate governmental units when they act in their private receivership capacity." *Doe v. United States*, 58 F.3d 494, 498 (9th Cir. 1995); *In re Lopes*, 211 B.R. 443, 447 n.3 (D.R.I. 1997). Another exception which fits this formulation is the Pension Benefit Guaranty Corporation when serving as trustee for terminated plans. The fact that the Pension Benefit Guaranty Corporation is a wholly owned government corporation had no impact on the court's decision. *In re Art Metal U.S.A., Inc.*, 109 B.R. at 78.

In one early case predating *Cherry Cotton Mills*, GAO applied the precedents under the priority statute in determining which debts can be collected by offset against judgments under 31 U.S.C. § 3728. A-97085, June 13, 1942 (a debt owed to the Federal Deposit Insurance Corporation was not a debt owed to the United States for judgment offset purposes). While the result might still be the same for the corporation under the "private capacity" exception, the analysis probably should start by applying the offset cases rather than the priority cases.

c. Litigation in the Courts

(1) Sovereign immunity

We begin with the well-recognized principle that sovereign immunity protects the federal government and its agencies from suit. *E.g.*, *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 475 (1994). Of course, the United States may waive that immunity by consenting to be sued. *Id.* The Supreme Court in *Meyer* described sovereign immunity as being jurisdictional in nature—"the terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit." *Id.* at 475, *quoting United States v. Sherwood*, 312 U.S. 584, 586 (1941). Since government corporations are not always considered to "be" the United States, we cannot rely solely upon the general theories of sovereign immunity to determine the status of government corporations.

(2) "Sue-and-be-sued" clauses

Most government corporation charters provide the power to sue and be sued; that is, sue and be sued in the name of the corporation rather than the United States. The simplest charter provision empowers the corporation to "sue and be sued in its corporate name." *E.g.*, 16 U.S.C. § 831c(b) (Tennessee Valley Authority); 7 U.S.C. § 942 (Rural Telephone Bank). *See also* B-281064, Feb. 14, 2000 (discussing the Tennessee Valley Authority's power to sue and be sued). A variation includes one or two additional elements, such as 29 U.S.C. § 1302(b)(1), which authorizes the Pension Benefit Guaranty Corporation (PBGC) to "sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal." *See also* B-289219, Oct. 29, 2002 (describing PBGC's authority to sue and be sued in its own name). Another version adds a whole paragraph of instructions on such things as jurisdiction, venue, and the time limitations in which suit may be filed. *E.g.*, 7 U.S.C. § 1506(d) (Federal Crop Insurance Corporation (FCIC)); 15 U.S.C. § 714b(c) (Commodity Credit Corporation). *See*, *e.g.*, *Texas Peanut Farmers v. United States*, 409 F.3d 1370 (Fed. Cir. 2005) (discussing proper venue for suit against FCIC under 7 U.S.C. § 1506(d)).

Whether a government corporation without a sue-and-be-sued clause also has sovereign immunity is open to some debate. In *Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 389 (1939), the Supreme Court said that the mere fact that corporations are created by Congress and act as agencies of the United States "would not confer on such corporations legal immunity even if the conventional to-sue-and-be-sued clause were omitted." Other courts seized upon this proposition and proclaimed that a government corporation does not share the government's sovereign immunity unless Congress expressly grants it. *E.g.*, *Reconstruction Finance Corp. v. Langham*, 208 F.2d 556 (6th Cir. 1953); *United States v. Edgerton & Sons*, 178 F.2d 763 (2nd Cir. 1949). Taken to its logical conclusion, this position would render the sue-and-be-sued clause surplusage—the situation would be the same with or without it. In *Keifer*, however, the Court was dealing with legislation which authorized the Reconstruction Finance Corporation to create certain regional corporations, and found that Congress contemplated that the powers of the parent corporation would flow through to its progeny. Many government corporations have come and gone in the decades since the *Keifer* decision, virtually all possessing the sue-and-be-sued power. It would seem that the omission of that power from a new statutory charter could not be summarily dismissed. Be that as it may, the question would likely turn on congressional intent (*Federal Land Bank v. Priddy*, 295 U.S. 229, 231 (1935)) and may well remain academic if Congress continues to routinely include the sue-and-be-sued clause.

Regardless of the arguable consequences of silence in a legislative charter, the important starting principle is that Congress has the power to control the matter by including appropriate language, one way or the other, in the charter. *Keifer*, 306 U.S. at 389; *Priddy*, 295 U.S. at 231–32. As the Supreme Court put it in *Federal Housing Administration v. Burr*, 309 U.S. 242, 244 (1940), "there can be no doubt that Congress has full power to endow [a government corporation] with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process."

A very similar statement is found in *Priddy*, 295 U.S. at 231: "Immunity from suit is . . . given up when the language of the organic statute specifically waives it." *See also Dollar v. Land*, 154 F.2d 307, 312 (D.C. Cir. 1946), *aff'd*, 330 U.S. 731 (1947). The most common legislative device for waiving sovereign immunity is the sue-and-be-sued clause. When Congress passes enabling legislation allowing a federal entity to be sued under a sue-and-be-sued clause, that waiver of sovereign immunity "should be given a liberal—that is to say, expansive—construction." *United States Postal Service v. Flamingo Industries, Ltd.*, 540 U.S. 736, 741 (2004). The Supreme Court emphasized that sue-and-be-sued clauses could only be limited by implication in certain circumstances where there has been a—

> "'clea[r] show[ing] that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow sense.'"

Federal Deposit Insurance Corp. v. Meyer, 510 U.S. 471, 480 (1994), *quoting Burr*, 309 U.S. at 245.

The fact that a government corporation can sue or be sued does not mean that it can be hauled into court for any perceived wrong. The Supreme Court pointed out in *Meyer* that the sovereign immunity waiver is only the first step in a two-step process: "The first inquiry is whether there has been a waiver of sovereign immunity. If there has been such a waiver, as in this case, the second inquiry comes into play—that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief." *Meyer*, 510 U.S. at 484.

The *Meyer* Court held that the sue-and-be-sued clause of the former Federal Savings and Loan Insurance Corporation waived its immunity with respect to a constitutional tort claim, but that there was no legal basis—and the Court emphatically refused to create one—for asserting a constitutional tort claim against the corporation itself. In the *Meyer* case, the source of the substantive law upon which the suit relied did not provide an avenue for relief. *Id.* at 483–86. Thus, a sue-and-be-sued clause does not furnish the legal basis for "liability if the substantive law in question is not intended to reach the federal entity." *Flamingo Industries*, 540 U.S. at 744. *See also Young v. Federal Deposit Insurance Corp.*, 763 F. Supp. 485 (D. Colo. 1991); *Atchley v. Tennessee Valley Authority*, 69 F. Supp. 952 (N.D. Ala. 1947); *Grant v. Tennessee Valley Authority*, 49 F. Supp. 564 (E.D. Tenn. 1942). The *Atchley* court put it this way:

> "A distinction must be recognized between the procedural question of whether a government corporation is subject to suit and the substantive question of whether a given set of facts establishes its liability as a matter of substantive law. The sue-and-be-sued clause in the TVA Act does nothing but remove the procedural bar to suit against an agency of the Federal Government. It does not engender liability in a case where liability would not otherwise exist."

Atchley, 69 F. Supp. at 954.

Some conflict has arisen regarding the source of payments for potential judgments and the effect, if any, on jurisdiction. The source of that conflict can be found in the *Burr* case. In *Burr*, the Supreme Court held that garnishment was available to litigants against the Federal Housing Administration (FHA), but stated that this did not mean "that any funds or property of the United States [could] be held responsible for this judgment." *Burr*, 309 U.S. at 250. The Supreme Court pointed out that claims against private corporations are normally only collectible against corporate assets and that the same was true for the FHA. The National Housing Act directed that claims against the FHA involved in this case "shall be paid out of funds made available by this Act." *Id.* at 250, *quoting* Pub. L. No. 73-479, §1, 48 Stat. 1246 (June 27, 1934). Thus, the Supreme Court concluded that only funds which were actually in the possession of FHA, "severed from Treasury funds and Treasury control, are subject to execution." *Burr*, 309 U.S. at 250. On the other hand, FHA funds deposited with the Treasury were not subject to execution because there had been no consent to reach them and allowing execution "would be to allow proceedings against the United States where it had not waived its immunity." *Id.* Recognizing that this restriction on execution deprived it of utility, the Supreme Court emphasized that this was an inherent limitation on the statutory scheme and remedies provided by Congress. *Id.* at 251.

Federal courts have differed in interpreting the *Burr* holding. Some courts have held that, in order to establish the government's waiver of sovereign immunity, the party suing a government corporation with a sue-and-be-sued clause must show that a judgment against the government corporation would come from funds in its possession and control. *Johnson v. Secretary of Housing & Urban Development*, 710 F.2d 1130, 1138 (5th Cir. 1983); *S.S. Silberblatt, Inc. v. East Harlem Pilot Block*, 608 F.2d 28, 36 (2nd Cir. 1979); *Marcus Garvey Square, Inc. v. Winston Burnett Construction Co.*, 595 F.2d 1126, 1131 (9th Cir. 1979); *Rawlins v. M&T Mortgage Corp.*, No. 05 Civ. 2572(RCC) (S.D.N.Y. Sept. 1, 2005); *Thomas v. Pierce*, 662 F. Supp. 519, 526 (D. Kan. 1987). *See also Oklahoma Mortgage Co. v. Government National Mortgage Association*, 831 F. Supp. 821, 823 (W.D. Okla. 1993) (the Government National Mortgage Association has no funds in its possession and control separate from Treasury funds, and statute precludes recovery from its assets, so claims against it were, in reality, claims against the United States barred by sovereign immunity).

Other courts reason that even if funds are in the possession and control of the federal entity, the action must be brought against the United States if the funds originated from the public treasury. *Housing Products Co. v. Flint Housing Commission*, No. 99-1551 (6th Cir. Nov. 7, 2000) (*per curiam)*; *Portsmouth Redevelopment and Housing Authority v. Pierce*, 706 F.2d 471 (4th Cir. 1983). These courts note that funds appropriated to a federal entity "do not cease to be public funds after they are appropriated." *Pierce*, 706 F.2d at 473–74. At least one court has criticized this approach on the basis that if funds appropriated to federal entities cannot be used to satisfy judgments acquired by the waiver of immunity provided by a sue-or-be-sued clause, it would "render such clauses ineffectual." *C.D. Barnes Associates, Inc. v. Grand Haven Hideaway Ltd.*, 406 F. Supp. 2d 801, 818 (W.D. Mich. 2005).

Some courts have rejected both these approaches, reasoning that those cases misinterpret *Burr*. *Auction Co. of America v. Federal Deposit Insurance Corp.*, 132 F.3d 746 (D.C. Cir. 1997). In deciding jurisdictional issues involving the FDIC, the *Auction* court criticized the distinction between suits against agencies and those against the United States because "this test was designed to distinguish suits against private individuals from ones against the sovereign," and "[f]ederal agencies or instrumentalities performing federal functions *always* fall on the 'sovereign' side of [the] fault line; that is why they possess immunity that requires waiver." *Id.* at 752. The *Auction* court stated that although the source of funds for recovery may become an issue, "it is not jurisdictional and does not bear on whether a suit against the FDIC as Receiver is a suit against the United States." *Id.* at 752–53.

Other courts have held that when sovereign immunity is waived by a sue-and-be sued clause, the court does not need to analyze whether there are funds within the government corporation's control for jurisdictional purposes. *C.H. Sanders Co.v. BHAP Housing Development Fund*, 903 F.2d 114, 120 (2nd Cir. 1990);[203] *Jackson Square Ass'n v. Department of Housing & Urban Development*, 797 F. Supp. 242, 245–46 (W.D.N.Y. 1992). Upon consideration of the government's petition for rehearing in the *C.H. Sanders* case, the Second Circuit addressed the concern that the Department of Housing and Urban Development (HUD) was obliged to satisfy any judgment that might be rendered out of Treasury funds. *C.H. Sanders Co. v. BHAP Housing Development Fund*, 910 F.2d 33 (2nd Cir. 1990) (denying petition for rehearing). The Second Circuit held that HUD would be obliged to satisfy any judgment only out of non-Treasury funds that are available to it and would have no payment obligation if no such funds were available. *Id.*

Another court distinguished *Burr* on the basis that jurisdiction was derived from another source, such as the Tucker Act, which does not limit the source of judgment, instead of FHA's sue and be sued clause. *National State Bank of Newark v. United States*, 357 F.2d 704, 711 (Ct. Cl. 1966).

Finally, the court in *Far West Federal Bank v. Office of Thrift Supervision*, 930 F.2d 883, 890 (Fed. Cir. 1991), recognized the split, but avoided choosing one or the other because the court was able to identify funds in control of the government corporation from which any judgments would be paid. In *Far West*, the government argued that any judgment would be paid from Treasury funds and not funds in control of the government corporation and such a claim could only be asserted in the Claims Court under the Tucker Act. *Id.* at 890. The government's argument was based upon a "Treasury backup" provision stating that the Secretary of Treasury will fund amounts as may be necessary for fund purposes. *Id.* However, the court held that the liabilities of the fund were to be paid from the fund, the fund was to be administered by the government corporation and the Treasury backup provision simply implemented congressional intent that the fund have sufficient resources to carry out its obligations. *Id.* at 889–90. Thus, the court concluded that the Treasury backup provision did not

[203] We note that the sue-or-be-sued clause at issue in *C.H. Sanders* has been amended since the case was decided. *See* 12 U.S.C. § 1701q. Although the clause has been superseded (*see United American Inc. v. N.B.C.-U.S.A. Housing Inc. Twenty Seven*, 400 F. Supp. 2d 59, 63–65 (D.C. Cir. 2005)), the proposition for which the case is cited (*i.e.*, waiver of sovereign immunity by a sue-or-be-sued clause) has not been disturbed.

bar recovery under the sue-and-be-sued clause or impose exclusive Tucker Act jurisdiction. *Id.* at 890.

Notwithstanding the differences discussed above, generally, judgments against a government corporation are paid by the government corporation rather than from the Judgment Fund.[204] Judgments against government corporations are "otherwise provided for," so when judgments are obtained against government corporations they can pay them, like private corporations, from those corporate assets. Both GAO and the Attorney General recognize this rule. *See*, *e.g.*, 62 Comp. Gen. 12 (1982); B-236414, Feb. 22, 1991; 22 Op. Off. Legal Counsel 141 (1998); 13 Op. Off. Legal Counsel 362 (1989).

(3) <u>The Tucker Act</u>

Sue-and-be-sued clauses are not the only waivers of sovereign immunity for government corporations. The Tucker Act waives sovereign immunity of the United States and sets out jurisdictional parameters for certain monetary claims against the United States, including those founded upon the Constitution, any act of Congress, any regulation of an executive department, or any express or implied contract with the United States. 28 U.S.C. § 1491(a)(1). Under the Tucker Act, the United States Court of Federal Claims has exclusive jurisdiction for civil suits of more than $10,000 and concurrent jurisdiction with federal district courts for civil suits not exceeding $10,000. 28 U.S.C. §§ 1346(a)(2) and 1491(a)(1). The Tucker Act provides jurisdiction for suits against the United States "whenever 'a federal instrumentality acts within its statutory authority to carry out [the government's] purposes' as long as no other specific statutory provision bars jurisdiction." *Auction Co. of America v. Federal Deposit Insurance Corp.*, 141 F.3d 1198, 1199 (1998) (*Auction II*), *quoting Butz Engineering Corp. v. United States*, 499 F.2d 619, 622 (Ct. Cl. 1974). Several mixed-ownership government corporations, such as the Federal Deposit Insurance Corporation (FDIC) as receiver, the Office of Thrift Supervision, and the Resolution Trust Corporation have been held to be federal instrumentalities for Tucker Act purposes. *Auction II*, 141 F.3d

[204] Under section 1304 of title 31, United States Code, a permanent appropriation, commonly know as the Judgment Fund, was created to pay judgments against the United States when, among other things, "the payment is not otherwise provided for." If an appropriation or fund under the control of the agency involved in the litigation is legally available to satisfy a particular judgment, then the judgment appropriation may not be used. *See*, *e.g.*, 62 Comp. Gen. 12 (1982); B-236414, Feb. 22, 1991; B-211389, July 23, 1984.

at 1199; *Auction Co. of America v. Federal Deposit Insurance Corp.*, 132 F.3d 746, 750 (D.C. Cir. 1997) (*Auction I*). *See, e.g.*, *Slattery v. United States*, 35 Fed. Cl. 180 (1996); *Seuss v. United States*, 33 Fed. Cl. 89 (1995).

A wholly owned government corporation is clearly a federal instrumentality for Tucker Act purposes where it can be demonstrated "that it is an agency selected by the Government to accomplish purely governmental purposes . . . and that it is doing work of the Government." *Breitbeck v. United States*, 500 F.2d 556, 558 (1974) (Saint Lawrence Seaway Development Corporation). *See also Oklahoma Mortgage Co. v. Government National Mortgage Association*, 831 F. Supp. 821 (1993) (company's claim was an action founded upon a contract, against the United States, seeking relief in excess of $10,000 which was within the exclusive jurisdiction of the United States Claims Court). Even where wholly owned government corporations carry out commercial activities that can be characterized as private, if their purpose is to further the policy interests of the government, they are considered to be federal instrumentalities for Tucker Act purposes. *Optiperu, S.A., v. Overseas Private Investment Corp.*, 640 F. Supp. 420, 424 (D.D.C. 1986). The *Optiperu* court reviewed the legislative history of the Overseas Private Investment Corporation (OPIC) and found several instances where Congress set out OPIC's governmental policy objectives while carrying out transactions that would otherwise normally be characterized as private, such as issuing and guaranteeing loans and insurance. *Id.* at 424–25. The court noted that under 22 U.S.C. § 2191 OPIC is "an agency of the United States under the policy guidance of the Secretary of State." *Optiperu*, 640 F. Supp. at 424. The court also pointed out that OPIC was listed as a wholly owned government corporation in the Government Corporation Control Act, 31 U.S.C. § 9101(3)(H), and noted the various provisions dealing with OPIC's budget submissions, appropriations, financial audits and account requirements with the government. *Optiperu*, 640 F. Supp. at 424 n.2. Finally, the court found that even if OPIC had to pay any judgments out of its funds rather than the Treasury, this did not eliminate its status as a federal instrumentality. *Id.* at 425–26. Rather, the United States would be jointly or severally liable for any money damages obtained against OPIC. *Id.* at 426.

The various waivers of sovereign immunity and jurisdictional authority may provide plaintiffs with several choices of forum. For example, in *Auction I*, 132 F.3d at 753, the court pointed out that plaintiffs suing the FDIC in contract could sue in the Court of Federal Claims for Tucker Act suits of more than $10,000, in the Court of Federal Claims or federal district court for Tucker Act claims of less than $10,000, or in any court of law or equity under the FDIC sue-or-be-sued clause.

(4) Liability for costs and remedies of litigation

Once government corporations sue, or are sued, they can expect to be subject to at least some of the typical costs of litigation. Courts have analyzed the sue-and-be-sued clauses of government corporations in order to determine which costs can be assessed against government corporations. In *Federal Housing Administration v. Burr*, 309 U.S. 242 (1940), for example, the Supreme Court held that the Federal Housing Administration (FHA) was subject to all civil process incident to the commencement or continuance of legal proceedings which included the garnishment of the wages of an FHA employee sought in that case.[205] The Supreme Court noted that garnishment is a well-known remedy available to litigants and "[t]o say that Congress did not intend to include such civil process in the words 'sue and be sued' would in general deprive suits of some of their efficacy." *Id.* at 246. The Court pointed out two examples of government agencies with sue-and-be-sued clauses with specific prohibitions against attachment and garnishment, which added weight to the Court's conclusion that Congress ordinarily intended that such civil process apply or it would have specifically prohibited them. *Id.* at 247 n.10.

The Supreme Court considered whether the Reconstruction Finance Corporation (RFC), as the unsuccessful litigant, could be held liable for costs incident to litigation. *Reconstruction Finance Corp. v. Menihan Corp.*, 312 U.S. 81 (1941). The Supreme Court noted that although the RFC acted as a governmental agency "its transactions are akin to those of private enterprises" and Congress provided it with the power to sue and be sued. *Id.* at 83. The Supreme Court held that sue-and-be-sued clauses "normally include the natural and appropriate incidents of legal proceedings" and that the "payment of costs by the unsuccessful litigant, awarded by the court in the proper exercise of the authority it possesses in similar cases, is manifestly such an incident." *Id.* at 85. Although this statement was very broad, its application has been somewhat limited.

[205] *Compare* 26 Comp. Gen. 907 (1947) (finding that a sue-and-be-sued clause did not authorize collection of an FHA employee's federal tax indebtedness); 19 Comp. Gen. 798 (1940) (finding that a sue-and-be-sued clause did not authorize the FHA to purchase insurance to cover potential tort liability).

Generally, interest cannot be recovered in a suit against the United States unless there is an express waiver of sovereign immunity from an award of interest. *Library of Congress v. Shaw*, 478 U.S. 310, 311 (1986);[206] *see also* B-243029, Mar. 25, 1991. Where a government corporation does not act like a private corporation, but acts as an agent for the government and there is no statue or authority for paying interest, interest cannot be imposed upon the United States directly or indirectly through the agent government corporation. *Riverview Packing Co. v. Reconstruction Finance Corp.*, 207 F.2d 361, 370 (3rd Cir. 1953).

However, interest can and has been recovered against government corporations under certain circumstances. A "commercial venture" exception to the no-interest rule has developed. Generally this exception recognizes that where an agency of the United States is involved in an essentially commercial and for-profit venture, its sue-and-be-sued clause waives sovereign immunity and may allow liability for pre- or post-judgment interest. *Standard Oil Co. v. United States*, 267 U.S. 76, 79 (1925); *R&R Farm Enterprises*, *Inc. v. Federal Crop Insurance Corp.*, 788 F.2d 1148 (5th Cir. 1986). If the party seeking payment of interest is a recipient of government benefits arising out of the agency's noncommercial ventures, courts have refused to award interest because the payment would be in excess of what Congress or the agency has authorized by law or regulation. *R&R Farm Enterprises*, 788 F.2d at 1153. The waiver of sovereign immunity does not create a new liability upon the government for the payment of interest. *See McGehee v. Panama Canal Commission*, 872 F.2d 1213 (5th Cir.), *rehearing denied*, 880 F.2d 413 (5th Cir. 1989); *Pender Peanut Corp. v. United States*, 21 Cl. Ct. 95 (1990).

In cases where the government corporation is not engaged in a commercial enterprise, but is acting as a governmental, regulatory entity, it is not subject to prejudgment interest awards even where it has a sue-and-be-sued clause. For example, where the Federal Deposit Insurance Corporation (FDIC) is acting as a regulatory agency protecting the banking system, it is not subject to prejudgment interest awards. *Far West Federal Bank v. Office of Thrift Supervision*, 119 F.3d 1358, 1366–67 (9th Cir. 1994);

[206] The Civil Rights Act has been amended to allow interest on judgments against the United States since *Shaw* was decided. *See* Pub. L. No. 102-166, § 114, 105 Stat. 1071, 1079 (Nov. 21, 1991). While the statutory provision at issue in the case has been superseded (*see Landgraf v. U.S.I. Film Products*, 511 U.S. 244, 251 (1994)), the proposition for which the case is cited (*i.e.*, the need for an express waiver of immunity from an interest award) has not been overturned.

Spawn v. Western Bank-Westheimer, 989 F.2d 830, 833–38 (5th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994); *Gilbert v. Federal Deposit Insurance Corp.*, 950 F. Supp. 1194, 1199–1200 (D.D.C. 1997).

The award of prejudgment interest may also be imposed against government corporations under the analysis recognized by the Supreme Court in *Loeffler v. Frank*, 486 U.S. 549, 556 (1988). Under Title VII of the Civil Rights Act of 1964, Congress waived sovereign immunity for actions against federal agencies, but not for interest awards. *Shaw*, 478 U.S. at 323. In *Loeffler*, the Supreme Court identified two factors which waived any existing immunity of the Postal Service.[207] First, the Supreme Court recognized that Congress had designed the Postal Service to be run like a business by "launching" it into the commercial world. *Loeffler*, 486 U.S. at 556. Second, Congress included a sue-and-be-sued clause in the Postal Service's charter. *Id.* However, since Congress did not expressly limit the waiver of sovereign immunity effected by the Postal Service's sue-and-be-sued clause, interest could be recovered against the Postal Service in Title VII cases even though it could not be recovered against other agencies. The Supreme Court concluded that "Congress is presumed to have waived any otherwise existing immunity of the Postal Service from interest awards" which could be recovered from the Postal Service "to the extent that interest is recoverable against a private party as a normal incident of suit." *Id.* at 556–57.

Finally, like federal agencies, government corporations may not be sued for punitive damages unless expressly authorized by Congress. *Springer v. Bryant*, 897 F.2d 1085, 1089 (11th Cir. 1990).

The Equal Access to Justice Act (EAJA) also authorizes fee awards against the United States, in various administrative and judicial actions which were not previously authorized. Pub. L. No. 96-481, 94 Stat. 2321, 2325–30 (Oct. 21, 1980), *amended by* Pub. L. No. 99-80, 99 Stat. 183–87 (Aug. 5, 1985). *See also* 63 Comp. Gen. 260, 261 (1984). Prior to the EAJA's implementation, the award of attorney's fees against the government was barred and a sue-and-be-sued clause that did not directly or expressly authorize an award of fees was not sufficient to override that bar.

[207] The U.S. Postal Service is an independent establishment of the executive branch. 39 U.S.C. § 201. However, it shares many characteristics of government corporations including commercial or business-type operations and a sue-and-be-sued clause. 39 U.S.C. § 401.

Resolution Trust Corp. v. Miramon, 935 F. Supp. 838, 842 (E.D. La. 1996), *citing Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board*, 679 F.2d 64, 66 (5th Cir. 1982).

The EAJA addressed judicial fee awards by extensively revising 28 U.S.C. § 2412. Section 2412 applies to the United States or "any agency and any official of the United States acting in his or her official capacity." 28 U.S.C. § 2412(c)(2). The EAJA has been applied to both mixed-ownership and wholly owned government corporations, although without addressing the issue of the EAJA's application to them. *See*, *e.g.*, *Resolution Trust Corp. v. Eason*, 17 F.3d 1126 (8th Cir. 1994); *Miramon*, 935 F. Supp. 838; *Olenhouse v. Commodity Credit Corp.*, 922 F. Supp. 489 (D. Kan. 1996).

As is true with other federal agencies, the EAJA operates as a limited waiver of a government corporation's sovereign immunity by permitting courts to award reasonable attorney's fees to prevailing parties under common law or the terms of a statute, but the waiver must be strictly construed in favor of the government. *Eason*, 17 F.3d at 1134. In that case, the Resolution Trust Corporation (RTC) sued officers of a failed savings and loan association alleging negligence and breach of fiduciary duty. *Id.* at 1128. The officers successfully defended against the action and attempted to recover attorney's fees from RTC relying on a regulation that authorized indemnification for expenses incurred in defending charges arising out of their official conduct. *Id.* at 1135. However, that regulation only applied during the "life" of the savings and loan. By the time RTC brought the action, the entity had failed and RTC was not acting in the capacity of the savings and loan. *Id.* Thus, the regulation did not apply and the officers could not recover attorney's fees. *Id.* at 1136.

The EAJA is specific in the items that may be awarded in a judgment against the United States for costs, fees and expenses, but does not authorize general compensatory damages for embarrassment or loss of reputation. *Miramon*, 935 F. Supp. at 843–44. Neither does a "naked" sue-and-be-sued clause, that is, one which does not directly or expressly authorize an award of fees. *Id.* at 843.

Finally, the terms "common law" and "statute" as used in the EAJA's authorization of fees refers to federal common law or a federal statute, not state law. *Eason*, 17 F.3d at 1134 n.6; *Miramon*, 935 F. Supp. at 846.

(5) Sovereign immunity from state and local taxes

The oft-quoted principle that the federal government and its activities[208] are immune from taxation by state and local governments was recognized by the Supreme Court in a case involving a government corporation. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819).[209] The application of this principle to government corporations has varied since *McCulloch*, but the main debate has centered on whether one should assume that an entity has such immunity due to its status as a corporation carrying out governmental purposes, or whether Congress must expressly grant such immunity by statute.

McCulloch involved the Second Bank of the United States, which was chartered by Congress, had 20 percent of its capital stock subscribed to by the United States, and several of its directors appointed by the President. The Second Bank of the United States established a branch in Maryland. The state of Maryland imposed a tax on all banks or branches of banks in the state which were not chartered by the Maryland state legislature. The Supreme Court held that the Supremacy clause of the Constitution prevents a state from exercising any power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the federal government or its constitutional means of carrying out its powers. *Id.* at 436. The Supreme Court emphasized that the bank's purpose was to carry out a governmental function, and concluded that any effort to tax the bank directly affected the government. The Supreme Court put it this way: "But this is a tax on the operations of the bank, and is, consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional." *Id.* at 436–37.

[208] A federal instrumentality is also immune from state and local taxation if it is "so assimilated by the Government as to become one of its constituent parts." *United States v. Township of Muskegon*, 355 U.S. 484, 486 (1958) (here state taxation was not unconstitutional as applied to a corporation which was permitted to use government property in the performance of government contracts because the government had no control over the activities of the corporation or any other interest which would make the corporation part of the government). The Supreme Court has added that tax immunity for a federal instrumentality is appropriate when the agency or instrumentality is "so closely connected to the Government that the two cannot be realistically viewed as separate entities, at least insofar as the activity being taxed is concerned." *United States v. New Mexico*, 455 U.S. 720, 735 (1982).

[209] The United States' immunity from state and local taxation is discussed in Chapter 4, section C.15.

Although the act creating the Bank did not expressly prohibit the states from taxing it, the Supreme Court in *McCulloch* did not address that issue. Five years later, the Supreme Court took up this issue in *Osborn v. The Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824). In *Osborn*, the Supreme Court held that although Congress did not expressly prohibit taxing the Bank, immunity was implied as a consequence of Congress's power to create and protect the Bank. *Id.* at 865.

