

Introduction

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B. The Congressional “Power of the Purse”

The congressional “power of the purse” refers to the power of Congress to appropriate funds and to prescribe the conditions governing the use of those funds.¹ The power derives from specific provisions of the Constitution of the United States. First, Article I, section 8 empowers the Congress to “pay the Debts and provide for the common Defence and general Welfare of the United States, ” and to—

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

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

“NO Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law .“

The Appropriations Clause has been described as “the most important single curb in the Constitution on Presidential power.”² It means that ‘no money can be paid out of the Treasury unless it has been appropriated by an act of Congress.’ Cincinnati Soap Co. v. United States, 301 U.S. 308,321 (1937). Regardless of the nature of the payment—salaries, payments promised under a contract, payments ordered by a court, whatever—a federal agency may not make a payment from the United States Treasury unless Congress has made the funds available. As the Supreme Court stated well over a century ago:

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

Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850). This prescription remains as valid today as it was when it was written. Citing both Cincinnati Soap and Reeside, the Court recently reiterated that any exercise of power by a government agency “is limited

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

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

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

As these statements by the Supreme Court make clear, the congressional “power of the purse” reflects the fundamental proposition that a federal agency is dependent on Congress for its funding. At its most basic level, this means that it is up to Congress to decide whether or not to provide funds for a particular program or activity and to fix the level of that funding. In exercising its appropriations power, however, Congress is not limited to these elementary functions. It is also well-established that Congress can, within constitutional limits, determine the terms and conditions under which an appropriation may be used. See, e.g., Cincinnati Soap Co., 301 U.S. at 321; Oklahoma v. Schweiker, 655 F.2d 401,406 (D.C. Cir. 1981) (citing numerous cases); Spaulding v. Douglas Aircraft Co., 60 F. Supp. 985,988 (S.D. Cal. 1945), *aff’d*, 154 F.2d 419 (9th Cir. 1946). Thus, Congress can decree, either in the appropriation itself or by separate statutory provisions, what will be required to make the appropriation “legally available” for any expenditure. It can, for example, describe the purposes for which the funds may be used, the length of time the funds may remain available for these uses, and the maximum amount an agency may spend on particular elements of a program. In this manner, Congress may, and often does, use its appropriation power to accomplish policy objectives and to establish priorities among federal programs.

Congress can also use its appropriation power for other measures. It can, for example, include a provision in an appropriation act prohibiting the use of funds for a particular program. By doing this without amending the program legislation, Congress can effectively suspend operation of the program for budgetary or policy reasons, or perhaps simply to defer further consideration of the merits of the program. The Supreme Court recognized the validity of this application of the appropriation power in United States v. Dickerson, 310 U.S. 554 (1940).

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

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

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

The only cases we have found in which courts invalidated funding restrictions as exceeding the congressional spending power did so on the grounds that the restrictions violated some independent constitutional bar. For example, in United States v. Lovett, 328 U.S. 303 (1946), the Supreme Court held an appropriation act restriction unconstitutional as a bill of attainder. The rider in question was a prohibition on the payment of salary to certain named individuals rather than a condition on the receipt of funds. In a more recent case, a provision in the 1989 District of Columbia appropriation act prohibited the use of any funds appropriated by the act unless the District adopted legislation spelled out in the rider. The provision was invalidated on first amendment grounds. Clarke v. United States, 705 F.Supp. 605 (D.D.C. 1988), aff'd, 886 F.2d 404 (D.C. Cir. 1989). The district court recognized that Congress has the power to condition funding on the enactment of certain legislation by the states. E.g., North Carolina ex rel. Morrow v. Califano, 445 F. Supp. 532, 535-36 (E. D.N.C. 1977), aff'd mem., 435 U.S. 962. The difference was that the provision in question would have barred use of all funds provided for the District for 1989 and, as both the district court and the court of appeals noted, was thus clearly coercive. 705 F. Supp. at 609; 886 F.2d at 409.⁴

Unless and until the courts provide further definition, it would appear safe to say that Congress can, as long as it does not violate the Constitution, appropriate money for any purpose it chooses, from paying the valid obligations of the United States to what the Supreme Court has termed "pure charity," and can implement

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

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

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

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

“[The Appropriations Clause] is not self-defining and Congress has plenary power to give meaning to the provision. The Congressionally chosen method of implementing the requirements of Article I, section 9, clause 7 is to be found in various statutory provisions.” Barrington v. Bush, 553 F.2d 190, 194-95 (D.C. Cir. 1977).

There were few statutory funding controls in the early years of the Nation and abuses were commonplace. As early as 1809, one senator, citing a string of abuses, introduced a resolution to look into ways to prevent the improper expenditure of public funds.⁶ In 1816 and 1817, John C. Calhoun lamented the “great evil” of diverting public funds to uses other than those for which they were appropriated.⁷ Even as late as the post-Civil War years, the situation saw little improvement. “Funds were commingled. Obligations were made without appropriations. Unexpended balances from prior years were used to augment current appropriations.”⁸

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

⁶19 Annals of Cong. 347 (1809) (remarks of Senator Hillhouse).

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

⁸Id. at 57.

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

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

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

Implementation of this provision, as a logical corollary of the appropriation power, is also wholly within the congressional province, and the courts have so held.⁹ United States v. Richardson, 418 U.S. 166, 178 n.11 (1974) (“it is clear that Congress has plenary power to exact any reporting and accounting it considers appropriate in the public interest”); Barrington v. Bush, 553 F.2d at 195; Hart v. United States, 16 Ct. Cl. at 484 (“[auditing and accounting are but parts of a scheme for payment . . .”).

