Payment of Judgments

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A. Introduction

If you had read the Washington Post for September 30, 1985, you would have seen an article boldly proclaiming "SUING UNCLE SAM BECOMES GROWTH INDUSTRY." To those of us who are involved either with the litigation itself or with the payment process, this was not exactly high revelation. It is no secret that America in the last third of the 20th century has become the most litigious society in the recorded history of the human race. We sue each other and everyone else in sight[1] over just about everything these days, so it seems, and suits against the government are no exception.

In the early years of the Republic, this was not the case, because our legal system adopted from the English common law the concept of "sovereign immunity"—the firmly imbedded rule that the United States, as sovereign, cannot be sued without its consent.[2] Consent is given (or, in other words, sovereign immunity is "waived") by the enactment of a statute authorizing suits of a given type. Waivers of sovereign immunity must be explicit.[3] Congress may attach conditions to the waiver.[4] And, what Congress gives, Congress can take away. Although it happens infrequently, Congress can at any time withdraw the consent to be sued.[5]

The history of litigation involving the United States is largely the history of congressional waivers of sovereign immunity. Some milestones in this evolution have been: 1855—creation of United States Court of Claims; 1863—amendment to that legislation to empower the Court of Claims to render final judgments (all the court could do under the original legislation was report cases to Congress); 1887—Tucker Act; 1920—Suits in Admiralty Act; 1946—Federal Tort Claims Act. The 1960s and 1970s saw a variety of environmental and civil rights legislation, perhaps the most important of which was the 1972 amendment to the Civil Rights Act of 1964 which made its employment discrimination provisions applicable to the federal government.

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[1]And occasionally some not in sight. See, for example, United States ex rel. Mayo v. Satan and His Staff, 54 F.R.D. 282 (W.D. Pa. 1971). The complaint was defective on several grounds, however, one of which was the failure to include instructions for the service of process.

[2]E.g., United States v. Sherwood, 312 U.S. 584 (1941); United States v. Mescalero Apache Tribe, 518 F.2d 1309 (Ct. Cl. 1975).

[3]United States v. Mitchell, 445 U.S. 535, 538 (1980).

[4]Sherwood, 312 U.S. at 587; Federal Housing Administration v. Burr, 309 U.S. 242, 251 (1940).

[5]Lynch v. United States, 292 U.S. 571 (1934) (consent to sue is not a property right but a privilege); Juda v. United States, 13 Cl. Ct. 667, 689 (1987) (citing several other cases); 4B Op. Off. Legal Counsel 516 (1980).

Sovereign immunity is still a rule of law in the United States, but it now applies to a much smaller universe. Why has the United States given up such a favorable position? One rather mundane reason is that the flood of private relief bills became too much of a drain on congressional time and resources. (If you can't sue, the only thing left is to ask Congress for help). More importantly, however, there has been increasing recognition of the philosophy expressed by a Comptroller of the Treasury many years ago in 8 Comp. Dec. 12, 18 (1901): "The Government should not be permitted to wrong a citizen any more than a citizen should be permitted to wrong the Government."

Thus, federal courts can now render judgments against the United States in a great variety of actions. This chapter will explore how those judgments are paid.

The payment of judgments against the United States and GAO's role in that process are prescribed by statute. District court judgments are addressed in 28 U.S.C. § 2414, which provides that final judgments rendered by a district court against the United States shall be paid "on settlements by the General Accounting Office." Final judgments rendered by the Court of Federal Claims are paid, pursuant to 28 U.S.C. § 2517(a), "on presentation to the General Accounting Office of a certification of the judgment by the clerk and chief judge of the court." In addition, 31 U.S.C. § 1304 provides a permanent indefinite appropriation for the payment of certain judgments against the United States as "certified by the Comptroller General."

Although these statutes are worded differently, GAO's function under them is the same: to certify judgments for payment. It has been termed an essentially ministerial function in the sense that it does not contemplate review of the merits of a particular judgment. B-129227, December 22, 1960. See also 22 Comp. Dec. 520 (1916). Be that as it may, both because the expenditure of appropriated funds is involved and because the scope and complexity of litigation involving the government are constantly increasing, the payment process gives rise to a number of problem areas.

At the present time, neither GAO nor anyone else in the federal government knows how much the United States pays out in judgments every year. The largest single source of judgment payments is the permanent appropriation established by 31 U.S.C. § 1304. Annual totals from this appropriation are listed in the President's budget submission (nearly $791 million for fiscal year 1992, for example), and GAO collects data as well. However, as we will see, several types of judgments are paid from other sources, and no centralized mechanism exists for the collection of data on judgments which do not pass through GAO.

B. Source of Funds

1. Requirement for Appropriation

A waiver of sovereign immunity may result in a judgment against the government but, without more, will not get it paid. This is because the "Appropriations Clause" of the United States Constitution (art. I, § 9, cl. 7), which prohibits the withdrawal of money from the United States Treasury except under an appropriation, applies with equal force to payments directed by a court. Office of Personnel Management v. Richmond, 496 U.S. 414, 424–26 (1990); Reeside v. Walker, 52 U.S. (11 How.) 272, 291 (1850); Rochester Pure Waters District v. EPA, 960 F.2d 180, 184–85 (D.C. Cir. 1992); Hughes Aircraft Co. v. United States, 534 F.2d 889, 906 (Ct. Cl. 1976). While this constitutional requirement may not prohibit a court from entering a judgment, it comes into play with respect to the payment of that judgment. As the former Court of Claims said in Collins v. United States, 15 Ct. Cl. 22, 36 (1879):

> "When this court gives judgment against the United States, the constitutional prohibition referred to applies to the judgment as it did to the claim upon which it is founded."

Thus, the Appropriations Clause must be satisfied before any judgment against the federal government can be paid. This may take the form of (1) a specific appropriation for a particular judgment or judgments, (2) a general appropriation for judgments, or (3) legislative authorization, which itself can take various forms, to use existing operating appropriations. For 150 years, number (1) was the primary payment mechanism; the payment structure now is a combination of (2) and (3).

2. The Permanent Judgment Appropriation: Overview

a. Origin

At the start of the 20th century, various statutes had the effect of requiring specific appropriations for the payment of most judgments against the United States. This being the case, the Comptrollers of the Treasury began holding that agency operating appropriations were not available to pay those judgments. The Comptrollers saw an element of illogic, at least in some situations, in saying that an appropriation which would have been clearly available to pay something if the matter never went to court ceased being available because the agency failed or refused to pay and a court told the agency to pay it. E.g., 8 Comp. Dec. 261, 262 (1901); 8 Comp. Dec. 145, 149 (1901). Despite these misgivings, the result in most cases was that specific appropriations were required.

The practice of specifically appropriating for judgments became further solidified in 1904 by a statute (33 Stat. 422) which required that estimates for the payment of judgments be transmitted to Congress the same as other requests for appropriations. Against this legislative background, the rule became firmly entrenched that agency operating appropriations were not available to pay judgments. Exceptions were (and continue to be) recognized only where Congress had made some other provision, or established some other mechanism, for payment. E.g., 15 Comp. Gen. 933 (1936); 5 Comp. Gen. 203 (1925); 1 Comp. Gen. 540 (1922); 27 Comp. Dec. 262 (1920); 11 Comp. Dec. 169 (1904).

In 1950, Congress repealed the requirement for specific budget submissions for judgments. The reason, legislative history suggested, was that Congress viewed the thrust of the 1904 statute as having been superseded by 31 U.S.C. § 1105, which provides generally for the submission of the President's budget to Congress. Therefore, the repeal did not produce any change in the way judgments were paid. This legislative development is outlined, and the rule restated, in 34 Comp. Gen. 221 (1954). Thus, prior to 1956, judgments against the United States could be paid, for the most part, only upon enactment of specific congressional appropriations. Under this system, it was possible for Congress to refuse to appropriate the funds for a given judgment, leaving the judgment creditor with a valid entitlement against the United States but no funds legally available to satisfy it. Although there were instances where this happened (see, e.g., 47 Stat. 28 and 33 Stat. 422), it was rare. In Glidden Co. v. Zdanok, 370 U.S. 530, 570 (1962), the Supreme Court noted a 1933 study which had found 15 instances in a 70-year period where Congress had refused to pay a judgment.

In the early 1950s, GAO recommended the enactment of a permanent general appropriation for judgments. The recommendation was designed to expedite the payment of judgments by eliminating the need for specific congressional appropriations, and to save the government money both by eliminating the largely ministerial appropriations and by reducing interest costs. The executive branch supported the proposal. It was not immediately enacted, however, because the original proposal contained language which some felt would authorize the Comptroller General to review the merits of a judgment prior to payment. The Judiciary especially expressed concern over this possibility, fearing that it could destroy the finality of judgments and lead to a situation in which the Comptroller General might deny a claim administratively, with the claimant then suing successfully and the Comptroller General refusing to pay the judgment for the same reasons he had originally denied the claim.

The proposal was refined and, on July 27, 1956, was enacted as section 1302 of the Supplemental Appropriation Act of 1957, 70 Stat. 678, 694, now codified at 31 U.S.C. § 1304.[6] As originally enacted, section 1304 applied only to judgments rendered pursuant to 28 U.S.C. §§ 2414 and 2517, and then only to judgments not in excess of $100,000,[7] which it was then estimated would cover 98–99 percent of all judgments against the United States.[8]

Thus, as of July 1956, judgments less than $100,000 could be paid promptly under section 1304. Until the $100,000 limit was removed in 1977, however, judgments in excess of $100,000 continued to require specific congressional appropriations, which were made in supplemental appropriation acts. Under this procedure, summarized in B-162076, August 7, 1967, the Justice Department reported all judgments in excess of $100,000 to the Treasury Department as soon as they became final. As the time for the next supplemental appropriation request approached, the Office of Management and Budget notified Treasury and Treasury forwarded its recommendations for inclusion in the request. Congress generally provided the funds in the form of a lump-sum appropriation, with the specific judgments to which it applied listed in Senate and House Documents. Upon enactment of the appropriation, Treasury sent the judgments to GAO for settlement.

b. Major Amendments

As noted above, the original version of 31 U.S.C. § 1304 was fairly limited. The appropriation reached its present scope through a series of

[6]Occasionally called the Automatic Payment of Judgments Act, 31 U.S.C. § 1304 is more commonly referred to as the "Judgment Fund."

[7]GAO and the courts construed the $100,000 limitation as applicable to the amount awarded either to a single plaintiff or to two or more plaintiffs jointly, rather than the aggregate judgment amount. United States v. Varner, 400 F.2d 369 (5th Cir. 1968); United States v. Maryland ex rel. Meyer, 349 F.2d 693 (D.C. Cir. 1965); 40 Comp. Gen. 307 (1960); B-183576, August 26, 1977; B-163682, May 24, 1968.

[8]Hearings on Supplemental Appropriation Bill, 1957, Before Subcomm. of the House Comm. on Appropriations, 84th Cong., 2d Sess., pt. 2, at 884 (1956).

amendments, the most important of which are summarized below in chronological sequence.

(1) Compromise settlements

Public Law 87-187, 75 Stat. 416 (1961), amended the judgment appropriation, and made corresponding amendments to 28 U.S.C. § 2414, to add (1) judgments of state and foreign courts upon the Attorney General's certification that it is in the interest of the United States to pay, and (2) compromise settlements.

The addition of compromise settlements was particularly significant. A compromise settlement is an agreement reached by the parties involving mutual concessions. 38 Op. Att'y Gen. 94, 95–96 (1933). The Attorney General, as the government's chief litigator, has broad authority to compromise cases referred to the Justice Department for prosecution or defense. Executive Order No. 6166, § 5 (June 10, 1933); United States v. Hercules, Inc., 961 F.2d 796, 798 (8th Cir. 1992); 38 Op. Att'y Gen. 124 (1934); 38 Op. Att'y Gen. 98 (1934). The power attaches "immediately upon the receipt of a case in the Department of Justice." 38 Op. Att'y Gen. at 102. However, a compromise settlement which exceeds the authority of the official purporting to make it does not bind the government. White v. United States Department of Interior, 639 F. Supp. 82 (M.D. Pa. 1986), aff'd mem., 815 F.2d 697 (3d Cir. 1987); United States v. Irwin, 575 F. Supp. 405 (N.D. Tex. 1983). The Court of Appeals for the Fourth Circuit has held that the Attorney General, in settling a case, is bound by the same laws that control the government agency being represented. Executive Business Media, Inc. v. United States Department of Defense, 3 F.3d 759 (4th Cir. 1993).

As noted earlier, the original version of the judgment appropriation applied only to judgments, not to compromise settlements. In order to take advantage of the judgment appropriation in cases where agency funds were not otherwise available, it became common practice to submit the compromise agreement or stipulation to the court, whether required or not, and to have the court issue it as a consent judgment. It had long been the view of the "accounting officers" that a judgment based upon such a stipulation was nevertheless a judgment and payable as such. E.g., 21 Comp. Dec. 705 (1915). Thus, the device of converting a compromise settlement into a consent judgment enabled it to be paid under 31 U.S.C.

§ 1304.[9] In view of this practice, the limitation of the 1956 legislation to judgments turned out to make little difference as a practical matter except to require an additional step which, where not otherwise required, served little useful purpose. The extension of the judgment appropriation to include compromise settlements was therefore a logical application of the concept.

The amendment to 28 U.S.C. § 2414 provided a standard for determining when compromise settlements are payable from the judgment appropriation. It states that compromise settlements "shall be settled and paid in a manner similar to judgments in like causes and appropriations or funds available for the payment of such judgments are hereby made available for the payment of such compromise settlements." Thus, the rule is that a compromise settlement is payable from the same source that would apply to a judgment in the same suit. If a given action could result in a money judgment payable from the judgment appropriation, a compromise settlement of that action will be payable from the judgment appropriation. E.g., B-212134, June 29, 1983. If the action would not result in a money judgment payable from the judgment appropriation—either because a resulting judgment would be payable from agency funds or because it would not result in a money judgment at all, such as a suit for an injunction—then the judgment appropriation will not be available for a compromise settlement. E.g., B-248313, April 10, 1992 (internal memorandum); B-246660, March 20, 1992 (internal memorandum). See also B-182219, October 23, 1974 (judgment against official in individual capacity). To restate, a compromise settlement has no effect on the source of funds. This is also the position of the Department of Justice. 13 Op. Off. Legal Counsel 118 (1989) (preliminary print). A contrary view, as Justice points out, might encourage settlements driven by source-of-funds considerations rather than the best interests of the United States. Id. at 125.

The availability of the judgment appropriation for compromise settlements includes compromises of cases arising in foreign countries. B-167543-O.M., August 4, 1969.

(2) Federal Tort Claims Act

Public Law 89-506, 80 Stat. 306 (1966), made major changes to the Federal Tort Claims Act. Prior to 1966, the authority of agencies to settle tort

[9]See B-115234, March 30, 1959, GAO's comments on an early version of the bill which ultimately became Pub. L. No. 87-187. See also 62 Comp. Gen. 12, 16–17 (1982).

claims administratively was limited to claims not in excess of $2,500. For claims over that amount, a lawsuit had to be filed. Under the pre-1966 version of the Federal Tort Claims Act, compromise settlements, even of the lawsuits, were payable solely from agency funds.[10] The 1966 amendments eliminated the monetary ceiling on administrative settlement authority (although settlements over $25,000 require the Attorney General's approval), and changed the payment process.

Section 6 of Public Law 89-506, 80 Stat. at 307, added to 31 U.S.C. § 1304 two categories of awards under the Federal Tort Claims Act—administrative awards in excess of $2,500 (28 U.S.C. § 2672) and compromise settlements entered into after commencement of suit (28 U.S.C. § 2677). Administrative awards of less than $2,500 continue to be payable from agency funds.

(3) Elimination of $100,000 ceiling

By 1977, the $100,000 limitation on payments under 31 U.S.C. § 1304 had become unrealistically low, and Congress still found itself having to make routine appropriations for judgments, a task it had largely wanted to rid itself of in 1956. For example, Federal Tort Claims Act awards greater than $100,000 had become increasingly common. Pub. L. No. 95–26, 91 Stat. 61, 96 (1977), removed the $100,000 limitation. Thus, since 1977, judgments, awards, and compromise settlements payable under 31 U.S.C. § 1304 are payable without regard to amount. See Temoak Band of Western Shoshone Indians v. United States, 593 F.2d 994, 999 (Ct. Cl. 1979).

(4) Certain administrative awards

It turned out that the elimination of the $100,000 ceiling still did not totally eliminate the need for periodic specific "judgment appropriations" because those appropriations had included, in addition to court judgments, a few administrative claim settlements under statutes which required specific congressional appropriations for payment. Public Law 95–240, § 201, 92 Stat. 107, 116 (1978), further expanded the judgment appropriation to pick up several of these, now specified in 31 U.S.C. §§ 1304(a)(3)(B) and (D): awards under the so-called Small Claims Act (31 U.S.C. § 3723) and awards in excess of amounts payable from agency funds under 10 U.S.C. §§ 2733 or 2734, 32 U.S.C. § 715, and 42 U.S.C. § 2473(c)(13). These are all discussed further in Chapter 12.

[10]Since this limitation was specified in the Federal Tort Claims Act itself, it had been unaffected by the 1961 enactment of Pub. L. No. 87-187.

(5) Contract Disputes Act of 1978

Prior to 1978, while court judgments on contract disputes were payable from the judgment appropriation, awards by agency boards of contract appeals were payable directly by the contracting agency. The Contract Disputes Act of 1978[11] changed this by making monetary awards by boards of contract appeals payable from the judgment appropriation, and by requiring that the contracting agency reimburse the judgment appropriation for both court judgments and board awards. Contract Disputes Act payments are also discussed further in Chapter 12.

(6) Brooks Act awards

The Brooks Automatic Data Processing Act, 40 U.S.C. § 759, generally establishes procedures for the procurement of automatic data processing (ADP) equipment. In 1984, the Competition in Contracting Act (Pub. L. No. 98–369, § 2713, 98 Stat. 494, 1182) amended the Brooks Act to authorize the General Services Administration Board of Contract Appeals to hear and decide protests against ADP contract awards. 40 U.S.C. § 759(f). If the GSBCA finds that the procuring agency has violated a statute or regulation, it may award (a) costs of filing and pursuing the protest, including reasonable attorney's fees, and (b) costs of bid and proposal preparation. These awards are payable from the judgment appropriation initially, subject to reimbursement "out of funds available for the procurement." Id. § 759(f) (5) (E), added by Pub. L. No. 103-355, § 1436 (1994).

Prior to late 1994, the Brooks Act did not expressly require reimbursement of the judgment appropriation. The GSBCA initially took the position that it could direct reimbursement in particular cases. Federal Computer Corporation, GSBCA No. 10527-C, 92-1 BCA ¶ 24,415 (1991). The Justice Department disagreed. 14 Op. Off. Legal Counsel 126 (1990) (preliminary print). A divided GSBCA subsequently repudiated its previous position. Sysorex Information Systems, Inc. v. Department of the Treasury, GSBCA No. 10781-C (10642-P)-REIN, 93-1 BCA ¶ 25,428 (1992). The Court of Appeals for the Federal Circuit regarded the issue as a nonjusticiable intra-governmental dispute and declined to rule on it. United States v. Julie Research Laboratories, 881 F.2d 1067 (Fed. Cir. 1989). Congress ended the controversy by adding the reimbursement requirement as part of the

[11]Pub. L. No. 95-563, §§ 13 and 14(c), 92 Stat. 2383, 2389–90 (1978), codified at 41 U.S.C. § 612 and 31 U.S.C. § 1304(a)(3)(C).

Federal Acquisition Streamlining Act of 1994. See the Bid Protest heading of Chapter 12 for further discussion.

c. Key Features

An examination of 31 U.S.C. § 1304 as it now exists discloses several key features which, in effect, define the availability of the appropriation.

First, it is a permanent, indefinite appropriation. This means that it has no fiscal year limitations, there is no limit on the amount of the appropriation, and there is no need for Congress to appropriate funds to it annually or otherwise. It operates completely independent of the congressional authorization and appropriation process. It is, in effect, standing authority to disburse money from the general fund of the Treasury.

Second, it very precisely delineates the items for which it is available—the items listed in 31 U.S.C. §§ 1304(a)(3) and (c)(1).[12]

Third, it is available only for judgments, awards, and compromise settlements which are "not otherwise provided for."