In later cases, the Supreme Court addressed Congress's power to exempt government corporations from state taxation without relying upon the "implied" immunity of the *McCulloch* and *Osborn* cases. *Federal Land Bank v. Crosland*, 261 U.S. 374 (1923); *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921). In those cases, Congress created government corporations—federal land banks—and specifically exempted their bonds and mortgages from state and local taxation. The Supreme Court held that Congress not only had the power to create the corporations, but to protect their operations by exempting them from taxation. *Crosland*, 261 U.S. at 377; *Smith*, 255 U.S. at 211–12. A few months after it decided *Crosland*, the Supreme Court returned to the *McCulloch* analysis in a case involving state taxation of another government corporation, the Spruce Production Corporation. *Clallam County v. United States*, 263 U.S. 341 (1923). In the words of the Supreme Court:

> "It is true that no specific words forbid the tax, but the prohibition established by *McCulloch v. Maryland*, . . . was established on the ground that the power to tax assumed by the State was in its nature 'repugnant to the constitutional laws of the Union' and therefore was one that under the Constitution the State could not use. . . . The immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words."

Id. at 344, *quoting McCulloch*, 17 U.S. (4 Wheat.) at 425, 426, 430.

A statement by the *Clallam* court provides a clue as to what appears to be the distinction between these approaches. The Supreme Court noted that, unlike "the case of a corporation having its own purposes, as well as those of the United States and interested in profit on its own account," the Spruce Production Corporation was incorporated only for the convenience of the United States to carry out its ends. *Clallam*, 263 U.S. at 345. Although not addressed in either the *Smith or Crosland* cases, the federal land banks were mixed-ownership government corporations with private (read profit), as well as government purposes. *See also Federal Land Bank v. Priddy*, 295 U.S. 229, 234–35 (1935) (noting that Congress provided a specific grant of immunity from taxation to a corporation having its own as well as government purposes).

Subsequent decisions by the Supreme Court continued this analysis. For example, recognizing that Congress may grant immunity from state and local taxation to a federal instrumentality or government corporation in *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21 (1939), the Supreme Court explained that "Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations thus validly authorized." *Id.* at 32–33.[210] The Supreme Court held that the creation of the corporation "was a constitutional exercise of the congressional power and that the activities of the Corporation through which the national government lawfully acts must be regarded as governmental functions and as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments." *Id.* at 32. *See also Federal Lank Bank v. Bismark Lumber Co.*, 314 U.S. 95, 99 (1941) (statutory exemption from taxation for federal land banks includes sales taxes).

As seen in the cases discussed above, Congress has specifically prescribed the scope of immunity for many government corporations by wholly or partially exempting them from state and local taxation.[211] In other instances, Congress expressly waived immunity from taxation of any real property belonging to a government corporation. For example, under the provisions of the statute establishing the Reconstruction Finance Corporation (RFC), Congress waived the immunity of real property of the

[210] The *Pittman* case involved the Home Owners' Loan Corporation, a wholly owned and controlled government corporation, upon whose mortgages the state of Maryland imposed a tax. The act establishing the Home Owners' Loan Corporation provided that it, its franchises, capital, reserves, surplus, loans and income shall be exempt from all state and municipal taxes.

[211] Other examples include, but are not limited to, 7 U.S.C. § 1511 (Federal Crop Insurance Corporation); 22 U.S.C. § 2199(j) (Overseas Private Investment Corporation); 33 U.S.C. § 986 (Saint Lawrence Seaway Development Corporation); 29 U.S.C. § 1302(g) (Pension Benefit Guarantee Corporation).

RFC and its subsidiary corporations.[212] *Board of County Commissioners v. United States*, 123 Ct. Cl. 304 (1952). However, the RFC's authority to pay taxes was contingent upon the corporation's holding legal title and having full control and dominion over the property. 32 Comp. Gen. 164 (1952). Once the RFC declared property to be surplus and transferred the title to the United States, the property was held by and for the use of the United States. Thus, the "cloak of immunity descended upon the property" so that no tax liability for state and local taxes could be imposed and agencies could not use appropriated funds to pay such taxes. *Board of County Commissioners*, 123 Ct. Cl. at 324 (property transferred to the Bureau of Mines). *See also* 36 Comp. Gen. 713 (1957) (property transferred to the General Services Administration); 34 Comp. Gen. 319 (1955) (same).

(6) Litigation authority

Once a government corporation decides to sue, or is sued, it must determine whether it must be represented in litigation by the Justice Department, or whether it can use or hire its own attorneys. The Justice Department has extremely broad authority with respect to litigation involving the federal government. "Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested" is reserved to the Justice Department. 28 U.S.C. § 516. Further, "the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party." *Id.* § 519. The term "agency" is defined for purposes of title 28 of the United States Code as including "any corporation in which the United States has a proprietary interest." *Id.* § 451. Therefore, absent some form of exemption, 28 U.S.C. §§ 516 and 519 apply to wholly owned and at least some mixed-ownership government corporations. In some cases, the authority is reinforced by charter language. For example, 7 U.S.C. § 943(e) expressly makes the Rural Telephone Bank subject to the Attorney General's litigation authority.

The Justice Department has expressed the position that exemptions from the Attorney General's litigation authority should be clear and specific. *See* Department of Justice, Civil Division, *Compendium of Departments and Agencies With Authority Either by Statute or Agreement to Represent*

[212] Act of January 22, 1932, § 10, 47 Stat. 10, *as amended by* Act of June 10, 1941, § 3, 55 Stat. 248.

Themselves in Civil Litigation (October 1982), at 9–10 (hereafter, *Civil Litigation Compendium*). The Department does not regard a simple sue-and-be-sued clause as enough. *Id.* at 11. An example of explicit authority is the Pension Benefit Guaranty Corporation statute, which provides that the Corporation may complain or defend a lawsuit "through its own counsel." 29 U.S.C. § 1302(b)(1). Even where a corporation has independent litigating authority, Justice believes the corporation should invoke that authority only in programmatic litigation. In nonprogrammatic litigation which is of governmentwide import, like suits under the Freedom of Information Act or Federal Tort Claims Act, Justice urges the corporations to avail themselves of Department representation. *Civil Litigation Compendium*, at 18–19. The Department's litigating authority does not apply to noninstrumentality corporations. *Id.* at 22 n.13.

The *Civil Litigation Compendium* recognizes that Justice has acquiesced in self-representation by two corporations, the Federal Deposit Insurance Corporation (FDIC) and the Tennessee Valley Authority (TVA), which possess only the simple version of the sue-and-be-sued clause. *Id.* at 26–27. The courts have held Justice to that acquiescence and have upheld self-representation authority for FDIC and TVA. *Tennessee Valley Authority v. EPA*, 278 F.3d 1184, 1191–93 (11th Cir. 2002), *withdrawn in part on other grounds*, 376 F.2d 1236 (11th Cir. 2003), *cert. denied*, 541 U.S. 1030 (2004); *Cooper v. Tennessee Valley Authority*, 723 F.2d 1560 (Fed. Cir. 1983); *Federal Deposit Insurance Corp. v. Irwin*, 727 F. Supp. 1073 (N.D. Tex. 1989), *aff'd on other grounds*, 916 F.2d 1051 (5th Cir. 1990); *Algernon Blair Industrial Contractors, Inc. v. Tennessee Valley Authority*, 540 F. Supp. 551 (M.D. Ala. 1982).

Exemptions may be partial as well as complete. For example, the Export-Import Bank may represent itself "in all legal and arbitral proceedings outside the United States." 12 U.S.C. § 635(a)(1). Under this provision, Justice has advised that it is required to conduct the Bank's litigation inside the United States, and in addition may represent the Bank in stateside arbitration proceedings. 3 Op. Off. Legal Counsel 226 (1979).

One consequence of self-representation is that the corporation must pick up the responsibility of paying the actual representation costs and the various expenses of preparing and presenting the case which would otherwise be borne by the Justice Department's litigation budget. 38 Comp. Gen. 343 (1958) (requiring the Federal Housing Administration to bear the costs of auctioneer fees and advertising costs incident to foreclosure proceedings); B-9850, May 23, 1940 (requiring the Home Owners' Loan

Corporation to bear the costs of attorney fees, cost of printing an appellate brief, and other miscellaneous expenses); B-3163, Apr. 24, 1939 (requiring the Federal Housing Administration to bear the cost of legal services necessary for foreclosing a defaulted mortgage or regaining possession of property).

9. Termination of Government Corporations

Unlike a private corporation, a government corporation cannot terminate its existence on its own authority.[213] The power to terminate a government corporation flows from the power to create one, a power clearly held by Congress. Congress may terminate a government corporation for any of a number of reasons. For example, many government corporations were created to address short-term or temporary issues or crises. Logically, once the issue or crisis is resolved, the need for the government corporation is eliminated and it can be terminated. For example, many corporations created to meet the wartime needs of World Wars I and II, and the social and economic crises of the Great Depression, were dissolved once those crises had passed.

Congress terminated all government corporations in order to bring them under its control upon the enactment of the Government Corporation Control Act (GCCA). GCCA required all government corporations then existing to institute dissolution or liquidation proceedings on or before June 30, 1948, subject to reincorporation by act of Congress for such purposes, powers and duties as might be authorized by law. Pub. L. No. 79-248, § 304(b), 59 Stat. 597, 602 (Dec. 6, 1945). *See Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 390 (1995).

Sometimes Congress provides itself with a built-in opportunity to determine whether it wants to continue a program carried out by a government corporation. Congress may provide a termination date in the enabling legislation or charter of some government corporations that must be reauthorized if Congress wants them to continue in existence. In other situations, Congress may impose a deadline for a government corporation to fulfill its goals. For example, Congress directed the Resolution Trust Corporation (RTC), created to manage and resolve failed savings institutions and recover funds by managing and selling the institutions' assets, to terminate no later than December 31, 1995. 12 U.S.C. § 1441a(m).

[213] *See* Ronald C. Moe, *Managing the Public Business: Federal Government Corporations*, S. Prt. No. 104-18, at 29 (1995) (Moe 1995).

RTC did terminate by that date, having substantially completed its mission. GAO, *Financial Audit: Resolution Trust Corporation's 1995 Financial Statements*, GAO/AIMD-96-123 (Washington, D.C.: July 2, 1996), at 8–9.

Congress may take actions short of termination by converting a government corporation into a private institution. For example, Congress converted the National Consumer Cooperative Bank from a mixed-ownership government corporation to a federally chartered, private banking institution. Pub. L. No. 97-35, title III, subtitle C, §§ 390–396, 95 Stat. 357, 433–41 (Aug. 13, 1981). *See* B-219801, Oct. 10, 1986. Other government corporations are created with the goal of privatization. For example, Congress directed the United States Enrichment Corporation (USEC) to operate as a for-profit government corporation and work towards privatization.[214] In 1996, Congress enacted legislation to privatize the USEC.[215]

Congress may also terminate a government corporation due to its dissatisfaction with the corporation's purpose and management. For example, Congress abolished the Synthetic Fuels Corporation in 1985 by rescinding its funding and giving it 120 days to wind up its affairs.[216] Pub. L. No. 99-190, 99 Stat. 1185, 1249–50 (Dec. 19, 1985). The Federal Asset Disposition Association met a similar fate. In the face of mounting criticism regarding its method of creation, its purpose, and management, Congress dissolved it as part of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, § 501(a), 103 Stat. 183, 383 (Aug. 9, 1989).[217]

In other cases, Congress has changed its view and gone back and forth on the form of a government corporation. For example, Congress replaced the Panama Canal Company, a government corporation, with the Panama Canal Commission, an appropriated fund agency, because it wanted to maintain greater oversight of the Canal during the remaining years of U.S. control. Pub. L. No. 96-70, §§ 1101, 1302, 93 Stat. 452, 456, 477 (Sept. 27,

[214] Energy Policy Act of 1992, Pub. L. No. 102-486, title IX, § 901, 106 Stat. 2776, 2937–38 (Oct. 24, 1992), *repealed by* United States Enrichment Corporation Privatization Act, Pub. L. No. 104-134, title III, § 3116(a)(1), 110 Stat. 1321, 1321-349 (Apr. 26, 1996).

[215] Pub. L. No. 104-134, §§ 3101–3117.

[216] For a more detailed discussion on this, see Moe 1995, at 19–22.

[217] For a more detailed discussion on this, see Moe 1995, at pages 22–26.

1979). *See* B-280951, Dec. 3, 1998. Subsequently, Congress granted the Commission greater autonomy and converted it into a revolving-fund agency. Pub. L. No. 100-203, title V, subtitle E, pt. 2, § 5422(a), 101 Stat. 1330, 1330-271 (Dec. 22, 1987); B-280951, at 6. Finally, Congress expanded the Commission's business-like powers to its final status as a wholly owned government corporation,[218] when the canal was transferred from U.S. control, "as an autonomous entity that [could] compete as a commercial enterprise in international transportation markets." B-280951, at 8.

C. Nonappropriated Fund Instrumentalities

> "Their birth is funded by the Government. The seed money for their creation came from the Government. They are managed by Government people who are paid Government salaries. They usually occupy Government facilities, perhaps on some cost-reimbursable arrangement, but on Government real estate, using Government facilities. They perform essentially a morale-building function for Government personnel, which the Government would otherwise have to appropriate funds for if it weren't having it done in this manner. There is a very close identity between them and the Government people with whom they are working every day. They are providing service to Government people engaged in a Government mission. As I say, this is just off the top of my head."

Testimony of Louis Spector, Commissioner of the Court of Claims, on nonappropriated fund instrumentalities.[219]

1. Introduction

The term nonappropriated fund instrumentality (NAFI) has a variety of meanings based on the particular context. In a report in 1977, GAO noted that there is no official definition or commonly understood opinion of what

[218] Pub. L. No. 104-106, div. C, title XXXV, § 3522(a), 110 Stat. 186, 638 (Feb. 10, 1996), *codified at* 22 U.S.C. § 3611.

[219] *Jurisdiction of U.S. Courts, Nonappropriated Fund Activities: Hearings on S. 980 Before Subcommittee No. 4 of the House Committee on the Judiciary*, 91st Cong., 1st Sess. 9 (1969), *quoted in McDonald's Corp. v. United States*, 926 F.2d 1126, 1129–30 (Fed. Cir. 1991).

is or is not a nonappropriated fund activity.[220] At the outset, then, it is useful to be cognizant of the danger of relying merely on a NAFI label to determine what laws apply to an entity, its relationship with the United States government, how the entity was created, its source of funding, or what authorities it can exercise. These issues can only be addressed in the context of a particular entity. We start our discussion with the "oldest" of these NAFIs—morale, welfare, and recreation organizations attached to the military.

a. History of Military Morale, Welfare, and Recreation Organizations

The need to provide services and items to fulfill the morale, welfare, and recreational needs of officers and employees of armed forces originated long before the establishment of the United States government and far from our shores. Persons providing such support have existed since the times of the Roman Legions. "Caesar alludes to the itinerant merchants who followed the legions, selling items not considered necessaries by quartermasters."[221] From the time of the Roman Legions to the European armies and navies of the seventeenth and eighteenth centuries,[222] these men, known as sutlers,[223] followed armies and met ships in port in order to supply the soldiers and sailors with provisions and contraband.[224] Due to the monopolistic prices charged by sutlers, sailors organized their own ship cooperatives called "slop chests."[225]

The United States government, at times, has directly provided items and services to meet the morale, welfare, and recreational needs of its officers and employees of the armed forces while, at other times, it has relied upon

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[220] GAO, *Magnitude of Nonappropriated Fund and Related Activities in the Executive Branch*, FPCD-77-28 (Washington, D.C: Apr. 25, 1977).

[221] Michael Francis Noone, *Legal Problems of Non-Appropriated Funds*, Mil. L. Rev. Bicentennial Issue, 357, 361 (1975). This article was originally published as appendix 1 of the Senate Judiciary Committee, *Hearings on S. 3163*, *Subcommittee on Improvements in Judicial Machinery*, 90th Cong. 2nd Sess. 201, 203–08 (1968). We will cite to pages in Noone's Military Law Review article.

[222] Stephen Castlen, *Let the Good Times Role: Morale, Welfare, and Recreation Operations*, Army Lawyer 3, 6 (1996).

[223] The term "sutler" means a small vendor, derived from the word "soltelen" which means to befoul or perform mean duties. Noone, at 361.

[224] *Id.*

[225] *Id.*

private sources, albeit under governmental control, to provide such goods and services. Beginning with the American Articles of War of 1775, sutlers, itinerant or camp-following merchants, were authorized to sell to the troops items not provided by the government such as "victuals, liquors, or other necessaries of life"[226] for the use of soldiers.[227] The American Articles of War of 1775 also regulated the sutlers' conduct, hours, and quality of items sold.[228] For example, although sutlers were not a component part of the Army, they were subject to the orders and regulations of the Continental Army.[229] Sutlers were not permitted to sell liquor, victuals, or provide entertainment after nine at night, before the beating of the reveilles, or during Sunday religious services.[230] Commanding officers' duties included monitoring sutlers to ensure that they supplied soldiers with good and wholesome provisions at a reasonable price.[231] The Articles also prohibited commanding officers from charging exorbitant prices for houses or stalls let out to sutlers or charging any duty upon sales or having any financial interest in sales.[232] The Articles further established a fund for fines collected from soldiers and officers for behaving indecently or irreverently during religious services.[233] The fund benefited sick soldiers of the troop or company to which the offenders belonged.[234] This is the first record we have of a United States government nonappropriated fund instrumentality (NAFI).[235]

[226] *Winthrop's Military Law and Precedents*, *American Articles of War of 1775, Article LXVI*, 953, 958 (2nd ed., 1920 reprint) (*Winthrop*).

[227] Paul J. Kovar, *Legal Aspects of Nonappropriated Fund Activities*, 1 Mil. L. Rev. 95, 96 (1958).

[228] *Winthrop*, Art. XXXII, LXIV, LXV, and LXVI, at 956, 958.

[229] *Id.*, Art. XXXII, at 956.

[230] *Id.*, Art. LXIV, at 958.

[231] *Id.*, Art. LXV, at 958.

[232] *Id.*, Art LXVI, at 958.

[233] *Id.*, Art. II, at 953.

[234] *Id.*

[235] Castlen, at 6.

Sutlers were permitted to sell to the soldiers on credit and the paymaster could deduct the amount from the soldier's pay and pay the sutler directly.[236] In 1847, Congress abolished sutlers' rights to have such a lien on a soldier's pay. Act of March 3, 1847, ch. 61, § 11, 9 Stat. 184, 185. Congress reinstated and abolished the sutlers' right to have a lien on a soldier's pay several times throughout the next decades.[237] In 1862, Congress enacted a bill which provided for the appointment of sutlers in the Volunteer Service, set out their duties, and authorized sutlers to have a lien on part of a soldier's pay. Act of March 19, 1862, ch. 47, 12 Stat. 371. This act established guidelines for the activities and service of sutlers to the Army and their regulation by the War Department. The commanding officer of each brigade was required to have the commissioned officers of each regiment in the brigade select a sutler for their regiment, who would be the sole sutler for that regiment. *Id.*, 12 Stat. 372. The act listed specific articles that sutlers could sell to soldiers including food, toiletries, reading materials, tobacco, stationery, and other items which in the judgment of the inspectors general were for the good of the service. *Id.*, 12 Stat. 371. However, the sale of liquor was prohibited. *Id.*

The sutlers paid fees based upon the average number of soldiers in a unit for the privilege of doing business in that unit. Fines were imposed on sutlers for violation of regulations. All fees and fines were deposited into the "post fund" administered by a group of officers, known as the "Council of Administration," along with the post commander. Kovar, at 97. The post fund aided indigent widows or children of deceased soldiers or disabled soldiers discharged without pensions, bought books and periodicals for the post library, and supported the post school and band. *Id.* In 1835, company funds, subject to the control of the post commander, were authorized by Army regulations to derive income from rental of billiard tables, the sale of grease from the company mess, and savings from the economical use of food. Noone, at 363.

The sutler system was subject to many abuses; soldiers were cheated and charged usurious interest and military officials and the merchants were involved in fraud and corruption. GAO, *Appropriated Fund Support for Nonappropriated Fund and Related Activities in the Department of*

[236] *Id.* at 6.

[237] *E.g.*, Act of June 12, 1858, ch. 156, § 5, 11 Stat. 332, 336 (repealed the legislation depriving sutlers of the right to have a lien on a soldier's pay); Act of December 24, 1861, ch. 4, § 3, 12 Stat. 331 (abolished the sutlers right to have a lien on a soldier's pay).

Defense, FPCD-77-58 (Washington, D.C.: Aug. 31, 1977), at 4. In 1866, Congress responded to these abuses by abolishing the office of sutler effective July 1, 1867. Act of July 28, 1866, ch. 298, § 25, 14 Stat. 328, 336; *see* FPCD-77-58, at 4. With the abolishment of sutlers, Congress required the subsistence department of the Army to sell articles, designated by the inspectors general, at cost. 14 Stat. at 336. In 1867, Congress authorized the Commanding General of the Army to permit the establishment of trading posts on certain military posts. Resolution No. 33 of March 30, 1867, 15 Stat. 29. Where the commissary department was prepared to supply stores to soldiers, traders were not permitted to remain at such posts or sell any goods kept by the commissary department. *Id.*

In 1870, Congress repealed Resolution No. 33 and enacted legislation authorizing the establishment of post traders in certain locations to be under the protection and control of the military as camp followers and subject to the War Department's regulations.[238] Act of July 15, 1870, ch. 294, § 22, 16 Stat. 315, 319–20. The War Department established general policies regulating the post traders which were carried out by a council of administration for the post. Kovar, at 100 n.28. Unlike the sutlers before them, the post traders did not have the right to a lien on a soldier's pay. *Id.*

The Secretary of War did not appoint a post trader at all military posts. Kovar, at 101. At posts where there were no post traders, the Secretary authorized commanders to establish canteens to supply troops with articles for their entertainment and comfort at moderate prices. *Id.*, *citing* General Order No. 10, 1889. The following year, in 1890, the Secretary authorized all posts to establish canteens. Post commanders could make government buildings available to house canteens and its activities. An officer "in charge of canteen" managed the canteen assisted by a "canteen council" and its profits were distributed among the participating companies. *Id.*, *citing* General Order No. 51, May 18, 1890. A canteen was established either on credit or from funds of the companies benefiting from the canteen. To promote and expand canteens, the War Department prohibited company fund activities from selling any item sold by the canteen. *Id.*, *citing* Circular No. 1, Adjutant General's Office, Feb. 9, 1891. Canteens were authorized to use profits to purchase sporting equipment

[238] This act authorized the establishment of post traders at certain posts on the frontier not in the vicinity of any city or town when, in the Secretary of War's judgment, such posts were necessary to accommodate emigrants, freighters, and other citizens. In 1876, Congress authorized the Secretary of War to appoint post traders at all military posts regardless of location. Act of July 24, 1876, 19 Stat. 100.

and any items that would contribute to the "rational enjoyment and contentment of the soldiers." *Id.*, *citing* Circular No. 7, Adjutant General's Office, June 10, 1890.

Canteens evolved into the post exchanges which performed essentially the same functions. Kovar, at 102; Noone, at 365. By 1893, the post exchange had taken over the services provided by the post trader and Congress prohibited the Secretary of War from making further appointments of post traders or from filling vacancies. Act of January 28, 1893, ch. 51, 27 Stat. 426. In 1895, the War Department established post exchanges at all military posts. Kovar, at 102, *citing* General Order Number 46, July 25, 1895. The post exchanges were to provide a reading and recreation room, a store, a restaurant, and other facilities to supply at reasonable prices, articles (not supplied by the government) for rational recreation and amusement. *Id.* Post exchanges were authorized to use government buildings and were managed by an "officer in charge" and a council who reported to the post commander. *Id.*

Although the Army regulated post exchanges and provided direct support through free government space and the use of military officers to manage their operations, the post exchanges were not considered to be an agency or instrumentality of the United States. Noone, at 365. The Judge Advocate General of the Army described the legal status of the post exchange in an 1893 opinion:

> "Now the Post Exchange is not a United States institution or branch of the United States military establishment, but a trading store permitted to be kept at a military post for the convenience of the soldiers. It is set up and stocked, not by means of an appropriation of public moneys, but by means of the funds of companies, *etc.*; the officers ordering the purchases . . . [are] responsible for the payment, not the Government."

Noone, at 365, *citing* 61 JAG Record Book, 1882–1895, 479 (1893).

Congress limited the aid that the Army could provide to the post exchanges in the Army's Appropriations Act for Fiscal Year 1893 as follows:

> "*And provided further*, That hereafter no money appropriated for the support of the Army shall be expended for post gardens or exchanges, but this proviso shall not be

> construed to prohibit the use by post exchanges of public buildings or public transportation when, in the opinion of the Quartermaster-General, not required for other purposes."

Act of July 16, 1892, ch. 195, 27 Stat. 174, 178 (emphasis in original).[239]

The post exchange and post and company funds continued to carry out morale, welfare, and recreation (MWR) functions until after World War I. Kovar, at 102. After World War I, the War Department created and expanded organizations and functions to provide services such as motion pictures and library facilities, recreation centers and programs, child care centers, restaurants and other services for both service members and their family members. Castlen, at 9; Kovar, at 102–03. The War Department established a Morale Branch in 1941 to provide MWR services. Castlen, at 9. During World War II, the post exchanges were reorganized into a central organization known as the Army Exchange Service (currently in operation and now known as the Army and Air Force Exchange Service or AAFES) within the Morale Branch of the War Department. *Id.*

b. Defining the Nonappropriated Fund Instrumentality

> "I am worried about the definition of 'nonappropriated funds.' Every time I think of one, you give me another one; then I think of another possibility."

Rep. Wiggins, House of Representatives (1969).[240]

In 1975, Congress authorized GAO to audit the operations and accounts of nonappropriated fund activities authorized or operated by the head of an executive agency to sell goods or services to U.S. government personnel and their dependents.[241] In a 1977 report, GAO listed those activities, a brief description of each one, their assets, and gross revenues. GAO,

[239] This law is now codified at 10 U.S.C. § 4779(b).

[240] *Nonappropriated Fund Activities: Hearings on S. 980 Before Subcommittee No. 4 of the House Committee on the Judiciary*, 91st Cong., 1st Sess. 18–19 (1969), *quoted in McDonald's Corp. v. United States*, 926 F.2d 1126, 1130 (Fed. Cir. 1991) (statement made in discussion of amending the Tucker Act, 28 U.S.C. § 1491, to waive sovereign immunity for all nonappropriated fund instrumentalities, not only those administered by the Department of Defense).

[241] Pub. L. No. 93-604, § 301, 88 Stat. 1959, 1961–62 (Jan. 2, 1975), *codified at* 31 U.S.C. § 3525.

Magnitude of Nonappropriated Fund and Related Activities in the Executive Branch, FPCD-77-28 (Washington, D.C.: Apr. 25, 1977). The report noted that some agencies maintained that their programs were not nonappropriated fund activities, but rather, private associations not officially a part of the government. "Varying interpretations are understandable," the report stated, "since there is no official definition or commonly understood opinion of what is or is not a nonappropriated fund activity." *Id.* at i. GAO cited an earlier Office of Management and Budget (OMB) study which found that the lack of a governmentwide definition of NAFIs caused confusion and precluded a reliable review of all nonappropriated fund instrumentalities (NAFIs). *Id.*, *citing* OMB, *Study of Procurement Payable for Nonappropriated Funds* (Aug. 1975).

As noted in the 1977 GAO report, defining the terms "nonappropriated funds," "nonappropriated fund instrumentalities" (NAFIs), or "nonappropriated fund activities" poses challenges. Contributing to the confusion is that the terms have been used interchangeably and without necessarily recognizing the differences between appropriated and nonappropriated funds. The term "appropriated funds" refers to funds provided in a regular annual appropriation act or a law enacting a permanent, indefinite appropriation.[242] Both types of legislation authorize the obligation and expenditure of funds and designate the funds to be used. 63 Comp. Gen. 331, 335 (1984). *See also* GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 21. Permanent, indefinite appropriations include gift acceptance and use authority, revolving funds, working capital funds, and franchise funds. Nonappropriated funds would include funds that are *not* derived from an annual appropriation act or a law enacting a permanent, indefinite appropriation. As such, these funds are generally not subject to the same fiscal controls as appropriations.

In a broad sense, there are two types of NAFIs: morale, welfare, and recreational (MWR) entities (armed forces NAFIs with an historical basis) and all other NAFIs. While the armed forces NAFIs have common historical roots, there often is not much commonality among non-armed forces NAFIs. Historically, the armed forces NAFIs were organized to meet

[242] There has been some controversy over what constitutes a continuing permanent, indefinite appropriation, a discussion of which is contained in Chapter 2, section B.1.

MWR needs of military and their dependents.[243] DOD describes the importance of MWR programs as follows:

> "MWR programs are vital to mission accomplishment and form an integral part of the non-pay compensation system. These programs provide a sense of community among patrons and provide support services commonly furnished by other employers, or other State and local governments to their employees and citizens. MWR programs encourage positive individual values, and aid in the recruitment and retention of personnel. They provide for the physical, cultural, and social needs and general well-being of Service members and their families, providing community support systems that make [DOD] bases temporary hometowns for a mobile military population."

DOD Instruction 1015.10, *Programs for Military Morale, Welfare, and Recreation (MWR)*, ¶ 4.2 (Nov. 3, 1995). *See also* 58 Comp. Gen. 94, 98 (1958) (noting that DOD "NAFIs exist to help foster the morale and welfare of military personnel and their dependents").

DOD defines NAFIs as:

> "Nonappropriated Fund Instrumentality (NAFI). A [DOD] organizational and fiscal entity that is supported, in whole or in part by [nonappropriated funds]. It acts in its own name to provide or assist the Secretaries of the Military Departments in providing programs for [DOD] personnel. It is not incorporated under the law of any State or the District of Columbia, but has the legal status of an instrumentality of the United States."