The Constitution mentions appropriations in only one other place. Article I, section 8, clause 12 provides that the Congress shall have power to “raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years.” The two-year limit in clause 12 has been strictly construed as applying essentially to appropriations for personnel and for operations and maintenance, and not to other military appropriations such as weapon system procurement or military construction. See B-114578, November 9, 1973; 40 Op. Att’y Gen. 555 (1948); 25 Op.

⁹Thus, Congress has delegated authority to the Comptroller General to prescribe, after consultation with the President and the Secretary of the Treasury, accounting principles and standards for the federal government. 31 U.S.C. 83511.

Att’y Gen. 105 (1904). In any event, Congress has traditionally made appropriations for military personnel and operations and maintenance on a fiscal-year basis.

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

C. Historical Perspective

1. Evolution of the Budget and Appropriations Process ¹⁰

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

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

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

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

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

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

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

In the mid-19th century, a move was begun to restrict appropriation acts to only those expenditures which had been previously authorized by law. The purpose was to avoid the delays caused when legislative items or “riders” were attached to appropriation bills. Rules were eventually passed by both Houses of Congress to require, in general, prior legislative authorizations for the enactment of appropriations.

It was during this same period that the concept of a fiscal year separate and distinct from the calendar year came into existence.¹¹

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

Before 1921, departments and agencies generally made individual requests for appropriations. These submissions were compiled for congressional review in an uncoordinated “Book of Estimates.” The Budget and Accounting Act authorized the President to submit a national budget each year and restricted the authority of the agencies to present their own proposals. See 31 U.S.C. §§ 1104, 1105. With this centralization of authority for the formulation of the executive branch budget in the President and the newly established Bureau of the Budget (now Office of Management and Budget), Congress also

¹¹prior@ 1842, the government did not distinguish between fiscal Year and calendar year. From 1842 to 1976, the government’s fiscal year ran from July 1 to the following June 30. In 1974, Congress changed the fiscal year to run, starting with FY 1977, from October 1 to September 30. 31 U.S.C. § 1102. The concept of a fiscal year has been termed an “absolute necessity.” *Sweet v. United States*, 34 Ct. Cl. 377, 386 (1899). See also *Bachelor v. United States*, 8 Ct. Cl. 235, 238 (1872) (reasons for fixing a fiscal year are “so obvious that no one can fail to see their importance”).

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

The decades immediately following World War II saw growth in both the size and the complexity of the federal budget. It became apparent that the congressional role in the “budget and appropriations” process centered heavily on the appropriations phase and placed too little emphasis on the budgetary phase. A major round of reforms came about with the Congressional Budget and Impoundment Control Act of 1974.¹³ This statute made several major changes in the budget and appropriations process. For example:

- It established a detailed calendar governing the various stages of the budget and appropriations process. 2 U.S.C. § 631.
- It provided for congressional review of the President’s budget; the establishment of target ceilings for federal expenditures through one or more concurrent resolutions; and the evaluation of spending bills against these targets. 2 U.S.C. §§ 632-642. Prior to this time, Congress had considered the President’s budget only in the context of individual appropriation bills. To implement the new process, the law created Budget Committees in both the Senate and the House, and a Congressional Budget Office.
- Prompted by the growth of “backdoor spending,” it enhanced the role of the Appropriations Committees in reviewing proposals for contract authority, borrowing authority, and mandatory entitlements. 2 U.S.C. § 651.

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

The next piece of major legislation in the fiscal area was the Balanced Budget and Emergency Deficit Control Act of 1985, known as the Gramm-Rudman-Hollings Act,¹⁴ enacted to deal with a growing budget deficit (excess of total outlays over total receipts for a given fiscal year, 2 U.S.C. § 622(6)). The Gramm-Rudman procedures received a major overhaul with the Budget Enforcement Act of

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

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

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

1990¹⁵ The law establishes maximum deficit amounts for each fiscal year through FY 1995, subject to adjustment, and sets monetary caps on several broad spending categories. In grossly oversimplified terms, if spending bills cause a cap to be exceeded, the law provides mechanisms for making appropriate spending reductions (called “sequestrations” of budget authority). Sequestrations may occur at several points during a fiscal year.

2. GAO’s Role in the Process

As the budget and appropriations process has evolved over the course of the 20th century, GAO’s role with respect to it has also evolved. Title III of the Budget and Accounting Act of 1921, GAO’s basic enabling statute, created two very different roles for the Comptroller General and his new agency. First, he was to assume all the duties of the Comptroller of the Treasury and his six subordinate auditors, and to serve as the chief accounting officer of the government. To this end, the Comptroller General is to settle all claims by and against the government,¹⁶ and to settle the accounts of the United States government.¹⁷ Another of these functions is the issuance of legal decisions, discussed separately in Section E below.

In addition, the Comptroller General was directed to investigate the receipt, disbursement, and application of public funds, reporting the results to Congress;¹⁸ and to make investigations and reports upon the request of either House of the Congress or of any congressional committee with jurisdiction over revenue, appropriations, or expenditures. *9 He is also directed to supply such information, if requested, to the President.²⁰ The mandates in the 1921 legislation, together with a subsequent directive in the Legislative Reorganization Act of 1946 to make expenditure analyses of executive branch

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

¹⁶Budget and Accounting Act 5305, 42 Stat. at 24, 31 U.S.C. § 3702(a).