Fourth, it is available only for judgments, awards, and compromise settlements which are "final."

Fifth, it is available only upon the certification of the Comptroller General.

The last three items are discussed in detail later in this chapter.

Finally, it is important to emphasize that the judgment appropriation is not itself a waiver of sovereign immunity; the legal basis for a judgment or award must be found elsewhere. As the Supreme Court has cautioned, 31 U.S.C. § 1304

> "does not create an all-purpose fund for judicial disbursement. . . . Rather, funds may be paid out only on the basis of a judgment based on a substantive right to compensation based on the express terms of a specific statute."

Office of Personnel Management v. Richmond, 496 U.S. 414, 432 (1990). See also In re All Asbestos Cases, 603 F. Supp. 599, 612 n.16 (D. Hawaii

[12]The listing in section 1304 while precise is not exclusive. Congress may include a provision in other legislation making some particular item payable under section 1304. An example is section 6239 of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, 3743, amending 26 U.S.C. § 7430 to authorize the awarding of costs and attorney fees in administrative proceedings before the Internal Revenue Service, and providing expressly for payment under 31 U.S.C. § 1304.

1984) (31 U.S.C. § 1304 "is irrelevant to the issue of whether . . . the legal predicate for judgment against the government exists").

d. Budgetary and Obligational Treatment

Although, as noted earlier, the judgment appropriation does not receive money transfusions through the regular appropriations process, it is nevertheless included in the President's annual budget submissions. In the "program by function" analysis, it appears under the "general government" heading; in the "program by agency" analysis, it is listed under the Treasury Department. Totals appear in the annual Budget Appendix volumes under the title "Claims, Judgments, and Relief Acts."[13] While the judgment appropriation is thus reflected in the budget in the manner described, disbursements are not accounted for by the agency whose activities gave rise to the judgment.

The judgment appropriation is exempt from reduction or sequestration under the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings Act), as amended. 2 U.S.C. § 905(g).

As discussed in Chapter 7, one of the criteria for recording obligations under 31 U.S.C. § 1501 is subsection (a)(6), documentary evidence of "a liability that may result from pending litigation." The recording requirement of 31 U.S.C. § 1501(a)(6) has never been viewed as applicable to the judgment appropriation. The "obligations" are wholly beyond the control of either GAO or the Treasury Department, and attempting to track pending litigation would present an enormous administrative burden with no compensating benefit. Further, since the judgment appropriation is by definition both permanent and indefinite and thus cannot be overobligated nor can a payment be charged to the "wrong" fiscal year, the separate recording of obligations would serve no purpose. Also, pending litigation which may result in a judgment payable from the judgment appropriation does not obligate the appropriations of the respondent agency since the judgment will have no financial impact on that agency's appropriations.

For judgments payable from agency funds, case law is limited but provides some guidance. The applicability of subsection (6) was first discussed in

[13]The budget presentation generally parallels the four Treasury accounts which comprise the permanent judgment appropriation: Judgments, Court of Federal Claims (20X1740); Judgments, U.S. [District] Courts (20X1741, including administrative settlements under the Federal Tort Claims Act); Claims for damages (20X1742, these being the payments authorized under 31 U.S.C. §§ 1304(a)(3)(B) and (D)); and Claims for contract disputes (20X1743, the reimbursable payments under the Contract Disputes Act). However, it also includes two items which are not part of the judgment appropriation but which are paid under other permanent accounts: claims for firefighting service and private relief laws. Thus, to determine the total expenditures from the judgment appropriation, these two items must be deducted.

35 Comp. Gen. 185 (1955). Noting that the subsection was enacted to permit obligations to be recorded in land condemnation proceedings under the Declaration of Taking Act, and that it could not have been intended to require recording in every pending case which might or might not result in liability, the Comptroller General concluded that subsection (6) requires the recording of an obligation "only in those cases where the Government is definitely liable for the payment of money out of available appropriations and the pending litigation is for the purpose of determining the amount of the Government's liability." 35 Comp. Gen. at 187.

Twenty years later, the scope of subsection (6) was expanded in a decision involving an anti-impoundment suit, 54 Comp. Gen. 962 (1975). That decision concerned a case in which the plaintiff had alleged the failure of the Department of Agriculture to properly administer the Food Stamp Act. The district court ordered the funds in question recorded as an obligation under subsection (6) to prevent the unexpended balance from expiring. The Comptroller General stated that 35 Comp. Gen. 185 had correctly expressed the general rule, but noted further that anti-impoundment litigation must be considered unique and concluded that the court's order established a valid obligation. See also B-115398.48, December 29, 1975 (non-decision letter); 62 Comp. Gen. 527 (1983).

A few years later, GAO applied its 1975 decision in 61 Comp. Gen. 509 (1982), a case in which the defendant agency, in order to avoid the entry of a temporary restraining order, had entered into a stipulation to obligate the contested funds before the end of the fiscal year. The decision pointed out that the stipulation was sufficient "documentary evidence" to support the recording of the obligation. Id. at 512.

Thus far, these are the only situations—land condemnation and impoundment-related cases—in which GAO has applied 31 U.S.C. § 1501(a)(6). See also Rochester Pure Waters District v. EPA, 960 F.2d 180, 186 (D.C. Cir. 1992); Township of River Vale v. Harris, 444 F. Supp. 90, 94 (D.D.C. 1978). (Both cases cite 35 Comp. Gen. 185.)[14]

Notwithstanding the lack of case law, subsection (6) would presumably apply in any other situation meeting the tests of 35 Comp. Gen. 185—(1) government is definitely liable, (2) purpose of the litigation is to determine the amount of the liability, and (3) resulting judgment is payable from agency funds. Suppose, for example, a court grants an award of

[14]For an additional situation in which recording an obligation under 31 U.S.C. § 1501(a)(6) might be appropriate, see Foley v. Carter, 526 F. Supp. 977, 981 n.9 (D.D.C. 1981).

attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d), with the amount to be determined in subsequent proceedings. The agency should record an obligation under subsection (6) when the determination as to liability becomes final.

3. Scope of the Judgment Appropriation: Some General Considerations

Not all directives issued by a court against the federal government result in the use of 31 U.S.C. § 1304. Several types of judgments are "otherwise provided for," and these will be explored later. Before getting to that discussion, however, it is necessary first to set out some general considerations which help define what kinds of things may be paid from the judgment appropriation or, in other words, define what is a judgment for purposes of section 1304 and what is not.

a. Judgment Appropriation Not Available for Administrative Claim Settlements

As we noted earlier, there are a few situations in which the judgment appropriation has been made available for administrative claim settlements. However, apart from a relatively few explicit statutory exceptions, the important distinction to keep in mind is judicial vs. administrative. See 69 Comp. Gen. 40 (1989) (discussing distinction in context of back pay claims). The judgment appropriation is available for court judgments and certain Justice Department compromise settlements. It is not available for claims settled at the administrative level or awards by administrative tribunals. 64 Comp. Gen. 349 (1985) (administrative settlement of age discrimination complaint); 58 Comp. Gen. 667 (1979) (undisputed administratively imposed penalties under Clean Air Act); B-199291, June 19, 1981 (administrative award of attorney fees under Title VII of Civil Rights Act); B-143673, November 11, 1976, overruled on other grounds by 56 Comp. Gen. 615 (1977) (claims under 31 U.S.C. § 3721); B-130140, January 29, 1957 (claim settled by Comptroller General).

There are many types of administrative claims which agencies routinely pay from their own operating funds. The judgment appropriation does not change this.

b. Requirement for Money Judgment

Essentially, 31 U.S.C. § 1304 contemplates a money judgment, that is, a judgment directing the government to pay money as opposed to a judgment directing the government to perform some specific action. Any judgment can be translated into a monetary amount in the sense that the cost of compliance can be calculated, but this does not mean that the ultimate cost is to be borne by the judgment appropriation. 70 Comp. Gen. 225, 228 (1991). The Justice Department reached the same conclusion in 13 Op. Off. Legal Counsel 118 (1989) (preliminary print). Thus, 31 U.S.C.

§ 1304 was not available to fund court orders or settlements directing agencies to: reconsider eligibility under a benefit program, 70 Comp. Gen. 225; implement a nondiscriminatory employment system, 69 Comp. Gen. 160 (1990); hire an equal opportunity expert, B-234793.2, June 5, 1989; or correct structural defects in a building, B-193323, January 31, 1980. None of these are money judgments.

Similarly, a judgment ordering the reinstatement of a terminated federal employee might very well result in an entitlement to back pay under the Back Pay Act, but unless the judgment specifically directs the payment of back pay, any resulting payment would have to come from the employing agency's funds. 58 Comp. Gen. 311, 312 (1979).

A remand to an administrative body is not a money judgment, and does not become one simply because the administrative body subsequently directs the payment of money (or the case is settled) pursuant to the remand. B-189449, August 31, 1977. The cited decision dealt with a suit against the District of Columbia government, but the point is equally applicable in the context of 31 U.S.C. § 1304. See also Sullivan v. Department of Navy, 720 F.2d 1266, 1276 n.3 (Fed. Cir. 1983); Brewer v. United States Postal Service, 647 F.2d 1093, 1098–99 (Ct. Cl. 1981) (remand to Merit Systems Protection Board is not a money judgment even where it directs the Board to issue an order requiring payment of back pay).

Once the basic money judgment requirement has been satisfied, the judgment statutes (28 U.S.C. §§ 2414 and 2517, 31 U.S.C. § 1304) do not address the permissible forms the money judgment may take. For example, while a judgment must be a money judgment to be payable from the permanent appropriation, there are situations in which it does not necessarily have to include a sum certain. Thus, judgments awarding back pay under the Back Pay Act or Title VII of the Civil Rights Act of 1964 are money judgments for purposes of section 1304 even where they do not specify the dollar amount to be paid. 58 Comp. Gen. 311 (1979); 55 Comp. Gen. 1447 (1976). As a general proposition, however, payment delays are less likely to occur if the judgment specifies the dollar amount to be paid.

Money judgments have "traditionally taken the form of a lump sum, paid at the conclusion of the litigation." Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 533 (1983). While, in the context of judgments against the federal government, this remains true in the overwhelming majority of cases, the decades of the 1970s and 1980s saw the mushrooming of "structured settlements" in personal injury cases requiring long-term care. In a structured settlement, the award is either placed in a reversionary trust or used to purchase an annuity. Depending on the circumstances, the trust or annuity may or may not be accompanied by a separate lump-sum amount paid directly to the plaintiff.

The first consideration of such an arrangement from the payment perspective appears to have been in B-162924, December 22, 1967. The case involved a medical malpractice suit under the Federal Tort Claims Act on behalf of a plaintiff expected to remain comatose for life. The proposed settlement included two parts: (1) a lump-sum payment covering all damages other than future care and treatment, and (2) another lump sum payable in trust to a court-appointed trustee. The trust would include the power to invade the corpus if necessary. Upon the death of the plaintiff, any remaining corpus and income would revert to the United States. The Comptroller General found the proposal legally unobjectionable, cautioning only that the amount paid to the trustee should represent the government's maximum obligation and should not exceed the cost of a reasonable fixed settlement.

Some courts have stated that they lack the authority to order anything other than a lump-sum money judgment. Frankel v. Heym, 466 F.2d 1226, 1228–29 (3d Cir. 1972); Lozada v. United States, 140 F.R.D. 404, 416 (D. Neb. 1991); Andrulonis v. United States, 724 F. Supp. 1421, 1519 n.616 (N.D.N.Y. 1989); Elliott v. United States, 329 F. Supp. 621, 628 (D. Me. 1971). See also Reilly v. United States, 665 F. Supp. 976, 1016–17 (D.R.I. 1987), aff'd in part and remanded on other grounds, 863 F.2d 149 (1st Cir. 1988) (court said it was following Frankel, but then ordered limited reversionary trust).

More recently, the 10th Circuit has held that a district court in a Federal Tort Claims Act case has the inherent power to order that damages be paid in the form of a reversionary trust if in the plaintiff's best interest, as long as the government's obligation to the plaintiff ceases upon payment of a fixed lump sum to fund the trust. Hull v. United States, 971 F.2d 1499, 1505–06 (10th Cir. 1992), cert. denied, 113 S.Ct. 1844. The court viewed this as consistent with Frankel because the proposal the Frankel court disapproved would have required the government to supplement the trust from time to time, something the Hull court agreed could not be imposed on the government. Id. at 1504–05. See also Nemmers v. United States, 795 F.2d 628, 636 (7th Cir. 1986) (court may require purchase of annuity if it fears victim's relatives may misuse lump-sum payment); Hill v. United

States, 854 F. Supp. 727, 732 (D. Colo. 1994); Wheeler Tarpeh-Doe v. United States, 771 F. Supp. 427, 457 (D.D.C. 1991) (government could be required to fund a reversionary trust).

In any event, whatever inherent powers the courts have or do not have, the parties are free to agree to payment in a "structured" (trust or annuity) form. E.g., Gretchen v. United States, 618 F.2d 177, 181 n.5 (2d Cir. 1980) (suit under Public Vessels Act). See also Wyatt v. United States, 783 F.2d 45 (6th Cir. 1986); Robak v. United States, 503 F. Supp. 982, 983 (N.D. Ill. 1980), aff'd in part and rev'd in part on other grounds, 658 F.2d 471 (7th Cir. 1981). (Both cases involve structured settlements—an annuity in Wyatt, a reversionary trust in Robak—which originated in agreements of the parties.) Of course, a structured award is also permissible where expressly authorized by statute. E.g., Reilly, 863 F.2d at 169 n.16.

Money reverting to the United States under a structured settlement is credited to the appropriation from which the settlement was originally disbursed (usually the judgment appropriation). B-209849, December 2, 1982 (non-decision letter).

c. Form of Judgment

The judgment does not have to be captioned "judgment." It may be, and frequently is, designated as an "order." The caption is immaterial as long as the court's action is a final determination of the rights of the parties. B-164766, June 1, 1979; B-101576, February 3, 1955. Sometimes it may not be called anything. E.g., B-242209, December 17, 1990 (internal memorandum) (judge's handwritten notation in margin of plaintiff's pleading).

Clearly the term "judgment" embraces consent judgments or decrees. See, e.g., 4 Comp. Gen. 834 (1925). Also, as discussed previously, the permanent appropriation is available for compromise settlements of suits otherwise within its scope.

d. What Tribunals May Issue the Judgment

The primary focus of the judgment appropriation is, of course, judgments rendered by a United States district court or the United States Court of Federal Claims. This naturally includes the appellate courts which review judgments of these courts. For example, the United States Courts of Appeals and the Supreme Court occasionally award costs.

The Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980), established the United States Court of International Trade to replace the former Customs Court, authorized it to enter money judgments for or against the United States (28 U.S.C. § 2643(a)), and amended 28 U.S.C. § 2414 to include the Court of International Trade. Thus, principles in this chapter applicable to district courts will, to the extent they derive from the authority of 28 U.S.C. § 2414, apply generally to the Court of International Trade as well.

The Tax Court is generally not covered by 31 U.S.C. § 1304. 63 Comp. Gen. 470 (1984). However, by virtue of legislation enacted in 1986, costs and attorney fees awarded by the Tax Court under section 7430 of the Internal Revenue Code are payable from the judgment appropriation. 26 U.S.C. § 7430(a).

As noted earlier in this chapter, legislation in 1961 made the judgment appropriation available for state and foreign court judgments. However, before a state or foreign court judgment may be paid, the Attorney General (or someone to whom the authority has been delegated) must certify that it is in the interest of the United States to pay. 28 U.S.C. § 2414. State courts in this context include the courts of the District of Columbia. 56 Comp. Gen. 592, 595 (1977). Foreign courts may include certain international tribunals, an example being the International Court of Justice. 13 Op. Off. Legal Counsel 240 (1989) (preliminary print).

The "interest of the United States" determination was apparently designed to permit the payment decision to include considerations of policy as well as legal liability. B-206443, June 25, 1984. As with anything else payable from the judgment appropriation, the judgment must be final and payment must be not otherwise provided for. Id.; B-227527/B-227325, October 21, 1987 (non-decision letter). Restrictions in 31 U.S.C. § 1304 on post-judgment interest do not apply to state or foreign court judgments. B-206443, June 25, 1984; B-148111-O.M., February 14, 1962.

e. Imminent Litigation

Apart from the few categories of administrative claims noted earlier in this chapter, the judgment appropriation is available for one type of payment which may be made prior to the commencement of a lawsuit. Under 28 U.S.C. § 2414, the Attorney General or his designee may compromise claims "referred to the Attorney General for defense of imminent litigation . . . against the United States, or against its agencies or officials upon obligations or liabilities of the United States." There has been little occasion to construe this authority, but a 1979 decision set forth some general guidelines. The "imminent litigation" authority is not a device to enable an agency to avoid paying otherwise valid claims from its own funds. There must be a genuine disagreement or impasse. Litigation is not "imminent" for purposes of this provision merely because a claimant will sue if the agency does not pay. There must be a legitimate dispute over either liability or amount. Absent such a dispute or impasse, there is nothing to refer to the Attorney General. 58 Comp. Gen. 667 (1979). See also B-198352, June 22, 1981.

Opinions of the Attorney General on compromise authority in other contexts support the approach of 58 Comp. Gen. 667. See, for example, 38 Op. Att'y Gen. 98 (1934) (nothing to compromise where liability is certain; must be a "bona fide dispute as to either a question of fact or of law"); 38 Op. Att'y Gen. 94, 96 (1933), citing 23 Op. Att'y Gen. 18, 20 (1900) (claim "must in some way be doubtful" to be validly compromised).

f. Designation of Defendant

As a general proposition, at least in suits for money damages, the rule is that a federal agency may not be sued in its own name (the cases use the Latin "eo nomine") unless explicitly authorized by Congress. Blackmar v. Guerre, 342 U.S. 512 (1952); Shelton v. U.S. Customs Service, 565 F.2d 1140 (9th Cir. 1977); Economou v. U.S. Dep't of Agriculture, 535 F.2d 688 (2d Cir. 1976), vacated on other grounds, Butz v. Economou, 438 U.S. 478 (1978); Midwest Growers Cooperative Corp. v. Kirkemo, 533 F.2d 455 (9th Cir. 1976).

As one illustration, suits under the Federal Tort Claims Act are supposed to be brought against the United States and not the particular agency involved. City of Whittier v. U.S. Dep't of Justice, 598 F.2d 561 (9th Cir. 1979); Kohlbeck v. Kis, 651 F. Supp. 1233 (D. Mont. 1987); Murray v. U.S. Postal Service, 550 F. Supp. 1211 (D. Mass. 1982). See also 28 U.S.C. §§ 2674, 2679(a). In contrast, suits under Title VII of the Civil Rights Act of 1964 are required to designate the "head of the department, agency, or unit, as appropriate" as the defendant. 42 U.S.C. § 2000e-16(c). They are nevertheless viewed as suits against the United States for purposes of 31 U.S.C. § 1304. 58 Comp. Gen. 311, 315–16 (1979). In some types of cases, the designation of an agency rather than the United States as defendant will be important where it reflects jurisdiction deriving from a "sue and be sued" clause. A 1994 Supreme Court decision discussed exposure to constitutional tort suits under a "sue and be sued" clause. See FDIC v. Meyer, 114 S. Ct. 996 (1994).

Thus, for payment purposes, or more specifically the availability of 31 U.S.C. § 1304, the caption of a case is not in and of itself controlling. It should not be assumed that all cases in which the defendant is the United States will be payable from the judgment appropriation (a good example being a

Federal Tort Claims Act suit involving the Postal Service), nor should it be assumed that all cases in which a particular agency or agency head is designated as defendant will be payable from agency funds. The nature of the judgment and not the caption of the case is the controlling factor.

Regardless of how the case is captioned, the key question is whether the judgment binds the United States. If it does not (for example, where the government was not a party), there is no basis to invoke 31 U.S.C. § 1304. E.g., B-240135, August 14, 1990. See also 44 Comp. Gen. 86 (1964); B-244911, July 25, 1991 (internal memorandum).

g. Judgment Against Individual Officer or Employee

As seen above, a judgment against an official in his or her official capacity may in appropriate circumstances be viewed as a judgment against the United States for purposes of 31 U.S.C. § 1304. This generally means situations where the official, usually an agency head, is merely a "nominal defendant" and the suit is in reality a suit against the United States. "[A] suit against the head of a federal agency in his official capacity only is considered a suit against the government itself." Anderson v. Transamerica Specialty Insurance Co., 804 F. Supp. 903, 906 (S.D. Tex. 1992). See also Brandon v. Holt, 469 U.S. 464, 471–73 (1985). A prime example is an employment discrimination suit under Title VII of the Civil Rights Act.