Department of Defense Instruction 1015.15, *Procedures for Establishment, Management, and Control of Nonappropriated Fund Instrumentalities*

[243] Serving the MWR needs of the armed forces members and their families with goods and merchandise purchased through NAFIs is not limitless. NAFIs provide items and services for personal consumption, not for business, profit-making motives. *See generally Covill v. United States*, 959 F.2d 58, 59 (6th Cir. 1992) (noting that a Coast Guard warrant officer received a punitive letter of reprimand because he purchased merchandise from an armed forces NAFI purportedly for personal use, but instead used the merchandise in his restaurant where he sold it at retail to the general public).

and Financial Management of Supporting Resources, encl. 2, ¶ E2.1.12 (May 25, 2005). In discussing a suit brought by an employee of a military officers' club (a DOD NAFI), one court, using the phrase "nonappropriated fund activity" instead of NAFIs, said:

> "A non-appropriated fund activity is one to which the government has initially provided funds to permit it to begin operation. The governmental loan is repaid out of the profits earned by the activity. Thus, the activity is created by the government with governmental funds for governmental personnel, and is administered by governmental employees for the use and benefit of the United States."

Bowen v. Culotta, 294 F. Supp. 183, 185 (E.D. Va. 1968).

Although NAFIs are considered United States government instrumentalities, NAFIs are not federal agencies or government corporations. They also are not typical private or commercial enterprises. Like DOD, GAO has noted that a NAFI mainly operates with funds generated from its own activities:

> "NAFIs encompass a wide range of activities and resist a general definition. They share common characteristics in that they are associated with governmental entities and, to some extent, are controlled by and operated for the benefit of those Governmental entities. However, the essence of a NAFI is that it is operated with the proceeds of its activities, rather than with appropriated funds."

64 Comp. Gen. 110, 110–11 (1984). *See also* B-289605.2, July 5, 2002.

GAO has identified several characteristics of MWR NAFIs:

- The activity is established under the authority or sanction of a government agency with or without an initial advance of government funds.
- The activity is created and run by government officers or employees.
- The activity is operated for the benefit of government officers or employees and/or their dependents.

- The operations of the activity are financed by the proceeds therefrom.

B-167710-O.M., May 6, 1976, at 4. Although many NAFIs demonstrate these characteristics, GAO noted that they are not absolute and should be applied on a case-by-case basis. *Id*.

Other government entities funded with permanent, indefinite appropriations also may operate with the proceeds from their activities, including revolving funds and working capital funds, but those entities are not NAFIs unless Congress has established them as NAFIs. Unlike activities funded with permanent, indefinite appropriations, the common thread among armed forces NAFIs is that while they operate from the proceeds of their activities, the funds they collect are used for the collective benefit of the members of the armed forces, government officers or employees, and their dependents who generate them.

Congress has created some government entities and designated that they operate as nonappropriated fund instrumentalities or with nonappropriated funds. *See*, *e.g.*, 7 U.S.C. § 2279b (Graduate School of Department of Agriculture); 12 U.S.C. § 244 (Board of Governors of the Federal Reserve); *see also* B-217578, Oct. 16, 1986. These entities do not serve MWR needs of government employees. Unlike the armed forces NAFIs already discussed, these entities are statutory creations and any fiscal limitations are defined by their organic statutes. Armed forces NAFIs fulfilling MWR purposes have an historical basis and were not created by statute, although Congress, in some cases, has approved of or authorized such NAFI operations. *See*, *e.g.*, 10 U.S.C. § 2488.

Further complicating the discussion of NAFIs is the use of the term NAFI by some federal courts. The Federal Circuit and the Court of Federal Claims have used the term in cases discussing their jurisdiction. *See*, *e.g.*, *AINS*, *Inc. v. United States*, 365 F.3d 1333, 1343 (Fed. Cir. 2004) (holding that the court had no jurisdiction to hear case against U.S. Mint because it was a NAFI). *See also O'Quin v. United States*, 72 Fed. Cl. 20, 23–24 (2006); *McCafferty v. United States*, 61 Fed. Cl. 615, 616 (2004). The Federal Circuit's definition of a NAFI for purposes of its jurisdiction has resulted in classifying entities that operate with permanent, indefinite appropriations as NAFIs. *See AINS*, 365 F.3d 1333; *Core Concepts of Florida*, *Inc. v. United States*, 327 F.3d 1331 (Fed. Cir. 2003). *See also Furash & Co. v. United States*, 252 F.3d 1336 (Fed. Cir. 2001) (holding that the court had no jurisdiction to hear claims against the Federal Housing Finance Board because it was a NAFI).[244]

Although a permanent, indefinite appropriation is not reenacted each year in the annual appropriations process, it is an appropriation nonetheless. Consequently, GAO does not view revolving funds (permanent, indefinite appropriations) as NAFIs. GAO does not question, nor has it the authority to question, a court's determination of its own subject matter jurisdiction. The Federal Circuit recognizes that the weight of its authorities is limited in scope to its jurisdiction determination: "The authorities cited by the GAO to support [its position on what constitutes an appropriation], however, are not applicable to the [court's] non-appropriated funds doctrine in the same sense that they are applicable to federal appropriations law." *Core Concepts*, 327 F.3d at 1338.

2. Legal Status

a. Authority for Creation

As noted above, for the most part armed forces nonappropriated fund instrumentalities (NAFIs) are rooted in history and regulated by the military departments to assist in meeting the moral, welfare, and recreation (MWR) needs of their personnel. Some of these NAFIs later received statutory recognition. *See*, *e.g.*, 10 U.S.C. § 2488 (Secretary of Defense may authorize a NAFI to operate a military exchange and commissary store on a military base). *See also* B-167710-O.M., May 6, 1976 (noting that military departments established NAFIs under the departments' general regulatory authority). The fact that NAFIs originated from historical practice and later received congressional recognition does not affect their status. Indeed, with regard to military post exchanges, the Supreme Court stated: "That the establishment and control of post exchanges have been in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force of law." *Standard Oil Co. v. Johnson*, 316 U.S. 481, 484 (1942).

[244] For a further discussion of these decisions, see Chapter 2, section B.1.

b. Relationship to the United States Government

> "It would not be an exaggeration to call their legal status bizarre. They are operations of the federal government, yet they are not."[245]

Despite their peculiarities, nonappropriated fund instrumentalities (NAFIs) are now recognized as being federal instrumentalities, albeit "a special breed of federal instrumentality, which cannot be fully analogized to the typical federal agency supported by federal funds." *Cosme Nieves v. Deshler*, 786 F.2d 445, 448 (1st Cir. 1986), *cert. denied*, 479 U.S. 824 (1986).

In *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942), the State of California attempted to levy a tax upon military post exchanges. The California Motor Vehicle Fuel License Tax Act imposed a license tax on the privilege of distributing motor vehicle fuel. By its terms, the tax was inapplicable to fuel sold to the United States government. California insisted that Standard Oil levy the tax on sales it made to the U.S. Army Post Exchanges in California. In the suit to recover payment, Standard Oil (with the United States as *amicus curiae*) claimed the sales to the Post Exchanges were exempt under the Act. Standard Oil also argued that if the Act were construed to require payment on such sales, it would impose an unconstitutional burden upon instrumentalities or agencies of the United States. The California courts found for the state on both issues. *Standard Oil*, 316 U.S. at 482. The decision was appealed, however.

Upon appeal to the Supreme Court, the Court looked first to the legal status of the post exchange, examining the relationship between the United States and the post exchanges as demonstrated through the creation, regulation, and practices of the activity. *Id.* at 484. The Court recognized several factors: The post exchanges were established pursuant to regulations of the Secretary of War under authority granted by Congress originally in the Act of July 15, 1870, 16 Stat. 315, 319, and Act of March 1, 1875, 18 Stat. 337. *Id.* The commanding officer of an army post had virtually total authority to establish and manage the exchange. The supervisory councils for the exchanges consisted of the commanding officers of the post units and they served in that capacity without any compensation other than their regular pay. *Id.* The purpose of the post exchanges was to provide a convenient source of low priced goods for soldiers. *Id.* at 484–85. The government did not assume any of the financial obligations of the post exchanges, but

[245] Michael Francis Noone, *Legal Problems of Non-Appropriated Funds*, Mil. L. Rev. Bicentennial Issue, 357, 359 (1975).

government officers were responsible for the funds obtained. Profits were used only for the welfare, pleasure, and comfort of the troops. *Id.* at 485.

> "From all this, we conclude that post exchanges as now operated are arms of the government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes."

Id. Accordingly, the Supreme Court concluded, the state could not tax the fuel sold to the post exchanges. *Id.*

Lower federal courts have applied the *Standard Oil* analysis to determine whether NAFIs are immune from suit involving contract matters. In *Nimro v. Davis*, 204 F.2d 734 (D.C. Cir.), *cert. denied*, 346 U.S. 901 (1953), Nimro brought suit against the board members of a Naval Gun Factory Lunchroom Committee for "services rendered and expenses incurred." *Nimro*, 204 F.2d at 734. The board, composed of naval officers and civilian employees, argued that it was an instrumentality of the Navy Department, and therefore was immune from suit to the same extent as the department itself. To counter this defense, Nimro maintained that he was suing the members of the board in their representative capacity as custodians of a private fund, not as government employees. *Id.* at 735.

Noting the several factors considered in *Standard Oil,* the court held that the Naval Gun Factory Lunchroom Committee, a NAFI, was a United States government instrumentality because it was made up of the department's own personnel, acting officially under authority and direction of the Secretary in accordance with his instructions, to carry out a purpose declared by him to be an integral part of the department. *Id.* at 736. The court found the individuals comprising the Lunchroom Committee's board to be acting for and on behalf of the United States, and not in any private capacity. As such, the suit comprised an action against the United States that could not be maintained without its consent.[246] *Id.* at 736.

[246] In 1970, Congress waived sovereign immunity for contract claims arising against some NAFIs, including NAFIs closely affiliated with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, and Exchange Councils of the National Aeronautics and Space Administration. Pub. L. No. 91-350, 84 Stat. 449 (July 23, 1970), *codified at* 28 U.S.C. § 1491. *See also McDonald's Corp. v. United States*, 926 F.2d 1126, 1132–33 (Fed. Cir. 1991).

In *Automatic Retailers of America, Inc. v. Ruppert*, 269 F. Supp. 588 (S.D. Iowa 1967), Automatic Retailers sued members of the Employees Welfare Committee of the Des Moines Post Office Employees Association to enforce a contract for vending machine services. *Automatic Retailers*, 269 F. Supp. at 590. One employee member moved to dismiss the case, arguing that the suit was in essence against the Employee Welfare Committee, an instrumentality of the United States that was immune from suit.

Applying the elements set forth in the *Standard Oil* decision, the court held that the Employee Welfare Committee constituted an integral part of the Postal Service and was an instrumentality of the United States for purposes of suit. *Automatic Retailers*, 269 F. Supp. at 591. The court further determined that, although Automatic Retailers had named committee members in their individual capacity, the suit sought to compel the Employees Welfare Committee, and thus the United States, to act. Since the United States had not consented to suit, the court dismissed the case. *Id*. at 592. *See also Employees Welfare Commission v. Daws*, 599 F.2d 1375, 1378–79 (5th Cir. 1979). The court found that the committee was established pursuant to regulatory authority, the Postal Service appointed employees to carry out the contractual and managerial duties of the committee, the Postal Service regulated and controlled vending stands and machines, and the primary objective of the committee was to further the interests of the Postal Service. *Automatic Retailers*, 269 F. Supp. at 591.

However, there are also times when the action of a NAFI or its employees will not be attributable to the government. There was a time when, under contract with base exchanges, telegraph offices were routinely operated on military bases by NAFI employees. In 50 Comp. Gen. 76 (1970), the Nellis Air Force Base Exchange operated a telegraph office on the base under contract with Western Union. The contract between the exchange and Western Union stipulated that the exchange acted as the agent for Western Union. 50 Comp. Gen. at 77. Prospective government contract bidders telegraphed their bids within the required time frame for bid acceptance, but the bids were nevertheless delivered late to the contracting office by the telegraph office run by the base exchange. Under Army regulations, late bids are accepted if the delay is due to the government's mishandling of the bid but precludes consideration of late bids delayed by the telegraph company's error. *Id*. GAO held that where the base exchange acts as the agent for the telegraph company, as the contract stipulated in this case, the activity was not an instrumentality of the government and the exchange's actions were not attributable to the government. Accordingly, the bid here was deemed late due to mishandling by a telegraphy company's error and not considered in the procurement process. *Id.* at 80. *See also* B-186794, Nov. 11, 1976.

3. Sources of Funding: The Use of Appropriated Funds for Nonappropriated Fund Instrumentalities

> "Although for some purposes nonappropriated fund activities are considered instrumentalities of the Government, they are generally self-supporting and do not receive appropriated funds from the Congress."

B-215398, Oct. 30, 1984.

a. Self-Supporting or Subsidized?

As the name suggests, a nonappropriated fund instrumentality (NAFI) is "operated with the proceeds of its activities, rather than with appropriated funds." 64 Comp. Gen. 110, 111 (1984). That sounds simple enough, but the reality is not so simple. Part of the reason for this is that some people think the government should fund morale, welfare, and recreation (MWR) using appropriated funds, while others find that suggestion outrageous. Some argue for direct government support for the MWR services provided by NAFIs because there is a legitimate business need to provide MWR support for members of the armed forces. Others, like private retailers in competition with NAFIs, argue that recreational expenses should be paid for by the government through traditional procurement from the private sector, not by making NAFIs compete with the private sector. Still others argue that the taxpayers should not pay for any employee recreational expenses, advocating that NAFIs should be self-supporting and their profits used for MWR expenses. The tension between these factions has led to a complicated mix of appropriated and nonappropriated funding for NAFIs.

b. General Rule: Appropriations Not Available for Morale, Welfare, and Recreation unless Authorized by Congress

The general rule, established in early decisions, is that expenses associated with employee morale, welfare, and recreation (MWR) cannot be paid from appropriated funds unless specifically authorized by law. *See* 27 Comp. Gen. 679 (1948) (Navy appropriations not available to hire full-time or part-time employees for recreational programs for civilian employees of Navy); 18 Comp. Gen. 147 (1938) (river and harbor appropriation not available to provide recreational activities for workers). The rationale for the rule was that those types of expenditures would only have an indirect bearing on the purposes for which the appropriations were made. 27 Comp. Gen. at 681.

In addition, several laws specifically prohibited the use of appropriated funds for certain MWR expenses. As early as 1892, Congress passed legislation prohibiting the use of appropriated funds of the various armed forces for the exchanges; that legislation authorized the exchanges to use military buildings and transportation when not being used by the military. Act of July 16, 1892, ch. 195, 27 Stat. 174, 178, *codified at* 10 U.S.C. §§ 4779, 9779 (Army and Air Force, respectively). Congress has also specifically authorized the use of certain appropriated funds for MWR expenses. *See* 10 U.S.C. § 2241(a)(1) (authorizing the use of Operation and Maintenance (O&M) appropriations for MWR).[247] At the same time, however, Congress expressly prohibited the Department of Defense (DOD) from using appropriated funds for equipping, operating, or maintaining golf courses at DOD facilities or installations. Pub. L. No. 130-160, div. A, title III, § 312, 107 Stat. 1547, 1618 (Nov. 30, 1993), *codified at* 10 U.S.C. § 2491a(a).[248] In 1998, GAO interpreted this prohibition as precluding the use of appropriated funds to install or maintain pipelines for watering an Army golf course. B-277905, Mar. 17, 1998.[249] DOD argued that other laws permitted DOD to participate in water conservation projects and federal agency cooperative efforts to resolve water resource issues in concert with conservation of endangered species. GAO concluded that those laws did not override the prohibition of section 2491a. *Id.*

In a 1949 report on nonappropriated funds, GAO reported on the improper use of appropriated funds to support activities such as restaurants, stores, golf courses, and theaters, and recommended changes in accounting, billing, reimbursements, and legislation. GAO reported that there was a "widespread and growing practice . . . of withholding from the Treasury and diverting to unauthorized purposes substantial sums of money coming into the hands of persons in the service of the United States in connection with the performance of their official duties." B-45101, Aug. 10, 1949, at 1. GAO had several concerns: (1) whether these activities were authorized to withhold revenues, donations, and contributions arising from such

[247] Congress also has appropriated advances for the establishment of nonappropriated fund instrumentalities (NAFIs) which were to be repaid to the Treasury. *See* B-156167, July 18, 1967 (advanced appropriations to Midshipmen's Store Fund, a NAFI, to acquire a dairy farm). In some cases, Congress later repealed the requirement that a NAFI repay the Treasury the sums advanced. *Id.*

[248] Section 2491a(b) exempts from this prohibition golf courses at installations outside the United States or at remote and isolated locations as designated by the Secretary of Defense.

[249] B-277905 refers to 10 U.S.C. § 2246(a) as the statutory prohibition. In 2004, section 2246 was renumbered to be section 2491a. Pub. L. No. 108-375, div. A, title VI, § 651(d), 118 Stat. 1811, 1972 (Oct. 28, 2004).

activities; (2) the unreimbursed or "free" use of public property and funds in connection with revenue producing activities; and (3) GAO's lack of specific authority to audit NAFIs. *Id.* at 5–7. While not questioning the validity of NAFI purposes to meet MWR needs, GAO questioned whether Congress had by law authorized these types of expenditures and whether they should not be self-supporting. *Id.* at 7–8.

The rule appears to be simple—an agency may not use appropriated funds to support MWR needs or nonappropriated fund instrumentalities providing those needs unless specifically authorized by law. However, like many things in law and life, it is not, in fact, that simple.

c. The Current Trend: Use of Appropriated Funds

We have used the necessary expense doctrine to address whether appropriations are legally available for certain morale, welfare, and recreation (MWR) expenses of some agencies without nonappropriated fund instrumentalities (NAFIs). The cases have increasingly recognized that, given isolated or remote working conditions, certain items or services contribute directly to an agency's mission by enhancing employee morale and productivity. For example, in cases where employees are located at a remote site where MWR items and equipment would not otherwise be available and such expenses would be necessary for recruitment and retention of personnel, GAO has held that appropriated funds may be used to pay for MWR expenditures. *See*, *e.g.*, 54 Comp. Gen. 1075 (1975) (purchase of television set for crew on Environmental Protection Agency ship gathering and evaluating water samples on multiday cruises); B-144237, Nov. 7, 1960 (transportation of musical instruments, sports, and recreational equipment to isolated Weather Bureau installations in the Arctic); B-61076, Feb. 25, 1947 (purchase of ping pong paddles and balls by Corps of Engineers to equip recreation room on a seagoing dredge justified by policy in War Department regulations and necessary expense for the recruitment and retention of employees).

The military's use of appropriated funds for MWR expenses has differed from civilian agencies because, in the context of the necessary expense rule, it is easier for the military to justify MWR expenses due to the nature of its mission, the remoteness of many of its locations, and hardships imposed on military members and families.

In 1954, GAO considered whether the Department of the Air Force could use appropriated funds to pay for travel relating to the business of the Army and Air Force Exchange Service (AAFES). B-120139-O.M., Aug. 16, 1954. Since expenses for travel involving public business could be paid from appropriated funds, GAO analyzed whether travel involving AAFES business qualified as public business. The Comptroller General noted that AAFES is a government instrumentality under the executive control of officers of the services, who receive pay and allowances from appropriated funds while assigned to the exchanges. Thus, travel involving command supervision of exchanges is public business and the use of appropriated funds is reasonable. Command supervision may include travel for the purposes of inspecting, auditing, or investigating exchange activities, attending exchange conferences, coordinating exchange matters, or attending exchange schools and may be paid from appropriated funds as travel in connection with public business. The Department of the Air Force, however, could not use appropriations to pay for AAFES's operational expenses. Travel for the purpose of purchasing exchange supplies for resale related more to operational expense and not to command supervision and could not be considered as travel on public business. *Id.*

A few years later, GAO considered whether the Department of the Army could use appropriated funds to pay for travel by a member of the Army in order to participate in a field artillery basketball tournament as a nonparticipating coach. B-133763, Nov. 13, 1957. At issue was whether the travel was for public business. Army regulations provided that nonappropriated funds could be used to pay the expenses of military members participating in sports program activities. However, nonappropriated funds could not be used to pay expenses of official travel of military personnel when performing command supervision of the Army sports programs. Applicable travel regulations provided that travel conducted for public business (defined as relating to activities or functions of the service to which the traveler was attached) could be paid with appropriated funds. So, was the nonparticipating coach engaged in official government business or not? GAO held that while a tournament was recognized as part of athletic or recreational programs of the Army, it did not appear to be an activity or function of a field artillery battalion and would not constitute public business under the regulations. GAO advised the requestor to seek reimbursement from nonappropriated funds. *Id.*

In 1962, the Comptroller General was asked whether it was proper for the Air Force to use appropriated funds to pay for the modification, alteration, or repair of buildings or facilities used by a post exchange. B-147516-O.M., Jan. 24, 1962. Both the Secretary of Defense's authority and Air Force regulations supported the use of appropriations to maintain MWR programs. *Id.*, *citing* DOD Directive 1330.2 (Aug. 31, 1956), *and* Air Force

Regulation 170-4A (July 1, 1958). GAO noted that Congress had authorized exchanges' use of public buildings and in the past had authorized the use of appropriated funds for construction, equipment and maintenance of buildings for exchange activities. B-147516-O.M., at 3. While current appropriations did not include specific authorization for such expenses, GAO deferred to the interpretation of the military departments that when Operation and Maintenance appropriations were available for repair and maintenance of facilities generally, reference to "facilities" would include those used for MWR activities. For these reasons, the Air Force could use appropriated funds to pay for the repair and alteration of NAFI facilities. *Id.*

In other cases, GAO addressed whether military departments could use appropriated funds for leasing and other property services on behalf of NAFIs. In B-154547-O.M., Oct. 20, 1964, GAO was asked whether the Department of Defense (DOD) could use appropriated funds to lease hotel facilities for a NAFI. The business of the NAFI was to provide quarters for transient and retired military personnel and their families. GAO answered, "yes," albeit with some hesitation. DOD cited its authority to conduct all affairs for the department, including welfare activities, in addition to the availability of Operation and Maintenance (O&M) appropriation for welfare and morale. GAO originally said "not good enough," noting that DOD had no specific authority to lease a building for a NAFI. Unless DOD could provide another interpretation of its authority to lease facilities for NAFIs, GAO would conclude that DOD could not do so. *Id.* Subsequently, GAO altered course, because DOD was authorized to lease buildings for military purposes and MWR use could reasonably be construed to constitute a military purpose. B-154547-O.M., July 7, 1965.

In 1975, GAO analyzed whether the Air Force could acquire land solely for recreational purposes.[250] GAO looked to the Air Force's authority to conduct welfare functions and the availability of DOD O&M appropriations for welfare and recreation in conjunction with the availability of appropriations to acquire land by lease or purchase. Deferring to DOD's discretion in interpreting the extent of its authority and responsibilities, GAO agreed that sponsoring recreational and social activities could be considered activities with a military purpose and the Air Force could acquire land interests for such activities.

[250] Unnumbered case dated February 21, 1975, found in GAO Manuscript Volume 642, part B, appendix 10.

In 1977, GAO reported on NAFIs in DOD and concluded that, while NAFIs operated mainly with self-generated revenue, DOD was providing some appropriated fund support, including funding transportation which should have been funded by the NAFIs, for example, for transportation of merchandise for resale by NAFIs. GAO, *Unauthorized and Questionable Use of Appropriated Funds to Pay Transportation Costs of Non-Appropriated Fund Activities*, LCD-76-233 (Washington, D.C.: June 3, 1977). While GAO noted that annual DOD appropriation acts had generally provided funds for welfare and recreation, Congress had not specifically provided funds for transportation of merchandise for resale through NAFIs. *Id.* at 1. Thus, the use of appropriated funds for transportation of exchange goods was only permitted when the goods were carried on conveyances that are owned, leased, or chartered by the government, where the government was already obligated to pay for the space whether used or not. *Id.* GAO recommended that the Secretary of Defense: (1) direct the NAFIs to reimburse the paying appropriation for excess transportation costs; (2) institute procedures for properly charging NAFIs for transportation services; and (3) recover costs for improper appropriated fund support provided to NAFIs. *Id.* at ii–iii.

GAO also reported that the government spent over $600 million each year to subsidize DOD NAFIs. GAO, *Appropriated Fund Support for Nonappropriated Fund and Related Activities in the Department of Defense*, FPCD-77-58 (Washington, D.C.: Aug. 31, 1977). GAO reported that appropriated fund support was understated because of the failure to include certain costs, such as personnel costs, indirect costs, and other unrecognized costs. *Id.* at 19–25. In testimony on the findings of this report, GAO stated that the three major concerns with appropriated fund support were: (1) the use of military personnel to perform nonmilitary duties in NAFI activities; (2) the lack of a system for accurately reporting appropriated fund support; and (3) the lack of specific guidelines for providing appropriated fund support. GAO, *Appropriated Fund Support for Nonappropriated Fund and Related Activities of the Department of Defense: Testimony before the House Committee on Armed Services, Investigations Subcommittee* (Washington, D.C.: Sept. 27, 1977).

d. Other Issues in Appropriated Fund Support

Questions arise as to whether an agency may reimburse a nonappropriated fund instrumentality (NAFI) with appropriated funds for goods or services that the NAFI provides. In B-192859, Apr. 17, 1979, the Comptroller General considered whether the Army could reimburse a NAFI, a consolidated post housing fund that provided maid and custodian services, mowing and watering services, maintenance of roads, snow removal, and general policing services for common use areas in post housing. Although the Army was responsible for providing those services, it did not. The NAFI decided to provide the services and pay for them by charging the housing residents. Later, the NAFI decided to bill the Army for those services and seek reimbursements from the Army for the residents. GAO concluded that the NAFI could be reimbursed for those services for which the Army was responsible. The decision noted that obtaining services from a NAFI is tantamount to obtaining them from a nongovernmental source and that regular purchase orders should be used. In B-192859, the documents prepared and actions taken by the Army and the NAFI did not create a binding contract and no binding obligation on the government was created. Accordingly, any voucher to pay the NAFI for goods and services could not be repaid. However, for those services for which the Army was responsible and had received a benefit, the NAFI could be reimbursed on a *quantum meruit* basis. For those services that were not the responsibility of the Army, the NAFI could not be reimbursed with appropriated funds. For further discussion regarding contracting with a NAFI for goods and services see section C.4.b. of this chapter.

A related issue affecting NAFIs is the proper disposal or deposit of receipts from the sale of NAFI property or resulting from NAFI operations. In B-156167, July 18, 1967, the Navy asked whether the proceeds from a contemplated sale of the Naval Academy dairy farm could be credited to the Midshipmen's Store Fund. GAO noted that, by statute, federal agencies are required to deposit all proceeds from the disposition of excess property in the Treasury as miscellaneous receipts. Exceptions to this statute include property acquired with nonappropriated funds or appropriated funds that by law are reimbursable. The funds used to purchase the dairy farm were derived from the Midshipmen's Store Fund, a NAFI, or from an advance of appropriated funds that were by law reimbursable at the time of the advance. Consequently, any realized gain from the sale of the dairy farm could be credited to the Midshipmen's Store Fund. *Id.*

A different result is obtained when the proceeds of a transaction derive not from NAFI operations, but from official business of the government. The miscellaneous receipts statute (as discussed in Chapter 6, section E.2) requires government officials receiving money for the use of the United States to deposit the money in the Treasury. 31 U.S.C. § 3302(b). In *Reeve Aleutian Airways, Inc. v. Rice*, 789 F. Supp. 417 (D.D.C. 1992), the Air Force awarded a contract to a commercial air carrier to provide passenger and cargo service to a remote base in the Aleutian Islands. *Id.* at 419–20. Fares purchased directly or reimbursed by the government for its personnel, dependents, and contractor employees would provide the carrier's revenue. *Id.* at 421. In return for landing rights and ground support the contractor would pay a "concession fee" (*i.e.*, a rebate) for deposit to the base morale, welfare, and recreation (MWR) fund, a NAFI. The court found that the fees for the use of property of the United States were "public monies" and there was no authority in this case to divert those funds to an MWR fund. *Id.* Accordingly, the miscellaneous receipts statute required that such fees be deposited in the Treasury. *Id.*

In *Scheduled Airlines Traffic Offices, Inc. (SATO) v. Department of Defense*, 87 F.3d 1356 (D.C. Cir. 1996) (SATO), the Defense Construction Supply Center, a DOD agency, awarded a commercial travel office contract requiring the contractor to offer both official (government business) and unofficial (personal travel for government employees and dependents) travel services. The contractor was required to pay the government concession fees on both official and unofficial travel. Concession fees for official travel were deposited to the Treasury and fees for unofficial travel were deposited to the local MWR fund, a NAFI. *SATO*, 87 F.3d at 1357–58. The travel agency, SATO, had bid unsuccessfully on similar contracts in the past, losing the bid to a company that agreed to pay larger concession fees for unofficial travel. Through informal channels, it learned that the agency made its award determinations "largely to maximize payments to the local Morale Funds." *Id.* at 1358. SATO filed suit seeking declaratory and injunctive relief to prohibit the award of the contract. *Id.* Among other things, SATO claimed that the miscellaneous receipts statute did not permit the deposit of the concession fees into MWR funds, but compelled their deposit into the Treasury. *Id.* The government argued that this contract was different from the one in *Reeve Aleutian:* The concession fees were derived solely from unofficial travel paid for by private funds and were not government funds. *Id.* at 1362.