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

¹⁸Budget and Accounting Act §§ 312(a) and (c), 42 Stat. at 25–26, 31 U.S.C. § 712(1)–(5)

¹⁹Budget and Accounting Act § 312(b), 42 Stat. at 26, 31 U.S.C. §§ 712(4) and (5). At about the same time, both the House and the Senate consolidated jurisdiction over all appropriation bills in a single committee in each body.

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

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

The Accounting and Auditing Act of 1950²² authorized the Comptroller General to audit the financial transactions of each executive, legislative, and judicial agency;²³ and to prescribe, in consultation with the President and the Secretary of the Treasury, accounting principles, standards, and requirements for the executive agencies suitable to their needs.²⁴

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

The Congressional Budget and Impoundment Control Act of 1974 gave GAO a number of additional duties in the budgetary arena. It directs GAO, in cooperation with Treasury, the Office of Management and Budget, and the Congressional Budget Office, to "establish, maintain, and publish standard terms and classifications for fiscal, budget, and program information of the Government, including information on fiscal policy, receipts, expenditures, programs, projects, activities, and functions." Agencies are to use these terms and classifications in providing information to Congress.²⁶ It gives GAO a variety of functions relating to the obtaining, studying, and reporting to Congress of fiscal, budget, and program information.²⁷ Finally, it gives the Comptroller General the responsibility to

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

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

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

²⁴*Id.* § 112(a), 64 Stat. at 835.31 U.S.C. § 3511(a).

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

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

²⁷31 U.S.C. §§ 1115(b)-(e). **also derived** from Pub. L. No. 93-344, § 801(a). GAO is continually studying the budget process as part of its overall mission. For an overview of GAO reform proposals, with references to related GAO reports, see Managing the Cost of Government: Proposals for Reforming Federal Budgeting Practices, GAO/AFMD-90-1 (October 1989). A study of the budget deficit is The Budget Deficit: Outlook, Implications, and Choices, GAO/OCG-90-5 (September 1990).

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

The Federal Managers' Financial Integrity Act of 1982²⁹ is a very brief law but one with substantial impact. It was intended to increase governmentwide emphasis on internal accounting and administrative controls. Agencies are to establish internal accounting and administrative control systems in accordance with standards prescribed by the Comptroller General, conduct annual reviews of their systems in accordance with Office of Management and Budget guidelines, and report the results of these reviews to the President and to Congress, GAO monitors, and issues governmentwide reports on, the implementation of the Financial Integrity Act. See, for example, Financial Integrity Act: Inadequate Controls Result in Ineffective Federal Programs and Billions in Losses, GAO/AFMD-90-10 (November 1989).

D. "Life Cycle" of an Appropriation

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

- Executive budget formulation and transmittal
- Congressional action
- Budget execution and control
- Audit and review
- The "afterlife" ' -unexpended balances

1. Executive Budget Formulation and Transmittal

The first step in the life cycle of an appropriation is the long and exhaustive administrative process of budget preparation and review, a process that may well take place several years before the budget for a particular fiscal year is ready to be submitted to the Congress. The primary participants in the process at this stage are the agencies and individual organizational units, who review current operations, program objectives, and future plans, and the

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

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

Office of Management and Budget (OMB),³⁰ which is charged with broad oversight, supervision, and responsibility for coordinating and formulating a consolidated budget submission.

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

The President's budget must be submitted to Congress on or before the first Monday in February of each year, for use during the following fiscal year. 2 U.S.C. § 631. Numerous statutory provisions, the most important of which are 31 U.S.C. & 31104-1109, prescribe the content and nature of the materials and justifications that must be submitted with the President's budget request. A comprehensive listing is contained in GAO's report Budget Issues: The President's Budget Submission, GAO/AFMD-90-35 (October 1989). Specific instructions and policy guidance are contained in OMB Circular No. A-11, entitled Preparation and Submission of Budget Estimates.

2. congressional Action

a. Summary of Congressional Process

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

In simpler times, appropriations were often made in the form of a single, consolidated appropriation act. The most recent regular consolidated appropriation act³¹ was the General Appropriation Act, 1951, 64 Stat. 595. Since that time, appropriations have generally

³⁰OMB was established by Part 1 of Reorganization Plan No. 2 of 1970 (84 Stat. 2085), which designated the former Bureau of the Budget as OMB and transferred all the authority vested in the Bureau and its director to the President. By Executive Order 11541, July 1, 1970, the President in turn delegated that authority to the Director of OMB. OMB's **primary functions include assistance to the President** in the preparation of the budget and the formulation of the fiscal program of the government, supervision and control of the administration of the budget, centralized direction in executive branch financial management, and review of the organization and management of the executive branch.