However, a judgment against an officer or employee in his or her individual capacity is not a judgment against the United States and is not payable from the permanent judgment appropriation.[15] An individual capacity suit seeks a remedy against the individual rather than against the government. Suits of this nature skyrocketed after the Supreme Court's decision in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), holding that federal employees could be held liable for money damages for certain constitutional violations (the so-called "constitutional tort"). The offense in Bivens, for example, was a violation of the search-and-seizure protections of the Fourth Amendment.

Whether individual capacity judgments can be paid or reimbursed from agency funds is a separate question. There are a few situations in which government liability is established by statute. For example, 26 U.S.C. § 7423 authorizes the Secretary of the Treasury to reimburse any officer or employee of the United States for (a) sums recovered against the employee in any court for any internal revenue taxes collected by the

[15]See Kentucky v. Graham, 473 U.S. 159, 166–67 (1985). The Graham decision includes a brief but useful discussion of the distinction between individual capacity and official capacity actions. An official capacity suit requires a waiver of sovereign immunity. E.g., Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985); Clark v. Library of Congress, 750 F.2d 89, 102–04 (D.C. Cir. 1984).

employee, and (b) all damages and costs recovered in any suit against the employee for actions taken in the performance of official duties in matters relating to tax administration. Reimbursement under 26 U.S.C. § 7423 is discretionary. Gilbert v. DaGrossa, 756 F.2d 1455, 1460 (9th Cir. 1985). Reimbursement under this statute must be made from agency funds and not from the permanent judgment appropriation. 56 Comp. Gen. 615, 619–20 (1977).

Also, under 28 U.S.C. § 2006, a judgment against a "collector or other revenue officer" arising from the performance of official duty may be converted into a judgment against the government if the court certifies that probable cause existed or that the officer acted under the direction of the Secretary of the Treasury or other proper government official. The Supreme Court discussed the origin of this statute in United States v. Kales, 314 U.S. 186, 197–98 (1941). If a certificate of probable cause is issued and the case falls within the scope of 26 U.S.C. § 7423, payment must come from agency funds in accordance with 56 Comp. Gen. 615. However, GAO has used the judgment appropriation in a case where the certificate was issued and the case did not fall within the scope of 26 U.S.C. § 7423. In either case, it is immaterial whether the government is being asked to pay the judgment directly or to reimburse the employee. B-200431-O.M., December 31, 1981. (B-200431-O.M. traces the history and evolution of payments under 28 U.S.C. § 2006 and 26 U.S.C. § 7423.)

Since judgments to which the provisions of 26 U.S.C. § 7423 or 28 U.S.C. § 2006 apply are judgments against the individual and not the United States, restrictions on interest and costs awardable against the United States do not apply. Thus, interest and costs may be included in the reimbursement or direct payment to the extent awarded in the judgment. 12 Comp. Gen. 474 (1932); 8 Comp. Gen. 126 (1928); 21 Comp. Dec. 705, 707 (1915); B-45014, November 4, 1944; B-200431-O.M., December 31, 1981. If the judgment involves the overpayment of any internal revenue tax, interest is now allowable as a matter of statutory entitlement. 28 U.S.C. § 2411; 8 Comp. Gen. at 128.

Wholly apart from any limited statutory authority that may exist such as 26 U.S.C. § 7423 or 28 U.S.C. § 2006, both GAO and the Justice Department have often stated the proposition that where an officer or employee of the government is sued because of some official act done in the discharge of an official duty, the expense incurred by that officer or employee in the discharge of such duties should be borne by the United States. This principle has deep roots. E.g., 15 Comp. Dec. 621 (1909); 9 Op. Att'y Gen.

51 (1857); 3 Op. Att'y Gen. 306 (1838). Where payment or reimbursement is proper under this principle, it must be made from agency appropriations.

During the 1980s, largely in response to the flood of Bivens-type suits, approximately a dozen agencies issued regulations establishing programs to indemnify their employees against personal liability for actions taken within their scope of employment. The Justice Department's Office of Legal Counsel has issued several opinions upholding the legality of these programs. 15 Op. Off. Legal Counsel 70 (1991) (preliminary print) (Treasury Department); 13 Op. Off. Legal Counsel 54 (1989) (preliminary print) (Environmental Protection Agency); 10 Op. Off. Legal Counsel 9 (1986) (preliminary print) (Justice Department).

The basis in each case is the "necessary expense" doctrine of purpose availability—that is, an agency can legitimately determine that such a program will materially contribute to the effective accomplishment of its mission. Each opinion points out that payment must come from the agency's general operating appropriations. The agency must review each case individually, and may not indemnify for actions not within the scope of employment even though taken in the course of performing official duties. 15 Op. Off. Legal Counsel at 78. The agency must also guard against Antideficiency Act violations. Id. (This opinion, at 72 nn. 4–6, gives references for all then-existing agency programs.)

GAO has not had the occasion to address any of the formal agency programs (nor should there be any need or reason in light of the OLC opinions), but has considered a number of individual cases. For example, in Merovka v. Allen, 410 F.2d 1307 (10th Cir. 1969), personal-capacity judgments were entered against 3 federal game wardens who, in an attempt to protect waterfowl, had violated federal regulations by placing "no hunting" signs on private property. Although the court found that the agents had exceeded their authority, they had acted in accordance with agency policy and at the direction of their superiors. Accordingly, reimbursement was appropriate. B-168571-O.M., January 27, 1970.

A few years later, this case was distinguished in B-176229, October 5, 1972, affirmed by B-176229, May 1, 1973, in which an employee of the Bureau of Indian Affairs attempted to eject certain individuals from a building and was sued for assault and battery. Reimbursement was denied because the liability did not arise by reason of performance of official duties nor because of compliance with agency instructions nor pursuant to orders of superiors. See also B-182219, October 23, 1974 (National Guard technician, dismissed for refusing to participate in a firing squad at a military funeral, sued the Adjutant General who fired him; GAO found appropriated funds unavailable, under 31 U.S.C. § 1304 or otherwise, to pay a judgment or settlement against the defendant).[16]

Most GAO decisions and opinions in this area have dealt with attorney's fees or court-imposed fines, and the cases are covered in the appropriate sections of Chapter 4.

4. The "Otherwise Provided For" Exception

a. Introduction

The permanent judgment appropriation is available only where payment is "not otherwise provided for." 31 U.S.C. § 1304(a)(1). Payment is otherwise provided for if some other appropriation or fund is legally available to satisfy the judgment. E.g., 66 Comp. Gen. 157, 160 (1986); 62 Comp. Gen. 12, 14 (1982).

In order to understand the "otherwise provided for" concept, it is necessary to understand exactly what 31 U.S.C. § 1304 was designed to do. As we have seen, prior to 1956 (and, for judgments over $100,000, prior to 1977), most judgments against the United States could not be paid without a specific congressional appropriation, regardless of the agency's willingness to pay or regardless of how much money the agency had available. These are the judgments section 1304 was intended to pick up. However, not all judgments required specific appropriations. There were, prior to enactment of the judgment appropriation, situations in which agency funds were available to pay judgments. The "otherwise provided for" exception in section 1304 preserved these situations and the concept generally.

Thus, the judgment appropriation was intended to eliminate the need to seek specific appropriations from Congress to pay judgments when that need resulted from the legal unavailability of funds. It was not intended to shift the payment source for items which could always have been paid from agency funds, whether the authority was expressly provided by

[16]The rationale in B-182219 for the unavailability of agency appropriations was a rather summary out-of-context application of the principle that agency funds are normally not available for judgments, citing another out-of-context application which has since been overruled. The evaluation of whether indemnification is appropriate in any given case should instead be based on the factors discussed in B-176229 and the Justice Department opinions.

statute or was reasonably implied from the nature of the agency's legal status or mission.

Recognition of the "otherwise provided for" concept appears in many places in the legislative history of both the original enactment of 31 U.S.C. § 1304 and subsequent amendments. The most detailed discussion of the original 1956 legislation is a statement by the (then) Bureau of the Budget printed in the hearings of the House Appropriations Committee. The statement begins by noting that some types of judgments could be paid from existing funding sources, and that the rest of the discussion "relates solely to the general types of cases for which specific appropriations are required."[17] When compromise settlements were added in 1961, the reports of both the Senate and House Judiciary Committees quoted a Justice Department statement to the effect that settlements would be payable from the permanent appropriation only "[i]f agency funds or appropriations are not available for this purpose."[18] And, when certain administrative awards were added by the 1978 Supplemental Appropriations Act, the reports of both the Senate and House Appropriations Committees emphasized that the new provision "is not intended to affect claims which are payable from agency appropriations."[19]

There is no single test to determine if something is "otherwise provided for." The determination may flow from the nature of the defendant agency, the type of judgment involved, or the statutory funding scheme applicable to the particular agency or program. Types of judgments which existed prior to the availability of the judgment appropriation and which could have been paid from agency funds remain unaffected—they remain "otherwise provided for." For types of judgments which did not exist prior to enactment of the judgment appropriation, the question usually is whether Congress has established a mechanism which is available for payment. Most situations, as we will see, involve some degree of complexity.

Before proceeding to specific situations, two key points need to be emphasized:

[17]Hearings on Supplemental Appropriation Bill, 1957, Before Subcomm. of the House Comm. on Appropriations, 84th Cong., 2d Sess., pt. 2, at 883 (1956).

[18]S. Rep. No. 733, 87th Cong., 1st Sess. 3 (1961); H.R. Rep. No. 428, 87th Cong., 1st Sess. 3 (1961).

[19]S. Rep. No. 564, 95th Cong., 1st Sess. 76 (1977); H.R. Rep. No. 644, 95th Cong., 1st Sess. 53 (1977).

- The question of whether payment is "otherwise provided for" is a question of legal availability rather than actual funding status. As a general proposition, if payment of a particular judgment is "otherwise provided for" as a matter of law, the judgment appropriation is not available, and the fact that the defendant agency may have insufficient funds at that particular time does not operate to make the judgment appropriation available. 66 Comp. Gen. 157, 160 (1986); Department of Energy Request to Use the Judgment Fund for Settlement of Fernald Litigation, Op. Off. Legal Counsel, December 18, 1989. The agency's recourse in this situation is to seek funds from Congress, the same as it would have to do in any other deficiency situation.
- There is only one proper source of funds in a given case. The very terms of 31 U.S.C. § 1304—making an appropriation for payments not otherwise provided for—require that a source-of-funds determination be made. There is no election involved, however. If agency funds are available, then the judgment appropriation is not. Conversely, if a judgment is properly payable from the judgment appropriation, then payment of that judgment from agency funds violates 31 U.S.C. § 1301(a) (restricting appropriations to the objects for which made).

If an agency inadvertently or erroneously uses agency funds to pay something which should have been charged to the judgment appropriation, GAO's policy is to reimburse the agency upon proper request. See, e.g., B-178551, January 2, 1976 (letter to Air Force); B-52600/B-97131, May 7, 1952.

For judgments payable from agency appropriations, the rules of availability of appropriations with respect to time and amount as described in Chapters 5 and 6 of this publication apply just as they would to any other expenditure. See, e.g., 70 Comp. Gen. 225 (1991) (use of expired appropriation).

b. Tax Judgments

The method of appropriating for tax refunds has changed several times over the decades, and along with it the method of paying tax judgments.[20] Prior to fiscal year 1921, appropriations for refunding internal revenue taxes were made on an annual, indefinite basis. These appropriations were not available for judgments, however, and tax refund judgments required specific appropriations. 2 Comp. Gen. 501, 502 (1923). As the result of legislation enacted in 1919 (40 Stat. 1145), tax refund appropriations starting with fiscal year 1921 became regular (definite) annual appropriations, based on budget requests submitted by the Treasury

[20]Our source for much of this discussion is B-211389, July 23, 1984.

Department. These appropriations were available for judgments. 27 Comp. Dec. 442 (1920); 2 Comp. Gen. 501 (1923); A-12287, December 31, 1925.

The tax refund appropriation was converted to a permanent indefinite appropriation in 1948,[21] and is now codified at 31 U.S.C. § 1324. In addition, the Commissioner of the Internal Revenue Service is specifically authorized to pay judgments "for any overpayment in respect of any internal-revenue tax." 28 U.S.C. § 2411. Thus, judgments representing overpayments or amounts improperly collected by IRS are paid by IRS and charged to the IRS "Refunding Internal Revenue Collections" account. Judgments in this category may result from suits for refund under 26 U.S.C. § 7422 or suits for wrongful levy under 26 U.S.C. § 7426. The judgments are paid directly by IRS without the need for settlement action by GAO. A-97256, November 3, 1938.

This treatment of tax judgments makes sense from the accounting perspective as well. Amounts collected by the IRS by way of judgments are credited as internal revenue collections. 26 U.S.C. § 7406. Paying tax judgments from the IRS refund account is therefore logical and gives a more accurate picture of the net effect of the government's tax collecting activities. Cf. 55 Comp. Gen. 625 (1976).

It can be seen from the foregoing that the major types of tax judgments are "otherwise provided for," and their payment does not involve use of 31 U.S.C. § 1304.

However, this does not mean that the judgment appropriation is never available for judgments arising from the activities of the IRS. The distinction is illustrated in B-211389, July 23, 1984. The IRS had seized a building to enforce a delinquent tax lien against a lessee who occupied space in the building. The owner of the building, who was not a delinquent taxpayer, sued for damages it had sustained as a result of the seizure. The governing circuit recognized a cause of action in this type of situation under the Tucker Act, based on an "inverse condemnation" approach. Since the case did not involve the return of anything received by the IRS, nor was it a suit against an individual revenue officer or agent, GAO concluded that a settlement of the suit was payable from the judgment appropriation. To illustrate the difference between this type of case and "tax judgments" that are payable by IRS, the decision gave the following example:

[21]Supplemental Treasury and Post Office Departments Appropriation Act, 1949, Title I, 62 Stat. 560, 561 (1948). The provision is discussed in B-137762.33, August 5, 1977.

"If, for example, an IRS agent while en route to seizing a building were involved in a motor vehicle accident and negligently injured a private citizen, the citizen would have a claim cognizable under the Federal Tort Claims Act. An adverse judgment in such a case would be payable from the permanent judgment appropriation, even though the IRS agent was in the course of performing revenue-collecting duties at the time of the accident." B-211389 at 4.

There are other situations in which the IRS may be held liable for "damages" separate and distinct from paying back amounts it has received. The Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342 (1988), included the following new provisions:

- Section 6240, 102 Stat. 3746, added a new 26 U.S.C. § 7432. It authorizes civil actions for damages and costs if the IRS knowingly or negligently fails to release a tax lien when required to do so under 26 U.S.C. § 6325.
- Section 6241, 102 Stat. 3747, added a new 26 U.S.C. § 7433. It authorizes civil actions for damages and costs if the IRS "recklessly or intentionally disregards" any provision of the Internal Revenue Code or regulations.

Each of these sections includes a payment provision expressly directing payment under 31 U.S.C. § 1304. Since both payment provisions use the word "claims," GAO regards 31 U.S.C. § 1304 as available for administrative settlements as well as court judgments, although the issue has not been addressed in a formal decision or opinion.

Prior to 1982, individual IRS employees could be sued for wrongful disclosure of tax returns or tax return information. As noted above, the Secretary of the Treasury could pay or reimburse any resulting judgments. (Wrongful disclosure was the precise situation involved in 56 Comp. Gen. 615.) In 1982, the statute authorizing suits against the employees (26 U.S.C. § 7217) was repealed and replaced with a new 26 U.S.C. § 7431, under which the remedy is a suit for damages against the United States. Although 26 U.S.C. § 7431 does not include a payment provision, there is no reason to charge judgments or compromise settlements under it to anything other than the permanent judgment appropriation. Administrative settlements under section 7431, however, are payable from IRS appropriations. B-238692, February 26, 1990 (internal memorandum).

With the enactment of the various provisions summarized above for damage suits against the United States, the incidence of suits against individual employees in tax matters should greatly diminish.

c. Land Condemnation Judgments

The permanent judgment appropriation is, as a general proposition, not available for land condemnation judgments. Rather, these are payable from the funds of the acquiring agency. 66 Comp. Gen. 157 (1986) (GAO's most comprehensive discussion); 54 Comp. Gen. 799 (1975); B-164035, May 1, 1968; B-154988, August 21, 1964.

We noted earlier that the judgment appropriation was not intended to shift the source of funds for judgments which, prior to its enactment, were payable from agency funds. Land condemnation judgments fall into this category. 17 Comp. Gen. 664 (1937); 5 Comp. Gen. 737 (1926); A-25484, January 11, 1929; A-12979, February 10, 1926 ("Judgments in condemnation proceedings . . . are not for reporting to the Congress as are ordinary judgments of Federal courts . . . ."); B-117598-O.M., December 8, 1953.

In brief, any agency with the authority to acquire land has the authority to acquire it by condemnation. 40 U.S.C. § 257. Condemnation necessarily involves litigation and a judicial determination of just compensation. There is no such thing as "administrative condemnation." Condemnation can be accomplished only through judicial process. Thus, an appropriation available for land acquisition is of necessity available for acquisition by condemnation, whether or not it actually uses the term "condemnation." Land condemnation judgments are therefore "otherwise provided for" because they can be paid from funds of the acquiring agency.

As a matter of policy, GAO's position is that the power of eminent domain should not be accompanied, in the hands of an acquiring agency, by unlimited and uncontrolled access to the general fund of the Treasury through use of the judgment appropriation. The exercise of that power, the power to take private property, should be controlled by Congress through the appropriation process. 66 Comp. Gen. at 160. In addition, condemnation judgments are different from other judgments in that condemnation is basically nothing more than the exercise of a normal program activity. Id. at 160–61.

Although the rule is that condemnation judgments may not be paid from the judgment appropriation, there have been a few exceptions. Congress may, of course, provide for use of the judgment appropriation in particular situations. For example, legislation providing for the expansion of the Redwood National Park made the judgment appropriation available for amounts in excess of the amount deposited with the court. 16 U.S.C. § 79g(b); B-212681(1), September 27, 1983. More recently, legislation providing for expansion of the Manassas National Battlefield Park specified payment from the judgment appropriation. Pub. L. No. 100-647, Title X, § 10002, 102 Stat. 3342, 3810 (1988). It may be significant that both of these were legislative takings.

Another exception arose from legislation in 1977 which gave the district court in Guam jurisdiction to hear, and render judgment on, claims by Guamanians for just compensation for land taken by the United States during and shortly after World War II.[22] The legislative history made it clear that payment from the judgment appropriation was intended. B-212134, June 29, 1983. Given the nature of the case, there would have been no other existing appropriation to charge, and payment from the judgment appropriation would not have the effect of augmenting anyone's land acquisition funds. See also 39 Comp. Gen. 166 (1959).

Another limited exception was recognized by decision. In 1973, Congress directed the Secretary of Agriculture to acquire by condemnation certain Klamath Indian forest lands. Congress then appropriated $49 million for the acquisition, but the judgment awarded just compensation considerably in excess of that amount. The legislative history indicated that Congress fully recognized that the $49 million would not be sufficient. Reasoning that the authorization applied to specifically known and identified lands and conferred no discretion on the condemning agency to determine how much land or which tracts to include, and that the appropriation could not have been applied to the acquisition of any other land nor could it have been exhausted by anything but the condemnation of the Klamath forest lands, the Comptroller General concluded that no purpose would be served by requiring a specific appropriation for the deficiency portion of the judgment and that payment from the judgment appropriation would not offend the established structure of funding land acquisitions. B-198352, April 18, 1980. However, the Comptroller General once again reviewed and reaffirmed the traditional treatment of condemnation judgments in general, noting that land acquisition is a normal activity for a number of agencies for which Congress sets the desired program levels through the appropriation process.

The term "inverse condemnation" refers to a variety of claims for just compensation under the Fifth Amendment. The cases may or may not involve the acquisition of land by the government. About the only thing the judgments have in common is that they reflect a determination that there

[22]Technically, these were not land condemnation suits. In a land condemnation action, the government is the plaintiff. In these cases, the condemnations had been consummated 30 years earlier.

has been a compensable taking of a property interest—some action by the government which sufficiently interferes with a private property right so as to create a right to compensation under the Fifth Amendment. One example is B-211389, July 23, 1984, discussed in our previous section on tax judgments. Another example is the so-called “regulatory taking,” in which a court finds that some government regulatory activity has infringed on a property interest in a manner deemed compensable.