The Court of Appeals for the District of Columbia Circuit concluded that the fees were government funds. *Id.* at 1362–63. The travel agents paid them in consideration for government resources, such as the right to occupy agency space, utilize government services associated with the space, and serve as an exclusive on-site travel agent. *Id.* at 1362. Since the miscellaneous receipts statute requires the deposit into Treasury of "money for the government *from any source*," the government's argument about the private source of funds was rejected. *Id.* (emphasis in original). The *SATO* court noted that the concession fees were derived from procurements administered by a government agency in which the Morale Fund played no role. *Id.* at 1363. The court observed that "not only does the travel scheme at issue here divert to Morale Funds revenues that should be deposited in the Treasury, but it also creates incentives for government officials to reduce even those funds that are deposited in the Treasury." *Id.* Depositing the fees into MWR funds violated the miscellaneous receipts statute. *Id.* The decision left open the question of whether unofficial travel concession fees could be retained by an MWR fund if a NAFI administers the contract.

e. Borrowing by Nonappropriated Fund Activities

GAO has determined that some nonappropriated fund instrumentalities (NAFIs) have the authority to borrow funds from commercial sources. In B-148581-O.M., Dec. 18, 1970, GAO found that no federal law specifically prohibited the Army and Air Force Exchange Services (AAFES) (a military post exchange NAFI) from borrowing funds. GAO observed that the general laws governing borrowing by the United States, the use of appropriated funds and other financial transactions of the government have not been applied to NAFIs. Moreover, the United States is not a party to nor is it legally bound or obligated by the financial transactions of NAFIs, notwithstanding their status as federal instrumentalities immune from state taxation. GAO had previously noted that an Army regulation authorizes the borrowing of funds by post restaurants. 9 Comp. Gen. 411 (1930). Then current DOD regulations granted AAFES implied authority to borrow funds from private sources and such authority was considered a normal practice for a business operation like AAFES. B-148581-O.M., Dec. 18, 1970. However, GAO emphasized that such loans could not be on the credit of the United States.

4. Transactions with Federal Agencies

Since they are so closely involved with the federal government, it is not surprising that nonappropriated fund instrumentalities and the agencies they are associated with want to enter into transactions for the provision of goods and services. This section addresses these practices and the legal authority for such transactions.

a. Economy Act and Intra-Agency Orders

As a general matter, the federal government is one entity (or "person") for legal purposes. So, when agencies wish to obtain items or services from one another, they do not enter into contracts *per se*—a person cannot contract with himself. *See* Chapter 12, section B.1. One source of authority for agencies to obtain services from one another is by entering into reimbursable interagency agreements under the Economy Act. 31 U.S.C. § 1535. However, although nonappropriated fund instrumentalities (NAFIs) are instrumentalities of the United States government, the

Economy Act does not apply to NAFIs. 58 Comp. Gen. 94 (1978) (Army and NAFIs could not enter into intra-agency orders for services provided to Army).

The Comptroller General explained the rationale for this result in 58 Comp. Gen. 94 which involved the Army's use of intra-Army orders for obtaining goods and services from NAFIs. GAO emphasized that the Economy Act authority involves the transfer of moneys from one appropriation account to another for services provided. In the case of a NAFI, by definition, the transfer would not involve an appropriation account. (While an instrumentality of the government, NAFIs are not federal agencies and do not have appropriated fund accounts.) Recognizing their connection to the government, the Comptroller General noted that "they differ significantly from other Governmental activities, particularly with respect to budgetary and appropriation requirements." *Id.* at 97. It was those differences, rather than their status as government instrumentalities, which the Comptroller General found controlling. 58 Comp. Gen. at 97. The Comptroller General further noted that Congress has no direct control, through appropriations, over the accounts of the NAFI (and neither did GAO, through its account settlement authority). Thus, obtaining goods and services from a NAFI is "tantamount to obtaining them from non-Governmental, commercial sources." *Id.* at 98.

Similarly, when considering the use of interagency agreements between federal agencies and the Graduate School of the Department of Agriculture, the Comptroller General again determined that the Economy Act did not apply to this statutorily created NAFI. 64 Comp. Gen. 110, 113 (1984) (decision concluded that the Government Employees Training Act, 5 U.S.C. § 4104, also did not constitute authority for agreements between federal agencies and NAFIs for the same reasons).

b. Contracting to Sell Goods and Services to Agencies

Noting that nonappropriated fund instrumentalities (NAFIs) exist primarily to help foster the morale, welfare, and recreation needs of government officers and employees, the Comptroller General, at times, has questioned whether it is appropriate for federal agencies to procure goods and services from the NAFI for the benefit of the federal agency. 58 Comp. Gen. 94, 98 (1978). Despite this observation, GAO has recognized circumstances in which it may be appropriate for agencies to procure goods and services from NAFIs through the competitive procurement process and sole sourcing procurements.

With regard to participation in the competitive procurement process, the Comptroller General has stated that obtaining services from a NAFI is "tantamount to obtaining services from nongovernment commercial sources" and, therefore, NAFIs may compete to provide goods or services to agencies in the competitive procurement process. 68 Comp. Gen. 62, 66 (1988) (Department of Agriculture Graduate School may compete in competitive procurement for operation and maintenance of a federal agency's training laboratory); 64 Comp. Gen. 110, 111–12 (1984) (Department of Agriculture Graduate School may be an appropriate recipient of sole source or competitive contract for training of federal employees); B-215580, Dec. 31, 1984 (Army could not purchase child care services from a NAFI *via* intra-agency order, but could use a regular purchase order). The Comptroller General has also stated that "a NAFI may compete in, and be awarded a contract under a competitive procurement unless otherwise precluded by its charter from doing so." 64 Comp. Gen. at 112. *See also* B-289605.2, July 5, 2002; B-274795, Jan. 6, 1997.

Sole-sourcing is another matter. There may be circumstances where an agency's contract with a NAFI for goods or services might be proper, such as where it is impracticable for an agency to obtain goods or services from sources other than NAFIs, or where only a NAFI could provide the urgently required goods or services. 58 Comp. Gen. at 98. In such cases, a sole source contract would be proper with appropriate justifications. *Id. See also* B-235742, Apr. 24, 1990 (proposed sole-source award to a NAFI for lunchroom monitoring services at Department of Defense dependent schools was proper). Whether a NAFI should provide goods or services will depend upon the factual circumstances. In 58 Comp. Gen. 94 (1978), it was improper for a NAFI to provide mattresses to the Army, but GAO did not have enough information on the record to determine whether the provision of janitorial and dry-cleaning services was also inappropriate. 58 Comp. Gen. at 99. In circumstances where it is impracticable for an agency to obtain goods or services from sources other than NAFIs, or where only a NAFI could provide the urgently required goods or services, sole-source contracts may be proper. *Id.* at 98.

In another case, the Army wanted to purchase "health and comfort kits" (shampoo, razors, chewing gum, and shoe polish) for soldiers in Korea from the Army and Air Force Exchange Service on a sole-source basis. B-190650, Sept. 2, 1980. GAO noted that the Army had not alleged that other sources were not capable of furnishing the items (nor could it make that statement since other sources were currently providing the items) and held that the fact that a NAFI is able to perform a contract with greater ease or at less cost than any other concern does not justify a noncompetitive procurement. *Id.* *See also* 58 Comp. Gen. at 98–99 (noting that, where circumstances require services or goods to be supplied by a NAFI because of exigent circumstances or practicality, appropriate sole source justifications should be prepared); B-235742, Apr. 24, 1990 (finding that use of sole-source justification papers prepared by the Army for contract with a NAFI for lunch room monitoring services was proper).

Where NAFIs provided services to federal agencies under inter- or intra-agency orders later found to be improper, GAO has allowed the activities to be reimbursed on a *quantum meruit* or *quantum valebant* basis, if ratified by an authorized contracting official. 58 Comp. Gen. 94, 100 (1978); B-199533, Aug. 25, 1980; B-192859, Apr. 17, 1979.

c. Statutory Authority to Enter into Contracts with Federal Agencies

Congress provided statutory authority for certain nonappropriated fund instrumentalities (NAFIs) to enter into contracts and agreements with other federal agencies or instrumentalities.

As part of the 1997 National Defense Authorization Act, Congress authorized agencies and instrumentalities of the Department of Defense that support operation of the exchange system, or a morale, welfare, and recreation (MWR) system to enter into contracts or other agreements with other federal agencies or instrumentalities. That statute specifically provides:

> "An agency or instrumentality of the Department of Defense that supports the operation of the exchange system, or the operation of a morale, welfare, and recreation system, of the Department of Defense may enter into a contract or other agreement with another element of the Department of Defense or with another Federal department, agency, or instrumentality to provide or obtain goods and services beneficial to the efficient management and operation of the exchange system or that morale, welfare, and recreation system."

Pub. L. No. 104-201, div. A, title III, § 341(a)(1), 110 Stat. 2422, 2488 (Sept. 23, 1996), *codified at* 10 U.S.C. § 2492.

The House Committee on National Security noted that exchanges and the MWR programs need to become more efficient, and determined that this could be achieved by permitting contracting between those activities and federal agencies. H.R. Rep. No. 104-563, at 278 (1996).

5. Nonappropriated Fund Instrumentality Procurement

Obviously, the armed forces nonappropriated fund instrumentalities (NAFIs) have to procure goods and services for morale, welfare, and recreation programs. This section addresses the applicable procurement policies and procedures. It is important not to just categorize an entity as a NAFI and then think it obvious what laws apply to the entity. For example, Federal Prison Industries, Inc (FPI) has been described by the Federal Circuit as a NAFI for purposes of its jurisdiction, but FPI was created by statute as a wholly owned government corporation. As such, FPI is subject to the Competition in Contracting Act. B-295737, B-295737.2, Apr. 19, 2005.

41 U.S.C. § 5—This law specifies that, subject to other authority or stated exceptions, "purchases and contracts for supplies or services for the government may be made or entered into only after advertising a sufficient time previously for proposals." 41 U.S.C. § 5. NAFI contracts are made for the benefit of government officers or employees in their individual personal capacity, not in their official capacity. There is no case law, however, addressing whether 41 U.S.C. § 5 applies to NAFI contracting.

Competition in Contracting Act—The Competition in Contracting Act of 1984 (CICA)[251] made several changes to procurement provisions, including GAO's bid protest authority (which we will discuss in section C.8.b(4) of this chapter). Its applicability depends on the definition of "federal agency" found in the Federal Property and Administrative Services Act of 1949, ch. 288, 63 Stat. 377, 378 (June 30, 1949), codified at 40 U.S.C. § 102. Federal agency includes an executive branch agency. 40 U.S.C. § 102(5). An executive branch agency includes any executive department or independent establishment, including wholly owned government corporations. 40 U.S.C. § 102(4). However, it does not include NAFIs which, although recognized as government instrumentalities associated with and supervised by government entities, operate without appropriated funds and are not federal agencies. B-270109, Feb. 6, 1996; B-228895, Dec. 29, 1987.

[251] Pub. L. No. 98-369, div. B, title VII, 98 Stat. 494, 1175 (July 18, 1984), *codified in scattered sections of* titles 10, 31, and 41, United States Code.

Armed Services Procurement Act of 1947 [252]—Although many NAFIs are related to the Department of Defense (DOD), the Armed Services Procurement Act and armed services and defense acquisition regulations do not apply to NAFIs because they operate with nonappropriated funds. 10 U.S.C. § 2303(a) (chapter applies to procurements for which payments are to be made from appropriated funds). *See also Ellsworth Bottling Company v. United States*, 408 F. Supp. 280, 285 (W.D. Okla. 1975); 58 Comp. Gen. 94, 98 (1978).

The armed forces have some regulations applicable to armed forces NAFI procurements with nonappropriated funds. *See*, *e.g.*, Army Regulation 215-1, *Military Morale*, *Welfare*, *and Recreation Programs and Nonappropriated Fund Instrumentalities*, ch. 5 (Oct. 24, 2006); Army Regulation 215-4, *Nonappropriated Fund Contracting* (Mar. 11, 2005). However, there are circumstances in which appropriated funds are used for armed forces NAFI purchases. *See*, *e.g.*, Army Regulation 215-1, ch. 5. In those cases, defense acquisition regulations will apply.

Federal Property and Administrative Services Act of 1949—NAFIs are not federal agencies for purposes of the Federal Property and Administrative Services Act of 1949 (Property Act). *See* B-270109, Feb. 6, 1996. Also, the provisions of the Property Act would not apply to armed forces NAFIs since section 302 of the Act excludes DOD instrumentalities from the provisions of title III of that Act. 41 U.S.C. § 252(a). *See* 66 Comp. Gen. 231, 235 (1987). *See also Ellsworth Bottling Co.*, 408 F. Supp. at 283–84. (Army and Air Force Exchange Service is not subject to the FPASA as it is part of the Departments of Army and Air Force).

Federal Acquisition Regulation—The Federal Acquisition Regulation (FAR), the governmentwide regulation which implements the Federal Property and Administrative Services Act, applies to federal agencies and acquisitions with appropriated funds. This would not include NAFI procurements with nonappropriated funds. 48 C.F.R. § 2.101(b). However, there are circumstances in which appropriated funds are used for NAFI purchases. *See*, *e.g.*, Army Regulation 215-1, ch. 5. If appropriated funds are used for a NAFI purchase, FAR and agency regulations would apply to the procurement. *See id.*; Army Regulation 215-4.

[252] Pub. L. No. 80-413, 62 Stat. 21 (Feb. 19, 1948), *codified at* 10 U.S.C. §§ 2202, 2301–2314, 2381, 2383.

6. Debts Due Nonappropriated Fund Instrumentalities

Despite their close association with the government, debts owed nonappropriated fund instrumentalities (NAFIs) are not debts owed the United States. Until 1966, this had a profound impact on the debt collection tools available to nonappropriated fund instrumentalities (NAFIs). In *Kenny v. United States*, 62 Ct. Cl. 328 (1926), an Army officer was assigned to serve as superintendent of a post exchange. A post exchange civilian employee lost post exchange receipts in the amount of $2,557.60. The superintendent was ultimately held responsible for payment of the amount not recovered and the amount was withheld from his pay. The court held that the receipts of a post exchange were not the property of the United States, the superintendent was not in arrears to the United States, and therefore, the loss could not be deducted from his statutory pay as an Army officer. *Id.*

Similarly, in 43 Comp. Gen. 431 (1963), GAO held that a debt owed to the Officer's Mess, a NAFI, could not be set off against an enlisted member's final pay because it did not constitute a debt to the United States. The result was the same in B-170400, Sept. 21, 1970, *aff'd*, B-170400, Feb. 2, 1971, where GAO held that a debt owed by a former employee of the Defense Supply Agency to the Officer's Mess and Post Restaurant, a NAFI, could not be set off against his final compensation or the amount to his credit in the Civil Service Retirement Fund.

Various federal laws, including the Federal Claims Collection Act of 1966,[253] as amended by the Debt Collection Act of 1982[254] and the Debt Collection Improvement Act of 1996,[255] provide federal entities, including "instrumentalities" of the government, with methods to collect their debts, such as salary offset and administrative offset of monies otherwise payable to debtors. 31 U.S.C. § 3701(a)(4) (includes instrumentality in the definition of executive, judicial, or legislative agency). The Debt Collection Improvement Act of 1996 amended the terms "claim" or "debt" to include "expenditures of nonappropriated funds." 31 U.S.C. § 3701(b)(1)(B). Also, Congress authorized the Department of Defense to collect debts owed by service members to its instrumentalities, including NAFIs, by deducting

[253] Pub. L. No. 89-508, 80 Stat. 308 (July 19, 1966), *codified at* 31 U.S.C. §§ 3701–3733.

[254] Pub. L. No. 97-365, 96 Stat. 1749 (Oct. 25, 1982).

[255] Pub. L. No. 104-134, § 31001, 110 Stat. 1321, 1321-358 (Apr. 26, 1996).

that amount from the member's pay in monthly installments. 37 U.S.C. § 1007(c).

Courts have held that for purposes of setoff under the Bankruptcy Code, where a debtor to a NAFI is owed a refund from the Internal Revenue Service (IRS), the refund may be set off against a debt owed to the NAFI. *In re Hanssen*, 203 B.R. 149 (Bankr. E.D. Ark. 1996).

7. Nonappropriated Fund Instrumentality Property

While a nonappropriated fund instrumentality (NAFI) is not a federal agency and in many cases is not supported by appropriated funds, its property is under government control. 40 Comp. Gen. 587 (1961). This case involved the commercial aircraft purchased by "military aero clubs" or "flying clubs," NAFIs which provide flying instruction, practice, and recreation for active duty and retired military personnel, Department of Defense civilian personnel, their families, and other personnel designated by the Department of Defense. GAO held that the aero club, as a NAFI, owned and used equipment in its capacity as a government enterprise and may own and use property and equipment only in that capacity. *Id.* at 589. Thus, GAO concluded that commercial aircraft purchased by the aero club were to be regarded as government conveyances under government travel regulations and government travelers could be reimbursed for the expenses of their operation in the circumstances specified by those regulations. *Id.* at 590.

In other cases involving property, the courts have held that NAFI property is property of the United States for purposes of a statute prohibiting theft of anything of value from the United States or any department or agency thereof. *See United States v. Sanders*, 793 F.2d 107 (5th Cir. 1986) (merchandise from the Army and Air Force Exchange Service is a "thing of value from the United States" under 18 U.S.C. § 641). *See also United States v. Towns*, 842 F.2d 740 (4th Cir.), *cert. denied*, 487 U.S. 1240 (1988) (the Army and Air Force Exchange Service, as an instrumentality of the United States, is an agency or department of the United States for purposes of 18 U.S.C. § 641 and theft of its property causes property loss to the United States).

8. Management of Nonappropriated Fund Instrumentalities

a. Regulation and Oversight

For armed forces nonappropriated fund instrumentalities (NAFIs), the Department of Defense (DOD) provides for their operations and carries out its oversight by regulation.[256] DOD's regulations cover everything from the creation of NAFIs, their purpose, funding, contracting, employment, audits, financial management, property management, to their dissolution.

Congress has also approved regulations of DOD's NAFIs, requiring specific departments and agencies to regulate such entities, and imposed specific requirements by statute. For example, in 1821 Congress approved the General Regulations for the Army which contained specific regulations regarding sutlers, the predecessors of Army MWR activities. Act of March 2, 1821, ch. 13, § 14, 3 Stat. 615, 616. Under 10 U.S.C. § 2783, the Secretary of Defense is required to establish regulations for DOD's NAFIs governing the purposes for which nonappropriated funds may be expended and the financial management of such funds to prevent, waste, loss, or unauthorized use. Section 2783 also establishes penalties for violations of the financial management regulations for civilian employees of DOD and members of the armed forces. Under 10 U.S.C. § 136(b), Congress established the position of the Under Secretary of Defense for Personnel and Readiness who is to perform duties which include exchanges, commissaries, and NAFIs.

b. Authority to Audit Nonappropriated Fund Activities

(1) <u>GAO jurisdiction</u>

In 1975, Congress gave GAO the authority to audit the operations and accounts of nonappropriated fund activities authorized or operated by the head of an executive agency to sell goods or services to government

[256] *See*, *e.g.*, Department of Defense Instruction 1015.08, *DoD Civilian Employee Morale, Welfare, and Recreation Activities (MWR) and Supporting Nonappropriated Fund Instrumentalities (NAFI)* (Dec. 3, 2005); Department of Defense Directive 1015.2, *Military Morale, Welfare, and Recreation*, June 14, 1995; Department of Defense Financial Management Regulation 7000.14-R, vol. 13, *Nonappropriated Funds Policy and Procedures* (Aug. 1994); Army Regulation 215-1, *Military Morale, Welfare, and Recreation Programs and Nonappropriated Fund Instrumentalities*, (Oct. 24, 2006); Army Regulation 215-4, *Nonappropriated Fund Contracting* (Mar. 11, 2005).

personnel and their dependents.[257] Several questions came up regarding what types of activities were covered under this authority. B-167710-O.M., May 6, 1976. GAO explained that the scope of the audit authority was not intended to apply to every nonappropriated fund activity since "the primary responsibility should rest with the operating agencies concerned." *Id.* at 1. GAO pointed out that the statute listed the military and National Aeronautics and Safety Administration exchanges and similar entities as examples of the types of activities to be audited under this authority.[258] *Id.* Since GAO could not identify a workable definition of a nonappropriated fund activity, it relied on the case law and statutes dealing with nonappropriated fund operations to identify the applicable elements used for determining whether a particular activity should be audited.[259]

The Comptroller General may audit the accounting systems and internal controls of nonappropriated fund instrumentalities (NAFIs) as well as internal or independent audits or reviews of those funds. 31 U.S.C. § 3525(a)(1)–(3). To carry out this authority, records and property of NAFIs are to be made available to the Comptroller General. 31 U.S.C. § 3525(c). The Comptroller General is authorized to audit NAFIs which receive income from vending machines on federal property and has access to any records necessary to conduct such audits. 20 U.S.C. § 107b-3.

(2) Other auditors

GAO has concluded that the Secretary of Defense was authorized by statute and regulations to require Department of Defense (DOD) internal auditors to audit DOD nonappropriated fund instrumentalities (NAFIs). B-148581.14-O.M., Aug. 17, 1976. Military audit agencies or certified public

[257] The General Accounting Office Act of 1974, Pub. L. No. 93-604, § 301, 88 Stat. 1959, 1961 (Jan. 2, 1975), *codified at* 31 U.S.C. § 3525.

[258] In the recodification of this provision in Pub. L. No. 97-258, 96 Stat. 963 (Sept. 13, 1982), the words "military or other . . . such as the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, Exchange Councils of the National Aeronautics and Space Administration, commissaries, clubs, and theaters" were omitted as surplus. *See* 31 U.S.C. § 3525, Revision Notes.

[259] These elements include whether: (1) the activity was established under the authority or sanction of a government agency with or without an initial advance of government funds; (2) the activity is created and run by government officers or employees and/or their dependents; (3) the activity is operated for the benefit of government officers or employees and/or their dependents; and (4) the operations of the activity are financed by the proceeds therefrom rather than by appropriations. B-167710-O.M., May 6, 1976.

accountants may audit military department NAFIs in accordance with DOD regulations and instructions. DOD Instruction 7600.6, *Audit of Nonappropriated Fund Instrumentalities and Related Activities* (Jan. 16, 2004); Army Regulation 215-1, *Military Morale, Welfare, and Recreation Programs and Nonappropriated Fund Instrumentalities*, ch. 18 (Oct. 24, 2006).

(3) Settlement of accounts

Under 31 U.S.C. § 3526 the Comptroller General adjusts and settles the accounts of the United States government and certifies balances in the accounts of accountable officers. Under the accounts settlement authority, the Comptroller General can take exception to an improper transaction, and hold the certifying or disbursing officer personally liable for the amount of money erroneously or improperly expended. 62 Comp. Gen. 40, 41 (1982). GAO can exercise its account settlement authority over government agencies, departments, or independent establishments. While 31 U.S.C. § 3525 provides GAO with audit authority over nonappropriated fund instrumentalities (NAFIs), it does not include accounts settlement authority over NAFIs. B-187004, Aug. 12, 1976; B-183034, Apr. 18, 1975.

(4) Bid protests

Prior to the enactment of the Competition in Contracting Act (CICA),[260] GAO's accounts settlement authority was the basis for its bid protest jurisdiction. B-218441, Aug. 8, 1985. Stated slightly differently, GAO viewed its authority to consider protests of contract awards as an extension of its authority to settle appropriated funds accounts of the government. B-185084, Nov. 28, 1975. The fact that an agency labeled funds as nonappropriated was not determinative of whether GAO would exercise jurisdiction over a bid protest. For example, in B-188770, Feb. 24, 1978, GAO reviewed the protest of a procurement for the design and construction of a commissary which was to be paid from a trust revolving fund account in which commissary surcharges were deposited. Originally, GAO dismissed the protest because the agency asserted that these funds were nonappropriated. B-188770, Apr. 14, 1977. Upon reconsideration, GAO determined that the commissary surcharge funds were appropriated funds because Congress had authorized the collection of the surcharge and

[260] Pub. L. No. 98-369, div. B, title VII, 98 Stat. 494, 1175 (July 18, 1984). GAO's bid protest responsibilities under CICA are codified at 31 U.S.C. §§ 3551–3556.

its use for commissary construction. 57 Comp. Gen. 311 (1978). GAO noted that this was consistent with its prior analysis that statutes authorizing the collection and credit of fees to a particular fund and making the fund available for specified expenditures constituted appropriations of funds.[261] *Id.* at 313. Since these were, in fact, appropriated funds, GAO did have accounts settlement authority for the funds and bid protest jurisdiction over the protest.[262] *Id.* at 315.

Since the enactment of CICA, GAO's jurisdiction over bid protests is no longer defined by its accounts settlement authority; rather, CICA established GAO bid protest jurisdiction over procurements by federal agencies as defined in the Federal Property and Administrative Services Act of 1949 (Property Act), Act of June 30, 1949, ch. 288, 63 Stat. 377, *codified at* 40 U.S.C. § 472. The definition of federal agency includes an executive branch agency.[263] 40 U.S.C. § 102(5). The definition of an executive branch agency includes any executive department or independent establishment in the executive branch of the government and wholly owned government corporations. 40 U.S.C. § 102(4). However, it does not include nonappropriated fund instrumentalities (NAFIs) which, although recognized as government instrumentalities associated with and supervised by government entities, operate without appropriated funds and are not, in that sense, federal agencies. B-270109, Feb. 6, 1996. *See also* 4 C.F.R. § 21.5(g).

This does not mean that GAO will never consider a protest involving a procurement by a NAFI. GAO will review a NAFI procurement where the protester asserts that the NAFI is acting as a conduit for the federal agency in order for the agency to circumvent applicable procurement statutes and regulations. B-270109, Feb. 6, 1996. For example, in B-256560, July 5, 1994, GAO considered a protest concerning a procurement by an employees'

[261] Legally, these funds were offsetting collections, a permanent, indefinite appropriation. See the discussion of various types of budget authority in Chapter 2, section A.2.

[262] In B-188770, GAO expressly overruled prior bid protest decisions to the extent that these prior decisions held that commissary funds were nonappropriated and that GAO would not consider protests involving procurements financed with such funds.

[263] The Property Act defines a federal agency as an executive agency or an establishment in the legislative or judicial branch of the government (except the Senate, the House of Representatives, and the Architect of the Capitol, including any activities under the Architect's direction). 40 U.S.C. § 102(5). This definition of a federal agency is adopted in CICA at 31 U.S.C. § 3551(3), and appears in GAO's bid protest regulations at 4 C.F.R. § 21.0(c).

association, which was a NAFI. The protester, a private-sector contractor, alleged that the Bureau of Prisons (BOP) was improperly diverting to the NAFI requirements for the procurement of vending machines used in its employee and visitor lounge areas in order to avoid applying procurement statutes and regulations, specifically, CICA's mandate for full and open competition. GAO determined that the vending machines in question were not part of BOP's requirements, and did not represent BOP's needs or objectives, and, therefore, BOP could not be said to be diverting a requirement to the employees' association. GAO concluded that the procurement was a legitimate NAFI procurement, properly intended to serve the needs of the employees' association and its members.

Further, the fact that an agency will receive some incidental benefit from a NAFI procurement does not convert it into an agency requirement. In B-256560, the protester argued that BOP was going to receive benefits from the vending machines being procured by the NAFI and, as such, the agency's appropriations would be improperly augmented. Notwithstanding the fact that the inmates may have had some limited access to buy items from the visitor lounge vending machines during prison visiting hours, the record showed, and GAO concluded, that these machines were not necessary to serve BOP's mission of inmate care. In other words, the vending machines in the visitor lounge primarily existed for the benefit of the employees' association and its members, and inmate use and benefit was only incidental. Access by the inmates did not convert the machines into an agency need or benefit.

GAO will make its own determination regarding its jurisdiction over a bid protest under CICA. In B-295737, B-295737.2, Apr. 19, 2005, Federal Prison Industries, Inc. (FPI), citing *Core Concepts of Florida*, *Inc. v. United States*, 327 F.3d 1331 (Fed. Cir. 2003), argued that GAO lacked jurisdiction to hear a protest of an FPI solicitation for shirt fabric because FPI is a NAFI. GAO disagreed with the court's characterization of FPI as a NAFI. FPI by statute is a wholly owned government corporation. *See* 31 U.S.C. § 9101(3)(E) (includes FPI in a list of wholly owned government corporations). Noting that the Property Act clearly included wholly owned government corporations in its definition of a federal agency, 40 U.S.C. § 102(4), a definition which, as previously noted, was adopted in CICA, GAO concluded that it has jurisdiction under CICA to hear protests arising out of procurements by wholly owned government corporations, such as FPI.

9. Sovereign Immunity

As instrumentalities of the United States government, nonappropriated fund instrumentalities are subject to and entitled to various duties and privileges of the United States government. One of these is the principle of sovereign immunity: The United States, as sovereign, cannot be sued without its consent.

a. Immunity from State and Local Taxation

Under the doctrine of sovereign immunity, the federal government of the United States is immune from taxation by state and local governments, a principle recognized by the Supreme Court in *McCulloch v. Maryland*, 17 U.S.(4 Wheat.) 316 (1819). This constitutional immunity extends to federal instrumentalities, including nonappropriated fund instrumentalities (NAFIs). *Standard Oil v. Johnson*, 316 U.S. 481, 485 (1942). This immunity prohibits a state taxing authority from imposing a markup on the purchases of NAFIs. *United States v. State Tax Commission of Mississippi*, 421 U.S. 599, 604–05 (1975). This is so even where that markup is not collected directly from the NAFI, but is collected by suppliers. *Id.* at 608–09.

The United States may consent to state taxation of its instrumentalities. For example, Congress permits collection of state taxes on gasoline and other fuels sold through post exchanges and other retail sales agencies of the federal government on military installations when such fuels are not for the exclusive use of the United States. 4 U.S.C. § 104. Congress also permitted states to levy taxes within federal areas to the same extent as though the area were not a federal area, with certain exceptions not relevant here.[264] 4 U.S.C. §§ 105–107.

b. Immunity from Suit

In 1970, Congress amended the Tucker Act to waive immunity for claims arising from some armed forces and National Aeronautics and Space Administration (NASA) nonappropriated fund instrumentalities (NAFIs) contracts. Pub. L. No. 91-350, 84 Stat. 449 (July 23, 1970), *codified at* 28 U.S.C. § 1491(a). Prior to 1970, the courts had consistently held that neither the NAFI, nor the agency supervising the NAFI, could be sued. *E.g.*, *Jaeger v. United States*, 394 F.2d 944 (D.C. Cir. 1968); *Kyer v. United States*, 369 F.2d 714 (Ct. Cl. 1966); *Keetz v. United States*, 168 Ct. Cl. 205

[264] This also had the effect of removing any immunity previously enjoyed by private concessionaires located on military installations since they are not instrumentalities of the United States. Stephen Castlen, *Let the Good Times Role: Morale, Welfare, and Recreation Operations*, Army Lawyer 3, 11 n.69 (1996).