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

been made in a series of regular appropriation acts plus one or more supplemental appropriation acts. Most regular appropriation acts are organized on the basis of one or more major departments and a number of smaller agencies (corresponding to the jurisdiction of appropriations subcommittees), although a few are based solely on function. An agency may receive funds under more than one appropriation act. The individual structures are of course subject to change over time. At the present time, there are 13 regular appropriation acts, as follows:

- Departments of Commerce, Justice, State, the Judiciary, and related agencies
 - ∨ Department of Defense
- Department of the Interior and related agencies
- Departments of Labor, Health and Human Services, Education, and related agencies
- Department of Transportation and related agencies
 - ∨ Department of the Treasury, Postal Service, and general government
 - ∨ Departments of Veterans Affairs, Housing and Urban Development, and independent agencies
 - ∨ District of Columbia
- Energy and water development
- Foreign operations, export financing, and related programs
- Legislative branch
 - ∨ Military construction
- Rural development, Department of Agriculture, and related agencies

Before considering individual appropriation measures, however, Congress must, under the Congressional Budget Act, first agree on governmentwide budget totals. A timetable for congressional action is set forth in 2 U.S.C. § 631, with further detail in §§ 632–656. Key steps in that timetable are summarized below.³²

First Monday in February. On or before this date, the President submits to Congress the Administration's budget request for the fiscal year to start the following October 1. The deadline under the

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

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

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

Within 6 weeks after President submits budget. Each congressional committee with legislative jurisdiction submits to the appropriate Budget Committee its views and estimates on spending and revenue levels for the following fiscal year on matters within its jurisdiction. 2 U.S.C. § 632(d), as amended by section 13112(a)(5) of the Omnibus Budget Reconciliation Act of 1990, 104 Stat. 1388-608. The House and Senate Budget Committees then hold hearings and prepare their respective versions of a concurrent resolution, which is intended to be the overall budget plan against which individual appropriation bills are to be evaluated.

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

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

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

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

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

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

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

b. Points of Order

A number of requirements relevant to an understanding of appropriations law and the legislative process are found in rules of the Senate and/or House of Representatives. For example, Rule XXI(2), Rules of the House of Representatives, prohibits appropriations for objects not previously authorized by law. A similar but more limited prohibition exists in Rule XVI, Standing Rules of the Senate. Other examples are the prohibition against including general legislation in appropriation acts³³ (Senate Rule XVI, House Rule XXI), and the prohibition against consideration by a conference committee of matters not committed to it by either House (Senate Rule XXVIII, House Rule XXVIII). The applicability of Senate and House

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

rules is exclusively within the province of the particular House and a matter on which the Comptroller General will generally not render an opinion. E.g., B-173832, August 1, 1975.

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

The effect of these rules and of statutes like 2 U.S.C. § 651(a) is to subject the non-complying bill to a “point of order.” A point of order is a procedural objection raised by a Member alleging a departure from a rule or statute governing the conduct of business. It differs from an absolute prohibition in that (a) it is always possible that no one will raise it, and (b) if raised, it may not be sustained. Also, some measures may be considered under special resolutions waiving points of order. If a point of order is raised and sustained, the offending provision is effectively killed, and may be revived only if it is amended to cure the non-compliance.

The potential effect of a rule or statute subjecting a provision to a point of order is limited to the pre-enactment stage. If a point of order is not raised, or raised and not sustained, the provision if enacted is no less valid. To restate, a rule or statute subjecting a given provision to a point of order has no effect or application once the legislation or appropriation has been enacted. 57 Comp. Gen. 34 (1977); 34 Comp. Gen. 278 (1954); B-173832, August 1, 1975; B-123469, April 14, 1955; B-87612, July 26, 1949.

3. Budget Execution and Control

a. In General

The body of enacted appropriation acts for a fiscal year, as amplified by legislative history and the relevant budget submissions, becomes the government’s financial plan for that fiscal year, The

“execution and control” phase refers generally to the period of time during which the budget authority made available by the appropriation acts remains available for obligation. An agency’s task during this phase is to spend the money Congress has given it to carry out the objectives of its program legislation.

The Office of Management and Budget apportions or distributes budgeted amounts to the executive branch agencies, thereby making funds in appropriation accounts (administered by the Treasury Department) available for obligation. 31 U.S.C. §§ 151 1–16. The apportionment system through which budget authority is distributed by time periods (usually quarterly) or by activities is intended to achieve an effective and orderly use of available budget authority, and to reduce the need for supplemental or deficiency appropriations. Each agency then makes allotments pursuant to the OMB apportionments or other statutory authority. 31 U.S.C. §§1513(d),1514. An allotment is a delegation of authority to agency officials which allows them to incur obligations within the scope and terms of the delegation.³⁴ These concepts will be discussed further in Chapter 6. Further detail on the budget execution phase may also be found in OMB Circular No. A-34, Instructions on Budget Execution.

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

b. Impoundment

While an agency’s basic mission is to carry out its programs with the funds Congress has appropriated, there is also the possibility that, for a variety of reasons, the full amount appropriated by Congress will not be expended or obligated by the administration. Under the Impoundment Control Act of 1974, an impoundment is an action or inaction by an officer or employee of the United States that precludes the obligation or expenditure of budget authority

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

provided by Congress. GAO, Glossary of Terms Used in the Federal Budget Process, PAD-81-27, at 63 (1981).³⁵ The Act applies to “Salaries and Expenses” appropriations as well as program appropriations. 64 Comp. Gen. 370,375-76 (1985).

There are two types of impoundment action—deferrals and rescission proposals. A deferral is a postponement of budget authority in the sense that an agency temporarily withholds or delays obligation or expenditure. The President is required to submit a special message to Congress reporting any deferral of budget authority. Deferrals are authorized only to provide for contingencies, to achieve savings made possible by changes in requirements or greater efficiency of operations, or as otherwise specifically provided by law.³⁶ A deferral may not be proposed for a period beyond the end of the fiscal year in which the special message reporting it is transmitted, although, for multiple-year funds, nothing prevents a new deferral message covering the same funds in the following fiscal year. 2 U.S.C. §§ 682(1), 684.³⁷

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

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

³⁶These requirements are repeated in 31 U.S.C. §1512(c), which prescribes conditions for establishing reserves through the apportionment process. The President’s deferral authority under the Impoundment Control Act thus mirrors his authority to establish reserves under the Antideficiency Act. In other words, deferrals are authorized only in those situations in which reserves are authorized under the Antideficiency Act. GAO/OGC-90-4 (B-237297.3, March 6, 1990). Deferrals for policy reasons are **not** authorized. *Id.*

³⁷Under the original 1974 legislation, a deferral **could be** overturned by the passage of an **impoundment** resolution by either the House or the Senate. This “legislative veto” provision was found unconstitutional in *City of New Haven v. United States*, 809 F.2d 900 (D.C. Cir. 1987), and the statute was subsequently amended to remove it. Congress may, of course, enact legislation disapproving a deferral and requiring that the deferred funds be made available for obligation.