GAO looks at inverse condemnation judgments on a case-by-case basis, and it is difficult to state a “rule.” As a general proposition, inverse condemnation judgments are paid from the judgment appropriation, except where an agency, intending to acquire certain property, by delay or otherwise (which may be intentional or unintentional) effectively “forces” the landowner to file an inverse condemnation action and the result would be a clear augmentation of the agency’s land acquisition appropriations. B-183692-O.M., September 28, 1982. See also 66 Comp. Gen. at 163, citing Althaus v. United States, 7 Cl. Ct. 688 (1985), as an example of an inverse condemnation judgment which would not be paid from the judgment appropriation.

A related type of suit is an action to quiet title, 28 U.S.C. § 2409a, in which someone other than the federal government brings a civil action against the United States to adjudicate a disputed title to real property in which the government claims an interest. If the government loses, it may nevertheless choose to retain possession or control of the property by paying just compensation. A judgment or settlement of this nature is analogous to a direct condemnation and is payable from funds of the acquiring agency. B-249130, February 23, 1993 (internal memorandum). See also A-25484, January 11, 1929.

d. Judgments for Refunds

In Eastport Steamship Corp. v. United States, 372 F.2d 1002 (Ct. Cl. 1967), the Court of Claims recognized that claims for money fall into two somewhat overlapping but nevertheless different categories: (1) claims “in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum,” and (2) “demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury.” Id. at 1007. The court went on to give examples of each type. For purposes of this discussion, we use the term “refund” to correspond roughly to the court’s first category.

Judgments directing refunds are materially different from judgments awarding damages. When a court orders a refund, it is directing the government to return money it received and which the court has determined it improperly received and/or retained. In this sense, it may be argued that a judgment directing a refund is not truly a "money judgment" within the scope of 31 U.S.C. § 1304, but is more akin to injunctive relief. Cf. 70 Comp. Gen. 225, 228 (1991). In addition, if an agency has credited the receipt to its own appropriation or fund, charging the refund to the general fund of the Treasury by paying the judgment under 31 U.S.C. § 1304 would result in an augmentation of the receiving appropriation. A refund should be charged to the general fund only where the receipt was covered into the general fund.

The rule with respect to refunds was stated in 17 Comp. Gen. 859, 860 (1938) and repeated in 29 Comp. Gen. 78, 79 (1949) as follows:

> "When the amount subject to refund can be traced as having been erroneously credited to an appropriation account the refund claim is chargeable to said appropriation whether it be lapsed or current, or reimbursable or nonreimbursable."

GAO has applied the rule regardless of whether the refund is ordered administratively or judicially.

Several more recent decisions will illustrate. In 55 Comp. Gen. 625 (1976), a court directed the refund of a fine paid to the Internal Revenue Service for violation of wagering tax provisions of the Internal Revenue Code. Since the fine had been deposited in the Treasury as an internal revenue collection, the proper account to charge with the refund was the IRS account for refunding internal revenue collections. (Augmentation was not a concern in this case because the fine had not been credited to an operating appropriation or fund.) A very similar case is B-135312, March 13, 1958.

In 61 Comp. Gen. 224 (1982), a court ordered the Department of the Interior to refund fees collected from 1975 through 1981 for right-of-way permits. For part of this time, the fees had been deposited in the general fund of the Treasury as miscellaneous receipts. For the remaining years, the fees were deposited in a special account which Congress had appropriated for use by Interior. For the years in which the fees had been deposited as miscellaneous receipts, the refund was held chargeable to the appropriation for "Refund of Moneys Erroneously Received and Covered" established by 31 U.S.C. § 1322(b)(2). However, for the years in which the fees had been credited to the special account, the refund was held chargeable to that special account.

Both of these decisions applied the rule set forth in 17 Comp. Gen. 859. Since there was an available source of funds in each case, there was no need to consider payment under 31 U.S.C. § 1304.

A somewhat different situation occurred in B-164766, June 1, 1979. There the Court of Claims had approved a contractor's motion to substitute a bond in lieu of money previously paid to the Department of the Army under the Renegotiation Act. The issue was the source of funds for the court-ordered refund of the money previously paid. Since the prior payment had been deposited in the Treasury as miscellaneous receipts, there was no basis to charge the refund to Army appropriations. Also, the "Moneys Erroneously Received and Covered" account could not be charged since the deposit had been proper when made, and the court order directing the refund was not based on any suggestion that the original receipt was in any way erroneous. Since there was no other appropriation or fund that could properly be charged, the refund was held payable from the judgment appropriation. (The Renegotiation Board ceased operations as of March 31, 1979.)

Thus, when a judgment or compromise settlement orders a refund, as opposed to the payment of money damages, the first question to ask is what the agency did with the money. If the agency retained the money for credit to its own appropriations, then the refund is chargeable to the agency's appropriations, and the fact that the agency may have spent the money is irrelevant.[23] If the money was deposited in the Treasury as miscellaneous receipts, a judicially-ordered refund may be charged to the "Erroneously Received and Covered" appropriation if applicable, or if not, to the judgment appropriation. Other cases applying these principles are B-206443, June 25, 1984; B-150624-O.M., April 18, 1963; B-140180-O.M., January 27, 1960.

A somewhat analogous situation is the action in rem in which a court directs return of the "res." The "res" may be tangible property, money, or tangible property which has been sold and converted to cash. In the

[23]In Texas State Commission for the Blind v. United States, 796 F.2d 400, 407 (Fed. Cir. 1986), the court refused to apply the refund theory in a suit seeking a portion of vending machine income which the plaintiff alleged the Defense Department improperly diverted in violation of the Randolph-Sheppard Act, in part because Congress had apparently taken these amounts into consideration in determining DOD appropriations. The question was academic, however, as the plaintiff lost the case.

typical case, the action is brought against the property itself, and any judgment is satisfied from that property. E.g., B-75900, June 11, 1948.

The Supreme Court considered an in rem situation in Republic National Bank of Miami v. United States, 113 S. Ct. 554 (1992). The government sought forfeiture of a residence alleged to have been purchased with illegal drug money. The bank claimed a lien interest under a mortgage. Upon agreement of the parties and approval of the court, the property was sold and the proceeds held by the United States Marshal. The district court held in favor of the government and directed forfeiture of the proceeds. The bank filed a notice of appeal, but did not try to obtain a stay of execution of the judgment. The Marshal then deposited the proceeds in the Assets Forfeiture Fund (28 U.S.C. § 524(c)) in the Treasury, and the government moved to dismiss the appeal, arguing that deposit of the proceeds removed the matter from the court's jurisdiction.

The main issue before the Supreme Court was whether deposit of the proceeds in the Treasury terminated the in rem jurisdiction. The answer was no, unless deposit of the funds in the Treasury would somehow render further judgments "useless." The government argued that judgment in this case would be useless because there was no authority to refund the deposited proceeds from the Treasury. In multiple opinions, the Court rejected this argument. While the Court split over the precise nature of the authority, it was unanimous in its belief that adequate authority existed to refund the proceeds from the Treasury in the event that the bank prevailed on its appeal from the underlying forfeiture action. Some of the Justices believed that there was no need for an appropriation to authorize the refund in a case like this, while others found the requisite appropriation in 31 U.S.C. § 1304, together with 28 U.S.C. § 2465 which directs the return of seized property upon entry of judgment for the claimant. (There is no indication that the Court considered whether the Assets Forfeiture Fund itself could satisfy the requirement for an appropriation.)

e. United States Postal Service

Prior to the Postal Reorganization Act of 1970, the Post Office Department was largely a "regular" federal agency, and as such was subject to GAO's claims settlement jurisdiction. The version of 31 U.S.C. § 1304 then in effect included a permanent appropriation of the postal revenues to pay judgments. Judgments were submitted to GAO for certification, but were then forwarded to the Post Office Department (rather than the Treasury Department) for actual payment.

The Postal Reorganization Act replaced the Post Office Department with "an independent establishment of the executive branch of the Government" to be known as the United States Postal Service (USPS). 39 U.S.C. § 201. The USPS was empowered to sue and be sued, and was given its own claims settlement authority. 39 U.S.C. §§ 401(1), 401(8), 2603. It is expressly subject to the Federal Tort Claims Act. 39 U.S.C. § 409(c).

The Postal Reorganization Act addressed the payment of judgments by adding a provision now found at 39 U.S.C. § 409(e):

> "A judgment against the Government of the United States arising out of activities of the Postal Service shall be paid by the Postal Service out of any funds available to the Postal Service."

Thus, the Postal Reorganization Act changed nothing in terms of the source of funds. By virtue of 39 U.S.C. § 409(e), the judgments are explicitly "otherwise provided for." See Butz Engineering Corp. v. United States, 499 F.2d 619, 625, 628 (Ct. Cl. 1974). However, the Act did result in a procedural change—USPS judgments are now paid directly by the USPS and do not require GAO certification prior to payment. B-164786, October 8, 1970.

Cases occasionally raise the issue of whether a particular judgment "arose from activities of" the Postal Service. If so, it is payable by the Postal Service; if not, it is payable from the judgment appropriation. A 1978 decision involved a compromise settlement under the Federal Tort Claims Act. A trailer owned by an independent contractor of the Postal Service had become separated from the tractor-trailer rig and struck the plaintiff's automobile. The trailer was clearly on Postal Service business, but it was also subject to the Department of Transportation's motor carrier safety regulations. The decision, while not reflecting any opinion on the merits of the case, concluded that the judgment did arise from Postal Service activities and was therefore properly payable by the Postal Service. B-190593, November 29, 1978.

A 1985 case which did not result in any written GAO decision or opinion provides another good illustration. A USPS employee suffering from chest pains consulted a USPS doctor. The doctor misdiagnosed the situation, but immediately sent the employee to a VA hospital and even arranged for transportation. VA personnel also misdiagnosed the situation. Several days later, the employee died. The chest pains had resulted from a non-work related heart condition. In the ensuing wrongful death action under the

Federal Tort Claims Act, the government negotiated a settlement. Even assuming that the USPS doctor was negligent, that negligence was not the proximate cause of death since the doctor sent the employee immediately to a hospital and death did not occur until more than a week later. In these circumstances, GAO did not view the claim as "arising out of the activities of" the Postal Service for purposes of 39 U.S.C. § 409(e), and certified the settlement for payment from the judgment appropriation.[24]

Still another useful illustration, again not the subject of any written GAO decision or opinion, resulted from the payment of the class action judgment in Alaniz v. Office of Personnel Management, 728 F.2d 1460 (Fed. Cir. 1984), in which the court found that OPM had improperly determined cost-of-living allowance adjustments for certain years. Postal Service employees were included in the plaintiff class. If OPM's action had been binding on the Postal Service as it was with other executive agencies, then the judgment would have arisen from the activities of OPM, not the Postal Service, and the USPS plaintiffs could have been paid from the judgment appropriation along with the other executive branch plaintiffs. If, however, as was in fact the case, the Postal Service was not legally required to follow OPM's action but had voluntarily chosen to do so, then the judgment arose from the Postal Service's activities for payment purposes.

f. Government Corporations

For the most part, judgments against a government corporation are paid by the corporation rather than from the judgment appropriation. This result is based in part on "otherwise provided for" reasoning and in part on the legal and funding status of the typical corporation.

The theory is that a government corporation is set up to operate in a business-like manner. It is usually given considerable latitude in determining its expenditures; it is free from many of the restrictions on appropriated funds that apply to noncorporate agencies; and its statutory charter typically contains a "sue and be sued" clause. Of particular relevance to the present context, a corporation may generally retain funds it receives in the course of its operations and is not required to deposit them in the Treasury as miscellaneous receipts. Also, unlike a regular government agency, a government corporation may procure liability insurance. This being the case, it is logical that losses incurred by a government corporation, whether by judgment or otherwise, should be treated as liabilities of the corporation and charged to corporate funds.

[24] Dixie Doreen Graham v. United States, GAO Claim No. Z-2870529.

In an early decision which predated both section 1304 and the Federal Tort Claims Act, the Virgin Islands Company, a wholly owned government corporation, sought to compromise a personal injury claim. In view of the Company's statutory power to sue and be sued, the Comptroller General concluded that, since a judgment obtained against the Company would be payable from funds derived from the operation of the Company, the compromise could be paid from the same source. 25 Comp. Gen. 685 (1946). The Attorney General had also taken the position that corporate funds could be used to pay tort judgments or to procure liability insurance. 39 Op. Att'y Gen. 559 (1938) (noting, at page 566, that to the advantages flowing from corporate status also attach responsibilities). Thus, since judgments and settlements of this type were payable from currently available funds prior to enactment of the judgment appropriation, they should be viewed as unaffected by it.[25]

Similarly, a court of appeals in a 1947 case said:

> "A government corporation can pay costs taxed against it out of its corporate funds without an appropriation by Congress, but costs taxed against the government cannot be so paid. A government corporation engaging in business in the commercial world can deal with a judgment for costs as one of the vicissitudes of business to be charged to profit and loss . . . ."

Walling v. Norfolk Southern Ry. Co., 162 F.2d 95, 96 (4th Cir. 1947). In appropriations jargon, the court was saying that the corporation's funds were legally available to pay judgments as business expenses.

In a later decision involving the Saint Lawrence Seaway Development Corporation, the Comptroller General expressed the view that judgments against the corporation should "at least ultimately" be paid from funds of the corporation. 37 Comp. Gen. 691, 695 (1958). This seemed to contemplate that there might be circumstances in which a judgment would be paid from the permanent appropriation[26] with the United States seeking reimbursement from the corporation. This in fact happened several years later in a suit for tropical differential pay involving the Panama Canal Company. GAO certified the judgment for payment under section 1304 and

[25]Under the Federal Tort Claims Act, which is now the exclusive remedy for tort actions against federal instrumentalities, including government corporations, suit must be brought against the United States. While this provides a uniform procedure for adjudicating tort claims, there is no indication that Congress intended to shift the payment burden from the individual corporations to the general fund of the Treasury. See 13 Op. Off. Legal Counsel 436 (1989) (preliminary print) (Commodity Credit Corporation).

[26]See Breitbeck v. United States, 500 F.2d 556 (Ct. Cl. 1974), for a possible example involving the St. Lawrence Corporation.

then sought reimbursement from the Panama Canal Company on the grounds that the judgment amounts were properly a cost of operation of the Company. B-164879, December 5, 1973.

Thus, judgments against a government corporation should be paid from corporate assets. The most detailed discussion of this rule is found in an opinion of the Justice Department's Office of Legal Counsel, 13 Op. Off. Legal Counsel 436 (1989) (preliminary print). See, in addition, Far West Federal Bank v. Director, Office of Thrift Supervision, 930 F.2d 883, 890 (Fed. Cir. 1991) (stating general rule); 45 Comp. Gen. 514 (1966);[27] B-142778-O.M., May 19, 1960 (Commodity Credit Corporation); B-213490, October 23, 1985 (non-decision letter) (Amtrak).

g. "Sue and Be Sued" Agencies

Congress has authorized a number of noncorporate agencies to conduct commercial-type programs. Examples are the various loan and insurance programs conducted by the Small Business Administration and the Department of Housing and Urban Development. The agency is usually authorized to sue and be sued and the programs are frequently financed by revolving funds. Where these three factors coincide—a business-type program conducted by a "sue and be sued" agency and financed from a revolving or other special fund—judgments arising from the program are as a general proposition payable by the agency from the fund. The theory is that a judgment of this type should be treated as a necessary expense of the program. 62 Comp. Gen. 12 (1982); B-189443, August 4, 1980 (non-decision letter). This principle is limited to judgments arising directly from the particular program and does not affect other types of judgments such as judgments in tort or discrimination suits to the extent they arise from what B-189443 called the agency's "administrative practices." 62 Comp. Gen. at 14.

This concept is closely related to, and supported by, the approach followed by a number of courts in determining district court jurisdiction under a "sue and be sued" clause. The predominant view finds a direct relationship between "sue and be sued" power and the availability of agency funds to pay a resulting judgment. For example, in S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28, 35-36 (2d Cir. 1979), the case that generated GAO's decision at 62 Comp. Gen. 12, the court, citing Federal Housing Administration v. Burr, 309 U.S. 242 (1940), said that when

[27]This case held that the settlement of a tort suit should be paid from assets of the corporation rather than operating appropriations of the parent agency. Since the case predated the availability of the judgment appropriation for compromises of Federal Tort Claims Act suits, the alternative of charging agency operating appropriations is obsolete. The case nevertheless remains valid for the proposition that the settlement should be paid from corporate assets.

Congress launches a federal agency into the commercial world and gives it "sue and be sued" power, "it is presumed in the absence of an express limitation on the waiver that the agency is suable for claims arising out of the commercial relationships which it enters into in pursuit of its statutory mission." The court then found that any judgment for plaintiff in the case could be paid from funds in the control of the defendant agency, in that case the Department of Housing and Urban Development. See also C.H. Sanders Co. v. BHAP Housing Development Fund Co., 903 F.2d 114, 120 (2d Cir. 1990);[28] Crowell v. Administrator of Veterans' Affairs, 699 F.2d 347, 351 n.1 (7th Cir. 1983); Industrial Indemnity, Inc. v. Landrieu, 615 F.2d 644, 646 (5th Cir. 1980) ("A judgment against the Secretary establishing plaintiff's entitlement can be paid out of money in the General Insurance Fund . . . .").[29] Cf. Taylor v. Administrator of Small Business Administration, 722 F.2d 105 (5th Cir. 1983) ("sue and be sued" clause of Small Business Act).

h. Nonappropriated Fund Judgments

A "nonappropriated fund instrumentality" or "NAFI" is an entity or activity which does not receive its funds from congressional appropriations. E.g., United States v. Hopkins, 427 U.S. 123, 125 n.2 (1976). The most commonly known NAFIs are those which operate within the military departments—such things as base or post exchanges, open messes, and recreation clubs. The very concept of a NAFI implies an activity which raises its own operating funds through product sales, member fees, etc., in contrast to an appropriated fund activity which is supported by taxpayer dollars. Both logic and policy considerations suggest that this concept would be largely a sham if NAFIs had unlimited access to the general fund of the Treasury through use of 31 U.S.C. § 1304. Absent statutory provision to the contrary, the Supreme Court has stated that the United States "assumes none of the financial obligations" of a NAFI. Hopkins, 427 U.S. at 124, quoting Standard Oil Co. v. Johnson, 316 U.S. 481, 485 (1942).

Tort judgments arising from nonappropriated fund activities are generally paid by the activity itself. See B-204703, September 29, 1981 (non-decision letter). In the case of the Army and Air Force Exchange Service, this is specified in a joint Army-Air Force regulation (AR 60-10/AFR 147-7). See also Mignona v. Sair Aviation, Inc., 937 F.2d 37 (2d Cir. 1991) (remanding tort claim against military flying club to state court). However, exceptions are possible, depending on exactly whose negligence caused the damage.

[28]The BHAP court suggested that a court need not waste its time analyzing the source of funds but "should simply direct the Secretary to satisfy the judgment out of funds that are within his control, assuming, of course, that such funds exist. It is only as to such funds that the Secretary's immunity has been waived." 903 F.2d at 120.

[29]While this is the majority view, it is not unanimous. See Marcus Garvey Square, Inc. v. Winston Burnett Construction Co., 595 F.2d 1126 (9th Cir. 1979), also purporting to apply FHA v. Burr.

For example, in a 1961 case, a person was injured on a wooden foot bridge providing access to a base exchange store. Since the negligence (defective planking) was imputable to the base engineer and not to any officer or employee of the exchange, the judgment appropriation was used. B-145762-O.M., May 19, 1961.

The treatment of NAFI contract judgments has had somewhat of a tortuous history. The earlier cases held that the United States could not be sued to enforce the contractual obligations of a NAFI. Jaeger v. United States, 394 F.2d 944 (D.C. Cir. 1968); Kyer v. United States, 369 F.2d 714 (Ct. Cl. 1966). In the Court of Claims, part of the reason was the court's position that, under 28 U.S.C. § 2517(a), its judgments could be paid only from appropriated funds. Kyer, 369 F.2d at 718. Unlike district courts, it felt that it could not direct payment from the NAFI's own funds. Id. at 719.