(1964); *Pulaski Cab Co. v. United States*, 157 F. Supp. 955 (Ct. Cl. 1958); *Borden v. United States*, 116 F. Supp. 873 (Ct. Cl. 1953). The most famous of these decisions, the *Borden* case, involved a chief accountant employed by the American Army Exchange Service. He brought suit against the United States to recover salary withheld to recoup the loss of money stolen from a safe at the post exchange. Mr. Borden had contracted with the American Army Exchange Service to serve as a senior accountant. His contract stipulated that the employer could withhold salary for claims against him on account of fraud, breach of contract, or negligence. Army regulations regarding NAFIs stated that: "Exchange contracts are solely the obligation of the exchange. They are not government contracts and the distinction between exchange contracts and government contracts will be observed and clearly indicated at all times." *Borden*, 116 F. Supp. at 877.

The Court of Claims held that, under the *Standard Oil* decision,[265] Mr. Borden could not sue the Exchange Service because it was part of the government and the government had not consented to a suit against the Exchange Service. *Id.* In addition, Mr. Borden was precluded from suing the government because Exchange contracts were not contracts of the United States and the United States was not liable on such contracts. *Id.*

The dilemma for Mr. Borden was not lost on the Court of Claims. The court put its concerns this way:

> "The Army officers are given complete supervision of these Post Exchanges. They handle the money. They have control of the funds. The funds are used to make the Army more effective. In other words the officers run the show. The Exchanges are established and maintained for the benefit of Army personnel. That is their major, in fact their sole purpose. Even the civilian employees are subject to the Articles of War. For the Army to contend and to provide by regulation that it is not liable since it did not act in its official capacity would be like a man charged with extra-marital activity pleading that whatever he may have done was done in his individual capacity and not in his capacity as a husband.
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[265] *Standard Oil v. Johnson*, 316 U.S. 481 (1942).

> "We think it is proper that this situation should be called to the attention of the Congress. It seems fair that either the Post Exchanges or the Government should be subject to suit and liable for any breach of contract that had been duly signed by the Army Exchange Service."

Borden, 116 F. Supp. at 877–78.

Some nonmilitary NAFIs have benefited from this same paradox. For example, several courts have held that Post Office employee welfare committees constitute integral parts of the Postal Service and were instrumentalities of the United States immune from suit without the United States' consent. *Employees Welfare Committee v. Daws*, 599 F.2d 1375 (5th Cir. 1979); *Automatic Retailers v. Ruppert*, 269 F. Supp. 588 (S.D. Ia. 1967).

In response to these decisions, Congress, amended the Tucker Act (28 U.S.C. § 1491) in 1970 to waive sovereign immunity for claims arising from some armed forces and NASA NAFI contracts. The amendment to the Tucker Act provided that express or implied contracts with these specified NAFIs are considered express or implied contracts with the United States. Pub. L. No. 91-350, *codified at* 28 U.S.C. § 1491(a). Section 1491(a) now reads as follows:

> "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States."

The purpose of the amendment was to afford contractors a federal forum in which to sue the specified NAFIs by "doing away with the inequitable 'loophole' in the Tucker Act." *United States v. Hopkins*, 427 U.S. 123, 126 (1976) (holding that an employment contract may qualify as an expressed or implied contract of the United States for purposes of Tucker Act jurisdiction). *See also* H.R. Rep. No. 91-933, at 2 (1970). That waiver of sovereign immunity only applied to the NAFIs specifically designated in the amendment to the Tucker Act. *See Sodexho Marriott Management, Inc. v. United States*, 61 Fed. Cl. 229, 232–33 (2004) (MWR activity at Marine Corps installation); *Research Triangle Institute v. Board of Governors of the Federal Reserve System*, 962 F. Supp. 61 (M.D.N.C. 1997) (Board of Governors of the Federal Reserve System); *McDonald's Corp. v. United States*, 926 F.2d 1126, 1132–33 (Fed. Cir. 1991) (Navy Resale and Service Support Office). *See also Wolverine Supply, Inc. v. United States*, 17 Cl. Ct. 190 (1989) (applying the same standard for determining immunity from suit under the Tucker Act to suits under the Contract Disputes Act, 41 U.S.C. §§ 601–613).

According to the Federal Circuit, as originally proposed, the amendment would have applied to all NAFIs. *Denkler v. United States*, 782 F.2d 1003, 1007 (Fed. Cir. 1986), *citing* H.R. Rep. No. 91-933, at 6–7. It was changed to cover the armed forces and NASA NAFIs named in the amendment because some government agencies protested that certain activities that operated incidentally to them, like bowling leagues or baseball teams, should not be covered by the amendment. *Id.* The court said that Congress decided to include only those activities which it believed would have sufficient assets to pay costs resulting from the expanded jurisdiction. *Id.* Subsequently, the Court of Claims and the Federal Circuit have addressed their jurisdiction under the Tucker Act amended on a number of occasions. For additional discussion see section C.1.b of this chapter and subsequent case law.

c. Payment of Judgments

If a party overcomes the jurisdictional barriers to suing a nonappropriated fund instrumentality (NAFI) and prevails in the action, who pays the judgment? One of the most commonly cited principles regarding NAFIs is that the United States "assumes none of the financial obligations" of NAFIs. *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485 (1942). The same is true of judgments against NAFIs.

NAFIs generally pay tort judgments entered against them from their own funds. They may not use appropriated funds and have no access to the permanent, indefinite appropriation known as the Judgment Fund, 31 U.S.C. § 1304. *See* B-204703, Sept. 29, 1981. *See also Mignogna v. Sair Aviation, Inc.*, 937 F.2d 37, 42–43 (2nd Cir. 1991).

When a judgment arises out of an express or implied contract made by the Army and Air Force Exchange Service, the Navy Exchanges, the Marine Corps Exchanges, the Coast Guard Exchanges, or the Exchange Councils of NASA, the Judgment Fund pays the judgment. 31 U.S.C. § 1304(c)(1). The Exchange making the contract is required to reimburse the Fund for the amount paid. 31 U.S.C. § 1304(c)(2).

10. Status of Nonappropriated Fund Instrumentality Employees

Employees of armed forces nonappropriated fund instrumentalities (NAFIs) are neither employees of federal agencies nor employees of the United States government. Pub. L. No. 82-397, ch. 444, § 1, 66 Stat. 138 (June 19, 1952).[266] Public Law 82-397 provides that armed forces NAFI employees "shall not be held and considered as employees of the United States for the purpose of any laws administered by the Civil Service Commission." *Id.* Rather, they are employees of the instrumentality. *United States v. Hopkins*, 427 U.S. 123, 127 (1976). Congress never intended that armed forces NAFI employees receive the same level of protection as other federal employees. *McAuliffe v. Rice*, 966 F.2d 979, 980 (5th Cir. 1992). *See also* B-289605.2, July 5, 2002 (Armed forces NAFI employees are not covered by civil service laws). Congress enacted Public Law 82-397 in response to the Department of Defense's desire for flexibility by exempting armed forces NAFI employees from civil service type protections. *See McAuliffe*, 966 F.2d at 980. Where Congress has made NAFI employees subject to laws applicable to other federal employees, it has done so by expressly including them within the coverage of specific statutes. *See Perez v. Army and Air Force Exchange Service*, 680 F.2d 779, 787 (D.C. Cir. 1982).

a. Applicability of Civil Service Laws

Armed forces nonappropriated fund instrumentality (NAFI) employees are generally not deemed to be employees of the United States except as specifically provided by statute. 5 U.S.C. § 2105(c). Section 2105(c) provides:

> "An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard

[266] Public Law 82-397 is codified at 5 U.S.C. § 2105(c) and incorporated within the Civil Service Reform Act of 1978.

> exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of—
>
> "(1) laws administered by the Office of Personnel Management, except—
>
> (A) section 7204;
>
> (B) as otherwise specifically provided in this title;
>
> (C) the Fair Labor Standards Act of 1938;
>
> (D) for the purpose of entering into an interchange agreement to provide for the noncompetitive movement of employees between such instrumentalities and the competitive service; or
>
> (E) subchapter V of chapter 63, which shall be applied so as to construe references to benefit programs to refer to applicable programs for employees paid from nonappropriated funds; or
>
> "(2) subchapter I of chapter 81, chapter 84 (except to the extent specifically provided therein), and section 7902 of this title."

The final sentence of 5 U.S.C. § 2105(c) states that it does not affect the status of the specified NAFIs as federal instrumentalities.

(1) Civil Service Reform Act of 1978

The Civil Service Reform Act of 1978[267] and the Supreme Court in *United States v. Fausto*, 484 U.S. 439 (1988), streamlined and simplified the remedies available to federal employees for adverse employment actions. *McAuliffe v. Rice*, 966 F.2d 979, 981 (5th Cir. 1992). The Civil Service

[267] Pub. L. No. 95-454, 92 Stat. 1111 (Oct. 13, 1978).

Reform Act of 1978 created a comprehensive framework providing substantive and procedural rights and remedies for federal employees for performance actions, removals, or other adverse actions.[268] In *Fausto*, the Supreme Court held that the Civil Service Reform Act was the exclusive substantive and procedural framework for federal employee actions, and precluded judicial review of an employee's action under other laws. To conclude otherwise, said the Court, would allow such claims to undermine the goals of unitary decision making and consistency intended by the Act. *Fausto*, 484 U.S. at 449–51. Thus, the Supreme Court held that the Civil Service Reform Act precluded an employee who otherwise did not qualify for review under the Act from bringing a claim under the Back Pay Act. *Id.* at 454–55.

Congress deliberately exempted armed forces nonappropriated fund instrumentality (NAFI) employees from federal civil service rules. This enabled the armed forces to carry out the missions of NAFIs with the maximum possible personnel flexibility. *McAuliffe*, 966 F.2d at 981. With a few exceptions, armed forces NAFI employees are not covered by laws which apply to employees within the general federal service, including the Civil Service Reform Act. *McAuliffe*, 966 F.2d at 980–81; *Perez v. Army & Air Force Exchange Service*, 680 F.2d 779, 785–87 (1982). *See* 5 U.S.C. § 2105(c). Thus, the remedies available to NAFI employees are established by regulation of the agency administering the NAFI. *See McAuliffe*, 966 F.2d at 981; *Castella v. Long*, 701 F. Supp. 578 (N.D. Tex. 1988). Accordingly, NAFI employees are not entitled to appeal adverse actions to the Merit Systems Protection Board. *Perez*, 680 F.2d at 787; *Taylor v. Department of the Navy*, 1 M.S.P.R. 591 (1980). In the *McAuliffe* case, a former civilian employee of an Air Force NAFI sought review of the decision to terminate her employment under the Administrative Procedure Act, 5 U.S.C. § 701–706. The court held that the exclusivity of the Civil Service Reform Act precluded judicial review under the Administrative Procedure Act.[269] *McAuliffe*, 966 F.2d at 981.

[268] For a detailed discussion of the Civil Service Reform Act, see *Fausto*, 484 U.S. at 443–47.

[269] But compare *Helsabeck v. United States*, 821 F. Supp. 404 (E.D.N.C. 1993), in which the district court held that the Civil Service Reform Act did not preclude judicial review of a claim for nonmonetary damages against the government by an employee for the Cherry Point Marine Air Station food service for procedures used to discharge him. While the court permitted the plaintiff to amend his complaint with respect to nonmonetary claims, it did not specify what the nature of the review would be. There is no subsequent history of the case to determine what, if anything, the plaintiff did as a result, so we are unable to infer what effect this would have on NAFI employee rights.

Since they are not covered by the Civil Service Reform Act, armed forces NAFI employees have attempted to challenge actions taken against them through other statutory and constitutional rights. These include invoking Tucker Act jurisdiction, 28 U.S.C. § 1491, for certain NAFI contracts, and seeking damages for constitutional deprivations by a government official, as established in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

As we previously discussed, the Tucker Act waives sovereign immunity for claims arising from contracts of certain post exchanges described in 28 U.S.C. § 1491(a). The Supreme Court has recognized that Tucker Act jurisdiction may be premised on an employment contract, as well as on one for goods or other services. *Army & Air Force Exchange Service (AAFES) v. Sheehan*, 456 U.S. 728, 735 (1982). Relying on this theory, Army and Air Force Exchange Service employees sued their employers alleging that they were employed by contract. *Id.* at 735; *Moore v. United States*, 21 Cl. Ct. 537 (1990); *Orona v. United States*, 4 Cl. Ct. 81 (1983). However, the courts found that the specific employees in those cases, in fact, were not serving under employment contracts but had been appointed to their positions. *Sheehan*, 456 U.S. at 736–38. Consequently, the courts lacked jurisdiction over their claims. *Id.* at 741; *Moore*, 21 Cl. Ct. at 539–40; *Orona*, 4 Cl. Ct. at 84. Where an employee holds his employment through appointment, claims for entitlements to pay and allowances derive from applicable statutes and regulations not from a claimed contract of employment. B-280764, May 4, 2000 (*citing AAFES*, 456 U.S. at 735).

Feeling confused? This next case is not going to make you feel a whole lot better. In *Castella v. Long*, 701 F. Supp. 578 (N.D. Tex.), *aff'd*, 862 F.2d 872 (5th Cir. 1988), *cert. denied*, 493 U.S. 936 (1989), a former Army and Air Force Exchange Service (AAFES) employee sued for damages after he was fired for making false claims for travel expense reimbursements. *Id.* at 580–81. The court recognized that AAFES employees were not federal employees with rights under the Civil Service System. Instead, AAFES employees fall under the Army and Air Force regulations. *Id.* at 581. Based on sovereign immunity, the court dismissed those claims which sought relief from the NAFI, the government, and the individuals who acted in their *official capacities* to fire the claimant. *Id.* at 582. The court then dismissed those claims against the individuals acting in their *personal* *capacities*,[270] based on *Bush v. Lucas*, 462 U.S. 367 (1983). *See Castella*, 701 F. Supp. at 583–84.

Bush held that *Bivens*-type constitutional damage claims could not be brought for alleged constitutional violations associated with a claimant's employment in the federal government. The reason for this was that Congress had established "an elaborate remedial system" which was intended to address employment-related claims by federal employees. *Bivens*-type actions would unduly disrupt that statutory scheme. *Bush*, 462 U.S. at 388.

The *Castella* court realized that *Bush* involved federal employees subject to the Civil Service System, not armed forces NAFI employees. *Castella*, 701 F. Supp. at 583. (As we noted earlier, Congress intentionally exempted armed forces NAFI employees from that system.) Nevertheless, it noted that some other courts (including its own circuit court) had applied (or endorsed applying) *Bush* to armed forces NAFI employee claims. The courts rationalized their position with the explanation that while the Army and Air Force regulations were not approved by Congress, they were, nevertheless, "an elaborate remedial system" that should not be augmented by *Bivens*-style constitutional claims. *Castella*, 701 F. Supp. at 584.

Strange as it may seem, by treating NAFI employees *the same* as federal employees under *Bush*, the courts may actually have reinforced the congressional intention that armed forces NAFI employees be treated *differently* than federal employees, since absent a *Bivens*-type claim, the NAFI employees are left more to the regulatory mercy of the agencies than are federal employees under the statutory civil service rules.

The *Castella* court also held that the NAFI employee could not use the Privacy Act challenging the correctness of the records that supported the decision to remove him, to attack the removal decision. *Castella*, 701 F. Supp. 585. The court explained that the purpose of the Privacy Act was to allow for the correction of factual or historical errors. It was not intended to permit a plaintiff to reopen consideration of unfavorable

[270] In the *Bivens* case, the Supreme Court held that an individual citizen was entitled to sue for damages for alleged constitutional deprivations by a government official. *Bivens*, 403 U.S. at 396–97. The *Bivens* remedy, it should be noted, runs against the offending official in his private capacity, not against the government.

federal agency decisions. The court found that the plaintiff was really alleging only a wrongful personnel decision. *Id.* at 584–85.

(2) Other employment related laws

The following list of laws typically associated with federal employment discusses their applicability to armed forces nonappropriated fund instrumentalities (NAFIs).

Whistleblower Protection Act of 1989[271]—Employees of armed forces NAFIs are not protected by the Whistleblower Protection Act because they are excluded from the definition of employee for purposes of title 5, United States Code. *Clark v. Merit Protection Systems Board*, 361 F.3d 647, 650–52 (Fed. Cir. 2004) (adopting the analysis of *Clark v. Army & Air Force Exchange Service*, 57 M.S.P.R. 43, 46 (1993)). However, pursuant to 10 U.S.C. § 1587, armed forces NAFI employees are protected from reprisal for whistleblowing under procedures adopted by the Secretary of Defense.

Classification and Pay Rates and Systems—As stated in 5 U.S.C. § 2105(c), armed forces NAFI employees are federal employees for purposes of: 5 U.S.C. § 7204, which prohibits discrimination because of race, color, creed, sex, or marital status against individuals in the classification of employees, administration of pay rates and systems of employees; appointments to positions above GS-15 under 5 U.S.C. § 3324; and the systematic agency review of operations under 5 U.S.C. § 305.

Fair Labor Standards Act of 1938—NAFI employees under the jurisdiction of the armed forces fall within the coverage of the Fair Labor Standards Act of 1938 (FLSA). 29 U.S.C. § 203(e)(2)(A)(iv). Unlike federal employees in the competitive or excepted service, armed forces NAFI employees are under another personnel system pursuant to 5 U.S.C. § 2105(c). Since such employees are not covered by the laws which apply to federal employees, procedural protections for removals or other adverse actions affecting those employees are established by regulation of the agency supervising the armed forces NAFI. *American Federation of Government Employees, Local 1799 and Department of Army, Aberdeen Proving Ground, Maryland*, 22 FLRA 574, 576 (1986). An FLSA claim may be brought against an armed forces NAFI, to the extent of nonappropriated funds, since the government has waived immunity with regard to wage

[271] Pub. L. No. 101-12, 103 Stat. 16 (Apr. 10, 1989), *codified at* 5 U.S.C. §§ 1201–1222.

claims under the FLSA. *El-Sheikh v. United States*, 177 F.3d 1321, 1323–24 (Fed. Cir. 1999); *Cosme Nieves v. Deshler*, 786 F.2d 445, 450 (1st Cir.), *cert. denied*, 479 U.S. 824 (1986) (an FLSA claim does not come within the limited exceptions of the Tucker Act); *Morales v. Senior Petty Officers' Mess*, 366 F. Supp. 1305 (D.P.R. 1973).

Family and Medical Leave Act of 1993[272]—Armed forces NAFI employees are federal employees for purposes of Title II of the Family and Medical Leave Act of 1993. 5 U.S.C. § 2105(c)(1)(E). Title II of the Family Medical Leave Act grants federal employees, including armed forces NAFI employees, rights to leave from work in enumerated circumstances, but no private right of action to enforce the leave rights. *Mann v. Haigh*, 120 F.3d 34, 37 (4th Cir. 1997). In the *Mann* decision, since the plaintiff was not a federal employee covered by the Civil Service Reform Act of 1978, and he was not entitled to a judicial review under the Administrative Procedure Act, his right to appeal his termination was limited to procedural safeguards provided by the NAFI. *Id.* at 37–38.

Civil Service Retirement Act[273]—The Civil Service Retirement Act entitles certain government employees to deferred retirement annuities. Typically, in order to be eligible for a retirement annuity under the Civil Service Retirement Act, an individual must complete at least 5 years of "creditable" civilian service and must complete at least 1 year of "covered" civilian service in the final 2 years of employment. 5 U.S.C. §§ 8333(a), (b); *Dupo v. OPM*, 69 F.3d 1125, 1128 (Fed. Cir. 1995). Although most service in the federal government is creditable, service with an armed forces NAFI is not, as a general rule, creditable service for purposes of the Civil Service Retirement Act. Armed forces NAFI employees are excluded from the definition of an employee for purposes of laws administered by the Office of Personnel Management which includes the Civil Service Retirement Act. 5 U.S.C. § 2105(c). *See also Dupo*, 69 F.3d at 1128. However, Congress has provided that in limited circumstances, service with an armed forces NAFI may be creditable for purposes of the Civil Service Retirement Act. The Nonappropriated Fund Instrumentalities Employees' Retirement Credit Act of 1986, Pub. L. No. 99-638, 100 Stat. 3535 (Nov. 10, 1986), codified at 5 U.S.C. § 8332(b)(16), provides that the following service is creditable:

[272] Pub. L. No. 103-3, 107 Stat. 6 (Feb. 5, 1993), *codified at* 28 U.S.C. §§ 2601–2654.

[273] Pub. L. No. 95-454, 92 Stat. 1111 (Oct. 13, 1978), *codified as amended in scattered sections of* title 5, United States Code.

> "[S]ervice performed by any individual as an employee described in section 2105(c) of this title after June 18, 1952, and before January 1, 1966, if (A) such service involved conducting an arts and crafts, drama, music, library, service club, youth activities, sports or recreation program (including any outdoor recreation program) for personnel of the armed forces, and (B) such individual is an employee subject to this subchapter on the day before the date of the enactment of The Nonappropriated Fund Instrumentalities Employees' Retirement Credit Act of 1986."

Therefore, armed forces NAFI employees are entitled to civil service retirement credit for that service only if they meet the following criteria: (1) the service to be credited was performed for an armed forces NAFI between June 18, 1952, and January 1, 1966; (2) the service performed during that period involved conducting certain activities as listed in 5 U.S.C. § 8332(b)(16); and (3) the individual was an employee subject to the Civil Service Retirement Act on November 9, 1986. *Dupo*, 69 F.3d at 1128. In the *Dupo* case, the Federal Circuit found that Mr. Dupo was employed by a Navy Exchange for the time periods required for creditable service. *Id.* at 1128–29. However, he had not conducted the activities listed in section 8332(b)(16). The *Dupo* court held that for purposes of section 8332(b)(16), "conducting" means "to lead from a position of command" or "to direct the performance of" and employees who were administrative or support workers, such as Mr. Dupo, generally did not satisfy this requirement. *Id.* at 1129. Furthermore, Mr. Dupo had been separated from service prior to November 9, 1986 and did not meet the third requirement. *Id.* Thus, he was not entitled to a civil service retirement annuity.

Relocation Expenses—Sections 5724 and 5724a of title 5, United States Code, authorize an agency to pay transferred employees travel and transportation expenses, various allowances, and relocation expenses. However, these expenses are allowable only for "an individual employed in or under an agency." 5 U.S.C. § 5721(2). Thus, an individual is entitled to these expenses if the agency from which he transfers and the agency to which he transfers are within this coverage. NAFIs are not considered federal agencies for the purpose of receipt and disbursement of funds, including payments to their employees. B-215398, Oct. 30, 1984. Employees of a NAFI are not employed by an agency within the meaning of section 5721(1) and are not entitled to relocation expenses under sections 5724 and 5724a when they transfer to a federal agency. In 1996, however, Congress authorized the Department of Defense to pay for travel, transportation, and relocation expenses for employees of the department and Coast Guard NAFIs to the same extent authorized for transferred employees.[274] Pub. L. No. 104-201, div. A, title XVI, § 1605(a)(1), 110 Stat. 2422, 2736 (Sept. 23, 1996), *codified at* 5 U.S.C. § 5736.

Dual Compensation Laws—The dual compensation laws were intended to preclude "double dipping"—in other words, to protect the taxpayer from paying the same individual two salaries. One way this has been manifested is in a provision which dictated that the retired pay of a regular retired officer be reduced if he held a position with the United States government or if his retired pay together with his civilian pay exceeded level V of the Executive Schedule. 5 U.S.C. §§ 5531, 5532, 5533.[275] In this context, "position" is defined as—

> "a civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (*including* a Government corporation and *a nonappropriated fund instrumentality under the jurisdiction of the armed forces*) or in the government of the District of Columbia."

5 U.S.C. § 5531(2) (emphasis added).

Thus, for example, the retired pay of regular retired officers of the armed forces who are employed with armed forces NAFIs is subject to reduction in order to avert dual compensation.

There are NAFIs outside the Department of Defense that employ retired officers of the armed forces, and the courts have considered the applicability of the dual compensation laws to them. In *Denkler v.*

[274] The General Services Administration Board of Contract Appeals concluded that an employee transferring from an armed forces NAFI to a civilian agency was entitled to relocation expenses under the 1996 law. *See In the Matter of Emma Jane Medina*, GSBCA No. 16,136, 04-1 B.C.A. ¶ 32,423 (2003); *In the Matter of Kenneth A. Hack*, GSBCA No. 15,758, 02-2 B.C.A. ¶ 31,926 (2002).

[275] Section 5532 was repealed, effective October 1, 1999. Pub. L. No. 106-65, div. A, title VI, § 656(a)(1), 113 Stat. 512, 664 (Oct. 5, 1999). We mention this provision nevertheless because the cases which apply it also apply other dual compensation provisions. Both those cases and the other dual compensation statutory provisions remain valid.

United States, 782 F.2d 1003 (Fed. Cir. 1986), the Federal Circuit considered whether the phrase "including . . . a nonappropriated fund instrumentality under the jurisdiction of the armed forces" was intended to include other NAFIs such as the Federal Reserve Board, a statutorily designated NAFI. The Federal Circuit concluded that although there did not appear to be a reason for Congress to limit the purpose of the dual compensation laws, Congress had limited the provision to retired military officers employed by NAFIs of the armed forces and the court would not legislate in its stead. *Id.* at 1008. Thus, in the *Denkler* case, the salary of employees of Federal Reserve Board was not subject to pay reduction under dual compensation principles. *Id.*

GAO followed the *Denkler* decision in 67 Comp. Gen. 436 (1988) in a case involving three retired military officers who were employed by the Federal Reserve System (FRS), holding that the FRS was a NAFI not under the jurisdiction of the armed forces and therefore not subject to the dual compensation pay reduction. *Id.* at 440. In that decision, GAO also analyzed the laws governing the Office of Civilian Radioactive Waste Management, an organization within the Department of Energy, to determine whether this entity was a NAFI. Because its funds came from user fees which were deposited in the Treasury for use in paying the Office's expenses, GAO concluded that it was not a NAFI. *Id.* at 441. Thus, the *Denkler* decision was not applicable, and employees of the Office of Civilian Radioactive Waste Management were subject to the dual compensation provisions. *Id.* *See also* B-236979, Apr. 19, 1990 (since the Panama Canal Commission collects funds, deposits them into a revolving fund in the Treasury, and withdraws from the fund pursuant to appropriation acts, the Commission is not a NAFI and its employees are subject to dual compensation reductions).

Title VII of the Civil Rights Act and Age Discrimination in Employment Act—Employees and applicants for employment in the military departments and executive agencies as defined by title 5 of the United States Code are entitled to maintain actions under Title VII of the Civil Rights Act. 42 U.S.C. § 2000e-16(a). The Act defines executive agency employees to include "employees and applicants for employment who are paid from nonappropriated funds." *Id.; see* B-234746-O.M., Mar. 10, 1989. Such persons also are entitled to maintain actions under the Age Discrimination in Employment Act. 29 U.S.C. § 633a. The proper defendant to be sued under these statutes is the head of the department, agency, or unit, which in the case of the Army and Air Force Exchange Service (AAFES) is the Secretary of Defense or the Secretary of the Air

Force and the Secretary of the Army jointly. *Honeycutt v. Long*, 861 F.2d 1346, 1349 (5th Cir. 1988) (AAFES is not an executive department, agency, or unit; it is an instrumentality of the United States operating under the Department of Defense).

Employment for Purposes of Immigration Laws—Under the Immigration and Nationality Act, an employee of the United States, upon the completion of 15 years of service, is eligible for classification as a special immigrant entitled to special consideration with his application for admission to the United States. 8 U.S.C. § 1101(a)(27). Public Law 82-397, 66 Stat. 138 (June 19, 1952), now codified at 5 U.S.C. § 2105, includes employees of armed services NAFIs in the definition of United States employee. The Office of Legal Counsel has concluded that armed forces NAFI employees are to be considered employees of the United States for the purposes of applying 8 U.S.C. § 1101(a)(27). 1 Op. Off. Legal Counsel 258 (1977). The Office of Legal Counsel determined that as a general rule, armed forces NAFI employees should be regarded as employees of the United States unless a federal statute provides otherwise. *Id.* In the case of the Immigration and Nationality Act, the Office of Legal Counsel concluded that neither the language or history of the Act suggested that employee of the United States was intended to have a restricted meaning. Further, since Congress's primary intention was to facilitate the immigration of persons serving the government abroad and NAFI employees were not excluded, they were eligible for classification as special immigrants under the Act. There is no GAO case law addressing the application of immigration laws to NAFI employees.

Criminal Statutes—Some NAFI employees, when charged with bribery under a federal statute, have offered as a defense that they are not federal employees. *See Harlow v. United States*, 301 F.2d 361 (5th Cir.), *cert. denied*, 371 U.S. 814, *reh'g denied*, 371 U.S. 906 (1962). Mr. Harlow and his co-conspirators were employed by the European Exchange System, which was established to operate various facilities, including military Post Exchanges. They were responsible for contracting for the Exchanges. They established various Swiss bank accounts, solicited bribes from vendors seeking to do business with the Exchanges, and deposited the bribes into those accounts. In appealing their convictions for corruption, the defendants argued that, as NAFI employees, they were not federal employees and could not be charged under a federal statute making it a crime for any employee or person acting for or on behalf of the United States to solicit or receive bribes. Although the court agreed that they were not federal employees, it declined to dismiss those charges because the defendants could be included under the term "person acting for or on behalf of the United States." The court reasoned that NAFIs are instrumentalities of the United States government and the employees, acting on behalf of the Exchanges in making contracting decisions, were acting on behalf of the United States. *Id.* at 370–71.