The Impoundment Control Act requires the Comptroller General to monitor the performance of the executive branch in reporting proposed impoundments to the Congress. A copy of each special message reporting a proposed deferral or rescission must be delivered to the Comptroller General, who then must review each such message and present his views to the Senate and House of Representatives. 2 U.S.C. § 685(b). If the Comptroller General finds that the executive branch has established a reserve or deferred budget authority and failed to transmit the required special message to the Congress, the Comptroller General so reports to the Congress. The Comptroller General also reports to the Congress on any special message transmitted by the executive branch which has incorrectly classified a deferral or a rescission, 2 U.S.C. § 686. GAO will construe a deferral as a de facto rescission if the timing of the proposed deferral is such that “funds could be expected with reasonable certainty to lapse before they could be obligated, or would have to be obligated imprudently to avoid that consequence.” 54 Comp. Gen. 453,462 (1974),

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

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

There is also a distinction between deferrals, which must be reported, and “programmatic” delays, which GAO does not regard as reportable under the Impoundment Control Act. A programmatic delay is one in which operational factors unavoidably impede the obligation of budget authority, notwithstanding the agency’s reasonable and good faith efforts to implement the program. GAO/OOC-91-8 (B-241514.5, May 7, 1991); GAO/OGC-91-3 (B-241514.2, February 5, 1991). Since intent is a relevant factor, the determination requires a case-by-case evaluation of the agency’s justification in

light of all of the surrounding circumstances. Delays resulting from the following factors may be programmatic, depending on the facts and circumstances involved: uncertainty as to the amount of budget authority that will ultimately be available for the program (B-203057, September 15, 1981; B-207374, July 20, 1982, noting that the uncertainty is particularly relevant when it “arises in the context of continuing resolution funding, where Congress has not yet spoken definitively”); time required to setup the program or to comply with statutory conditions on obligating the funds (B-96983/B-225110, September 3, 1987); compliance with congressional committee directives (B-221412, February 12, 1986); delay in receiving a contract proposal requested from contemplated sole source awardee (B-115398, February 6, 1978); historically low loan application level (B-1 15398, September 28, 1976); late receipt of complete loan applications (B-195437.3, February 5, 1988); delay in awarding grants pending issuance of necessary regulations (B-171630, May 10, 1976); administrative determination of allowability and accuracy of claims for grant payments (B-115398, October 16, 1975). A programmatic delay may become a reportable deferral if the programmatic basis ceases to exist.

4. Audit and Review

a. Basic Responsibilities

Every federal department or agency has the initial and fundamental responsibility to assure that its application of public funds adheres to the terms of the pertinent authorization and appropriation acts, as well as any other relevant statutory provisions. This responsibility—enhanced by the enactment of the Federal Managers’ Financial Integrity Act and the creation of an Inspector General in many agencies—includes establishing and maintaining appropriate accounting and internal controls, one of which is an internal audit program. Assuring the legality of proposed payments is also, under 31 U.S.C. § 3528, one of the basic responsibilities of agency certifying officers. The Chief Financial Officers Act of 1990 (Pub. L. No. 101-576, §§ 303,304,104 Stat. 2838, 2849-53), added new 31 U.S.C. § 3515 and 352 l(e)-(h), which provide for the preparation and audit of financial statements for those agencies required to establish Chief Financial Officers. In addition, GAO regularly

audits federal programs under its various authorities previously summarized.

b. GAO Recommendations

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

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

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

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

5. The “Afterlife”-
Unexpended Balances

Continuing our “life cycle” analogy, an appropriation “dies” in a sense at the end of its period of obligational availability. There is, however, an afterlife to the extent of any unexpended balances. Unexpended balances, both obligated and unobligated, retain a limited availability for five fiscal years following expiration of the period for which the source appropriation was made. These concepts are discussed in Chapter 5.

E. The Role of the
Accounting Officers:
Legal Decisions

1. A Capsule History

Since the early days of the Republic, the Congress, in exercising its oversight of the public purse, has utilized administrative officials for the settlement of public accounts and the review of federal expenditures. These officials have traditionally been called the “accounting officers” of the government.³⁸

a. Accounting Officers Prior to
1894

Throughout most of the 19th century, the accounting officers consisted of a series of comptrollers and auditors. Starting in 1817 with two comptrollers and four auditors, the number increased until, for the second half of the century, there were three co-equal comptrollers (First Comptroller, Second Comptroller, Commissioner of Customs) and six auditors (First Auditor, Second Auditor, etc.), all officials of the Treasury Department. The jurisdiction of the comptrollers and auditors was divided generally along departmental lines, with the auditors examining accounts and submitting their settlements to the appropriate comptroller.