In 1970, Congress enacted Pub. L. No. 91-350, 84 Stat. 449, to amend the Tucker Act to include express or implied contracts by the Army and Air Force Exchange Service, Navy, Marine, and Coast Guard exchanges, and the Exchange Councils of the National Aeronautics and Space Administration. It also amended the judgment appropriation to make it available for judgments and compromise settlements in this category, and to require reimbursement by the contracting instrumentality. 31 U.S.C. § 1304(c). The amendment has been held applicable to employment contracts as well as traditional procurement contracts. United States v. Hopkins, 427 U.S. 123 (1976). However, it is limited to the entities specified and does not extend to other nonappropriated funds. Swiff-Train Co. v. United States, 443 F.2d 1140 (5th Cir. 1971).

In situations not covered by the 1970 legislation, the Court of Claims continued to apply what had now become known as the "nonappropriated funds doctrine," but refined it so as to accept Tucker Act jurisdiction unless it could be shown that appropriated funds were statutorily precluded. E.g., McCarthy v. United States, 670 F.2d 996, 1002 (Ct. Cl. 1982) (agency "has authority to use appropriated funds if and to the extent appropriated, and that is sufficient"); L'Enfant Plaza Properties, Inc. v. United States, 668 F.2d 1211, 1212 (Ct. Cl. 1982) (Congress not "statutorily prohibited from appropriating funds"). Aware of potential payment implications, the court noted that its judgments were "normally payable" from the judgment appropriation. McCarthy, 670 F.2d at 1002. In cases such as Ford, Powell & Carson, Inc. v. United States, 4 Cl. Ct. 200 (1983), and Corbino v. United States, 488 F.2d 1008 (Ct. Cl. 1973), the court clearly recognized the inappropriateness of charging the judgments to the taxpayer.

An important 1984 case, United States v. General Electric Corp., 727 F.2d 1567 (Fed. Cir. 1984), considered the impact of the Contract Disputes Act. The case involved a somewhat newer category of "nonappropriated fund" cases—those involving the foreign military sales program or similar programs intended to operate at no cost to the government. "Nothing in the Contract Disputes Act of 1978 limits its application to appropriated funds." Id. at 1570. Thus, under 41 U.S.C. § 612, the payment provision of the Contract Disputes Act, judgments or board of contract appeals awards involving nonappropriated fund contracts are payable from the judgment appropriation, but payment must be reimbursed by the contracting agency or activity.

The remedies provided by Title VII of the Civil Rights Act extend to nonappropriated fund employees. 42 U.S.C. § 2000e-16(a). Largely by analogy with the tort cases, a few Title VII judgments have been paid from the judgment appropriation where the alleged discriminating officials were regular federal civilian or military officials. See B-234746-O.M., March 10, 1989.

Apart from the situations noted, the rule remains that the United States does not assume the financial obligations of nonappropriated fund activities. In the absence of legislation authorizing suit against the United States, suit, at least in the district courts, must be brought against the particular activity, with any resulting judgment or settlement payable from the activity's nonappropriated funds. E.g., Cosme Nieves v. Deshler, 786 F.2d 445 (1st Cir. 1986), cert. denied, 479 U.S. 824 (suit under Fair Labor Standards Act); Morales v. Senior Petty Officers' Mess, 366 F. Supp. 1305 (D.P.R. 1973) (same).

Cases involving the Farm Credit Administration raise a different type of nonappropriated fund issue. The Farm Credit Administration does not receive direct congressional appropriations but derives its operating funds from assessments levied on the institutions in the system it administers. Normally, funds of that type would still be regarded as appropriated funds on the theory that the agency's authority to retain and use the funds amounts to a continuing appropriation. However, the Administration's governing legislation provides that its operating funds "shall not be construed to be Federal Government funds or appropriated moneys." 12 U.S.C. § 2250(b)(2). This being the case, the funds are not encumbered by the traditional prohibition on the use of operating appropriations for judgments. Therefore, since the Administration's operating funds are legally available to pay litigative awards, payment is "otherwise provided for." B-251061.3, September 29, 1993; B-251061.2, February 10, 1993.

i. Impoundment/Assistance Funds

There is a body of case law concerning the power of the courts to either enjoin the expiration of budget authority or "revive" expired budget authority, in order to preserve its availability pending the litigation of claims. The first wave of cases involved challenges to executive branch impoundments by potential recipients under various grant and entitlement programs. The suits then spread to non-impoundment contexts, such as challenges to grant funding decisions or to the application of statutory apportionment formulas. The cases are fully covered in Chapter 5 under the heading Effect of Litigation on Period of Availability.

For purposes of this chapter, the point is that these cases, while they may result in judicial awards of money, do not involve the use of 31 U.S.C. § 1304. The claimant in the typical case is trying to establish entitlement to particular budget authority under some statutory assistance program, and any resulting judgment relates to that budget authority, to the extent any of it remains. (If claims of this sort were viewed as exposing the judgment appropriation, questions as to the expiration of budget authority would be irrelevant.)

Two cases from the Court of Appeals for the District of Columbia Circuit state the principle as follows:

> "[A]n equitable doctrine has been fashioned by the federal courts in recent years to permit funds to be awarded to a deserving plaintiff even after the statutory lapse date, as long as the lawsuit was instituted on or before that date. . . .
>
> "Application of this equitable doctrine, however, assumes that funds remain after the statutory lapse date. . . .
>
> "[T]he equitable doctrine permitting a judicial award of funds after the statutory lapse date will ordinarily, as here, have no application to a case in which all funds have properly been awarded."

West Virginia Association of Community Health Centers v. Heckler, 734 F.2d 1570, 1576–77 (D.C. Cir. 1984).

"[W]e point out that the scope of that relief is limited to the amount of fiscal year 1981 funds which remain available. Indeed, at oral argument, counsel for the nine states conceded that it is undisputed that the claims in issue may only be satisfied out of whatever balance remains."

Connecticut v. Schweiker, 684 F.2d 979, 999 (D.C. Cir. 1982), cert. denied, 459 U.S. 1207. See also Population Institute v. McPherson, 797 F.2d 1062, 1081 (D.C. Cir. 1986); Ambach v. Bell, 686 F.2d 974, 986 (D.C. Cir. 1982).

j. Garnishment

The wages of federal civilian and military personnel are subject to garnishment only pursuant to statutory authority. This follows from the concept of sovereign immunity, because garnishment involves the serving of legal process, usually issued by a state court, on federal agencies. Garnishment against federal wages is now permissible under two separate statutes.

(1) 42 U.S.C. § 659

In 1975, Congress enacted legislation to permit the garnishment of federal wages for alimony and child support. The basic provision is section 459(a) of the Social Security Act, 42 U.S.C. § 659(a), which states that "moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services" shall be subject to garnishment process for those two items. The terms "child support" and "alimony" are defined to include attorney's fees, interest, and court costs when authorized by state law and specified in the judgment or decree. 42 U.S.C. §§ 662(b), (c).

This legislation does not create any new federal right of action. It is merely a limited waiver of sovereign immunity to permit garnishment as and to the extent specified. 55 Comp. Gen. 517, 520 (1975). A garnishment order that exceeds the extent to which the government has statutorily waived its sovereign immunity imposes no obligation on the United States. See 57 Comp. Gen. 420 (1978).

The Office of Personnel Management has issued implementing regulations for the executive branch. 5 C.F.R. Part 581 (1993). They include detailed listings of moneys which are and are not subject to garnishment. They also designate, as required by 42 U.S.C. § 661(b), agents to accept service of process for each executive branch agency.

The Merit Systems Protection Board has held that a back pay award, although not listed in the OPM regulations, is subject to garnishment. Morones v. Department of Justice, 49 M.S.P.R. 212 (1991). In the cited case, the award was part of a settlement following a remand by the Court of Appeals for the Federal Circuit. Based on the Board's reasoning in Morones and the language of the statute, a case can be made that the same result would apply to a back pay award which is part of a court judgment payable under 31 U.S.C. § 1304, although there are thus far no cases.

Payments due from the Civil Service Retirement and Disability Fund are also subject to garnishment, but only after application for benefits has been filed. Oshiver v. United States, 618 F. Supp. 172 (E.D. Pa. 1985). (The Oshiver court suggested that it might be possible for the wife of a former employee who had disappeared to file the application.) Income tax refunds are not subject to garnishment.[30] 5 C.F.R. § 581.104(c); Enfinger v. Enfinger, 452 F. Supp. 553 (M.D. Ga. 1978).

Garnishment traditionally has involved an order issued by a court, and this is still the prevalent form. However, some states have developed an administrative garnishment process which, if otherwise proper, may qualify as "legal process" for purposes of 42 U.S.C. § 659. 73 Comp. Gen.—(B-257000, June 14, 1994); 55 Comp. Gen. 517 (1975); B-183433, June 25, 1976.

As a general proposition, garnishment orders will be payable directly by the employing agency from agency funds. Questions have arisen, however, where the agency fails to comply with garnishment process. One such case is 56 Comp. Gen. 592 (1977). The Environmental Protection Agency had negligently failed to withhold funds from an employee's salary under a District of Columbia writ of garnishment. The error was not discovered until after the employee had resigned and his retirement account had been paid over. Under D.C. law, an employer who fails to comply with a writ of garnishment is liable to the judgment creditor, and 42 U.S.C. § 659 makes the United States subject to garnishment process the same as a private party. Here, a judgment entered by a D.C. court against EPA could not be paid from funds under the control of the agency since there were no longer any agency funds to which the garnishment could attach. Therefore, the decision concluded that the judgment could be paid from the judgment appropriation if the Attorney General certified that it was in the interest of the United States to pay, as provided in 28 U.S.C. § 2414.

[30]Separate authority exists, however, to offset certain past-due child support payments against tax refunds. See 26 U.S.C. § 6402(c), 42 U.S.C. § 664.

A similar issue was considered in Young v. Young, 547 F. Supp. 1 (W.D. Tenn. 1980). That case involved state law under which an employer who failed to comply with garnishment process could be held liable for the full amount of the debt or judgment underlying the garnishment. The court held that the limited waiver of sovereign immunity in 42 U.S.C. § 659 made the United States liable only for the amounts it had failed to withhold, not for the entire amount of the underlying debt. The court also directed the government to take action to recover those amounts from the employee. The judgment itself was found payable under 31 U.S.C. § 1304. 547 F. Supp. at 5.

The case of Loftin v. Rush, 767 F.2d 800 (11th Cir. 1985), is another similar case, in which the judgment creditor had obtained a default judgment against the United States for the full amount of the underlying debt. The court held the default judgment void:

> "The judgment entered against the government officer was void. Mrs. Loftin had no remedy by which she could collect the judgment of $37,966 as a lump sum against the Navy. The federal statute involved here . . . does not waive federal immunity. It merely authorizes a federal disbursing officer to withhold funds from the future pay of a federal employee. The state court exceeded its authority in entering a judgment greater than that allowed by the statutes. The Department of Justice through the United States Attorney could have filed an original declaratory action in United States District Court to have the judgment declared void." 767 F.2d at 805.

Then, essentially in agreement with the Young decision, the court concluded that 42 U.S.C. § 659 "evinced no intention to make the government, as employer of a debtor, wholly liable for a debt it did not incur," i.e., the full amount of the underlying debt (767 F.2d at 809), and directed payment of the amounts the government had failed to withhold.

The Young and Loftin decisions both discuss 56 Comp. Gen. 592. Unfortunately, both overbroadly characterize the GAO decision as standing for the proposition that the United States can be held liable for the full amount of the underlying debt, an approach both courts rejected. However, the District of Columbia statute involved in 56 Comp. Gen. 592, quoted on page 594, clearly made the employer liable only for the amounts it failed to withhold, and this is all that was involved in that case. Thus, there is no inconsistency between Young, Loftin, and 56 Comp. Gen. 592. In addition, it should be noted that the OPM regulations provide:

> "[W]here a governmental entity negligently fails to comply with legal process, the United States shall be liable for the amount that the governmental entity would have paid, if the legal process had been properly honored."

5 C.F.R. § 581.305(e). In sum, if a federal agency fails to comply with garnishment process, the United States can, to the extent provided by state law, be held liable for the amounts the agency failed to withhold. If a state court judgment to this effect is obtained, the first question to ask is whether the agency has any other funds of the types described in the OPM regulations. If not, the judgment is payable from the judgment appropriation provided the Attorney General certifies that payment is "in the interest of the United States" pursuant to 28 U.S.C. § 2414.

Our discussion thus far has concerned government liability for failing to honor a garnishment writ. What about when it does honor one?

The statute, 42 U.S.C. § 659(f), provides:

> "Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section."

The key phrase here is "regular on its face." This means that the agency does not have to inquire beyond the writ itself. Employees have challenged agency compliance with garnishment process where the court which issued the writ did not have personal (as opposed to subject matter) jurisdiction over the employee-obligor. However, the Supreme Court has held that the government is not liable to the employee in this situation. United States v. Morton, 467 U.S. 822 (1984). If the writ is issued by a court with subject-matter jurisdiction and is otherwise "regular on its face," the agency is bound to comply. The withholding does not become improper so as to make the government liable to its employee merely because the state court lacked personal jurisdiction. As the Court pointed out, the OPM regulations also mandate this result. Further, the fact that the employee may have raised the jurisdictional problem with the agency is irrelevant. Id. at 829. In a similar case in 1982, the Comptroller General had reached the same result. 61 Comp. Gen. 229, quoted in part in Morton, 467 U.S. at 829 n.10.

(2) 5 U.S.C. § 5520a

In 1993, Congress enacted more general garnishment authority in the Hatch Act Reform Amendments of 1993, Pub. L. No. 103-94, § 9, 107 Stat. 1001, 1007, 5 U.S.C. § 5520a, to exist side-by-side with the Title 42 provisions.

The key provision is 5 U.S.C. § 5520a(b), which states that "pay from an agency to an employee is subject to legal process in the same manner and to the same extent as if the agency were a private person." "Agency" is defined in subsection 5520a(a)(1) as including all branches of the federal government, similar to the definition in 42 U.S.C. § 662(a). "Pay" is broadly defined in subsection 5520a(a)(4). "Legal process" is defined in subsection 5520a(a)(3). Like its counterpart in 42 U.S.C. § 662(e), it encompasses administrative process where authorized by state law. However, it does not include process issued by a court of a foreign country.

Where the Title 42 authority is limited to alimony and child support, 5 U.S.C. § 5520a is much broader, applicable to "a legal debt of the employee, or recovery of attorney's fees, interest, or court costs." Id. § 5520a(a)(3)(B). Administrative costs incurred by the employing agency in executing a garnishment may be added to the garnishment and retained by the agency as offsetting collections. Id. § 5520a(j)(2). The law requires implementing regulations to be issued by the same authorities who issue them for the various branches of the government under 42 U.S.C. § 661(a). 5 U.S.C. § 5520a(j)(1).

"Neither the United States, an agency, nor any disbursing officer shall be liable with respect to any payment made from payments due or payable to an employee pursuant to legal process regular on its face," as long as the payment is made in accordance with the statute and implementing regulations. Id. § 5520a(g). This is virtually identical to 42 U.S.C. § 659(f).

The law explicitly provides that it "shall not modify or supersede" the Title 42 provisions and that process under the Title 42 authority has priority over process under 5 U.S.C. § 5520a. 5 U.S.C. §§ 5520a(i), (h)(2).

k. Bankruptcy

In order to analyze how bankruptcy court awards are paid, it is first helpful to examine the kinds of monetary awards a bankruptcy court can make against the federal government, noting that federal bankruptcy law is evolving at a rapid and voluminous pace. Prior to the 1978 revision of the Bankruptcy Code (title 11 of the United States Code), there was no waiver of sovereign immunity in the bankruptcy laws. E.g., United States v. Krakover, 377 F.2d 104 (10th Cir. 1967), cert. denied, 389 U.S. 845. For example, under the old Bankruptcy Code, an order of a bankruptcy court directing a federal agency to pay the unpaid compensation of a deceased employee to the employee's trustee under a Wage Earner's Plan could not be enforced in the face of a competing claim by the employee's children under 5 U.S.C. § 5582. 58 Comp. Gen. 644 (1979). However, absent such competing claims, it had been GAO's view that an agency could as a matter of policy require its finance officers to respond to such orders since they would be enforceable against the individual employee. 61 Comp. Gen. 245 (1982); 47 Comp. Gen. 522 (1968).

The 1978 Bankruptcy Code contained a limited "waiver of sovereign immunity" provision, 11 U.S.C. § 106 (1982 ed.). The Supreme Court construed 11 U.S.C. § 106 in United States v. Nordic Village, Inc., 112 S. Ct. 1011 (1992). The Court recognized that the statute explicitly waived the government's sovereign immunity in two situations—compulsory counterclaims to government claims and permissive counterclaims capped by a setoff limitation. Id. at 1015. Apart from these situations, however, Nordic Village held that section 106 waived sovereign immunity only for declaratory or injunctive relief[31] and not for monetary recoveries. As a lower court later noted, monetary relief includes such things as attorney's fees, actual damages, and sanctions. In re Shafer, 146 B.R. 477, 479 (D. Kans. 1992).

In late 1994, Congress revised 11 U.S.C. § 106 in the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, § 113. The new section 106 expressly preserves the two counterclaim situations recognized in the 1978 law and, in addition, abrogates sovereign immunity in more than 50 named sections of Title 11. Subsection 106(a)(3) authorizes courts to issue "an order or judgment awarding a money recovery, but not including an award of punitive damages." Subsection 106(a)(4) provides that a money judgment against the United States "shall be paid as if it is a judgment rendered by a district court of the United States." This means paid from the judgment appropriation if final and not otherwise provided for. The new 11 U.S.C. § 106 applies to cases commenced "before, on, and after" October 22, 1994. Pub. L. No. 103-394, § 702(b)(2)(B).

Monetary awards against the United States in bankruptcy proceedings frequently involve violations of 11 U.S.C. § 362, the automatic stay. Under

[31]An example the Court cited is In re Neavear, 674 F.2d 1201 (7th Cir. 1982) (government bound by declaration that debt has been discharged). 112 S. Ct. at 1016.

this provision, the filing of a bankruptcy petition, voluntary or involuntary, operates as an automatic stay of almost all further collection efforts, including setoff, with respect to prepetition debts of the bankrupt. Even where setoff is permitted under other sections of the Code, such as 11 U.S.C. § 553, the creditor must nevertheless petition the court for relief from the automatic stay. It is now settled that 11 U.S.C. § 362 applies to federal agencies or instrumentalities. E.g., In re Inslaw, Inc., 83 B.R. 89, 158 (Bankr. D.D.C. 1988); In re Haffner, 25 B.R. 882, 887 (Bankr. N.D. Ind. 1982).

Subsection (h) of 11 U.S.C. § 362 provides that "[a]n individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees, and, in appropriate circumstances, may recover punitive damages." The term "individual" has been construed to mean any debtor, individual, corporate, or otherwise,[32] although some courts limit it to natural persons.[33] Several pre-Nordic Village cases made awards under section 362(h) against federal agencies, and a few included punitive damages.[34]

Under Nordic Village, the question became whether the violation occurred in the context of one of the two counterclaim situations in which the government's sovereign immunity had unquestionably been waived. If it did, then awards under 11 U.S.C. § 362(h) could be made against the federal government.[35] If it did not, monetary awards were not authorized.[36] The 1994 legislation made the distinction irrelevant by specifying 11 U.S.C. § 362 as one of the sections with respect to which sovereign immunity has been abrogated.

[32]Budget Service Co. v. Better Homes of Virginia, 804 F.2d 289 (4th Cir. 1986); In re NWFX, Inc., 81 B.R. 500 (Bankr. W.D. Ark. 1987); In re Nash Phillips/Copus, Inc., 78 B.R. 798 (Bankr. W.D. Tex. 1987); In re Tel-A-Communications Consultants, Inc., 50 B.R. 250 (Bankr. D. Conn. 1985).

[33]E.g., In re Chateaugay Corp., 920 F.2d 183 (2d Cir. 1990); In re Abacus Broadcasting Corp., 150 B.R. 925 (Bankr. W.D. Tex. 1993).