Tort Claims—The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671–2680, waived most of the government's sovereign immunity from torts. While the FTCA does not specifically refer to NAFIs, courts in certain instances have interpreted the FTCA's coverage to include some NAFIs that the courts consider to be federal instrumentalities. *See, e.g.*, *Brucker v. United States*, 338 F.2d 427, 430 (9th Cir. 1964) (military flying club); *United States v. Hainline*, 315 F.2d 153, 156 (10th Cir.), *cert. denied*, 375 U.S. 895 (1963) (military flying club); *United States v. Holcombe*, 277 F.2d 143, 144 (4th Cir. 1960) (Naval Officers' Mess). However, an equestrian club on an Army base was not covered under the FTCA. *Scott v. United States*, 226 F. Supp. 864 (M.D. Ga. 1963), *aff'd*, 337 F.2d 471 (5th Cir. 1964), *cert. denied*, 380 U.S. 933 (1965). The court concluded that the club differed from other activities such as post exchanges because the club was not an integral part of the Army and not subject to the requisite degree of control and supervision by the Army. *Id.* at 868–69.

Injuries to military service members when they are involved in NAFI activities, such as social or flying clubs, are considered to be in connection with their military service, which bars recovery under the FTCA. *Pringle v. United States*, 44 F. Supp. 2d 1168 (D. Kan. 1999), *aff'd*, 208 F.3d 1220 (10th Cir. 2000); *Eckles v. United States*, 471 F. Supp. 108, 110–11 (M.D. Pa. 1979) (and cases cited therein).

The federal courts have found that injuries to employees of armed forces NAFIs arising in the course of employment are covered under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. ch. 18; *see* 5 U.S.C. §§ 8171, 8173), and not the Federal Employees Compensation Act (5 U.S.C. § 8101) or the FTCA. *Traywick v. Juhola*, 922 F.2d 786 (11th Cir. 1991); *Vilanova v. United States*, 851 F.2d 1 (1st Cir. 1988), *cert. denied*, 488 U.S. 1016 (1989); *Calder v. Crall*, 726 F.2d 598 (9th Cir.), *cert. denied*, 469 U.S. 857 (1984).

D. Trust Funds

On June 27, 1829, an English chemist and mineralogist, James Smithson, died in Genoa, Italy. In 1835, in Pisa, Italy, James Smithson's nephew died without heirs. Smithson's will had stipulated that, if his nephew died without heirs, his estate should go, in trust, "to the United States of America, to found at Washington, under the name of the Smithsonian Institution, an Establishment for the increase and diffusion of knowledge."

The President expressed doubts about the legality of accepting the gift and sought statutory authority to do so. In Congress, the decision to accept Mr. Smithson's gift was not open and shut. Senator John C. Calhoun led a determined minority that opposed accepting the gift. Senator Calhoun argued that the gift abridged states' rights and was beneath the dignity of the government to accept. Federalism and dignity aside, money was then, and still is, a useful commodity. Accordingly, by Act of July 1, 1836, ch. 252, 5 Stat. 64, Congress authorized the acceptance of the Smithson bequest. Shortly thereafter, President Andrew Jackson appointed Mr. Richard Rush to pursue the claim of the United States in the Court of Chancery of England. Two years later, the Chancery Court awarded Smithson's estate to the United States.

Mr. Rush sold Mr. Smithson's properties, converting the proceeds into gold sovereigns. On July 17, 1838, he sailed for home, taking with him 11 boxes containing 104,960 sovereigns, 8 shillings, and 7 pence, as well as Mr. Smithson's mineral collection, library, scientific notes, and personal effects. Arriving in New York after a 6-week voyage, Mr. Rush transferred the gold coins to the Treasury to be melted down.

Eight years passed before the Congress resolved what should be done with Smithson's bequest. Suggestions included a national university, a public library, common schools, and an astronomical observatory. Congress settled the matter by Act of August 10, 1846, ch. 178, 9 Stat. 102, creating the Smithsonian Institution and leaving it up to the new Institution's Board of Regents to decide on the specific activities to undertake for the faithful execution of the Smithson trust. Congress directed that the principal of the Smithson bequest, "being the sum of $541,379.63," be lent to the United States Treasury and invested in public debt securities. 20 U.S.C. § 54. Congress provided an appropriation of the interest from the securities for the perpetual maintenance and support of the Smithsonian Institution. *Id.*

The legislative history surrounding acceptance of the Smithson Bequest and the founding of the Smithsonian Institution suggests that this may well have been one of the earliest instances of the United States accepting the role and responsibilities of "trustee" for private funds.[276] Today the United States has many different "trust funds."

As a general proposition, the United States holds funds or property "in trust" in three different situations. Like the Smithson bequest, the federal government may hold funds in trust that are donated to (and accepted by) the United States.[277] Second, the United States may have a trust obligation with respect to property of others that it controls and manages. Third, the United States holds dedicated receipts appropriated to statutorily designated trust funds. In this last form of "trust funds" the funds are owned by the federal government and are not "trusts" in the common, legal sense of the word; rather, they are accounting mechanisms within the context of the federal budget.

These days, it is clear that the federal government may hold funds "in trust" for any number of reasons and for any number of groups. Equally clear is that further generalizations are fraught with danger. In particular, care needs to be exercised with respect to the scope of the government's legal obligations to trust beneficiaries.

Usually, the creation, terms, and conditions of a trust depend solely upon the statute creating or authorizing the trust. However, from a fiscal law perspective, there can be other factors in the equation. The source of the funds held in trust is one of those factors. As the discussion below shows, sometimes the source of the funds determines whether the United States has a trust obligation with respect to the funds it holds. It can also be significant where statutory restrictions on the use of appropriated funds are at issue.

Another factor is the "common law." The decisions of the accounting officers of the government, as well as those of the courts, frequently refer to or use common law trust concepts to analyze or resolve issues concerning property of others that the government holds or possesses. In

[276] *See National Intelligencer*, *Smithson Legacy*, May 2, 1836, *available at* www.sil.si.edu/Exhibitions/Smithson-to-Smithsonian/natinte3.html (last visited Nov. 28, 2007) (congressional debates focused on whether sovereign governments can accept funds in trust).

[277] These privately owned trust funds are not included in budget totals and are referred to as deposit funds. *See generally Analytical Perspectives*, *Budget of the United States Government for Fiscal Year 2008* (Feb. 5, 2007), at 342, 359, *available at* www.whitehouse.gov/omb/budget/fy2008 (last visited Nov. 28, 2007).

this way, common law trust concepts inform the decision makers' judgment as they give meaning to the governing statutes. However, sometimes it is the common law alone which creates and controls the government's obligations with respect to property it holds "in trust." *See, e.g.*, *United States v. Mitchell*, 463 U.S. 206, 225 (1983); *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1377–79 (Fed. Cir. 2001). As the court observed in *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001), "[t]he general 'contours' of the government's obligations may be defined by statute, but the interstices must be filled in through reference to general trust law." That is, once a statutory obligation is identified, courts may look to the common law trust principles to particularize that obligation. *Cobell v. Norton*, 392 F.3d 461, 473 (D.C. Cir. 2004).[278]

One further word of caution: As suggested earlier, there is no one model of a federal trust fund. In certain situations the federal government may act and may have the legal obligation to act as a fiduciary with respect to funds or property it holds for the benefit of specified groups or individuals. In dollar terms, the amounts held in these "true" trusts are relatively minor. There are, however, a relatively small number of statutorily designated "trust fund" accounts. While these accounts are designated trust funds for bookkeeping and accounting purposes, they are not trusts in the sense that Congress may not redefine eligibility of beneficiaries, alter benefit amounts, or redirect receipts to other programs or purposes. *Cf.* OMB Cir. No. A-11, *Preparation, Submission, and Execution of the Budget*, § 20.12(d) (July 2, 2007). It is these statutorily designated trust accounts that contain the overwhelming amount of federal trust fund dollars. The use of the term "trust" in connection with these funds, however, implies greater rights in the "beneficiaries" and obligations in the "trustee," *vis-à-vis* the trust *corpus*, than the law actually recognizes.

1. Federal Funds and Trust Funds

The federal government holds funds in over 1,000 accounts. GAO, *Compendium of Budget Accounts: Fiscal Year 2001*, GAO/AIMD-00-143 (Washington, D.C.: Apr. 2000). At the highest level of generality, these

[278] That same court, however, cautioned the district court below against abstracting common law trust duties from any federal statutory basis or simply copying a list of common law trust duties from the *Restatement of Trusts* and imposing them on federal trustees. *Cobell*, 392 F.3d at 471.

accounts are divided into two[279] major groups: federal funds and trust funds. OMB Cir. No. A-11, *Preparation, Submission, and Execution of the Budget*, § 20.12(b) (July 2, 2007). Within each of these two groups there are several types of accounts.

a. Federal Funds

Federal funds include general fund expenditure and receipt accounts, special fund expenditure and receipt accounts, and intragovernmental, management, and public enterprise revolving fund accounts. OMB Cir. No. A-11, *Preparation, Submission, and Execution of the Budget*, § 20.12(c) (July 2, 2007). Of these accounts only the general fund receipt accounts are typically used to account for collections that are not earmarked by law for a specific purpose. *See, e.g.*, GAO, *Federal Trust and Other Earmarked Funds: Answers to Frequently Asked Questions*, GAO-01-199SP (Washington, D.C.: Jan. 2001), at 9–10.

Public enterprise revolving funds and special funds are financed by earmarked receipts. A public enterprise revolving fund is credited with receipts generated by a cycle of businesslike operations with the public "in which the agency charges for the sale of products or services and uses the proceeds to finance its spending." GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 4. The Postal Fund is an example of such a fund. 39 U.S.C. § 2003. Its receipts come primarily from mail and service revenues and are available, through a permanent, indefinite appropriation, for authorized activities and functions of the Postal Service without further appropriation action. 39 U.S.C. § 2003(a).

Special fund accounts are established to record receipts collected from a specific source and earmarked by law for a specific purpose or program. OMB Cir. No. A-11, §§ 20.3, 20.12. As a general proposition, special funds operate like statutorily designated trust fund accounts with little substantive difference other than that the authorizing legislation does not

[279] Compare 1 TFM 2-1520, which breaks down the accounts into three classifications: general funds, trust funds, and special funds.

designate them as trust funds.[280] GAO-01-199SP, at 10. The Nuclear Waste Fund, 42 U.S.C. § 10222(c), is an example. It receives mainly two kinds of receipts: fees collected from civilian nuclear power operators and interest income from investments in United States securities. 42 U.S.C. §§ 10222(a), (e). The amounts in this fund are only available for radioactive waste disposal activities including the development, construction, and operation of authorized facilities for the disposal of high-level nuclear waste. 42 U.S.C. § 10222(d).

b. Trust Funds

The trust fund group is comprised of trust fund expenditure accounts, trust fund receipt accounts, and trust revolving fund accounts.[281] OMB Cir. No. A-11, *Preparation, Submission, and Execution of the Budget*, § 20.12(b) (July 2, 2007). The distinguishing characteristic of these accounts is that they represent accounts, designated by law as trust funds, for receipts earmarked for specific purposes and sometimes, but not always, for the expenditure of these receipts. *Id.* Trust fund expenditure accounts record appropriated amounts of trust fund receipts used to finance specific purposes or programs under a trust agreement or statute. Trust fund receipt accounts capture collections generated by the terms of the trust agreement or statute. 1 TFM 2-1520. These include nonrevolving accounts finance programs such as the Social Security and Medicare programs.[282]

The other type of trust account, trust revolving fund accounts, cover the permanent appropriation and expenditure of collections used to carry out a cycle of businesslike operations in accordance with a statute that designates the fund as a trust fund. One example is the Commissary Funds, Federal Prisons, 31 U.S.C. § 1321(a)(22), which uses profits earned on sales of goods and articles not regularly provided to inmates by the federal

[280] The fact that other general authority would provide for the moneys in the fund to be accounted for and disbursed as trust funds does not affect their classification where Congress has specifically provided for deposit of the funds in a special deposit account. 16 Comp. Gen. 940 (1937).

[281] See GAO, *Federal Trust and Other Earmarked Funds*, GAO-01-199SP (Washington, D.C.: Jan. 2001), for a discussion of the composition of trusts and other earmarked funds, including their treatment in the federal budget process.

[282] The Social Security and Medicare programs are each funded out of two trust funds—Social Security from the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Trust Fund, and Medicare from the Federal Hospital Insurance Trust Fund and the Federal Supplementary Medical Insurance Trust Fund. 42 U.S.C. §§ 401(h), 1395i, 1395t.

prisons for recreational and general welfare items. This category also includes a number of small trusts created to account for the expenditure of funds in accordance with a trust agreement where the government may act as a fiduciary. *See* 31 U.S.C. §§ 1321(b), 1323(c).

Over the last 50 years, trust fund receipts have grown both as a share of total federal receipts and as a share of Gross Domestic Product (GDP). Today, annual trust fund receipts make up about half of all federal receipts and about 10 percent of GDP. GAO-01-199SP, at 31. In fiscal year 1999, GAO identified 130 federal trust funds. *Id.* at 12.

c. Congressional Prerogatives

Generally accepted governmental definitions do not constrain Congress in its designation of an account as a trust fund or special fund account.[283] Congress may and does approach the matter on a case-by-case basis. As a result, it is possible to find trust funds that share features of special funds and *vice versa*. For example, Congress designated the Environmental Protection Agency's Hazardous Substance Superfund as a trust fund, 26 U.S.C. § 9507, while it established the Department of Energy's similar Nuclear Waste Fund as a special fund on the books of the Treasury. 42 U.S.C. § 10222(c).

2. The Government as Trustee: Creation of a Trust

In governmental parlance, the term "trust funds" covers a lot of territory. Of course, it is applied in the classical sense to nongovernmental funds entrusted to the government. But it is also applied to certain governmental funds held by the government that have been designated as trust funds by statute. In addition, it is applied to funds that are donated to the government for specified purposes. Each of these uses of the term is discussed below.

a. Property of Others Controlled by the United States

At common law, a trust is "a fiduciary relationship with respect to property." Under it, the person holding title to the property has "equitable duties" to manage the property for the benefit of another person. This fiduciary relationship arises as a result of an expressed intention to create it. *Restatement (Third) of Trusts*, § 2 (2003). Clearly, the United States can act as a trustee. *E.g.*, Memorandum for the Assistant Attorney General,

[283] "When I use a word . . . it means just what I choose it to mean—neither more nor less." Spoken by Humpty Dumpty in Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking Glass* 213 (1871) (*reprinted* Holt Rinehart, and Winston, 1961).

Civil Division, *Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund*, OLC Opinion, May 22, 1995, *citing* 2 Scott & Fratcher, *The Law of Trusts* § 95 (4th ed. 1987) ("as sovereign, the United States has the capacity to act as a common law trustee"). Equally clear is that the terms on which the United States agrees to act as trustee vary widely. Thus, the initial questions are when does a trust arise and what are the conditions under which the government, as trustee, operates. The discussion that follows examines these issues.

Two Supreme Court decisions involving claimed breaches by the United States of trust obligations owed to Quinault Reservation Indian allottees address when an actionable trust may arise. In *United States v. Mitchell*, 445 U.S. 535, *reh'g denied*, 446 U.S. 992 (1980) (*Mitchell I*), Indian allottees sued the United States for damages for mismanagement of forest resources. The Indian allottees argued that the General Allotment Act imposed on the United States a fiduciary obligation to manage the forest resources for their benefit.[284] The Indian allottees claimed that the breach of the fiduciary obligation created by the General Allotment Act entitled them to money damages for a breach of trust. The General Allotment Act required the United States to "hold the land . . . in trust for the sole use and benefit" of the allottees. *Mitchell I*, 445 U.S. at 541 (quoting the General Allotment Act, *codified as amended at* 25 U.S.C. § 348). The Supreme Court rejected the Indian allottee's argument, reasoning that Congress used the trust language of the General Allotment Act for the limited purpose of preventing alienation of allotted lands and immunizing the lands from state taxation. The act created only a "limited trust relationship" for those purposes, and did not "unambiguously provide that the United States has undertaken full fiduciary responsibilities as to the management of allotted lands." *Id.* at 542. Absent such responsibilities, the United States was not answerable for damages. *Id.* "Any right of the [allottees] to recover money damages for Government mismanagement of timber resources must be found in some source other than the [General Allotment Act]." *Id.* at 546.

Fortunately for the Indian allottees, another source of authority was available to support their claim, and *Mitchell I* was not the last word on the matter. In *United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*), the Supreme Court found that a trust duty did arise under several other statutes and regulations which, unlike the General Allotment Act, did

[284] Under the General Allotment Act, the federal government had allotted all of the Reservation's land in trust to individual Indians, or "allottees."

expressly authorize or direct the Secretary of Interior to manage forests on Indian lands. *Id.* at 224. The Court explained that "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian Allottees), and a trust corpus (Indian timber, lands, and funds)." *Id.* at 225.

Quoting from the Court of Claims decision in *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183 (1980), the Supreme Court emphasized that "where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists." *Mitchell II*, 463 U.S. at 225. This remains true even if "nothing is said expressly in the authorizing or underlying statute . . . about a trust fund, or a trust or fiduciary connection." *Id.* Of course, where Congress has provided otherwise with respect to such moneys or property, those directions will control. *Id.* In other words, to recover for a breach of trust, the beneficiaries must be able to establish a trust responsibility that mandates monetary relief by statute, treaty, or the government's assumption of management and control over the funds or assets.

Ten years after *Mitchell II*, the Supreme Court decided two companion cases brought by Indian tribes alleging breach of trust obligations by the United States. In *White Mountain Apache Tribe*, 537 U.S. 465, the Tribe sought compensation from the United States for breach of a fiduciary duty to maintain land and improvements at Fort Apache Military Reservation in Arizona held in trust for the Tribe but occupied by the federal government. Dating to 1870, Fort Apache was established on territory that later became the Tribe's reservation. In 1923 and again in 1960 Congress provided by statute that the fort would be "held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes for as long as they are needed for that purpose." Pub. L. No. 86-392, 74 Stat. 8 (Mar. 18, 1960). Exercising that right, the Department of the Interior had allowed the historic buildings to fall into such disrepair that some were condemned and others demolished. Citing the terms of the 1960 statute, the Tribe brought suit against the United States in the Court of Federal Claims for money damages to restore the properties.

Affirming *Mitchell I* and *II*, the Supreme Court ruled for the White Mountain Apache Tribe, finding that the federal government had breached its duty as trustee to preserve the trust *corpus*. Like the statutes at issue in *Mitchell II*, the court found:

> "The 1960 Act goes beyond a bare trust and permits a fair inference that the Government is subject to duties as a trustee and liable in damages for breach. . . . [T]he statute [invests] the United States with discretionary authority to make direct use of portions of the trust corpus . . . [A]n obligation to preserve the property improvements was incumbent on the United States as trustee. This is so because elementary trust law, after all, confirms the commonsense assumption that a fiduciary actually administering trust property may not allow it to fall into ruin on his watch. 'One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets.'"

Id. at 474–75 (citations omitted).

In the companion case to *White Mountain Apache Tribe*, the Supreme Court found that the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. § 396a, does not assign managerial control to the Secretary of Interior over coal leasing on Navajo land and, as in *Mitchell I*, imposing fiduciary duties on the government would be out of line with one of IMLA's principal purposes. *United States v. Navajo Nation*, 537 U.S. 488, 508 (2003). IMLA requires Secretarial approval before coal mining leases negotiated between Tribes and third parties become effective. *Id.* at 507. IMLA also authorizes the Secretary generally to promulgate regulations governing mining operations, 25 U.S.C. § 396d. *Id.* The Navajo Nation sought money damages from the United States, alleging a breach of trust in connection with the Secretary of Interior's approval of a coal lease amendment negotiated by the Tribe and a third party. Unlike the elaborate provisions at issue in *Mitchell II*, the Court found the IMLA and its regulations, like the Allotment Act in *Mitchell I*, do not give the federal government full responsibility to manage Indian resources for the benefit of the Indians. Nor does IMLA establish even a limited trust relationship. Rather, IMLA aims to enhance tribal self-determination by giving Tribes, not the government, the lead role in negotiating mining leases on tribal lands with third parties. *Navajo Nation*, 537 U.S. at 507–08.

Consistent with *Mitchell II*, one court recently observed: "The federal government has substantial trust responsibilities toward Native Americans. This is undeniable." *Cobell v. Norton*, 240 F.3d 1081 (D.C. Cir. 2001). In fact, the Supreme Court has recognized a general trust relationship with Indian tribes since 1831.[285] *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 476 (2003), *citing Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (characterizing the relationship between Indian tribes and the United States as "a ward to his guardian"). In recent years, Indian claimants have sought to compel the government to properly account for the funds it holds for them. For its part, the government has had to acknowledge that it does not know how many accounts it is responsible for, is uncertain of the balances in them, and lacks the records necessary to determine that information.[286] *See, e.g.*, GAO, *Financial Management: BIA's Tribal Trust Fund Account Reconciliation Results*, GAO/AIMD-96-63 (Washington, D.C.: May 3, 1996). *See generally* GAO, *Indian Issues: BLM's Program for Issuing Individual Indian Allotments on Public Lands Is No Longer Viable*, GAO-07-23R (Washington, D.C.: Oct. 20, 2006).

The claimants in *Cobell* brought a class action for injunctive relief and damages in response to the government's alleged mismanagement of individual Indian trust accounts. *Cobell v. Babbitt*, 30 F. Supp. 2d 24 (D.D.C. 1998). (The district court bifurcated the proceedings and placed the reconciliation of the accounts and the claims for damages on hold pending completion of the court's investigation regarding the claims of inadequate accounting.) Finding that the government had breached its fiduciary duties, the trial court remanded the matter to the government with orders to promptly discharge its fiduciary duties in accord with the court's delineation of them. The court also retained jurisdiction over the matter and directed the government to file quarterly reports. *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 56–57 (D.D.C. 1999). *See also Cobell*, 240 F.3d

[285] Congress's power under the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, however, is not limited by this general trust relationship with Indians. *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. United States*, 367 F.3d 650, 665–67 (7th Cir. 2004), *cert. denied*, 543 U.S. 1051 (2005). In that case, the court rejected the Tribe's argument that a gubernatorial concurrence provision in the Indian Gaming Regulations Act, 25 U.S.C. § 2719(b)(1)(A), violated the federal government's trust responsibility to Indians and rejected the Tribes argument that all Indian legislation enacted pursuant to the Indian Commerce Clause, which confers "plenary power to legislate in the field of Indian affairs" to Congress, must be rationally related to furthering that trust relationship. *Id.*

[286] Beginning in fiscal year 2000 the federal budget no longer included funds that are owned by Indian tribes but are held and managed in a fiduciary capacity by the government on behalf of the tribes. These Indian tribal funds were included in the budget totals beginning with the adoption of the unified budget in 1969 through fiscal year 1999 under the generic title "tribal trust funds." *See* GAO, *Federal Trust and Other Earmarked Funds: Answers to Frequently Asked Questions*, GAO-01-199SP (Washington, D.C.: Jan. 2001), at 8.

at 1092–94 (discussing the procedural history of the *Cobell* litigation). The government appealed. Citing *Mitchell II*, the Circuit Court of Appeals for the District of Columbia agreed that the government owes common law fiduciary obligations to the Indians. *Id.* at 1098. The court noted that those obligations have been reaffirmed in a number of statutory provisions which specify how those duties are to be carried out. *Id.* at 1100–02. Those obligations include, the circuit court held, a "duty to account" which can be compelled by the courts if unreasonably delayed or withheld. *Id.* at 1102–04. The circuit court agreed it had been delayed, and affirmed and remanded the matter to the district court. *Id.* at 1110.

Following years of appeals and some reversals of high-profile contempt citations against cabinet secretaries, the District of Columbia circuit, in reassigning the case to a different federal district court judge below, expressed its frustration that "five years later, no remedy is in sight, th[e] case continues to consume vast amounts of judicial resources, and growing hostility between the parties distracts from the serious issues in the case." *Cobell v. Kempthorne*, 455 F.3d 317, 335 (D.C. Cir. 2006), *cert. denied*, ___ U.S. ___, 127 S. Ct. 1876 (2007). On April 20, 2007, the district court ordered a hearing on the government's accounting project to determine, among other things, whether the government has cured the breaches of its fiduciary duty. *Cobell v. Kempthorne*, Civ. A. No. 96-1285 (JR) (D.D.C. Apr. 20, 2007). While the *Cobell* litigation continues, a similar Indian trust case brought by over 4,000 individuals is winding its way through the court of federal claims. *See Wolfchild v. United States*, 72 Fed. Cl. 511 (2006).[287]

In *Fors v. United States*, 14 Cl. Ct. 709 (1988), the Claims Court rejected claimant's argument that the Marine Corps had a fiduciary duty to invest[288] the accumulated back pay of a deceased Marine Corps pilot either as a result of the Missing Persons Act or the common law. The court pointed out that essential to the holding in *Mitchell II* was the Supreme Court's finding that the statutes and regulations at issue established fiduciary

[287] For more information on the Indian trust litigation, see Ross O. Swimmer, *Separating Fact from Fiction: The Department of the Interior and the Cobell Litigation*, 33-SPG Hum. Rts. 7 (2006); Jamin B. Raskin, *Professor Richard J. Pierce's Reign of Error in the Administrative Law Review*, 57 Admin. L. Rev. 229 (2005).

[288] For more on a trustee's "duty to invest," see section D.5 of this chapter.

obligations of the United States in the management of Indian resources.[289] For the period at issue in *Fors*, there was no statutory or regulatory basis to charge the government with the fiduciary duties of a common law trustee. *Id.* at 718–19. To the contrary, the applicable statutes and regulations limited the Marine Corps authority to pay interest only until 90 days after a determination of death. *Id.*

Likewise, in *Franklin Savings Corp. v. United States*, 56 Fed. Cl. 720 (2003), the Claims Court rejected the argument of a failed savings and loans institution that the government's seizure of the savings and loans under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. § 1464(d)(2)(F), imposed *Mitchell II*-type fiduciary duties on the government. Unlike the timber management statutes at issue in *Mitchell II*, the claims court found that FIRREA, the banking statute relied on by the failed savings and loans, did not provide a substantive source of law which imposes fiduciary duties on the government. *Id.* at 752. "[N]othing in FIRREA demonstrates congressional intent to create a fiduciary duty whereby government must assure profits when seizing [a savings and loans]. . . . [I]mposing an enforceable trust relationship on the government in this case is simply antithetical to the regulatory purpose and congressional intent of FIRREA and the banking statutes in general." *Id.* at 753.

The Department of Veterans Affairs (VA) "personal funds of patients" trust fund (discussed in Chapter 9, section B.3.c) contains moneys of patients who, as a matter of convenience, deposit money with VA for safekeeping and use during their stay at VA hospitals. *See* 38 U.S.C. § 5504. The money is patient money, not government money, and the Comptroller General has treated such funds as held in trust by the United States. 68 Comp. Gen. 600 (1989).

The Office of Legal Counsel (OLC) has applied a *Mitchell II* analysis with respect to moneys contained in inmates' Prisoners' Trust Fund accounts. Memorandum for the Assistant Attorney General, Civil Division, *Fiduciary*

[289] *See also Hohri v. United States*, 782 F.2d 227, 243–44 (D.C. Cir. 1986), *vacated and remanded on jurisdictional grounds*, 482 U.S. 64 (1987) (neither narrow regulatory obligations or alleged contractual commitments impose fiduciary obligations on the United States with respect to Japanese-American internees during World War II); *Han v. United States*, 45 F.3d 333 (9th Cir. 1995) (United States has no general fiduciary obligation to bring suit against the State of Hawaii for alleged breach of trust obligations owed by the state to native Hawaiians).

Obligations Regarding Bureau of Prisons Commissary Fund, OLC Opinion, May 22, 1995. In the 1930s, the Department of Justice established Prisoners' Trust Funds at each federal prison for inmates to deposit money earned or sent to them while in prison. Inmates could use amounts in their accounts to purchase articles from prison commissaries. In the Permanent Appropriation Repeal Act of 1934, ch. 756, 48 Stat. 1224 (June 26, 1934), Congress classified the Prisoners' Trust Fund (and the related Commissary Fund discussed below) as a "trust fund." *See* 31 U.S.C. §§ 1321(a)(21), (a)(22).

OLC found three reasons to conclude that 31 U.S.C. § 1321 and the rules set forth in the Justice Department circular establishing the funds impose fiduciary obligations on the Bureau of Prisons with respect to amounts held in the Prisoners' Trust Funds. First, the money in the Prisoners' Trust Fund account is the inmate's property even though the Bureau of Prisons has assumed control over the property. Second, the circular establishing the funds requires the Bureau of the Prisons to act in the best interest of the prisoners in managing their funds, and third, the Bureau has always viewed its relationship to the Prisoners' Trust Funds as a fiduciary one.[290]

The Thrift Savings Fund established by the Federal Employees' Retirement System Act of 1986, 5 U.S.C. §§ 8401–8479, is also a trust in the classic sense of the term. The act provides federal employees a capital accumulation plan similar to those found in the private sector. Employees and the employing agencies contribute to the Thrift Savings Fund. Earnings on investments supplement amounts contributed to the fund. 5 U.S.C. §§ 8432(a), (c), and 8437(b). All sums contributed to the Thrift Savings Fund by or on behalf of an employee as well as earnings on those contributions are held in trust for the employee. 5 U.S.C. § 8437(g). The Thrift Savings Fund is managed in accordance with the investment policies established by the Federal Retirement Thrift Investment Board. 5 U.S.C. § 8472. The members of the Board are specifically designated fiduciaries.

[290] There can be no doubt that the government has fiduciary obligations with respect to the Prisoners' Trust Fund and VA Patient Funds mentioned above. Yet, we wonder: Do those funds really constitute "trusts" or are they "bailments"? *Cf*. B-153479, Apr. 15, 1964 (funds in the Prisoners' Trust Fund at issue regarded as held in bailment not trust). As OLC observed, fiduciary relationship can arise in many different contexts. This is important because, as OLC also observed quoting *Restatement (Second) of Trusts* § 2, comment b, (1959), at 7, "[t]he duties of a trustee are more intensive than the duties of some other fiduciaries." May 22, 1995, OLC Opinion, at n.5. For one thing, no one has held—so far—that the government has a duty to invest those funds and make them productive. See section D.5 of this chapter.