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

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

There are no published decisions of the First Comptroller prior to the term of William Lawrence (1880–1885). Lawrence published his decisions in a series of 6 annual volumes. After Lawrence’s decisions, a gap of 9 years followed until First Comptroller Robert Bowler published a single unnumbered volume of his 1893-94 decisions.³⁹

The decisions of the Second Comptroller and the Commissioner of Customs were never published. However, volumes of digests of decisions of the Second Comptroller were published starting in 1852. The first volume, unnumbered, saw three cumulative editions, the latest issued in 1869 and including digests for the period 1817-1869. Three additional volumes (designated volumes 2,3, and 4) were published in 1884, 1893, and 1899 (the latter being published several years after the office had ceased to exist), covering respectively the periods 1869-84, 1884-93, and 1893-94.⁴¹

Thus, material available in permanent form from this period consists of Lawrence’s 6 volumes, Bowler’s single volume, and 4 volumes of Second Comptroller digests.

b. 1894-1921: Comptroller of the Treasury

In 1894, Congress enacted the so-called Dockery Act, actually a part of the general appropriation act for 1895 (28 Stat. 162, 205), which consolidated the functions of the First and Second Comptrollers and the Commissioner of Customs into the newly created Comptroller of the Treasury. (The title was a reversion to one which had been used before 1817.) The 6 auditors remained, with different titles, but their settlements no longer had to be automatically submitted to the Comptroller.

The Dockery Act included a provision requiring the Comptroller of the Treasury to render decisions upon the request of an agency head or a disbursing officer. (Certifying officers did not exist back then.) Although this was to a large extent a codification of existing practice, it gave increased significance to the availability of the

³⁹Citations to these are rarely encountered, and we have observed no consistent citation format, except that the First Comptroller’s name is always included to prevent confusion with the later Comptroller of the Treasury series. Example: 5 Lawrence, First **Comp.** Dec. 408 (1884).

⁴⁰Digests are numbered consecutively within each volume, Citations should specify the digest number rather than the page number since several digests appear on each page. Example: 4 Dig. **Second Comp.** Dec. ¶ 35 (1893). Without the text of the decisions themselves, the digests are of primarily historical interest.

decisions. Accordingly, the first Comptroller of the Treasury (Robert Bowler, who had been First Comptroller when the Dockery Act passed) initiated the practice of publishing an annual volume of decisions “of such general character as will furnish precedents for the settlements of future accounts.” 1 Comp. Dec. iv (1896) (Preface).

The Decisions of the Comptroller of the Treasury series consists of 27 volumes covering the period 1894–1921.⁴¹ Comptroller of the Treasury decisions not included in the annual volumes exist in bound “manuscript volumes,” which are now in the custody of the National Archives and are thus unavailable as a practical matter.

c. 1921 to the Present Time

When the Budget and Accounting Act of 1921 created the General Accounting Office, the offices of the Comptroller of the Treasury and the 6 Auditors were abolished and their functions transferred to the Comptroller General. Among these functions was the issuance of legal decisions to agency officials concerning the availability and use of appropriated funds. Thus, the decisions GAO issues today reflect the continuing evolution of a body of administrative law on federal fiscal matters dating back to the Nation’s infancy. We turn now to a brief description of this function under the stewardship of the Comptroller General.

2. Decisions of the Comptroller General

a. General Information

Certain federal officials are entitled by statute to receive GAO decisions. The Comptroller General renders decisions in advance of payment when requested by disbursing officers, certifying officers, or the head of any department or establishment of the federal government, who may be uncertain whether he or she has authority to make, or authorize the making of, particular payments. 31 U.S.C. § 3529. These, logically, are known as “advance decisions.”

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

⁴¹These are cited by volume and page number, respectively, and the year of the decision, using the abbreviation “Comp. Dec.” Example: 19 Comp. Dec. 582 (1913). There is also a hefty (2,497 pages) volume, published in 1920, of digests of decisions appearing in volumes 1-26.

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

A decision is binding on the executive branch⁴² and on the Comptroller General himself,⁴³ but is not binding on a private party who, if dissatisfied, retains whatever recourse to the courts he would otherwise have had. There is no legal requirement for the private party to come to GAO, under the doctrine of exhaustion of administrative remedies, before seeking judicial resolution.

There is no specific procedure for requesting a decision from the Comptroller General. A simple letter is usually sufficient. The request should, however, include all pertinent information or supporting material, and should present any arguments the requestor wishes to have considered.

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

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

⁴²See United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 4 n.2 (1927); St. Louis, Brownsville & Mexico Ry. Co. v. United States, 268 U.S. 169, 174 (1925); United States v. Standard Oil Co. of California, 545 F.2d 624, 637-38 (9th Cir. 1976); Burkley v. United States, 185 F.2d 267, 272 (7th Cir. 1950); United States ex rel. Steacy-Schmidt Mfg. Co. v. Globe Indemnity Co., 66 F.2d 302, 303 (3d Cir. 1933); United States ex rel. Brookfield Construction Co. v. Stewart, 234 F. Supp. 94, 99-100 (D.D.C. 1964); Pettit v. United States, 488 F.2d 1026, 1031 (Ct. Cl. 1973); 54 Comp. Gen. 921 (1975); 45 Comp. Gen. 335, 337 (1965). An exception is decisions on bid protests under the Competition in Contracting Act, 31 U.S.C. §§ 3551-56, which by law have been designated as advisory only. See Ameron, Inc. v. Corps of Engineers, 809 F.2d 979 (3d Cir. 1986).

⁴³31 U.S.C. § 3526(b).