[34]In re Allen, 83 B.R. 678 (Bankr. E.D. Mo. 1988); In re Advanced Professional Home Health Care, Inc., 82 B.R. 837 (Bankr. E.D. Mich. 1988); In re Ketelsen, 78 B.R. 573 (Bankr. D.S.D. 1987); In re Stucka, 77 B.R. 777 (Bankr. C.D. Cal. 1987); In re Rinehart, 76 B.R. 746 (Bankr. D.S.D. 1987), aff'd, United States v. Rinehart, 88 B.R. 1014 (D.S.D. 1988); In re Santa Rosa Truck Stop, Inc., 74 B.R. 641 (Bankr. N.D. Fla. 1987); Matter of Woloschak Farms, 74 B.R. 261 (Bankr. N.D. Ohio 1987). Ketelsen included an award of punitive damages. The Stucka court said it would have awarded them if the debtor had asked. The matter was left to separate proceedings in Rinehart and Santa Rosa Truck Stop.

[35]In re Pinkstaff, 974 F.2d 113 (9th Cir. 1992); Matter of Flynn, 169 B.R. 1007 (Bankr. S.D. Ga. 1994).

[36]In re Pearson, 917 F.2d 1215 (9th Cir. 1990); Small Business Administration v. Rinehart, 887 F.2d 165 (8th Cir. 1989).

Another common situation is the turnover order—an order directing a federal agency to turn over monies found to have been improperly collected or withheld from the debtor. A turnover order is clearly a form of monetary relief. (Nordic Village involved a turnover situation.)

Still another source of monetary liability is violation of the permanent injunction against attempting to collect a debt which has been discharged (11 U.S.C. § 524). One line of cases distinguished Nordic Village and found no sovereign immunity bar to awarding monetary relief for violation of the discharage injunction.[37] Other cases applied Nordic Village and declined to make monetary awards against the federal government.[38] The 1994 legislation chose the former result by including 11 U.S.C. § 524 in the "abrogation list" of the revised 11 U.S.C. § 106(a).

Awards in bankruptcy proceedings often involve attorney's fees. Where not authorized by a provision of the Bankruptcy Code itself such as 11 U.S.C. § 362(h), it may nevertheless be possible to obtain a fee award under some other fee-shifting statute, although once again the courts are not uniform. The court in O'Connor v. U.S. Department of Energy, 942 F.2d 771 (10th Cir. 1991), held that a bankruptcy court may award attorney's fees under the Equal Access to Justice Act. A case following O'Connor is In re Shafer, 146 B.R. 477 (D. Kans. 1992). However, In re Davis, 899 F.2d 1136 (11th Cir. 1990), reached the opposite result. The Eleventh Circuit has also applied Davis to bar bankruptcy courts from awarding fees under 26 U.S.C. § 7430. In re Bricknell Investment Corp., 922 F.2d 696 (11th Cir. 1991). Other courts have regarded 26 U.S.C. § 7430 as applicable. E.g., In re Germaine, 152 B.R. 619 (Bankr. 9th Cir. 1993); In re Southeast Stores, Inc., 156 B.R. 160 (Bankr. E.D. Va. 1993); In re Kiker, 98 B.R. 103 (Bankr. N.D. Ga. 1988); In re Hill, 71 B.R. 517 (Bankr. D. Colo. 1987). See also Taborski v. IRS, 141 B.R. 959 (N.D. Ill. 1992) (section 7430 not exclusive so as to preclude award under 11 U.S.C. § 362(h)).

Against this background, the source of funds to pay judgments and awards in bankruptcy proceedings can be determined in most cases by referring to other portions of this chapter dealing with analogous judgments in other contexts. For example, reference to the headings Judgments for Refunds and Tax Judgments should resolve most turnover situations. Punitive damages should not pose a problem as they are now expressly prohibited by 11 U.S.C. § 106(a) (3).

[37]In re Cost, 161 B.R. 856 (Bankr. S.D. Fla. 1993); In re Daniels, 150 B.R. 985 (Bankr. M.D. Ga. 1992); In re Moulton, 146 B.R. 495 (Bankr. M.D. Fla. 1992).

[38]In re Shafer, 146 B.R. 477 (D. Kans. 1992); In re Hardy, 161 B.R. 320 (Bankr. S.D. Ga. 1993).

Attorney's fee awards are discussed in detail later in this chapter, and the general rules set out there would apply equally to fee awards in bankruptcy cases. Thus, awards under section 7430 of the Internal Revenue Code are payable from the judgment appropriation. Awards under 28 U.S.C. § 2412(d) (Equal Access to Justice Act), or under § 2412(b) where there has been a finding of bad faith, are payable from agency funds. Fees awarded under 11 U.S.C. § 362(h) would generally be payable from the judgment appropriation since nothing makes them "otherwise provided for."

Finally, there is some authority for the proposition that the Bankruptcy Code waives sovereign immunity for tort-based suits independent of the Federal Tort Claims Act. In re Town & Country Home Nursing Services, Inc., 963 F.2d 1146 (9th Cir. 1992); In re TPI International Airways, Inc., 141 B.R. 512 (Bankr. S.D. Ga. 1992). Resulting judgments would most likely be payable from the judgment appropriation, at least in non-turnover situations.

l. Other Situations

As the categories previously described make clear, there are few absolutes in making source-of-funds determinations. Most categories involve a "mixed bag" of payments from the judgment appropriation and payments from agency funds. The same holds true for the additional areas summarized below.

(1) Tort-based judgments

The vast majority of claims against the United States stemming from tortious government conduct are adjudicated under the Federal Tort Claims Act (FTCA), which provides for both administrative and judicial resolution. Administrative awards of $2,500 or less are paid from agency appropriations. Administrative awards in excess of $2,500 are paid from the judgment appropriation. Court judgments and compromise settlements by the Department of Justice are paid from the judgment appropriation regardless of amount. 28 U.S.C. §§ 2672, 2677; 31 U.S.C. § 1304(a)(3)(A).

Payments under the Federal Tort Claims Act represent the largest single source of payments under 31 U.S.C. § 1304, whether measured by numbers of cases or aggregate dollar amount, at least in most years. There are several reasons for this: every agency is exposed to tort claims; tort claims may produce very large judgments; and the judgment appropriation is available for the larger administrative awards as well as judgments and compromise settlements.

The availability of 31 U.S.C. § 1304 to pay FTCA awards is subject to the same basic requirements as other awards, including the requirement that payment be "not otherwise provided for." We have already noted a few "otherwise provided for" situations for FTCA payments (Postal Service, government corporations, nonappropriated fund instrumentalities). Although rare, exceptions may also exist even for "regular" federal agencies. For example, in 67 Comp. Gen. 142 (1987), GAO found the judgment appropriation available for judgments and awards under the FTCA in personal injury or physical property damage cases arising from the activities of the Federal Retirement Thrift Investment Board, the same as for other agencies. However, the decision drew a distinction between the so-called "physical torts," such as motor vehicle accidents, and "program losses" even where attributable to negligence on the part of an agency employee. The reason was that the Board's organic legislation (Federal Employees' Retirement System Act of 1986) contained detailed provisions to address program losses.

Maritime torts are adjudicated under the Suits in Admiralty Act, 46 U.S.C. App. §§ 741–752, or the Public Vessels Act, 46 U.S.C. App. §§ 781–790. At one time, the Suits in Admiralty Act had its own permanent appropriation. Although it is still carried in the U.S. Code at 46 U.S.C. App. § 748 (which also expressly preserves the "otherwise provided for" concept), the corresponding Treasury account was repealed in 1934 and replaced by language requiring specific congressional appropriations (48 Stat. 1226). Now, judgments and compromise settlements under the Suits in Admiralty and Public Vessels Acts are paid the same as FTCA judgments—from the judgment appropriation unless payment is otherwise provided for in a particular case. See B-199073, July 1, 1980 (non-decision letter).

A final case meriting notice is 39 Comp. Gen. 650 (1960). That decision involved a judgment under the Suits in Admiralty Act against the United States for injuries resulting from negligent performance by a Maritime Administration contractor of work under an Economy Act agreement between the Maritime Administration and the Department of the Navy. Maritime Administration paid the judgment from an available revolving fund, and then sought partial reimbursement from Navy. The decision held that the judgment had to be paid as a judgment (that is, from the judgment appropriation unless some other fund was available, as had in fact been the case), and could not be treated as a reimbursable item of direct cost under the Economy Act agreement. While the rationale seems clear enough in the context of a tort judgment, it should not be automatically assumed that the same result would apply to other types of judgments such as contract judgments.

(2) Pay, allowances, employment benefits

Judgments awarding compensation or benefits to present or former federal civilian employees or military personnel comprise another major category of judgments, most of which are payable under 31 U.S.C. § 1304. Thus, judgments awarding back pay under the Back Pay Act (unjustified or unwarranted personnel action) or Title VII of the Civil Rights Act of 1964 (employment discrimination) are generally paid from the judgment appropriation. 58 Comp. Gen. 311 (1979). See also 69 Comp. Gen. 40 (1989). The same rule applies to judgments under the Age Discrimination in Employment Act of 1967 (B-193509-O.M., April 19, 1979) and the Rehabilitation Act. It is irrelevant whether the judgment specifies an actual dollar amount as long as it directs the payment of back pay. 58 Comp. Gen. at 313.

Where the judgment does not specify the dollar amount, payment for the period up to the date of the judgment will be made from the permanent appropriation, while payment for any periods after the date of the judgment must be made by the employing agency from its own funds. 55 Comp. Gen. 1447 (1976). A limited exception to this was recognized in 60 Comp. Gen. 375 (1981). There, a court in a discrimination suit had awarded back pay and also ordered the payment of “front pay” until such time as a certain number of the plaintiffs were promoted. The “front pay” was an increment above the employee’s current salary and was more in the nature of damages than compensation. Since the agency’s salaries appropriation is available only for the compensation prescribed for the employee’s actual grade level, the “front pay” was held payable from the judgment appropriation.

As a general proposition, the same rules apply to other compensation-related judgments. E.g., B-246958, February 14, 1992 (internal memorandum) (judgment for severance pay payable from judgment appropriation).

In a few instances, where a particular benefit is funded from a special fund rather than the employing agency’s operating appropriations, GAO has found the payment “otherwise provided for.” Examples are:

- Judgments against the Civil Service Retirement Fund. 52 Comp. Gen. 175 (1972); B-115505, December 21, 1972.[39]
- Judgments awarding benefits under the military Survivor Benefit Plan, funded from the Military Retirement Fund. B-236414, February 22, 1991.

(3) Full faith and credit

If an agency enters into an otherwise lawful contractual obligation which binds the full faith and credit of the United States under statutory contract authority which provides no other funding mechanism, and Congress fails or refuses to appropriate money to liquidate the obligation, a resulting final judgment would be payable from the judgment appropriation. B-197742, August 1, 1986; B-211190, April 5, 1983; B-168313, November 21, 1969.

This does not mean that an agency can resort to 31 U.S.C. § 1304 as an alternative to using its own funds or seeking appropriate funding from the Congress. When Congress provides contract authority, it is normally assumed, at least where the governing legislation does not provide otherwise, that liquidating appropriations will be obtained through the normal appropriations process. For example, GAO and the Department of Justice have both reviewed the nature of obligations and funding under the Price-Anderson Act, and both agree that an agency must first use current funds to the extent available. If the agency has no appropriated funds available for that purpose, or if funds available to the agency are not sufficient, the agency must then seek additional funding from Congress. Only if Congress fails or refuses to provide the necessary funds does the potential availability of 31 U.S.C. § 1304 come into play. B-197742, August 1, 1986; Department of Energy Request to Use the Judgment Fund for Settlement of Fernald Litigation, Op. Off. Legal Counsel, December 18, 1989.

Further, an agency is not authorized to force a sham lawsuit to avoid its funding obligations. As the Justice Department emphasized in its Fernald opinion at 11:

> "The availability of [31 U.S.C. § 1304] assumes, of course, that there is a good faith dispute over the obligation of the United States to pay on the extant settlement obligation, and that DOE has earnestly attempted, but failed, to obtain the necessary funding from the Congress and monies remain otherwise unavailable. Payment from the judgment fund would not be

[39]The Court of Claims in Ellis v. United States, 657 F.2d 1178, 1180 (Ct. Cl. 1981), suggested that the judgment appropriation would pay. A separate opinion (id. at 1182–83) questioned this assumption.

> authorized were the United States now, in order to permit payment from the judgment fund, purposely to default upon its settlement obligation, were DOE to refuse to seek a special appropriation or to reprogram funds, and the United States thereafter to settle the inevitable lawsuit to enforce the indemnification agreement." (Emphasis in original.)

Such a settlement, as the opinion goes on to point out, would not be a bona fide compromise settlement by the Attorney General within the meaning of 28 U.S.C. § 2414.

(4) Punitive awards

Punitive awards—those intended to punish rather than compensate—may not be made against the United States without specific statutory authority. Missouri Pacific R.R. Co. v. Ault, 256 U.S. 554 (1921); Barry v. Bowen, 884 F.2d 442 (9th Cir. 1989); Smith v. Russellville Production Credit Ass'n, 777 F.2d 1544, 1549-50 (11th Cir. 1985); Painter v. TVA, 476 F.2d 943 (5th Cir. 1973); 55 Comp. Gen. 564 (1975). Punitive awards, as we use the term here, encompass two distinct things—punitive damages (damages over and above those necessary to compensate the injured party) and certain fines or sanctions for contempt of court. Punitive awards, even though they may be viewed as "money judgments" in the sense of court directives to pay money, should not be paid from the judgment appropriation.

In the case of Giancana v. Johnson, 335 F.2d 372 (7th Cir. 1964), an FBI agent was held in criminal contempt (Rule 42, Federal Rules of Criminal Procedure) and fined for refusing to answer certain questions the court had instructed him to answer. GAO was asked if appropriated funds were available to pay the fine. Since the agent had acted in compliance with agency regulations and specific instructions from the Attorney General, the FBI's operating appropriations were available to pay the fine. 44 Comp. Gen. 312 (1964). The reason the judgment appropriation could not be used was not because payment was otherwise provided for, but because

> "while a fine imposed for a contempt of court is a judgment of the court, a fine in its nature, principle, and purpose is a very different thing from the judgments the payment of which the Congress had in view in enacting [31 U.S.C. § 1304]." Id. at 314.

More precisely, the judgment appropriation is not available to pay criminal or civil contempt sanctions intended to punish or compel compliance; however, it may be used to pay civil contempt awards, usually in the form of costs and attorney's fees, intended to compensate the opposing party for losses arising from the government's noncompliance. The distinction is discussed in two internal memoranda, B-242786, January 31, 1991, and B-239556, October 12, 1990.

Note that where a sanction is assessed against an individual, the availability of agency funds to pick up the tab is a question separate and distinct from the availability of 31 U.S.C. § 1304. The unavailability of the judgment appropriation has no bearing on the availability of agency funds, which may or may not be available depending on whether the test of 44 Comp. Gen. 312 is met. For further elaboration and case citations, see the Fines and Penalties heading in Chapter 4.

Punitive damage awards against the United States are uncommon because they are mostly unauthorized. One exception is 11 U.S.C. § 362(h), which authorizes punitive damages for intentional violations of the automatic stay in bankruptcy proceedings. Although we have found no cases precisely on point, the unavailability of the judgment appropriation should follow logically from the contempt cases.

Whether we are talking about contempt sanctions or punitive damages, the policy underlying the unavailability of 31 U.S.C. § 1304 is the same. In Northwestern National Casualty Co. v. McNulty, 307 F.2d 432, 440 (5th Cir. 1962), Judge Wisdom stated:

> "Where a person is able to insure himself against punishment he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct."

Where the "insurer" is in a position to pass the financial burden on to the public, society is, in effect, "punishing itself." Id. at 441. While Judge Wisdom was addressing coverage under a commercial insurance policy, the analogy to "insurance" by virtue of 31 U.S.C. § 1304 should be readily apparent. See also Derechin v. State University of New York, 963 F.2d 513, 519 (2d Cir. 1992), and National Railroad Passenger Corp. v. Consolidated Rail Corp., 698 F. Supp. 951, 972 (D.D.C. 1988), for similar policy expressions.

(5) Miscellaneous statutory provisions

There are a number of situations, not susceptible of further generalization, in which the judgment appropriation may not be used because some other statute explicitly provides for payment in a particular context. Some of them are:

- 22 U.S.C. § 3776 (Panama Canal Act of 1979, as amended): judgments against Panama Canal Commission in actions for damage or injury to vessels, cargo, crew, or passengers. By statute, these are payable from funds made available for the maintenance and operation of the Panama Canal. See B-206860-O.M., June 7, 1982.
- 33 U.S.C. §§ 1321(i) and (k), section 311 of the Federal Water Pollution Control Act: judgments in suits to recover the cost of removal of oil or hazardous substances. These are payable by the Coast Guard from the revolving fund established by section 311. An example of such a case is Grundy Oil Co. v. United States, 14 Cl. Ct. 759 (1988).
- 38 U.S.C. §§ 1920, 1955, and 1984 (Supp. IV 1992): United States Government Life Insurance Fund and National Service Life Insurance Fund.
- 42 U.S.C. § 405(i): Social Security benefits.
- Judgments of the Court of Federal Claims awarding compensation under the National Vaccine Injury Compensation Program. With respect to vaccines administered prior to October 1, 1988, the judgments are payable from appropriations of the Department of Health and Human Services; with respect to vaccines administered on or after October 1, 1988, judgments are payable from the Vaccine Injury Compensation Trust Fund. 42 U.S.C. § 300aa-15(i); 26 U.S.C. § 9510.

Legislation may include payment provisions which expose the judgment appropriation in certain situations but not others. An example is 7 U.S.C. § 136m, as amended by section 501 of the Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, Pub. L. No. 100-532, 102 Stat. 2654, 2674 (1988). Under this law, certain classes of persons are entitled to indemnity payments when the Environmental Protection Agency cancels a pesticide registration. Indemnity payments to end users and, under certain circumstances, to purchasers other than end users, are to be paid under 31 U.S.C. § 1304. 7 U.S.C. § 136m(b)(3). Indemnity payments to other claimants (e.g., manufacturers) require specific line-item appropriations, which EPA must request when it takes an action (cancels a registration) that will require payment of indemnification. Id. § 136m(a)(4).

(6) No appropriation available

It is still possible—although remote—that a court might issue a judgment with no appropriation legally available from which to pay it. For example, B-191208-O.M., June 2, 1978, concerned litigation under the Micronesian Claims Act, which established the Micronesian Claims Fund for the payment of claims. The Court of Appeals for the District of Columbia

Circuit had remanded the case to the district court with instructions to direct the Micronesian Claims Commission to grant appropriate relief. The Fund was virtually exhausted and Congress had authorized, but not yet appropriated, additional funds. While a definitive determination at the time was not possible, it appeared that the Micronesian Claims Fund was the proper source of payment, meaning that the judgment appropriation would not be available. Therefore, if the Fund were exhausted, there would be no appropriation from which to pay, and the court recognized this possibility. Mister Ralpho v. Bell, 569 F.2d 607, rehearing denied, 569 F.2d 636, 639 (D.C. Cir. 1977). As we noted at the outset of this chapter, the Appropriations Clause of the Constitution prohibits any payment from the Treasury, including one ordered by a court, unless there is an appropriation available for that purpose. Accordingly, if such a situation were to arise, it would be necessary to seek funds from Congress.

Cases concluding that there is no available source of funds are—as they should be—rare. One example, which apparently resulted from legislative oversight and which was later cured legislatively, is 63 Comp. Gen. 470 (1984), discussed later in this chapter in connection with attorney's fees in tax cases.

C. Requirement of Finality

The three primary statutes that govern the payment of judgments against the United States—31 U.S.C. § 1304 and 28 U.S.C. §§ 2414 and 2517—all refer to the payment of "final" judgments. The term "final" in connection with judgments may mean different things in different contexts. See McDonald v. Schweiker, 726 F.2d 311, 313 (7th Cir. 1983); B-58540, August 12, 1946. A final judgment for purposes of taking an appeal (28 U.S.C. § 1291) and a final judgment for payment purposes are two different things.