5 U.S.C. §§ 8477(a), (b). Any fiduciary who breaches the responsibilities, duties, and obligations set out in the authorizing statute is personally liable to the Thrift Savings Fund for any losses and profits realized as a result of a breach of trust.[291] 5 U.S.C. § 8477(e).

Claimants have sought to use trust concepts to recoup funds in the Treasury. In *Stitzel-Weller Distillery v. Wickard*, 118 F.2d 19 (D.C. Cir. 1941), distillers sought to recover contributions paid into the Treasury pursuant to marketing agreements authorized by the Agricultural Adjustment Act. Previously, in *United States v. Butler*, 297 U.S. 1 (1936), the Supreme Court had declared related provisions of the act unconstitutional. Then, given the constitutional defects of the authorizing legislation, the Comptroller General concluded that the moneys could no longer be applied to the agreed upon purposes and had to be deposited into the general fund of the Treasury. 15 Comp. Gen. 681 (1936). In response, the distillers claimed that their contributions were impressed with a trust by virtue of section 20 of the Permanent Appropriation Repeal Act of 1934. That act recognized the existence of trust funds "analogous" to those specified in it and provided a permanent appropriation for payment of amounts held in such trust accounts. 31 U.S.C. § 1321(b). The claimants also argued that the contributions should be returned to them based on the general equitable doctrine that upon the failure of a trust, the trustee must return the trust *corpus* to the creator of the trust, in this case, the contributors. The court in *Stitzel-Weller* rejected the notion that the marketing agreement either explicitly or by analogy to other funds classified as trusts by the Permanent Appropriation Repeal Act of 1934, created a trust for the benefit of the contributors. Since there was no trust, there was no appropriation nor other authority to return the funds from the Treasury to the contributing distilleries. *Stitzel-Weller*, 118 F.2d at 21–23 (citing 15 Comp. Gen. 681).

Similarly, in *United States v. $57,480.05 United States Currency and Other Coins*, 722 F.2d 1457 (9th Cir. 1984), a claimant sought recovery of $57,480.05 forfeited and paid into the Treasury. In dismissing the case for

[291] Given the nature of these accounts, GAO recommended removal of the fund from the federal budget. B-227344, May 29, 1987. And, it was done. *See Analytical Perspectives, Budget of the United States Government for Fiscal Year 2001* (Feb. 2000), at 377. Beginning in fiscal year 2000, the federal budget also excludes funds owned by Indian tribes but held in trust by the government. As the notes to the federal budget explains, "the transactions of these funds are not transactions of the Government itself." *Id.* The Budget notes refer to these (and the Thrift Savings Fund moneys) as "deposit Funds." *Id.*

lack of jurisdiction over the *res*, the court pointed out that a judgment for the claimant "would require an impermissible payment of public funds not appropriated by Congress." *Id.* at 1459. The court rejected the claimant's suggested solution of "[e]nforcing a constructive trust on the government," noting that such a trust "would violate sovereign immunity in the absence of statutes or regulations clearly establishing fiduciary obligations." *Id.*

The two preceding cases involved unsuccessful attempts to recover funds in the Treasury by impressing them with an implicit common law trust. However, other cases have held the government liable for funds received in trust for others. For example, as discussed in Chapter 6, section E.2.h, and Chapter 9, section B.3.c, the government receives moneys to reimburse injured or overcharged consumers or residents that the government holds in trust to disburse to the injured parties. *Emery v. United States*, 186 F.2d 900 (9th Cir.), *cert. denied*, 341 U.S. 925 (1951); 60 Comp. Gen. 15 (1980). Since these moneys are not received for the use of the United States, they are not for deposit in the Treasury of the United States, nor is an appropriation needed for the Treasurer to disburse such funds. *Cf. Varney v. United States*, 147 F.2d 238 (6th Cir.), *cert. denied*, 325 U.S. 882, *reh'g denied*, 326 U.S. 805 (1945) (moneys received by War Food Administrator were "trust funds" retained and disbursed by market agents appointed by Administrator without deposit into the Treasury of the United States).

Simply because a government official has custody of nongovernment funds does not mean that they are held in a trust capacity. In B-164419-O.M., May 20, 1969, GAO distinguished between funds of a foreign government held by the United States incident to a cooperative agreement (trust funds), and funds of a private contractor held by a government official for safekeeping as a favor to the contractor. The latter situation was a mere bailment for the benefit of the contractor. Although the United States may have an obligation to exercise ordinary care with respect to bailed funds in its custody[292] (55 Comp. Gen. 356 (1975); 23 Comp. Gen. 907 (1944)), the government official with custody of the funds is not an accountable officer with respect to those funds. *See also* GAO, *White House: Travel Office Operations*, GAO/GGD-94-132 (Washington, D.C.: May 2, 1994), at 85 (government would be "morally or legally" liable for loss of funds collected by White House staff from press corps members to pay for press corps members' travel expenses as they accompany the President on trips; therefore, those funds shall be deposited in a Treasury account for safekeeping).

b. Trust Funds Designated by Statute

Earmarking alone does not create a trust fund since earmarked receipts can finance other types of accounts such as special funds. For example, Congress created the Vaccine Injury Compensation Trust Fund to compensate victims of vaccine-related injury or death. 26 U.S.C. § 9510. The Fund is financed by a tax on certain vaccines. *Id.* On the other hand, the North Pacific Fishery Observer Fund covers the cost of observers stationed on fishing vessels to collect information for fish management and conservation. Congress finances the program by assessing fees on fishing vessels and fish processors. 16 U.S.C. § 1862(d). Since Congress did not by statute designate the Observer Fund as a trust fund, Treasury classified it as a special fund.

The fact that money is held in a trust account does not necessarily create fiduciary obligations where they do not otherwise exist. *See* B-274855, Jan. 23, 1997. Most federal trust funds are trust funds simply because Congress says so, or, euphemistically, because the law designates them as such. Typically, the enabling legislation will earmark receipts or other money generated by a program for deposit in a fund designated by the

[292] A bailment is a "species" of trust. 8 C.J.S. *Bailments* § 1 (2005). A bailment arises when the owner delivers personal property to another for some particular purpose upon an express or implied contract to redeliver the property when the purpose of the bailment has been fulfilled. 53 Comp. Gen. 607, 609 (1974). Unlike a trust where title to the trust *corpus* passes to the trustee, in a bailment, title to the bailed property does not transfer. 8 C.J.S. *Bailments* § 32. The level of care required of a bailee depends on whether the bailment is for the benefit of the bailee, the bailor, or for their mutual benefit. *Id.* § 58. Though not treated as fiduciaries for all purposes, bailees have long been included within "the more general class of fiduciaries" since they hold a thing in trust for another. *E.g.*, *In re Holman*, 42 B.R. 848, 851 (1984). *See also United States v. Kehoe*, 365 F. Supp. 920, 922 (S.D. Tex. 1973) ("It was this failure of the common law to provide any criminal remedy for these breaches of trust . . . on the part of . . . *bailees, trustees, and other persons occupying fiduciary positions* that led to the enactment of the present Penal Code provision dealing with embezzlement.") *quoting* 21 Tex. Jur. 2d, *Embezzlement and Conversion* § 2, at 579–80 (1961) (emphasis added).

program legislation as a trust fund. See the Trust Fund Code, 26 U.S.C. §§ 9500–9510, for a listing of trust funds. These trust funds serve as accounting devices to distinguish the funds earmarked for deposit to the trust funds from general funds. The scope of the trustee's duties with respect to a trust fund will necessarily depend on the substantive law creating those duties. *See*, *e.g.*, *United States v. Mitchell*, 463 U.S. 206, 224 (1983) (*Mitchell II)* (statutes and regulations "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.")

The fact that Congress has designated a fund which finances a social service, public works, or revenue sharing program as a trust fund does not mean that the administering agency has a full range of fiduciary obligations. A leading case on this matter (not involving Indian lands or property) is *National Ass'n of Counties v. Baker*, 842 F.2d 369 (D.C. Cir. 1988), *rev'g*, 669 F. Supp. 518 (D.D.C. 1987), *cert. denied*, 488 U.S. 1005 (1989). In that case a number of local governments sued the Secretary of the Treasury seeking an order requiring the Treasury to release $180 million of Revenue Sharing Trust Fund moneys sequestered pursuant to Gramm-Rudman-Hollings, Pub. L. No. 99-177, 99 Stat. 1037 (Dec. 12, 1985). The district court issued an order requiring the Secretary to disburse the funds, and the Secretary appealed.

The Secretary argued that the district court lacked subject matter jurisdiction because the local governments were in effect asserting a money damage claim that only may be brought in the Claims Court. *National Ass'n of Counties*, 842 F.2d at 372. To sustain this argument the Secretary had to establish that substantive law mandated compensation for damages. The Secretary argued that because the Revenue Sharing Act created a trust fund with the Secretary as trustee, the statute was similar to the statutes found by the Supreme Court in *Mitchell II* to create a fiduciary duty in the United States, the breach of which mandated compensation.

The court of appeals rejected the Secretary's reliance on *Mitchell II*. The court concluded instead that the Revenue Sharing Act created only a limited trust relationship similar to the General Allotment Act trust in *United States v. Mitchell*, 445 U.S. 535, *reh'g denied*, 446 U.S. 992 (1980) (*Mitchell I*). *National Ass'n of Counties*, 842 F.2d at 375. Congress created the Revenue Sharing Trust Fund for budgetary reasons, not to subject the Secretary to actions for mismanagement of the trust. *Id*. at 376. "Indeed, there is no indication in the Revenue Sharing Act or its legislative history that the Secretary owes any common law fiduciary obligations to Trust

Fund recipients." *Id.* The Court rejected an implied right of action in favor of trust recipients based on a generalized common law trust theory because the substantive statute at issue did not make the United States expressly liable for mismanagement of the trust.

Applying the analysis used in *Mitchell I and II* and in *National Ass'n of Counties*, the Office of Legal Counsel (OLC) has construed the Bureau of Prison's obligations for the Commissary Trust Fund, classified as a trust fund under 31 U.S.C. § 1321, to not include common law fiduciary duties. Memorandum for the Assistant Attorney General, Civil Division, *Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund*, May 22, 1995. OLC discerned no indication in the legislative history of the Permanent Appropriation Repeal Act of 1934, the source statute for 31 U.S.C. § 1321, that Congress intended to subject the United States to suit for breach of fiduciary obligations in the management of the Commissary Fund. Unlike the Prisoners' Trust Fund accounts discussed earlier in this part, the moneys in the Commissary Fund were not the personal funds of the inmates, but resulted from a continuous cycle of business operations. The Bureau of Prisons retained the authority to decide whether and how much of any profits were to be disbursed through the welfare fund for the benefit of the inmate population. *See Washington v. Reno*, 35 F.3d 1093 (6th Cir. 1994) (district court did not abuse discretion in preliminarily enjoining Bureau of Prisons from alleged misappropriation of Commissary funds for purchase of telephone system to support prison security).

c. Accepting Donated Funds

As noted earlier in this publication, a number of departments and agencies have specific statutory authority to accept gifts. *See* Chapter 6, section E.3.a. The level of detail addressed by these statutory authorities varies. *Compare*, *e.g.*, 22 U.S.C. § 2697 (acceptance of unconditional and conditional gifts by the Secretary of State) *with* 31 U.S.C. § 3113 (acceptance of gifts to reduce the public debt). Section 19 of the Permanent Appropriation Repeal Act of 1934, 31 U.S.C. § 1323(c), provides general guidance concerning accounting for gifts and donations. Pursuant to this statute, donations or gifts are treated as trust funds and must be deposited in the Treasury as such. Like the statutory trust funds catalogued at 31 U.S.C. § 1321(a) and the analogous trust funds established pursuant to 31 U.S.C. § 1321(b), Congress has provided a permanent appropriation for donated funds. 31 U.S.C. § 1323(c) ("Donations . . . shall be deposited in the Treasury as trust funds and are appropriated for disbursement under the terms of the trusts.").

Before a government officer may accept a donation that would require the management of a trust, the officer must have the authority to bind the government to act as a trustee, with the attendant responsibilities and cost.[293] This was the issue in 11 Comp. Gen. 355 (1932). The Secretary of the Navy asked whether he was authorized to accept a bequest to the United States Naval Hospital in Brooklyn, New York, to be invested in a memorial fund. The proceeds of the trust were to be used for the maintenance and comfort of sailors in that hospital. The Comptroller General concluded that the President's gift acceptance authority was limited to hospitals for merchant seamen, not naval hospitals. Observing that if the testamentary gift was accepted, the United States would "become, in effect, a trustee for charitable uses," the Comptroller General ruled "that such an obligation could not legally be assumed by an officer on behalf of the United States without express statutory authority therefor." *Id.* at 356. To drive home the point, the Comptroller General further noted that without such authority, there would be no basis to use any appropriations to cover the necessary expenses of administering such a trust fund. *Id.*

A similar issue was touched on in 27 Comp. Gen. 641 (1948). In that decision, the issue was whether the Department of State created a trust fund for the education of Persian students in the United States as part of a settlement of claims of the United States against the Persian government. The answer to that question seems to have been that the President acting through the State Department had the authority to agree to the creation of trust. However, the decision ultimately turned not on the scope of the President's authority, but on "precisely what the terms of the agreement were." *Id.* at 645. The Comptroller General concluded that the agreement reached did not include the use of the funds for the benefit of the Persian students. Accordingly, the Secretary could not later, without additional consideration, modify the agreement to create a trust obligation on the part of the United States. *Id.* at 646.

[293] *Cf.* 4 First Comp. Dec. 457, 458 (1883), *citing United States v. Morris*, 23 U.S. (10 Wheat.) 246, 303 (1825) ("The Government cannot, without its authorized express consent, be forced to occupy the position of a trustee.").

3. Application of Fiscal Laws

a. Permanent Appropriation Repeal Act of 1934

Prior to 1934, government officials held a number of trust fund accounts outside the Treasury. The Comptroller General had directed the deposit of the funds to the accounts of Treasury officials in order to ensure that a proper accounting and audit was made of all disbursements. The Comptroller General permitted the withdrawal of trust funds, after deposit in the Treasury, without an express appropriation from Congress. Congress objected to the Comptroller General's approval of withdrawals of trust fund moneys without an appropriation as a violation of the constitutional prohibition that "no moneys shall be drawn from the Treasury but in consequence of an appropriation made by law." H.R. Rep. No. 73-1414, at 12 (1934). Ironically the solution was to provide a permanent appropriation for trust funds as part of legislation designed to repeal permanent appropriations in general. *Id.* Accordingly, in section 20 of the Permanent Appropriation Repeal Act of 1934, ch. 756, 48 Stat. 1233 (June 26, 1934), codified at 31 U.S.C. § 1321(a), Congress listed all funds of a trust nature that Congress wanted to maintain on the books of the government and provided a permanent appropriation for these funds. *See also* S. Rep. No. 73-1195, at 1–3 (1934); H.R. Conf. Rep. No. 73-2039, at 6–9 (1934). See 16 Comp. Gen. 147 (1936) for a comprehensive discussion of the Permanent Appropriation Repeal Act.

Section 20 of this act also provides prospective guidance. Any amounts received by the United States as trustee which are analogous to the funds listed in subsection (a) are for deposit in a trust account of the Treasury. Amounts "accruing to these funds" are permanently appropriated for expenditure in accordance with the terms of the trust. 31 U.S.C. § 1321(b). *See also* 31 U.S.C. § 1323(c).

b. Available Uses of Trust Funds

(1) Using donated funds

Funds held in trust are available only for trust purposes. Where an agency is authorized to accept a donation of funds for specified purposes, the funds may only be used for purposes necessary to carry out the trust. 17 Comp. Gen. 732 (1938). For the accepting agency to do otherwise would be a clear breach of the terms of the agreement governing the gift. *See* 47 Comp. Gen. 314 (1967). (Of course, an agency's authority to agree to any particular use of donated funds is limited by the terms of its statutory authority to accept donations. 11 Comp. Gen. 355 (1932).)

Appropriated funds are subject to many use restrictions. *See generally* Chapter 6. Depending on the terms of the donation, some of those restrictions may not apply to donations accepted by authorized officers of the United States. In several cases GAO has held that—

> "where the Congress authorizes Federal officers to accept private gifts or bequests for a specific purpose, . . . 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 . . . without reference to general regulatory and prohibitory statutes applicable to public funds."

16 Comp. Gen. 650, 655 (1937). *See* 36 Comp. Gen. 771 (1957); B-195492, Mar. 18, 1980; B-170938, Oct. 30, 1972; B-131278, Sept. 9, 1957; B-135255-O.M., Mar. 21, 1958. In 23 Comp. Gen. 726 (1944), the Comptroller General was asked what the National Park Trust Fund Board could do with the principal of gifts received in trust for the benefit of the National Park Service where the donor had not prescribed a particular purpose for the gift. The Board's statutory authority was silent on this point. *See* Pub. L. No. 74-201, § 2, 49 Stat. 477 (July 10, 1935), *codified at* 16 U.S.C. §§ 19e–19m. The statute did direct the Secretary of Treasury to invest donations for the account of the Board consistent with the laws applicable to a trust company in the District of Columbia and to credit the income from such investments to the National Park Trust Fund. Since the Board's statute did not authorize use of the principal of a gift, the Board could not invade the principal. However, to give "some effect to the action of the respective donors" in making a gift, the Board could use investment income for the presumed purpose of the gift—the general benefit of the National Park Service, its activities, or its services.

Another decision, B-274855, Jan. 23, 1997, discussed the range of permissible uses of donated funds available to the now defunct United States Advisory Commission on Intergovernmental Relations (ACIR). Congress created ACIR to give continuing attention to intergovernmental problems.[294] To finance its activities, Congress authorized ACIR to solicit and receive contributions from, among others, state governments. In 1995,

[294] Pub. L. No. 86-380, 73 Stat. 703 (Sept. 24, 1959).

Congress terminated ACIR effective September 30, 1996.[295] Two months prior to termination, Congress directed the National Gambling Impact Study Commission to contract with ACIR for research and authorized ACIR to continue in existence solely to perform the contract.[296]

The question was whether prior unconditional state contributions were available to cover ACIR's salaries and expenses until the National Gambling Commission awarded ACIR a contract. The states contributed funds to support ACIR's authorized activities. The Comptroller General viewed the funds as unrestricted gifts. As unrestricted gifts, they were available for ACIR activities authorized by Congress at the time of obligation and expenditure regardless of the activities contemplated by ACIR and the states at the time the gifts were made. The Comptroller General further concluded that after ACIR completed its authorized study, any unused contributions were for deposit in the Treasury as miscellaneous receipts. *Cf.* 15 Comp. Gen. 681 (1936) (moneys received that could no longer be applied to agreed upon purposes due to constitutional defects of authorizing legislation are for deposit as miscellaneous receipts).

Like direct appropriations, moneys donated in trust are available for expenses reasonably related to the purpose of the trust. That is the message of 23 Comp. Gen. 726 and B-274855, Jan. 23, 1997. In 55 Comp. Gen. 1059 (1976), for example, GAO held that the Forest Service could not transfer funds donated to establish and operate a research facility to a private foundation to invest and use for a purpose other than establishing and operating a research facility.

GAO also has considered whether donated funds could be used for expenses that the Comptroller General traditionally has viewed as personal. In 47 Comp. Gen. 314 (1967), GAO concluded that the purchase of seasonal greeting cards remained unallowable regardless of the fact that the Interior Department would pay for the cards from a trust fund for donations to the National Park Service. Donated funds, as a general matter, are no more available for personal expenditures than appropriated funds, unless, of course, the personal expense would serve the purpose of the donation and would otherwise fall within the agency's gift acceptance authority.

[295] Pub. L. No. 104-52, 109 Stat. 468, 480 (Nov. 19, 1995).

[296] Pub. L. No. 104-169, 110 Stat. 1482, 1487 (Aug. 3, 1996).

In B-195492, Mar. 18, 1980, Senator Proxmire questioned Interior's use of amounts held in its Cooperating Association Fund. The Secretary of the Interior maintains this discretionary fund under authority of 16 U.S.C. § 6, which permits the Department of Interior to accept lands, rights-of-way, buildings or other property, and money which may be donated "for the purposes of the national park and monument system." Interior was using these funds for contest entry fees, receptions for very important guests, gifts, and refreshments. While GAO reiterated that donated funds are not available for personal expenses, GAO noted that the strictures on the use of donated funds do not necessarily mirror those applicable to the use of appropriated funds. With respect to the "'entertainment,' 'gifts,' and other so called 'personal' items," GAO pointed out that the restrictions on the use of general agency appropriations for these purposes derived not from the idea that these could never be "official" expenses but that "such purposes are so subject to abuse as to require specific Congressional authorization before general agency appropriations may be so used." Since those expenses are not prohibited, where agencies can justify the use of donated funds as incident to the terms of the donation for what would otherwise be viewed as an improper personal use of general agency appropriations, we would not object. On the other hand, GAO noted that the availability of donated funds for travel and subsistence expenses is subject to the same rules as govern the use of appropriated funds because of statutory language that precluded the use of "funds appropriated for any purpose" for travel expenses of the kind at issue there.

(2) Property of others

General use restrictions have less applicability to the property of others being held in trust. In B-33020, Apr. 1, 1943, GAO did not object to use of Osage Indian Trust Funds to cover the cost of telegrams sent to members of Congress concerning pending legislation affecting the tribe that would have been prohibited by legislation concerning the use of appropriated funds to influence Congress. GAO did not object to these expenditures since Congress had appropriated the funds to be used for the benefit of the tribe and authorized the tribe to organize for its common welfare and to negotiate with federal, state, and local governments.

A slightly different twist on these concepts occurred in 20 Comp. Gen. 581 (1941). In that decision, the Library of Congress Trust Board held, as trustee, legal title to some improved real estate that the Federal Works Administrator wanted to lease. Standing in the way of the transaction was the longstanding rule of the accounting officers of the government that, absent statutory authority, the payment of rent by one agency to another for premises under the control of another is unauthorized. Since the United States did not in its own right hold legal title to, or have the beneficial right to the use of, the property, there was no objection to the payment of rent to the Library of Congress Trust Board in its capacity as trustee.

Similarly, the authority of the Pension Benefit Guaranty Corporation (PBGC), when acting as a trustee for terminated pension plans, is not constrained by laws applicable to contracting by federal agencies or the expenditure of public funds. B-223146, Oct. 7, 1986. One issue addressed by the decision was PBGC's authority to modify the fee provision of an existing contract with outside litigation counsel to include a contingent fee arrangement. Since PBGC was authorized by law to serve as a trustee for terminated pension plans, possessing all the rights and duties to act as a private trustee similarly situated, GAO could find no legal or public policy considerations which precluded PBGC's modifications of its contracts with outside counsel. (We can assume that we would have held otherwise if public funds were at issue. *See* Chapter 6, section C). Also, since any recoveries resulting from the litigation accrued to the terminated pension plan, the use by PBGC (in its capacity as trustee) of a portion of the recoveries to pay its contingent fee obligation would not violate the deposit requirements of the miscellaneous receipts statute.

(3) <u>Statutory trust funds</u>

Like donated funds held in trust, where Congress designates a trust account to receive dedicated tax receipts, the *corpus* of the trust is only available for trust purposes. The rationale for this axiom differs from cases where the government holds donated funds accepted in trust. As noted earlier, in the latter case, the limitation on the use of funds derives in the first instance from the agreement with the donor. While an agency's statutory authority to accept a gift is relevant in prescribing the range of uses to which an agency may agree, it is the donor's action in making a restricted gift, that is, one for designated purposes, that controls the particular use.[297]

Where the *corpus* of the trust account consists of dedicated tax receipts, the rationale for the rule is a function of Congress's constitutional prerogative to allocate resources for the general welfare. In other words, the limitation on the use of the funds for other than trust purposes derives from the terms of the statute creating the trust account and 31 U.S.C. § 1301(a), limiting the use of appropriated funds only to purposes for which appropriated. One consequence of this distinction concerning the source of the limitation on use manifests itself when Congress decides to modify the authorized uses of the trust funds. In the case of trust funds designed to serve as accounting mechanisms for dedicated tax receipts, Congress as the creator of the trust can change or modify the permissible uses of the trust funds. *Cf.* 36 Comp. Gen. 712 (1957). For an example of Congress changing the uses of a statutory trust fund filled with tax revenues, see the legislative history recounted in B-281779, Feb. 12, 1999.

As the prior discussion suggests, when resolving issues involving the application of statutory restrictions to this type of trust fund the Comptroller General will treat them more like a direct appropriation. In B-191761, Sept. 22, 1978, an agency of the Department of Agriculture wanted to dip into a user fee trust fund to provide a uniform allowance to its employees. Section 5901 of title 5, United States Code, requires that before an agency may use appropriated funds for uniforms, it must have specific statutory authority to do so. GAO resolved the issue on the basis of authority in Agriculture's appropriation act, which provided that "funds available to the Department" may be used for employee uniforms. Arguably, if donated funds were involved, the Department would have had a greater ability to use the funds for trust purposes unfettered by general regulatory statutes applicable to appropriated funds.

The essential point is that, if viewed like any other appropriation, amounts in a trust fund account may only be used for the purposes for which they were appropriated. As suggested above, depending on the source of funds,

[297] An argument has been made that funds held in trust and expended pursuant to the permanent appropriation of moneys "accruing to these trust funds" contained in the Permanent Appropriation Repeal Act of 1934, 31 U.S.C. § 1321(b), are appropriated funds subject to the laws governing the obligation and expenditure of any other appropriated funds. *See Soboleski v. Commissioner*, 88 T.C. 1024, 1034 (1987), *aff'd*, 842 F.2d 1292 (4th Cir. 1988).

this may translate to mean no more than the authorized purposes of the trust.

c. Intergovernmental Claims

Another consequence of the distinction is seen in decisions involving intergovernmental claims. As a general proposition, a federal agency or establishment that damages public property, real or personal, under the control of another federal agency or establishment may not pay a claim for that damage. Put another way, federal agencies may not assert damage claims against one another. *E.g.*, 60 Comp. Gen. 710, 714 (1981).

Claims involving property or funds held by the government in a trust capacity are an exception to this rule. In 41 Comp. Gen. 235 (1961), GAO found that the Bureau of Indian Affairs (BIA) could present a claim against the Air Force for damage to the San Carlos Irrigation Project caused by the crash of a Civil Air Patrol plane. Although the San Carlos Irrigation Project was an instrumentality of the United States, the project benefited the Pima Indians and was funded from moneys held in trust by the government for the Pima. The question was whether the BIA claim against the Air Force for damage to the project would constitute a claim by one government agency against another. The decision held that it would not. As BIA was acting in a trust capacity on behalf of the Pima, if the general rule were applied, the expense of repairing the damage would be borne not by the government but by the Pima. Thus, the claim was not that of one agency against another.

Applying similar reasoning, the Comptroller General found Navy appropriations available to pay a claim for damage to property of the Ryukyu Electric Power Corporation. B-159559, Aug. 12, 1968. The corporation, while an instrumentality of the United States Civil Administration of the Ryukyu Islands, was not an instrumentality of the United States government. Further, while funds available to the Civil Administration were government funds, they were in the nature of a trust account held for the sole benefit of the Ryukyu people. Another case applying the trust reasoning is B-35478, July 24, 1943 (since timberland was held in trust for counties, Bonneville Power Administration should pay for timber destroyed).

The trust exception of cases like 41 Comp. Gen. 235 and B-159559, Aug. 12, 1968, has its limits and does not apply where the trust fund is more in the nature of an accounting or bookkeeping device. An illustrative case is 65 Comp. Gen. 464 (1986). A Navy plane had crashed into and destroyed a Federal Aviation Administration (FAA) instrument landing system.

Although the FAA used funds from the Airport and Airway Trust Fund to repair its facility, the Comptroller General viewed this trust fund as little more than an earmarked appropriation, not involving the same kind of trust relationship as in the San Carlos and Ryukyu cases. Accordingly, the general rule controlled, and Navy appropriations were not available to reimburse the FAA.

4. Concepts of Amount and Time

Concepts of amount and time which are so important to general appropriations law (*see* Chapters 5 and 6) also come into play with trust funds. With respect to "amount," this would include concerns that trust funds are being used to augment regular appropriations. In B-107662, Apr. 23, 1952, GAO reviewed a Commerce procedure for charging trust funds with the cost of employees assigned full time to activities funded by regular appropriations, but assigned intermittently for short periods to activities financed by trust funds. GAO had no objection to the Commerce procedure, but cautioned that the proper records needed to be kept to ensure that trust funds did not augment general fund appropriations. *See also* B-138841, Sept. 18, 1959 (payment of regular weather bureau employees from Department of Commerce trust fund for intermittent services performed on trust fund projects).

As with other types of accounts, errors can and do occur that effect the amount properly credited to trust fund balances. When they do, the obvious solution is to correct them. GAO generally recognizes that an act of Congress is not necessary to correct clerical or administrative errors when dealing with the nontrust fund accounts of the government. 41 Comp. Gen. 16, 19 (1961). Where the evidence of an error is unreliable or inconclusive, the Comptroller General has objected to administrative adjustment of account balances. B-2369400, Oct. 17, 1989. This is particularly true where (as in the immediately preceding decision) the adjustment would result in additional budget authority being available to an agency.

In B-275490, Dec. 5, 1996, GAO concluded that Treasury could credit to the Highway Trust Fund $1.59 billion mistakenly not credited to that account. Each month, Treasury transferred from the general fund of the Treasury amounts appropriated to the Trust Fund based on Treasury estimates of the specified excise taxes for the month. The Treasury then adjusted the amounts originally credited to the fund to the extent the estimates differed from actual receipts. Due to a change in reporting format and a resulting transcription error, Treasury substantially understated the adjustments to the income credited to the trust fund. The Department of Transportation and Treasury discovered the error when the year-end statement was prepared. GAO agreed with Treasury that, as trustee of the Fund, Treasury should adjust the fiscal year 1994 and 1995 Trust Fund income statements to credit the Fund with the excise taxes originally not included in the Highway Trust Fund income statements just as if Treasury had credited such amounts upon receipt of the reports from the IRS. The Comptroller General made the following observation:

> "Apart from whatever responsibilities the Secretary may have to accurately state the accounts of the United States, the Secretary in his capacity as trustee of the [Highway Trust] Fund has the duty to accurately account for the amounts in the Fund consistent with the terms of the appropriation made thereto and the applicable administrative procedures adopted to effectuate his statutory responsibilities."