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

An involved party or agency may request reconsideration of a decision. The standard applied is whether the request demonstrates error of fact or law (e.g., B-184062, July 6, 1976) or presents new information not considered in the earlier decision. While the Comptroller General gives precedential weight to prior decisions,⁴⁴ a decision may be modified or overruled by a subsequent decision. In overruling its decisions, GAO tries to follow the approach summarized by the Comptroller of the Treasury in a 1902 decision:

"I regret exceedingly the necessity of overruling decisions of this office heretofore made for the guidance of heads of departments and the protection of paying officers, and fully appreciate that certainty in decisions is greatly to be desired in order that uniformity of practice may obtain in the expenditure of the public money, but when a decision is made not only wrong in principle but harmful in its workings, my pride of decision is not so strong that when my attention is directed to such decision I will not promptly overrule it. It is a very easy thing to be consistent, that is, to insist that the horse is 16 feet high, but not so easy to get right and keep right." 8 Comp. Dec. 695,697 (1902).

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

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

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

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

Informal opinions expressed by GAO officers or employees are meant to be helpful but are in no way controlling on any subsequent formal or official determinations by the Comptroller General. 56 Comp. Gen. 768,773-74 (1977); 31 Comp. Gen. 613 (1952); 29 Comp. Gen. 335 (1950); 12 Comp. Gen. 207 (1932); 4 Comp. Gen. 1024 (1925).

b. Note on Citations

Published decisions of the Comptroller General—those printed in the annual Decisions of the Comptroller General volumes—are cited by volume, page number on which the decision begins, and the year. Example: 31 Comp. Gen. 350 (1952). Unpublished decisions are cited by file number and date, for example, B-193282, December 21, 1978. The present file numbering system (“B-numbers”) has been in use since January 1939. From 1924 through 1938, file numbers had an “A” prefix.⁴⁷ Decisions selected for publication but for which page numbers have not yet been assigned are cited as follows: 69 Comp. Gen. (B-123456, April 1, 1990).

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

c. Matters Not Considered

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

In the first category are questions concerning which the determination of another agency is by law “final and conclusive.” Examples are determinations on the merits of a claim against another agency under the Federal Tort Claims Act (28 U.S.C. § 2672) or the Military Personnel and Civilian Employees’ Claims Act of 1964 (31 U.S.C. § 3721). Another example is a decision by the Secretary of Veterans Affairs on a claim for veterans’ benefits (38 U.S.C. § 21 1(a)). See 56

⁴⁷Cases prior to 1924 were classified according to type into one of four categories: advance decision (A.D. 1234), review decision (Review No. 2345), division memorandum (D.M. 3456), or appeal (Appeal No. 4567). In addition, some of the earliest decisions have no file designation. These must be cited by reference to the “manuscript volume” in which the decision appears. (These are volumes maintained by GAO primarily for internal purposes, containing the written product of the Office of General Counsel for a given month in chronological sequence.) Example: unpublished decision of September 1, 1921, 1 MS Comp. Gen. 712.

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

In addition, GAO has traditionally declined to render decisions in a number of areas which are specifically within the jurisdiction of some other agency and concerning which GAO would not be in the position to make authoritative determinations, even though the other agency's determination is not statutorily "final and conclusive." Thus, GAO will not "decide" whether a given action violates a provision of the Criminal Code (18 U.S.C.) since this is within the jurisdiction of the Justice Department and the courts.⁴⁸ If the use of public funds is an element of the alleged violation, the extent of GAO's involvement will be to determine if appropriated funds were in fact used and to refer the matter to the Justice Department if deemed appropriate or if requested to do so.⁴⁹

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

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

⁴⁸48 Comp. Gen. 24, 27 (1968); 37 Comp. Gen. 776 (19,58); 20 Comp. Gen. 488 (1941); B-215651, March 15, 1985.

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

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

⁵¹B-165548, January 3, 1969.

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

⁵³58 Comp. Gen. 282,286 (1979); B-240908, September 11, 1990; B-218900, July 9, 1986; B-217954, July 30, 1985; B-203737, July 14, 1981; B-179473, March 5, 1974; A-36314, April 29, 1931. For examples of cases where GAO's opinion was requested by a court, see 56 Comp. Gen. 768 (1977) and B-186494, July 22, 1976. Also, under 28 U.S.C. § 2507, the United States Claims Court may issue a "call" upon GAO (or any other agency) for comments on a particular issue or for other information.

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

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

d. Research Aids

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

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

- Civilian Personnel Law Manual
 - Title 1– Compensation
 - Title II – Leave

⁵⁴B-215863, July 26, 1984; B-210922.1, June 27, 1983; B-114578, November 9, 1973; B-157984, November 26, 1965; 5124985, August 17, 1955; A-23385, June 28, 1928. Except for matters perceived as involving conflicts between the prerogatives of the executive and legislative branches, the Attorney General has expressed a similar policy. 39 Op. Att'y Gen. 11 (1937).

Title III – Travel

Title IV – Relocation

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

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

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

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

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

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

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

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

3. Other Relevant Authorities

a. GAO Materials

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

(1) Legal opinions to Congress—As noted above, GAO prepares many legal opinions at the request of congressional committees or individual Members of Congress. Congressional opinions are prepared in letter rather than decision format, but if signed by the Comptroller General or his delegate, they have the same weight and effect. The citation form is identical to that for decisions, and some are now published in the annual Decisions of the Comptroller General volumes. As a practical matter, except where specifically identified in the text, the reader will not be able to distinguish between a decision and a congressional opinion based on the form of the citation.