In simple terms, a judgment against the United States is paid when the litigation is over. The basis for this position is that it is not in the government's interest to pay money out of the Treasury while the payee's entitlement to the money is still subject to change. In other words, the purpose of the finality requirement is to protect the government "against loss by premature payment of a judgment which might later through appeal be amended or reversed." B-129227, December 22, 1960. As stated in B-129227, the term "final judgment" for payment purposes means "such judgments as have become conclusive by reason of loss of the right to appeal—by expiration of time or otherwise—or by determination of the appeal by the court of last resort." See also Campbell v. United States, 809 F.2d 563, 574 (9th Cir. 1987); McDonald v. Schweiker, 726 F.2d at 313;

Keasler v. United States, 585 F. Supp. 825, 836 (E.D. Ark. 1984); Cedar Chemical Corp. v. United States, 18 Cl. Ct. 25, 31 (1989). Thus, a judgment against the United States is final for payment purposes when the appellate process is completed. Generally speaking and subject to the occasional exception, this can happen in one of three ways: determination by the court of last resort, determination by the parties not to seek further review, or expiration of the time limit for filing appeals. E.g., 73 Comp. Gen. 46 (1993).

To better understand the meaning of "final judgment" as that term is used in 31 U.S.C. § 1304, it is useful to examine the system section 1304 replaced. As we've discussed earlier in this chapter, before the judgment appropriation was enacted, most judgments against the United States required specific congressional appropriations for payment. Traditionally, Congress included very precise finality language when making these appropriations. For example, a 1925 appropriation stated that "[n]one of the judgments contained herein shall be paid until the right of appeal shall have expired." Act of March 4, 1925, 43 Stat. 1347, quoted in 4 Comp. Gen. 834, 835 (1925). A 1904 appropriation act using almost identical language may be found at 33 Stat. 422. A 1912 appropriation with this language is quoted in 20 Comp. Dec. 562 (1914). More recently, the Supplemental Appropriations Act, 1977, Pub. L. No. 95-26, 91 Stat. 61, 96, provided that "no judgment herein appropriated for shall be paid until it shall become final and conclusive against the United States by failure of the parties to appeal or otherwise."

Thus, when Congress decided to commit the payment of most judgments to a permanent appropriation, it was not legislating on a blank slate. The finality requirement, now compressed into the simple term "final judgments,"—

> "stems from the congressional determination, consistently expressed in legislation over many decades, that the United States should not be required to pay money out of the Treasury pursuant to a judgment or order of a court which is susceptible of being modified or reversed on appeal."

B-208999, September 13, 1982 (non-decision letter). Similarly, when the Comptroller General interpreted the finality requirement in B-129227, quoted above, GAO was not treading any new ground. The interpretation in B-129227 was nothing more than the logical continuation of the situation under prior law. E.g., B-102508, April 18, 1951; B-58540, August 12, 1946.

Section 2414, 28 U.S.C., provides that "[w]henever the Attorney General determines that no appeal shall be taken from a judgment or that no further review will be sought from a decision affirming the same, he shall so certify and the judgment shall be deemed final." The purpose of this provision is to permit a judgment to be paid before it has become final by operation of law, that is, before the time limit for taking an appeal has expired. Thus, strictly speaking, the Attorney General's certification is not necessary in cases where the time limit for taking an appeal has expired and a notice of appeal has in fact not been filed. B-129227, December 22, 1960. However, as a practical matter, GAO cannot track the status of all pending litigation, and therefore, the Attorney General's certification that no further review will be sought is required for all judgments. It is not required for consent judgments and compromise settlements, since no appeal can be taken from these actions. 4 Comp. Gen. 834 (1925). Once again, the concept embodied in the quoted portion of 28 U.S.C. § 2414 was nothing new; the statute in this respect was largely a codification of existing administrative interpretations. See 19 Op. Att'y Gen. 281 (1889); B-58540, August 12, 1946.

The concept of finality for payment purposes was discussed in B-164766, June 1, 1979, involving an order of the Court of Claims. The decision noted that GAO has no authority to make "intermediate" payments, and went on to summarize the situation as follows:

> "[T]he refund order may still be appealed to the Supreme Court and therefore cannot be considered 'final' at this stage of the litigation. Therefore, payment may not lawfully be made prior to such time as the Solicitor General has determined whether to petition for certiorari from the Court of Claims' order. If certiorari is sought, payment cannot be made prior to the time that the Supreme Court finally disposes of the issue, either by denying certiorari or, if granted, until it issues its decision. Thus, the order will become final for payment purposes when one of three things occurs—the Department of Justice determines not to seek further review, the Supreme Court denies a petition for certiorari, or if the petition is granted, the Supreme Court issues its decision."

It follows that GAO has no authority, nor is the permanent appropriation legally available, to make a partial or "good faith" payment, even upon the stipulation of the parties, while the litigation is still in process. B-191208-O.M., June 2, 1978.

On the surface, the preceding discussion would seem to suggest that payment can never be made until the litigation is over, that there can be only one "final judgment" in a given case, and that the entire case must be over before there can be finality for purposes of 31 U.S.C. § 1304. This, however, is often not the case. For example, in B-164766, June 1, 1979, the Court of Claims had ordered the United States to refund an amount previously paid by a contractor in return for the contractor's bond. GAO concluded that the issue of the refund was readily severable from the merits of the underlying litigation, and when the appellate process was complete with respect to it, the refund could be certified for payment without regard to the status of the balance of the litigation. In this case, different aspects of the case became final for payment purposes at different times, potentially resulting in more than one "final judgment"

In Barnes v. United States, 678 F.2d 10 (3d Cir. 1982), an appeal from a judgment under the Federal Tort Claims Act, the court held that it could, under 28 U.S.C. § 2106, grant partial summary affirmance with respect to the undisputed portion of the district court's judgment. The judgment in that case consisted of ten distinct elements, one of which was being appealed; there was no appeal on the issue of liability. The partial summary affirmance would be treated as a separate judgment, which could be paid notwithstanding the continuing appeal on the disputed item. Some months earlier, the court in Parker v. Lewis, 670 F.2d 249 (D.C. Cir. 1981), had granted summary affirmance with respect to the uncontested portion of an award of attorney's fees which was being appealed in an employment discrimination action, noting that only the amount (not the liability) was in dispute and a large portion of that was uncontestable. It follows that, in appropriate cases, the government can consent to the motion for partial summary affirmance.

The Contract Disputes Act of 1978 provides an additional situation in which there might be more than one "final judgment" in a given case. Under section 10(e), 41 U.S.C. § 609(e), "where a portion of one such claim can be divided for purposes of decision or judgment, and in any such suit where multiple parties are involved, the court, whenever such action is appropriate, may enter a judgment as to one or more but fewer than all of the claims, portions thereof, or parties." Since the Act authorizes agency boards of contract appeals to grant the same relief that would be available in the Court of Federal Claims, a board of contract appeals may make "partial awards" to the same extent the court can under section 10(e). 60 Comp. Gen. 573 (1981).

Judgments awarding back pay but not specifying the dollar amount to be paid present a somewhat different aspect of finality. On the one hand, the judgments (Back Pay Act, Title VII of the Civil Rights Act, etc.) are money judgments and may be paid from the permanent appropriation. However, such a judgment, even though it may be “final” with respect to the plaintiff’s right to recover, is not in and of itself “final” for purposes of GAO’s certification for payment. The reason for this is that the government’s computation would not be binding on the plaintiff and would itself be subject to judicial review. Therefore, before such a judgment may be certified for payment, GAO must be furnished an agreed-upon amount, that is, the employing agency’s computation, including any required deductions, together with written indication that the plaintiff will accept the amount in satisfaction of the judgment. If the parties cannot agree, further litigation may be necessary, but this must be done before the judgment is submitted for payment. 58 Comp. Gen. 311 (1979).

Awards of interim attorney’s fees have also raised finality issues. Interim fee awards are becoming increasingly common in certain types of litigation which tend to be lengthy and complex, prime examples being employment discrimination suits under Title VII of the Civil Rights Act and suits under the Freedom of Information Act.

In B-190940, September 21, 1978, a district court awarded attorney’s fees to the plaintiff in a Title VII suit. The plaintiff filed an appeal from the underlying order denying reinstatement, but neither party appealed the order awarding attorney’s fees. Since the litigation had already lasted for several years, and since the order awarding the fees was itself final and was not a part of the order reflecting the court’s determination on the merits which was on appeal, the award of attorney’s fees could be viewed as a separate “final judgment” and therefore certified for payment. The decision followed the Supreme Court’s rationale in Bradley v. Richmond School Board, 416 U.S. 696, 721–23 (1974).

Where, as in B-190940, the government does not intend to appeal an interim fee award, the Attorney General can so certify as provided in 28 U.S.C. § 2414, and there is no payment problem. However, where the government does plan to appeal an interim fee award but cannot do so because it is interlocutory and not appealable until the end of the litigation, it is difficult to see how the award can be deemed a final judgment. Be that as it may, several courts have directed the payment of interim fee awards in situations in which the award was not “final” in the traditional sense.[40]

[40]A comprehensive treatment by a former Justice Department attorney discussing many of the cases cited in the text is Gregory C. Sisk, Interim Attorney’s Fees Awards Against the Federal Government, 68 N.C. L. Rev. 117 (1989).

In McKenzie v. Kennickell, 669 F. Supp. 529 (D.D.C. 1987), a Title VII case, the court directed immediate payment of what the parties had agreed was the "irreducible minimum" owed to the plaintiffs. The court emphasized that if the parties had not been able to agree on the "irreducible minimum," fees could not be paid until the fee litigation was resolved. Id. at 533. The court went on to suggest that, in future cases, courts could satisfy the concerns of both parties by directing payment into an interest-bearing escrow account. This would preserve the value of the award while facilitating repayment if the government were successful on appeal. Id. at 535 n.7.

The McKenzie court cited with approval the case of Jurgens v. EEOC, 660 F. Supp. 1097 (N.D. Tex. 1987), another Title VII case decided several months earlier. While Jurgens did not involve the "irreducible minimum" concept, the court appears to have viewed the possibility that the fee award might be modified on appeal as sufficiently remote in that case as to remove any real substance from the finality argument. E.g., id. at 1103 n.5. The McKenzie and Jurgens courts both concluded that, to the extent of any conflict, the specific provisions governing fee awards under Title VII (42 U.S.C. § 2000e-5(k)) would prevail over the more general provisions of 28 U.S.C. § 2414. The court in Brown v. Marsh, 707 F. Supp. 21 (D.D.C. 1989), reached the same result, citing both McKenzie and Jurgens. Still another Title VII case saying essentially the same thing is Trout v. Lehman, 702 F. Supp. 3 (D.D.C. 1988), appeal dismissed, Trout v. Garrett, 891 F.2d 332 (D.C. Cir. 1989) (district court followed "irreducible minimum" approach of McKenzie). See also Parker v. Lewis, noted above.

In Rosenfeld v. United States, 859 F.2d 717 (9th Cir. 1988), the court reviewed Jurgens and McKenzie and applied their result to an interim fee award in Freedom of Information Act litigation.[41] Cases following Rosenfeld are Allen v. FBI, 716 F. Supp. 667 (D.D.C. 1989), and Allen v. Department of Defense, 713 F. Supp. 7 (D.D.C. 1989).

Before we leave the topic of finality, one related point deserves brief mention. A private litigant who appeals from an adverse judgment must generally post a supersedeas bond to obtain a stay of execution from the original judgment. This requirement does not apply to the United States. 28 U.S.C. § 2408; Rule 62(e), Federal Rules of Civil Procedure. See also

[41]The Rosenfeld court cited two district court cases in which interim fee awards were made against the United States in FOIA suits—Powell v. United States Dept. of Justice, 569 F. Supp. 1192 (N.D. Cal. 1983), and Biberman v. FBI, 496 F. Supp. 263 (S.D.N.Y. 1980). In neither case does the finality argument appear to have been raised as it is not addressed in either opinion.

Lightfoot v. Walker, 797 F.2d 505, 507 (7th Cir. 1986) (attributing the nonapplicability of Rule 62(e) to the existence of 31 U.S.C. § 1304).

D. Procedures

GAO does not pay judgments; it certifies them for payment. See 31 U.S.C. § 1304(a)(2). GAO does this by issuing a "Certificate of Settlement" (GAO Form 39) to the Treasury Department. The form, signed by an authorized official, specifies the amount due, the payee(s), mailing address, and a citation to the appropriation account from which payment is to be made.

The procedures currently in effect were developed jointly by GAO and the Justice Department in the 1950s after the enactment of 31 U.S.C. § 1304.[42] Presently, once GAO has received all necessary supporting material and assuming the payment does not raise novel legal issues, it takes GAO approximately 30 days to process a judgment, and approximately an additional week for Treasury to issue the check. Thus, adding an allowance for mailing time, a judgment check will normally be received within 6–8 weeks from the time GAO receives the necessary documents.

1. Judgments of the District Courts

Under current procedures, the payment process is automatic with respect to the plaintiff. There is no need for the private litigant to make any formal request or demand on GAO for payment.[43]

When a district court judgment becomes final (either by determination not to seek further review or by completion of the appellate process), the judgment is submitted to GAO, either by the pertinent branch of the Justice Department or in many cases by the cognizant United States Attorney's office. The submission should consist of:

- A copy of the judgment together with any related orders and documentation of any appellate action.
- A transmittal letter which, along with any other pertinent data, should (a) certify that no further review will be sought; (b) contain mailing instructions for the check(s); and (c) include pertinent information on any required deductions.
- An Adverse Judgment Data Sheet which, among other things, specifies the type of case and agency or agencies involved, and identifies any known

[42] See, e.g., B-63622/B-90307-O.M., August 15, 1956, with respect to district court judgments.

[43] The only action by the plaintiff that might be desirable would be a "protective filing" of a copy of the judgment to preserve possible entitlement to post-judgment interest under 31 U.S.C. § 1304(b) in cases where it applies.

indebtedness by the judgment creditor to the United States. (This is a format developed jointly in the early 1980s by GAO, the Justice Department, and the Office of Management and Budget, to permit GAO to record more precisely what is being paid.)

It is this payment request package from Justice (or an agency other than Justice authorized to handle the litigation) which triggers the payment process. Upon receipt by GAO, the judgment is given a file number for reference and retrieval purposes. If a judgment is transmitted by the private plaintiff or by the agency Justice is representing, GAO contacts the Justice Department (by form letter) to determine if the judgment is ready for payment. If Justice advises that the judgment is not yet ready for payment, nothing further will happen. If the judgment is ready for payment, the certification process begins.

The first and perhaps most important element in the certification process is the determination of the proper source of funds for payment, discussed in prior sections of this chapter. If it is determined that the judgment is not payable from the judgment appropriation, it is returned to the submitter with a brief explanation and advice as to the correct source of payment. Where it is determined that the judgment is payable from the judgment appropriation, the process will then take into consideration, where and to the extent applicable, the offsetting of indebtedness, the making of other required deductions, the payment of costs and/or attorney's fees, and the computation and payment of interest. Once these things are done, the next step is the preparation of the Certificate of Settlement.

The Certificate of Settlement is then sent to the Treasury Department, which prepares and issues the check(s) in accordance with the instructions on the Certificate. The check is mailed to the plaintiff in care of the cognizant U.S. Attorney or designated attorney at the Justice Department, depending on who litigated the case. This person will deliver the check to the judgment creditor in exchange for an appropriate release. As a general rule, the check will not be sent directly to the plaintiff or plaintiff's counsel. There are exceptions to this, based on the exigencies of the particular case and with the Justice Department's concurrence, but they are rare.

During the 1980s, the Treasury Department developed and refined its procedures for the use of electronic transfer ("wire transfer") in lieu of checks. Treasury calls this its Treasury Financial Communication System. Judgment payments will, upon request, be made by wire transfer. If wire transfer is desired, the payment request must include the name, city, and state of the receiving bank, the receiving bank's 9-digit American Bankers Association identifier, and the number of the account to which the payment is to be credited. Procedures for wire transfer are found in the Treasury Financial Manual, Vol. I, part 4. (Agencies paying their own judgments should be able to follow similar procedures without problem, except that the "TFCS" instructions will, in accordance with the Treasury Manual, appear on a disbursement voucher instead of a Certificate of Settlement.)

2. Judgments of the Court of Federal Claims

Current procedures for Court of Federal Claims judgments require two submissions, one from the Justice Department and one from the plaintiff. The Justice Department letter merely states that no further review will be sought and that the judgment may therefore be paid. In Contract Disputes Act cases, it also includes a billing address for agency reimbursement. The plaintiff's submission must consist of the following:

- A letter signed by the plaintiff and dated after the date of the judgment, stating that no further review will be sought, requesting payment, and indicating the address to which the check should be sent (plaintiff or plaintiff's counsel); or,
- If the letter is submitted by plaintiff's counsel and requests that the check be sent to counsel, it must be accompanied by a power of attorney dated after the date of the judgment. (A power of attorney executed prior to the date of the judgment is acceptable if it specifically authorizes transmission of payment to counsel on plaintiff's behalf.)
- The original transcript of the judgment, obtained from the Clerk of the Court, to accompany whichever of the above payment request letters is used.[44]

Procedures are otherwise the same as those for district court judgments, except that the check is sent directly to the plaintiff or plaintiff's counsel, in accordance with the plaintiff's instructions. An instruction sheet setting out the foregoing procedures is usually distributed by the office of the Clerk of the Court along with the judgment.

3. Judgments in Favor of Indian Tribes

Judgments obtained by Indian tribes against the United States have their own payment procedure prescribed by statute. The starting point is 25

[44]This is in addition to the "protective filing" necessary to preserve possible entitlement to post-judgment interest under 31 U.S.C. § 1304(b).

U.S.C. § 118, under which payments to Indians in satisfaction of court judgments must be made "under the direction of the officers of the Interior Department charged by law with the supervision of Indian affairs." This means the Bureau of Indian Affairs. Thus, traditionally, GAO has certified payment to the Bureau of Indian Affairs, which then holds the funds in a trust capacity for ultimate use and distribution.

Initially, the Bureau made distribution from the trust funds without further congressional action. However, beginning in the early 1960s, the annual Interior Department appropriation acts began including provisions prohibiting the distribution of Indian judgment funds (including awards by the now-defunct Indian Claims Commission) until additional legislation was enacted specifying the purposes for which the funds could be used. See, for example, the Interior Department and Related Agencies Appropriation Act for 1974, Pub. L. No. 93-120, 87 Stat. 429, 432 (1973). Under this system, even after a judgment had become final and GAO had certified it for payment, the money could not be paid over to the successful plaintiff until Congress enacted further legislation dealing with that specific judgment.

The prohibition in the 1974 appropriation act was the last such provision. In 1973, Congress enacted permanent legislation, since amended several times and now found at 25 U.S.C. §§ 1401–1407, to eliminate the need for specific distribution statutes in most cases. Under this legislation, the Bureau of Indian Affairs prepares a distribution plan and submits it to the Congress. The plan becomes effective automatically unless a joint resolution of disapproval is enacted within a specified time period. Specific distribution legislation is now necessary only if the Bureau determines that the circumstances of the particular case make it desirable, or if the Bureau's plan is disapproved. The Bureau has published implementing regulations, found at 25 C.F.R. Part 87.

The typical nonstatutory distribution plan, which the Bureau publishes in the Federal Register as a notice, will allocate part of the funds to be used in programs for the social and economic benefit of the tribe, and part for per capita distribution to individual tribal members. The plan may also include procedures for the treatment of the shares of deceased or legally incompetent beneficiaries, and minors. For an example, see 45 Fed. Reg. 57546, August 28, 1980. Examples of statutory distribution plans are Pub. L. No. 100-139, 101 Stat. 822 (1987) (Cow Creek Band of Umpqua Tribe), and Pub. L. No. 99-146, 99 Stat. 780 (1985) (Chippewas of Lake Superior).

The 1973 legislation applies only to Court of Federal Claims judgments. As a practical matter, however, this will include the major portion of judgments resulting from monetary claims by Indian tribes against the United States. See 28 U.S.C. § 1505.

Unlike other Court of Federal Claims judgments, the judgment in an Indian case is usually transmitted to GAO directly by the Clerk of the Court. Because payment is not made directly to the plaintiff, GAO will certify the judgment for payment upon receipt of a letter from the Justice Department stating that it has no objection to payment. There is no need for any further action by the plaintiff.

Most Indian tribes remain under federal supervision ("federal trust"). Termination of federal supervision is accomplished by statute. This has been done for several tribes, although the termination policy is no longer actively pursued. An example is 25 U.S.C. § 564q(a) (Klamath Indian Tribe). For tribes whose federal trust has been terminated, the judgment procedures set forth above will no longer apply if there is other legislation authorizing the distribution of judgment funds for that tribe. 25 C.F.R. § 87.2.