Id. See also 67 Comp. Gen. 342 (1988) (Bureau of Indian Affairs has duty to make prompt corrective payments to trust account beneficiary before collecting from an erroneous payee; to avoid overdraft of an Individual Trust Account, BIA could use funds from its Operation of Indian Programs appropriations to correct the erroneous payment from the Individual Trust Account); 65 Comp. Gen. 533 (1986) (funds returned to Individual Indian Money Account, which were earlier improperly recovered, should be repaid from appropriations currently available for the activity involved); 41 Comp. Gen. 16 (1961) (incorrect allocation of federal highway funds to states was an act in excess of statutory authority and consequently must be corrected through appropriate adjustments). In addition see the discussion of restoration in Chapter 9, section H.2.

The Comptroller General has recognized that the miscellaneous receipts statute does not apply to trust funds. 60 Comp. Gen. 15, 26 (1980); 27 Comp. Gen. 641 (1948). See discussion in Chapter 6, section E.2.h. The miscellaneous receipts statute directs that all moneys received for the use of the United States must be deposited in the general fund of the Treasury. 31 U.S.C. § 3302(b). The very terms of the statute call into question its application to moneys the government receives in trust. As a practical matter, in most instances, it is clear when the United States has received funds for its use. Occasionally a question does arise whether the funds are for credit to the general fund of the Treasury as a miscellaneous receipt or to a trust account. In 25 Comp. Gen. 637 (1946), GAO concluded that payments made in conjunction with making movies in national parks were payments made in consideration of the privilege to film in the park and, hence, were properly accounted for as miscellaneous receipts, not donations to the National Park Trust Fund. On the other hand, in B-195492, Mar. 18, 1980, GAO found no elements of an exchange and accordingly held that payments by nonprofit associations operating in national parks of one-half of 1 percent of their gross sales were properly treated as contributions to the Cooperating Associations Trust Fund, not as miscellaneous receipts.

In 60 Comp. Gen. 15 (1980) the Comptroller General expanded on the concept of "received in trust." The Department of Energy had received $25 million under the terms of a consent order settling disputes between Energy and the Getty Oil Company concerning compliance with oil price and allocation regulations. The order provided that Getty would deposit $25 million into a bank escrow account. The order did not specify how the money was to be distributed. Energy announced that the money would be distributed to state governments in proportion to the oil company's sales in that state and directed that the states use the money to defray the heating oil costs of low-income persons. GAO found that, to the extent the money would be returned as restitution to victims of Getty's alleged violation of oil and price allocation regulations, Energy was acting as a trustee and the funds need not be deposited to the Treasury as miscellaneous receipts. However, to the extent that Energy sought to distribute funds to a class of individuals other than to those overcharged, those funds were not held in trust and must be deposited in the Treasury as miscellaneous receipts. (This opinion was the first of several to address this matter. *See* 63 Comp. Gen. 189 (1984); 62 Comp. Gen. 379 (1983); B-210176, Oct. 4, 1984; B-200170, Apr. 1, 1981.)

For other cases treating amounts received as trust funds exempt from the miscellaneous receipts statute, see 51 Comp. Gen. 506 (1972) (National Zoo receipts are for deposit to the credit of the Smithsonian Institution, not as miscellaneous receipts, even though activities in question were supported mostly by appropriated funds because the Zoo operates under a trust charter); B-192035, Aug. 25, 1978 (income derived from local currency trust fund operations not for deposit as miscellaneous receipts since Agency for International Development is merely a trustee of host country funds); B-166059, July 10, 1969 (recovery for damage to property purchased with trust funds credited to trust fund account); B-4906, Oct. 11, 1951 (recoveries for lost or damaged property financed from Federal Old-Age and Survivors Insurance Trust Fund are creditable to the trust fund).

One decision applying "time" concepts to a statutory trust fund reached a predictable result. In B-171277, Apr. 2, 1971, amounts in the trust fund, which consisted of fees received from commercial testing labs for testing agricultural products, were available until expended. The "available until expended" language made the trust fund a no-year appropriation and thus available for multiyear contracts. So long as the fund contained amounts sufficient to cover all obligations under the contract, there would be no Antideficiency Act concerns. See Chapter 5 for a general discussion of no-year funds and multiyear contracts.

5. Duty to Invest

Under the common law, it is the trustee's duty to make the trust *corpus* productive. *Restatement (Third) of Trusts*, § 181 (1992). Obviously the issue is of more than passing importance to the trust beneficiaries. For amounts held in trust by the United States, the trustee's duty to make the trust *corpus* productive, and the trustee's corresponding liability to the beneficiary for failure to do so, are limited by the concept of sovereign immunity. As a general rule, the United States is not liable for interest unless it has consented to the payment of interest. *Library of Congress v. Shaw*, 478 U.S. 310, 314–17 (1986); *United States v. Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951). The Supreme Court has insisted that any such consent be express and clear, stating that "there can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute . . . to permit the recovery of interest suffice where the intent is not translated into affirmative statutory . . . terms." *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947). *See* B-272979, Aug. 23, 1996. *See also* 65 Comp. Gen. 533, 539–40 (1986) (no difference whether interest is characterized as "damages, loss, earned increment, just compensation, discount, offset, penalty or any other term"); B-241592.3, Dec. 13, 1991 (no authority to pay interest on funds held by Customs on behalf of the Virgin Islands, absent an agreement or statute).

Various arguments have been made that 31 U.S.C. § 9702 provides the requisite authority to pay interest on trust funds. Section 9702 provides that "[e]xcept as required by a treaty of the United States, amounts held in trust by the United States Government (including annual interest earned on the amounts)—(1) shall be invested in Government obligations; and (2) shall earn interest at an annual rate of at least 5 percent." This statute was intended to end the practice of investing United States trust funds in state obligations. Despite its seemingly straightforward language, this statute applies only where a statute, treaty, or contract requires trust funds to be invested. It is not an independent authorization for the payment of interest. B-241592.3, Dec. 13, 1991.

A comprehensive discussion of 31 U.S.C. § 9702 is contained in *United States v. Mescalero Apache Tribe*, 518 F.2d 1309, 1324 (Ct. Cl. 1975), *cert. denied*, 425 U.S. 911 (1976) and the cases cited therein. In *Mescalero*, the Court of Claims explained the purpose of the Act of September 11, 1841, ch. 25, § 2, 5 Stat. 465, now codified at 31 U.S.C. § 9702. Congress wanted to prohibit the investment of United States trust funds, otherwise required by treaty or statute to be invested, in state bonds and to require instead their investment in safer United States securities. The court held that the 1841 act did not require the payment by the United States of interest on any fund that was not expressly required to be invested by a contract, treaty, or a statute. The lesson of *Mescalero* and subsequent cases is that one must examine the statute or other legal source for the fund to determine whether any requirement to invest the trust fund exists. *Alcea Band of Tillamooks*, 341 U.S. 48 (interest on amount of compensation awarded for taking of original Indian title by United States in 1855 not allowed where jurisdictional act contained no provision authorizing award of interest); B-226801-O.M., May 4, 1988 (section 9702 did not require the Veteran's Administration to invest the Post-Vietnam Era Veterans Education Account, listed as a trust fund at 31 U.S.C. § 1321(a)(82)).

An example of a specific requirement for investment and the payment of interest is found at 25 U.S.C. § 161a. It requires that all funds held in trust by the United States to the credit of Indian tribes or individual Indians be invested by the Secretary of the Treasury, with interest at rates determined by the Secretary of the Treasury. GAO has considered the payment of interest on government held Indian funds numerous times. *E.g.*, 52 Comp. Gen. 248 (1972); 8 Comp. Gen. 625 (1929); B-272979, Aug. 23, 1996; B-243029, Mar. 25, 1991; B-108439, Dec. 28, 1973; B-126459, Feb. 20, 1956. The obligation to invest under section 161a does not arise prior to the date that Congress has specified for deposit of funds to the trust. B-108439, Apr. 13, 1978.

In 2001, the Department of Justice Office of Legal Counsel held that section 604(c) of the Water Resources Development Act of 1999, Pub. L. No. 106-53, 113 Stat. 269, 389–90 (Aug. 17, 1999), required the Treasury to invest the trust fund for two South Dakota Indian tribes in "available obligations" bearing the highest rate of interest, even when those obligations do not have the highest yields. Memorandum Opinion for the General Counsel, Department of the Treasury, *Investment of Federal Trust*

Funds for Cheyenne River and Lower Brule Sioux, OLC Opinion, Jan. 19, 2001. Recognizing that this statute is unique among federal trust funds, this opinion supports the general rule that the extent of a trustee's duties and powers is determined by the trust instrument and the specific rules of the applicable law. *See also Chippewa Cree Tribe of Rocky Boy's Reservation v. United States*, 73 Fed. Cl. 154 (2006).

6. Liability for Loss of Trust Funds

Where the government acts in the capacity of a trustee with respect to a fund it holds, the government must see to the proper application of the trust funds like a private trustee. *Julia A. L. Burnell v. United States*, 44 Ct. Cl. 535 (1909). In the cited case, the Treasury paid the wrong party through a mistake of law. The Claims Court held that the government remained responsible to the rightful owner of the securities. *Id.*

The decisions of the Comptroller General are to the same effect. For example, the Department of Veterans Affairs (VA) holds "personal funds of patients" for safekeeping and use during their stay at VA hospitals. The government is accountable to the patients for these funds like a private trustee would be.[298] 68 Comp. Gen. 600, 603 (1989). Accordingly, where an erroneous payment is made, the government is chargeable with any loss resulting from the breach of trust. In this case, VA was advised to make the trust fund whole by charging the deficiency to the VA's operating appropriation as a necessary expense of administering the trust. *Id.* To the same effect is 67 Comp. Gen. 342 (1988) (use of Bureau of Indian Affairs operating appropriation to adjust deficiency in Bureau trust fund). *See also* B-288284.2, Mar. 7, 2003.

The liability of an accountable officer for loss of funds in a trust account is no different than any other loss of government funds. Although the funds are not strictly speaking public funds, they are nevertheless funds for which the government is accountable. The absence of a beneficial interest in the funds does not alter the liability equation; by accepting custody of them, the United States assumes a trust responsibility for their care and safekeeping. B-200108, B-198558, Jan. 23, 1981. If a trustee commits a breach of trust, the trustee is chargeable with any loss resulting from that breach. B-248715, Jan. 13, 1993. *See generally United States v. Mitchell*, 463 U.S. 206, 226 (1983); *White Mountain Apache Tribe v. United States*,

[298] *Cf.* B-153479, Apr. 15, 1964 (prisoners' trust funds).

249 F.3d 1364 (Fed. Cir. 2001), *aff'd*, 537 U.S. 465 (2003). *See also Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. United States*, 175 Ct. Cl. 451, 455–56 (1966) (misuse of trust funds is a breach of trust, not Fifth Amendment taking). The responsibility of the accountable officer has been described as follows: "the same relationship between an accountable officer and the United States is required with respect to trust funds of a private character obtained and held for some particular purpose sanctioned by law as is required with respect to public funds." 6 Comp. Gen. 515, 517 (1927) (funds in retirement account of embezzling employee used to satisfy loss of private trust funds). *See also Osborn v. United States*, 91 U.S. 474 (1876) (court can summarily compel restitution of funds improperly withdrawn from registry account by former officers). The rules that apply for the relief of an accountable officer for the loss of appropriated funds also apply for the relief of an accountable officer for the loss of trust funds. B-288163, June 4, 2002. *See* Chapter 9, section B.3.c.

Other situations involving accountability for funds held in trust or trust-like circumstances include—

- VA patient funds: 68 Comp. Gen. 600 (1989); B-226911, Oct. 19, 1987; B-221447, Apr. 2, 1986; B-215477, Nov. 5, 1984; B-208888, Sept. 28, 1984.
- Erroneous payment to Individual Indian Money Account: 65 Comp. Gen. 533 (1986).
- Registry accounts of courts of the United States: B-288163, June 4, 2002; 64 Comp. Gen. 535 (1985); 63 Comp. Gen. 489, 490 n.1 (1984); B-200108, B-198558, Jan. 23, 1981.
- United States Naval Academy laundry fund: 17 Comp. Gen. 786 (1938).
- Prisoners' money held in Brig Officer's Safekeeping Fund: B-248715, Jan. 13, 1993.
- Mutilated and worn currency sent by private bank to Treasury for redemption: B-239955, June 18, 1991.
- Overseas Consular Service Trust Fund holding private funds to pay for funeral expenses: B-238955, Apr. 3, 1991.

- Foreign currencies accepted in connection with accommodation exchanges: B-190205, Nov. 14, 1977.

7. Claims

a. Setoff and Levy against Trust Funds

In 38 Comp. Gen. 23 (1958), GAO held that a delinquent taxpayer's postal savings deposits are property subject to Internal Revenue Service (IRS) levy and the fact that the postmaster held the deposits as a trust fund does not protect them from IRS levy. Similarly, in B-165138, Mar. 12, 1969, we advised the Bureau of Prisons that prisoners' funds it held as "trust funds" under 31 U.S.C. § 1321, are property subject to tax lien and levy under sections 6321 and 6331, respectively, of the Internal Revenue Code of 1954 (IRC). The literal language of section 6334(c) of the IRC compelled this result. That section provides that no property rights would be exempt from levy unless specifically exempted in section 6334(a). *See also* 63 Comp. Gen. 498 (1984) (honoring a levy against a judgment award did not give rise to a breach of trust); 34 Comp. Gen. 152 (1954) (government may take setoff against funds held by it in trust to recoup a debt owed to the government as sovereign).

Contrast the preceding decisions (involving the collection of taxes from trust funds held by the government) with 48 Comp. Gen. 249 (1968) (reversing B-72968, Apr. 21, 1948), where the Comptroller General held that the Bureau of Prisons could not set off prisoners' trust funds to satisfy claims of the United States arising from an inmate's destruction of government property. In reversing his earlier decision, the Comptroller General pointed out that he had not known at the time of his 1948 decision that the terms of the trust expressly required the prisoner's consent prior to a withdrawal of funds. Accordingly, given the new information, the Comptroller General held that absent a change in the terms of the trust agreement, the Bureau could not use prisoner trust funds to satisfy a writ of execution issued pursuant to a court judgment against the inmate. *Id*. *Cf*. 65 Comp. Gen. 533 (1986) (United States will absorb the loss for moneys erroneously paid from an Individual Indian Money account and forego collection from the erroneous payee—another Indian—in light of the moral obligations of the United States in dealing with the Indians).

b. Unclaimed Moneys

At the end of each fiscal year, money which has been in any of the trust accounts identified in or established pursuant to 31 U.S.C. § 1321 for more than a year and which represents money belonging to individuals whose location is unknown is transferred to a Treasury trust fund receipt account entitled "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown." 31 U.S.C. § 1322(a). Section 1322(b)(1) establishes a permanent, indefinite appropriation to pay claims from the Unclaimed Moneys account. Instructions to implement 31 U.S.C. § 1322 are contained in the *Treasury Financial Manual*, 1 TFM. 6-3000.

Under 31 U.S.C. § 3702(b), a claim against the government ordinarily cannot be considered unless the claim is received within 6 years of the date it accrues. The Comptroller General has held, however, that the 6-year statute of limitations in 31 U.S.C. § 3702(b) does not bar claims to recover moneys held in trust. *See* B-201669, Nov. 26, 1985 and decisions cited therein. Since the trustee holds property for the beneficiary's benefit, unless there is a breach of some duty owed by the trustee to a beneficiary, such as a repudiation of the trust, there is no claim or cause of action that would trigger the running of the statute. *Id. See* Bogert, *Trusts & Trustees*, 951 (2nd ed. rev. 1995). In keeping with the general rule, GAO has deemed the statute inapplicable to claims of beneficiaries payable from money held in trust. *See* 70 Comp. Gen. 612 (1991); 66 Comp. Gen. 40 (1986); 55 Comp. Gen. 1234 (1976); B-201669, Nov. 26, 1985. *See also* B-155963, Mar. 19, 1965 (special deposit account for the proceeds of withheld foreign checks); B-139963, July 6, 1959 (soldiers' deposit savings accounts); B-103575, Aug. 27, 1951 (unclaimed moneys of individuals whose whereabouts are unknown).

The agency that received and transferred the funds to the Treasury handles any claims relating to those funds. If a claim is determined to be valid, the agency may certify a payment voucher to Treasury. If the money was transferred to the trust account, payment is made directly from that account. *See* GAO, *Unclaimed Money: Proposals for Transferring Unclaimed Funds to States*, GAO/AFMD-89-44 (Washington, D.C.: May 9, 1989), at 10.

8. Federal Trust Funds and the Budget

As suggested earlier, certain federal trust funds (those with the largest amount of federal trust fund dollars) are bookkeeping devices to capture receipts earmarked for certain programs or purposes.[299] They do not hold cash separate from the Treasury—all moneys received by the Treasury are commingled and used to pay government obligations as they come due. In effect, Treasury borrows the earmarked receipts in exchange for interest-bearing, nonmarketable Treasury securities. As a result, a trust fund balance reflects federal debt, that is, debt held by a government account.[300] To the extent that the receipts credited to a trust fund (*i.e.*, fees, employee contributions, tax receipts, and interest earned on Treasury securities) exceed expenditures charged to the fund, the trust fund balance grows. The converse, of course, is also true—to the extent that expenditures exceed receipts, the balance decreases.

The Social Security trust funds are the largest federal trust funds both in terms of annual spending and account balance. They are also the largest single item in the federal budget. *See* GAO, *Fiscal Stewardship: A Critical Challenge Facing Our Nation*, GAO-07-362SP (Washington, D.C.: Jan. 2007), at 6. *See also* GAO, *Social Security Reform: Answers to Key Questions*, GAO-05-193SP (Washington, D.C.: May 2005); *Social Security Financing: Implications of Government Stock Investing for the Trust Fund, the Federal Budget, and the Economy*, GAO/AIMD/HEHS-98-74 (Washington, D.C.: Apr. 22, 1998), at 29. *See also* Library of Congress, Congressional Research Service, *Social Security's Treatment Under the Federal Budget: A Summary*, No. 95-206 (Mar. 20, 2002). Congress created the Social Security program in 1935 in response to the economic deprivations of the Depression. Originally created as a benefit system for

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[299] In B-274855, Jan. 23, 1997, for example, GAO noted that:

> "Donations are accounted for as trust funds and must be deposited in the Treasury as such under 31 U.S.C. § 1323(c), to be disbursed in accordance with the terms of the trust and the scope of the agency's statutory authority. Although contributions to [the Advisory Commission on Intergovernmental Relations] have been maintained separately from direct appropriations and held in a 'trust fund account' to carry out authorized purposes, they are not 'held in trust' as those words are commonly used to describe a fiduciary relationship to keep money for the benefit of another."

[300] Debt held by the government, about $8.5 trillion at the beginning of fiscal year 2007, primarily reflects debt owned by federal trust funds, such as the Social Security trust funds. GAO, *Bureau of the Public Debt's Fiscal Years 2006 and 2005 Schedule of Federal Debt*, GAO-07-127 (Washington, D.C.: Nov. 7, 2006), at 3–4.

retired workers, over time, Congress has expanded Social Security to insure disabled workers and the families of retired, disabled, and deceased workers. GAO, *Social Security: Different Approaches for Addressing Program Solvency*, GAO/HEHS-98-33 (Washington, D.C.: July 22, 1998), at 4.

Social Security consists of two separate trust funds, the Federal Old-Age and Survivors Insurance Trust Fund, which covers retirement and survivor benefits, and the Federal Disability Insurance Trust Fund, which provides benefits to disabled workers and their families.[301] Congress has provided a permanent indefinite appropriation from the general fund of the Treasury to the Social Security trust funds of an amount determined by applying the applicable employment tax rate to wages reported to the Secretary of Treasury or his delegate. 42 U.S.C. § 401(a)(3). As a check on the amount credited to these trust funds, the Commissioner of Social Security is to certify the amount of wages (or self- employment income) reported to the Internal Revenue Service (IRS). *Id. See* B-261522, Sept. 29, 1995 (Social Security Administration may use wage data collected by IRS in certifying to Treasury the amount of wages reported by employers and the amount of funds appropriated to the Social Security trust funds).

A Board of Trustees holds the Social Security trust funds. 42 U.S.C. § 401(c). The Board of Trustees is composed of the Secretary of the Treasury as Managing Trustee, the Commissioner of Social Security, the Secretary of Labor, the Secretary of Health and Human Services, all *ex officio*, and two members of the public nominated by the President and confirmed by the Senate. *Id.* In addition to holding the fund, it is the duty of the Board of Trustees to report to the Congress on the operation and status of the Funds and to review and recommend improvements in the administrative procedures and policies followed in managing the Funds. *Id.* A "person serving on the Board of Trustees" does not have a fiduciary duty *vis-à-vis* the trust funds and "shall not be personally liable for actions taken [as a member of the Board of Trustees] with respect to the Trust Funds." *Id.*

[301] *See generally* GAO-05-193SP; GAO, *Disability Insurance: SSA Should Strengthen Its Efforts to Detect and Prevent Overpayments*, GAO-04-929 (Washington, D.C.: Sept. 10, 2004); *Social Security Reform: Analysis of a Trust Fund Exhaustion Scenario*, GAO-03-907 (Washington, D.C.: July 29, 2003).

There are a number of large trust funds that finance public works, notably transportation, programs. A prominent example is the Federal Aid Highway Program which distributes billions of dollars of federal funding annually to the 50 states, the District of Columbia, and Puerto Rico for highway construction, repair, and related activities. To finance the highway program, Congress established the Highway Trust Fund account in the Treasury, 26 U.S.C. § 9503(a), designating the Secretary of Treasury as trustee, 26 U.S.C. § 9602(a).[302] Congress has provided the fund with a permanent, indefinite appropriation of amounts received in the Treasury from certain gasoline, diesel fuel, and other excise taxes paid by highway users. 26 U.S.C. § 9503(b). In fiscal year 1997, these earmarked revenues brought in $23.9 billion to the fund.[303] In 2006, the amount was $38.5 billion.[304] The Secretary of the Treasury is responsible for holding the Highway Trust Fund, reporting annually to Congress on the financial condition and operation of the fund, and investing any amounts in the fund not needed to meet current needs in interest-bearing Treasury securities. 26 U.S.C. § 9602. *See* B-275490, Dec. 5, 1996 (Treasury, as trustee, could credit Highway Trust Fund income statements with $1.59 billion in excise taxes mistakenly not credited to the Fund as the result of accounting and reporting errors).[305]

Chapter 98 of title 26, United State Code, contains a number of other trust funds established to finance social insurance, public works or environmental programs. For example, the Black Lung Disability Trust Fund finances the payment of benefits to eligible miners under the Black

[302] The Highway Trust Fund actually contains two accounts. The oldest and most well-known of the two accounts is the highway account. The other, more recent account is the Mass Transit Account, 26 U.S.C. § 9503(e).

[303] Department of Transportation, *Highway Trust Fund Primer* (Nov. 1998), at 1, *available at* www.fhwa.dot.gov/aap/PRIMER98.PDF (last visited Nov. 28, 2007).

[304] *Budget of the United States Government for Fiscal Year 2006, Appendix* (Feb. 7, 2005), at 807, *available at* www.whitehouse.gov/omb/budget/fy2006 (last visited Nov. 28, 2007).

[305] For more information on the history and operation of the Highway Trust Fund, see GAO, *Highway Trust Fund: Overview of Highway Trust Fund Estimates*, GAO-06-572T (Washington, D.C.: Apr. 4, 2006); *Federal-Aid Highways: Trends, Effect on State Spending, and Options for Future Program Design*, GAO-04-802 (Washington, D.C.: Aug. 31, 2004); *Highway Financing: Factors Affecting Highway Trust Fund Revenues*, GAO-02-667T (Washington, D.C.: May 9, 2002); and *Highway Trust Fund: Overview of Highway Trust Fund Financing*, GAO-02-435T (Washington, D.C.: Feb. 11, 2002). *See also* Library of Congress, Congressional Research Service (CRS), *The Federal Excise Tax on Gasoline and the Highway Trust Fund: A Short History*, No. RL30304 (Apr. 4, 2006).

Lung Benefits Act. 26 U.S.C. § 9501. Another social insurance fund is the Vaccine Injury Compensation Trust Fund, 26 U.S.C. § 9510. In addition to the Highway Trust Fund, other public works trust funds include the Airport and Airway Trust Fund, 26 U.S.C. § 9502, the Harbor Maintenance Trust Fund, 26 U.S.C. § 9505, and the Inland Waterways Trust Fund, 26 U.S.C. § 9506. Examples of trust funds designed to finance environmental remediation programs are the Hazardous Substance Superfund, 26 U.S.C. § 9507, and the Leaking Underground Storage Tank Trust Fund, 26 U.S.C. § 9508.

There has been an ongoing debate over whether the trust funds, particularly Social Security and the large infrastructure trust funds such as the Federal Highway Trust Fund and the Airport and Airways Development Trust Fund should be included in the budget. In other words, whether they should be "off budget," which are "those budgetary accounts (either federal or trust funds) designated by law as excluded from budget totals." GAO, *A Glossary of Terms Used in the Federal Budget Process*, GAO-05-734SP (Washington, D.C.: Sept. 2005), at 72.[306] Since fiscal year 1969 the President has submitted a unified budget that covers both trust and nontrust fund activities. The unified budget merges trust and nontrust outlays and receipts into a consolidated budget surplus or deficit. As a result, the growing positive trust fund balances, particularly in the Social Security trust funds, "[mask] the basic imbalance in the government's financial affairs." GAO, *The Budget Treatment of Trust Funds*, GAO/T-AFMD-90-3 (Washington, D.C.: Oct. 18, 1989), at 5. In other words, the trust fund surpluses disguise the severity of the deficit (or the amount of surplus) on the nontrust fund side of the government's ledgers.

Related to the on- or off-budget issue are allegations of misuse of the major trust funds such as the Highway and the Airport and Airway trust funds. Proponents of this view charge that, while the trust funds have a steady dedicated stream of tax receipts, budgeting actions have restricted fund outlays to create trust fund surpluses for budgetary reasons, namely, to

[306] A better sense of what it means to be "off budget" can be gleaned from the statutory provision prescribing the budgetary treatment of the Postal Service Fund. 39 U.S.C. § 2009a. Section 2009a directs that the receipts and disbursements of the Postal Service Fund shall be excluded from the budget totals, exempt from any statutory budget limitations, and exempt from sequestration orders under the Balanced Budget and Emergency Deficit Control Act of 1985. For additional discussion, see the CRS reports *Social Security and the Federal Budget: What Does Social Security's Being "Off Budget" Mean?*, No. 98-422 (Aug. 29, 2001) and *Appropriations for FY 2000: Department of Transportation and Related Agencies*, No. RL30208 (Feb. 4, 2000).

lower the deficit. GAO, *Budget Issues: Trust Funds and their Relationship to the Federal Budget*, GAO/AFMD 88-55 (Washington, D.C.: Sept. 30, 1988), at 4. This practice, proponents argue, breaks the implied agreement underlying the original enactment of the "trust fund"—full use of dedicated tax receipts for the trust fund program. Opponents of off-budget designations argue that changing the label or category does not make an activity less federal, does not change total federal revenues or spending, and contributes to a more confusing picture of the federal government's total taxes and spending. This simply highlights the tension that Congress faces between the collection and expenditure of earmarked revenues, whether trust funds or special funds, and the tradeoffs Congress must make with respect to spending priorities in general. GAO, *Budget Issues: Trust Funds in the Budget*, GAO/T-AIMD-99-110 (Washington, D.C.: Mar. 9, 1999), at 1.

A number of different approaches have been offered. One proposed approach is to take the fund "off budget." *See*, *e.g.*, H.R. 798, 106th Cong., § 7 (1999) (a bill to provide funding and off-budget treatment for the protection and enhancement of natural and cultural resources); H.R. 4, 105th Cong., § 2 (1997) (a bill proposing to provide off-budget treatment for the Highway, Airport and Airway, Inland Waterways and Harbor Maintenance Trust Funds). GAO has suggested that Congress could address the matter in the context of the unified budget by separately displaying trust funds, federal funds, and government sponsored enterprises in the budget. GAO/T-AFMD-90-3. In the Transportation Equity Act for the 21st Century, Pub. L. No. 105-178, 112 Stat. 107 (June 9, 1998) (TEA-21), Congress took yet a different approach with respect to the highway and mass transit programs. In TEA-21 Congress established outlay caps that apply separately to the highway and mass transit programs for fiscal years 1999 through 2003. In addition to carving out outlay caps for these programs separate from the dollar caps applicable to discretionary spending in general, Congress also specified annual guaranteed minimum spending levels tied, in the case of highways, to Highway Trust Fund receipts. For a discussion of the implications of this approach, see GAO, *Cap Structure and Guaranteed Funding*, GAO/T-AIMD-99-210 (Washington, D.C.: July 21, 1999).

In addition to transparency of trust fund balances through the budget process, another issue that has arisen is whether and to what extent the long-term actuarial costs of the largest social insurance trust funds (Social Security, Medicare, and Medicaid) should be reported on the balance sheet of the consolidated financial statements of the United States government as liability of the government. *See* FASAB, *Preliminary Views—Accounting for Social Insurance*, *Revised* (Oct. 23, 2006), *available at* www.fasab.gov/pdffiles/social insurance92006.pdf (last visited Nov. 28, 2007). While these trust funds presently show a surplus (thus, the investment of excess receipts in Treasury securities), the long-term cost of these programs is expected to reach nearly $40 trillion—over and above the anticipated future tax receipts. *See* GAO-07-362SP; GAO, *The Nation's Long-Term Fiscal Outlook: September 2006 Update*, GAO-06-1077R (Washington, D.C.: Sept. 2006). As of fiscal year 2006, the consolidated financial statements included a Statement of Social Insurance that reports the long-term actuarial costs of these programs, but the balance sheet reports as a liability only the amounts that are "due and payable" at fiscal year end under the programs. *See* FASAB, *Preliminary Views*, *supra*.