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

GAO office memoranda, particularly where they provide guidance in the absence of formal decisions on a given point or contain useful research or discussion.

(3) Audit reports—A GAO audit report is cited by its title, date of issuance, and a numerical designation. Up to the mid-1970's, the same file numbering system was used as in decisions ("B-numbers"). Now, the designation for an audit report consists of the initials of the issuing division, the fiscal year, and the report number, although a "B-number" is also assigned. Reports are numbered sequentially within each fiscal year. Thus, the first report issued by the General Government Division for FY 1990 would be designated "GAO/GGD-90-1." Certain types of reports are further designated by a letter suffix attached to the report number (e.g., BR for briefing report, FS for fact sheet). The names of audit divisions are subject to change over time as reorganizations occur, so the initials in a particular citation may not correspond to an existing audit division at any given time.

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

As required by 31 U.S.C. s 719(h),^{GAO} issues monthly and annual lists of reports. In addition, GAO occasionally prepares bibliographies of reports and decisions in a given subject area (food, land use, etc.). GAO reports may be obtained by calling (202) 275-6241.

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

(4) Non-decision letters — These are letters, signed by some subordinate official, usually to an individual or organization who has requested information or who has requested a legal opinion but is not entitled by law to a formal decision. Their purpose is basically to convey information rather than resolve a legal issue. Several of these are cited in this publication, either because they offer

a particularly clear statement of some policy or position, or to supplement the material found in the decisions. Each is identified parenthetically. The citation form is otherwise identical to an unpublished decision. As with the office memoranda, these are not decisions of the Comptroller General and do not have the same legal or precedential effect.

(5) Circular letters—A circular letter is a letter addressed simply to the “Heads of Federal Departments and Agencies” or to “Federal Certifying and Disbursing Officers.” It is distributed automatically to all federal agencies on GAO’s distribution list. Circular letters, although not common, are used for a variety of purposes and may emanate from a particular division within GAO or directly from the Comptroller General. Circular letters which announce significant changes in pertinent legal requirements or GAO audit policy or procedures are occasionally cited in this publication. They are identified as such and often, but not always, bear file designations similar to unpublished decisions.

(6) General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies—This large looseleaf volume is the official medium through which the Comptroller General issues accounting principles and standards and related material for the development of accounting systems and internal auditing programs, uniform procedures, and regulations governing GAO’s relationship with other federal agencies and private parties. It consists of eight titles (U.S. General Accounting Office; Accounting; Audit; Claims; Transportation; Pay, Leave, and Allowances; Fiscal Procedures; Records Management). The titles are revised and updated individually from time to time. In areas of mutual coverage, the Policy and Procedures Manual (particularly titles 4 and 7) is an important complement to Principles of Federal Appropriations Law.

(7) A Glossary of Terms Used in the Federal Budget Process, PAD-81-27 (3d ed., March 1981)—This is a booklet containing standard definitions of fiscal and budgetary terms developed by GAO in cooperation with the Treasury Department, Office of Management and Budget, and Congressional Budget Office, as required by 31 U.S.C. § 1112(c). Definitions used throughout Principles of Federal

Appropriations Law are based on the Glossary unless otherwise noted.

b. Non-GAO Materials

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

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

We have also included relevant decisions and opinions of other administrative agencies, primarily the Department of Justice, although our research in these areas has not been exhaustive. The Attorney General renders legal opinions pursuant to various provisions of law. E.g., 28 U.S.C. §§ 511–513. There are two series of published opinions.

Opinions signed by the Attorney General are called “formal opinions,” and are published in volumes entitled Official Opinions of the Attorneys General of the United States Advising the President and Heads of Departments in Relation to Their Official Duties (cited “Op. Att’y Gen.”). The series started in 1852 and now numbers 42 volumes. They are published at irregular intervals.

The second series consists of selected opinions by the Justice Department’s Office of Legal Counsel, which prepares and issues legal opinions under delegation from the Attorney General. Commencing in 1977, volumes 1–6 of the Opinions of the Office of Legal Counsel have thus far been published. Logically enough, they are cited “Op. Off. Legal Counsel.” Given the lengthy intervals in recent decades between volumes of the “formal” Attorney General opinions, these are now included in the OLC volumes as well. We have used a parallel citation format to identify this latter group. Example: 43 Op. Att’y Gen. , 4A Op. Off. Legal Counsel 16

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

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

c. Note on Title 31
Recodification

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

“compilation, restatement, and revision of the general and permanent laws of the United States which conforms to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections both of substance and of form .” 2 U.S.C. § 285b(1).

Enactment of a recodification transforms the title into “positive law.” A remodified title is legal evidence of the law, and resort to the Statutes at Large for evidentiary purposes is no longer necessary.

The recodification of Title 31 is essentially a restatement in updated form. It is not supposed to make any substantive change in the law. This point is made in the statute itself (Pub. L. No. 97-258, § 4(a), 96 Stat. 1067, 31 U.S.C. note preceding § 101) and in the accompanying report of the House Judiciary Committee (H.R. Rep. No. 97-651, 97th Cong., 2d Sess. 3 (1982)). In addition, the courts will not read a substantive change into a recodification in the absence of evidence that Congress intended a substantive change. E.g., Fourco Glass Co. v. Transmirra Products Corp., 353 U.S. 222, 227 (1957); United States v. Thompson, 319 F.2d 665, 669 (2d Cir. 1963).

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

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