There appears to be little case law involving the Indian judgment fund distribution legislation. In United States v. Dann, 706 F.2d 919 (9th Cir. 1983), the court held that, for purposes of a statutory bar against further claims arising from the same subject matter, a judgment was not "paid" until Congress had either legislated a distribution plan or permitted the Bureau's plan to become effective. The Supreme Court reversed, holding that payment occurred when the funds were transferred from the permanent judgment appropriation and deposited in the Bureau's trust account. 470 U.S. 39 (1985). The Court applied the common-law principle that funds "transferred from a debtor to an agent or trustee of the creditor constitute payment." Id. at 48.

In United States v. Overlie, 730 F.2d 1159 (8th Cir. 1984), the court held that the Bureau had no authority, in implementing a particular distribution plan, to deposit per capita shares into "Individual Indian Money" accounts and thereby render them subject to garnishment for debts owed to the Farmers Home Administration and Small Business Administration. In a similar type of case involving a terminated tribe, the Comptroller General held that a per capita share was subject to a levy for delinquent federal taxes issued by the Internal Revenue Service under 26 U.S.C. § 6331. 63 Comp. Gen. 498 (1984).

4. Compromise Settlements

As we have seen, a compromise settlement is paid from the same source that would apply to a judgment in the same suit. Since most cases are settled prior to final judgment, many of the "judgments" submitted to GAO for payment are in fact compromise stipulations.

For district court cases, compromise settlements are expressly provided for in the relevant payment statute (28 U.S.C. § 2414). Under current procedures, unless otherwise required, it is not necessary for a compromise stipulation to be approved by the court in order to be paid. It will be certified for payment if it is properly executed, and if it expressly states that, in consideration of payment, the plaintiff agrees to dismiss the action and to accept the stated sum in full and final satisfaction of the claim. B-199073, July 1, 1980 (non-decision letter). Payment procedures, including submission of a Judgment Data Sheet, are the same as for district court judgments.

When Congress amended 28 U.S.C. § 2414 in 1961 to include compromise settlements, there was no corresponding amendment to the Court of Federal Claims payment provision, 28 U.S.C. § 2517. The legislative history did not explain this omission, but there was no indication of any intent that the same concept should not apply to Court of Federal Claims cases. Be that as it may, because of the difference in statutory language, it has historically been the practice to reduce Court of Federal Claims settlements to what is essentially a pro forma judgment in order to conform to the literal language of 28 U.S.C. § 2517. GAO's view is that while the statute prescribes the procedure for the payment of judgments, it does not prohibit the payment of compromise settlements. Thus, if an otherwise sufficient compromise stipulation in a Court of Federal Claims case is submitted for payment, GAO will not decline certification merely because it has not been reduced to judgment. B-216251[-O.M.], July 25, 1988; B-217990.27-O.M., September 9, 1987. Procedures would otherwise be the same as for judgments, as and to the extent applicable.

5. Board of Contract Appeals Awards

When monetary awards by boards of contract appeals are to be paid from the permanent judgment appropriation, a "certification of finality" is required from both parties. The contractor (a) certifies that no further review of the award will be sought, (b) certifies that the amount of the award, with interest to the extent authorized by law, will be accepted in full and final satisfaction of the claim, and (c) provides an address to which the check is to be sent. The contracting agency also certifies that no further review will be sought and, in addition, provides (a) for interest computation purposes, the date the claim was filed or, for claims greater than $50,000, certified as required by 41 U.S.C. § 605(c); and (b) where the agency must reimburse the Treasury, an agency billing address to be used for that purpose. There is no required form for these certifications, although GAO has developed one which boards may use or adapt as they wish.

The contractor and contracting agency submit their respective certifications to the board. The board, usually through its clerk or recorder, then transmits these documents to GAO, along with a copy of the board's decision and award. GAO then issues a Certificate of Settlement to the Treasury Department, the same as for court judgments. In reimbursable cases, the Treasury Department will "bill" the contracting agency after payment has been made, using the billing address provided.

6. Designation of Payee

The principle GAO follows here is very simple: GAO will do what the judgment says. If there is any conflict between requests in a transmittal letter and the language of the judgment, the judgment will be followed.

Thus, where a judgment directs that the plaintiff shall recover, the check will be drawn payable to the plaintiff and to the plaintiff only. Absent specific provision in the judgment, GAO has no authority to have a check drawn payable to the plaintiff's attorney or to include the attorney as co-payee, since the attorney is not a judgment creditor of the United States. B-150338/B-152546, April 9, 1964 (non-decision letter). See also 9 Comp. Dec. 610 (1903). The principle involved was stated in an early decision as follows:

> "The primary objective [in] matters involving the disbursement of appropriated moneys, is to secure a valid acquittance to the United States and that, of course, is accomplished by payment to the individual to whom the Government is obligated."

24 Comp. Gen. 261, 262 (1944). This same principle applies to all payments of public funds. See 31 U.S.C. § 3322(a); 53 Comp. Gen. 482, 483 (1974); 14 Comp. Dec. 395 (1907); 17 Op. Att'y Gen. 675 (1884).

If it is desired to have the check drawn payable jointly to plaintiff and plaintiff's counsel, specific instructions must be included in the judgment or compromise stipulation.

In some cases, it may be desirable to have a judgment check drawn payable to the Clerk of the Court for subsequent distribution by the Clerk's office. To have this done, appropriate instructions must be included in the judgment. See 5 Comp. Gen. 737 (1926); 27 Comp. Dec. 987 (1921); 26 Comp. Dec. 912 (1920).[45] However, there is no authority for the government to pay money into the registry fund of a court for ultimate distribution under a judgment which has not yet been rendered. See 14 Comp. Gen. 567 (1935).

The principle of making payment only to the judgment creditor (plaintiff of record) applies equally where the plaintiff is a business entity (corporation, partnership, etc.). In the case of a defunct business entity, GAO will need evidence of who is legally entitled to receive the assets. If such evidence is not provided, the money will sit in the Treasury pending a judicial determination. E.g., B-127545, August 6, 1957; B-127545-O.M., August 7, 1956.[46]

7. Deceased Payee

If the payee dies before the judgment is paid (either before the check is issued or after issuance but prior to negotiation), the judgment is an asset of the decedent's estate and is therefore payable to whoever is entitled to receive those assets. Where the estate is being probated, this means the legal representative (executor or administrator). If there is no probate estate, it may be necessary to resort to the intestacy laws (laws of descent and distribution) of the state of the decedent's domicile at the time of death.

The government's interest in this situation is in making payment to the person who is legally entitled to receive it. If difficulty is encountered in negotiating a judgment check certified by GAO due to the intervening death of the payee, the check should be returned along with a claim for reissuance using Standard Form 1055 (Claim against the United States for Amounts Due in the Case of a Deceased Creditor). GAO will provide copies of the form upon request. If the estate is being probated, the claim should be submitted by the legal representative and accompanied by documentation of the appointment.

[45] 5 Comp. Gen. 737 suggests that judgments may be paid into a registry fund only in cases of "exceptional reason." As a practical matter, no problem will arise as long as the mode of payment is explicitly provided for in the judgment.

[46] Cases involving defunct business entities under the International Claims Settlement Act of 1949, discussed in Chapter 12, provide useful analogies for making similar determinations in the judgment context.

If there are no probate proceedings, GAO's policy is not to require appointment of a legal representative unless required under state law. See B-69787-O.M., May 2, 1979. If formal administration is not required under state law, GAO will recertify payment to the person(s) properly entitled to payment under the laws of the decedent's domicile.

The above procedures apply equally where the deceased judgment creditor was a federal employee. Since a judgment assumes its own identity irrespective of the nature of the underlying cause of action, 5 U.S.C. § 5582 (which establishes an order of precedence for certain payments due a deceased federal employee) does not apply to judgment payments. B-129994-O.M., January 29, 1957. Of course, an option always available is to return to court and have the court designate the new payee, in which event the court may choose to apply 5 U.S.C. § 5582.

8. Appeal From Settlement

Occasionally, a judgment creditor may take issue with GAO's settlement action. The disagreement may be based on a legal issue or possibly a clerical error. In cases of clerical error, corrective action can frequently be taken on the basis of a telephone call. If this is not sufficient, a judgment creditor may request reconsideration under GAO's regulations for claims settlement published at 4 C.F.R. Part 32.

The regulations provide that "[u]nless otherwise directed by the Comptroller General on the presentation of proper facts in the particular case, the check issued upon a settlement must not be cashed when its amount includes any item as to which review is applied for, but should accompany the application for review." 4 C.F.R. § 32.3. In many judgment cases, this will not be applicable, for example, where the claimant is appealing the disallowance of interest but there is no dispute over the principal judgment amount. Should there be any uncertainty, GAO's policy is to waive this requirement in judgment cases upon request.

It is also possible that the federal agency involved may disagree with GAO's source-of-funds determination. Upon being advised by GAO that a particular item should be paid from agency funds, the agency should proceed to authorize payment and may then seek GAO's reconsideration. If it is determined that the item should have been paid from the judgment appropriation, GAO will authorize reimbursement to the agency.

E. Deductions

1. Setoff

a. Statutory Basis

As noted previously, part of the settlement process is the offset of known indebtedness. However, since administratively uncollectible debts are no longer routinely referred to GAO, GAO relies heavily on information submitted with the payment request. If a debt exists, 31 U.S.C. § 3728 requires the Comptroller General to withhold payment of the judgment to the extent of the debt.

As the Court of Claims said in Labadie v. United States, 33 Ct. Cl. 476, 480 (1898):

> "When the time of payment comes the statutes give the accounting officers . . . abundant authority to set off an indebtedness due from a claimant to the United States against a judgment in his favor."

The statute not only establishes the requirement for setoff but also prescribes the procedures to be followed. GAO must first attempt to obtain the plaintiff's consent to the setoff. If the plaintiff consents, the amount of the debt is deducted from the judgment payment and the debt is discharged. If the plaintiff refuses to consent or denies the indebtedness, the amount must still be withheld, together with the estimated cost of prosecuting the debt to final judgment. GAO must then immediately refer the debt to the Justice Department so that suit may be commenced, unless, as discussed below, suit has already been brought. If judgment is entered against the United States, or if the amount recovered for the debt and costs is less than the amount withheld, the balance must be paid over to the plaintiff with 6 percent interest for the time it has been withheld. 17 Comp. Gen. 503, 509 (1937); 7 Comp. Dec. 585, 588 (1901); B-130754, March 12, 1957.

GAO does not have a formula to determine the amount to withhold as the estimated cost of prosecuting the debt in cases where the plaintiff refuses to consent. The estimate is made on a case-by-case basis.

The statute which is now 31 U.S.C. § 3728 was originally enacted in 1875 (18 Stat. 481). The original version contained language that appeared to make it applicable to administrative claims as well as judgments, although its application to administrative claims was not universally viewed as mandatory. 23 Comp. Dec. 68, 69 (1916). Congress amended the statute in 1933 to limit its application to court judgments. The legislative history of the 1933 amendment is explicit:

> "The amendments eliminate from the statute the language with respect to claims, limiting the application of the statute to judgment creditors."

S. Rep. No. 1021, 72d Cong., 2d Sess. 8 (1933), quoted in B-123811-O.M., January 14, 1959.

The original (1875) version also referred to the Secretary of the Treasury, since GAO did not then exist. When GAO was created in 1921 and inherited the Comptroller of the Treasury's functions, no corresponding amendment was made to 31 U.S.C. § 3728. The courts got around this simply by reading the statute as if it had been amended. United States v. LaGrange Grocery Co., 31 F.2d 297 (N.D. Ga. 1929); Standard Dredging Co. v. United States, 71 Ct. Cl. 218, 249–50 (1930). The 1933 amendment solved this problem as well by substituting Comptroller General for Secretary of the Treasury. Thus, while many pre-1933 cases remain valid for various purposes, they are obsolete to the extent they purport to apply the statute to administrative claims or refer to the Secretary of the Treasury.

b. Current Application

The requirements of 31 U.S.C. § 3728 with respect to judgment creditors have always been viewed as mandatory. E.g., A-58266, July 29, 1941; 37 Op. Att'y Gen. 215, 217–18 (1933). As such, they may not be defeated by the agreement of the parties. Thus, an agreement purporting to consent to the entry of final judgment without regard to setoff is invalid. Eastern Transportation Co. v. United States, 159 F.2d 349, 352 (2d Cir. 1947). However, "mandatory" does not have to be synonymous with "stupid." It is GAO's opinion that it possesses the discretion to pay a judgment without invoking the offset statute if warranted by the circumstances of a particular case, for example, if the validity of the debt is sufficiently doubtful or if the amount of the debt is too small to justify the effort. B-131865/B-131868, February 16, 1960. Also, the debt to be collected must be a debt owed to the United States. A debt owed to a government corporation is not a debt owed to the United States for purposes of 31 U.S.C. § 3728. A-97085, June 13, 1942 (FDIC).

There is an important distinction for purposes of 31 U.S.C. § 3728 between withholding and offset, reflecting the statute's two stages of operation. The first step is for GAO to withhold payment of the judgment. An administrative assertion of indebtedness is sufficient to support the initial withholding. Of course, GAO must then apply the statutory procedures. If the debtor consents, or if the debt is reduced to judgment, the withholding ripens into an offset. See generally Hines v. United States ex rel. Marsh, 105 F.2d 85, 87–88 (D.C. Cir. 1939); 5 Lawrence, First Comp. Dec. 408, 411–12 (1884).

While an administrative determination of indebtedness may be sufficient to invoke the initial withholding under 31 U.S.C. § 3728, the debt must be one which would support administrative collection action at that particular time. Thus, where a purchaser of government property is paying in installments and there has been no default, the balance due, absent provision to the contrary in the purchase agreement, is not a debt for purposes of 31 U.S.C. § 3728. National Bulk Carriers, Inc. v. Warren, 82 F. Supp. 511, 512 (D.D.C. 1949).

Mere delay by the government in paying a judgment pending determination of whether the claimant is indebted to the United States does not constitute a setoff for purposes of 31 U.S.C. § 3728 so as to create an entitlement to interest. 8 Comp. Gen. 668 (1929). (While the cited decision dealt with an administrative claim under the pre-1933 version of the statute, there is no reason why the principle involved would not apply equally to a judgment.)

As noted above, the procedures established by 31 U.S.C. § 3728 do not apply to the government's right of setoff prior to the entry of judgment on the claim against which offset is sought. See Fitzgerald v. Staats, 578 F.2d 435, 439 (D.C. Cir. 1978), cert. denied, 439 U.S. 1004; Whitbeck v. United States, 77 Ct. Cl. 309, 342–43 (1933), cert. denied, 290 U.S. 671. The right of setoff against an administrative claim is wholly independent of 31 U.S.C. § 3728, and there is no requirement to seek the debtor's consent by virtue of that statute.[47] E.g., Project Map, Inc. v. United States, 486 F.2d 1375 (Ct. Cl. 1973); 14 Comp. Gen. 849 (1935); B-188473, August 3, 1977.

However, the procedures of 31 U.S.C. § 3728 have been held to apply to administrative settlements under the Federal Tort Claims Act which are payable from the permanent judgment appropriation (i.e., awards greater than $2,500). B-135984, May 21, 1976. This is because the Federal Tort Claims Act (28 U.S.C. § 2672) provides for payment "in a manner similar to judgments and compromises in like causes." GAO will also apply those procedures to offsets against monetary awards by boards of contract

[47]Procedural requirements for setoffs may nevertheless exist under other laws. See Chapter 13.

appeals submitted to GAO for payment from the judgment appropriation. B-210316-O.M., September 16, 1983.[48] One court has found that the statute does not permit involuntary offset against seamen's wages protected by the admiralty statutes. Shilman v. United States, 164 F.2d 649, 652 (2d Cir. 1947), cert. denied, 333 U.S. 837.

In United States v. Cohen, 389 F.2d 689 (5th Cir. 1967), the court held that the United States may exercise its right of setoff under 31 U.S.C. § 3728 against a party claiming rights derivatively from a judgment creditor against whom the setoff would be proper, specifically, attorney's fees awarded under the Federal Tort Claims Act. Also, 31 U.S.C. § 3728 takes precedence over an attorney's lien created by state statute. Malman v. United States, 207 F.2d 897 (2d Cir. 1953); Morgan v. United States, 131 F. Supp. 783 (S.D.N.Y. 1955). See also Hornbeck Offshore Operators, Inc. v. Ocean Line of Bermuda, 849 F. Supp. 434 (E.D. Va. 1994) (maritime lien subject to setoff).

Where a judgment is obtained in a suit by one party for the use of another, i.e., "X for the use of Y v. United States," 31 U.S.C. § 3728 applies to the offset of a debt asserted against the "legal plaintiff" (X). See A-58266, July 29, 1941. Under the reasoning in United States v.Cohen, it would presumably also apply to a debt asserted against the "use plaintiff" (Y).

A 1977 decision held that a tax debt against an individual partner cannot be offset under 31 U.S.C. § 3728 against a judgment in favor of the partnership. B-188943, July 19, 1977.

If payment is withheld under 31 U.S.C. § 3728 and the debt is not already in suit, the debtor does not have to wait for the government to sue. The debtor can initiate the litigation by commencing an action for wrongful withholding of the judgment. Eastport Steamship Corp. v. United States, 130 F. Supp. 333 (Ct. Cl. 1955). If the debtor wins, interest is payable on the amount improperly set off the same as if the government had commenced the action. Eastport Steamship Co. v. United States, 140 F. Supp. 773 (Ct. Cl. 1956).

What happens if the United States has already reduced its debt claim to judgment? The statute requires that the government bring a civil action against the unconsenting debtor "if one has not already been brought." 31 U.S.C. § 3728(b)(2)(B). If the government has already prosecuted its claim

[48] GAO had not applied 31 U.S.C. § 3728 to board of contract appeals awards prior to the Contract Disputes Act of 1978. See B-162526, October 9, 1967.

to judgment, it may offset its judgment against the debtor's judgment without the need to follow 31 U.S.C. § 3728. B-140983-O.M., October 15, 1959. A court martial is not the equivalent of a judgment for this purpose. Shilman, 164 F.2d at 652.

The statute refers to judgments "presented to the Comptroller General [for payment]." 31 U.S.C. § 3728(a). An unresolved issue is how to offset against a judgment of a type which is normally paid without GAO involvement. The issue has surfaced in a number of cases involving tax judgments, but the case law has thus far not produced a clear answer.[49] In view of the various authorities available to the IRS such as 26 U.S.C. § 6402(a), it may be noted that the ultimate resolution in tax judgment cases, whatever it may be, would not necessarily apply to other "otherwise provided for" judgments.

2. Judgments Awarding Back Pay

When an agency pays an employee's salary, it normally makes several deductions from the gross amount for such things as income tax and retirement fund contributions. The treatment of these and similar deductions may also become an issue when an employee is awarded back pay as the result of a lawsuit under statutes such as the Back Pay Act, 5 U.S.C. § 5596.

In a 1961 decision to the Commissioner of Internal Revenue, the Comptroller General concluded that GAO has no authority to withhold federal income tax from a judgment for back pay unless the judgment specifically provides for such withholding. B-124720/B-129346, August 1, 1961. See also 44 Comp. Gen. 729 (1965) (social security withholdings). The reason is that GAO has no authority to administratively and unilaterally deviate from the judgment amount by certifying less than the amount awarded (8 Comp. Gen. 603, 605 (1929)), unless the action involved is itself mandated by statute such as the setoff of indebtedness under 31 U.S.C. § 3728. GAO reaffirmed this ruling 20 years later in B-124720/B-129346, September 23, 1981. The decision states:

> "The time to resolve the issue of tax withholding is before the judgment is entered. If the parties agree, this should be a simple matter. If the parties disagree, then that disagreement would have to be resolved by the court and the time to do that is when the judgment itself

[49]See United States v. Rochelle, 363 F.2d 225 (5th Cir. 1966); Empire Ordnance Corp. v. Harrington, 249 F.2d 680 (D.C. Cir. 1957); Snyder v. United States, 630 F. Supp. 182 (D. Md. 1986); Chapman v. United States, 347 F. Supp. 89 (C.D. Cal. 1972), rev'd on other grounds, 485 F.2d 1194 (9th Cir. 1973); Heirich v. United States, 340 F. Supp. 283 (N.D. Ill. 1971); Pugh v. Ladner, 52 F. Supp. 604 (E.D. Pa. 1943).

is being considered, not after it has become final and has been submitted to GAO for payment."[50]

It is important to distinguish what we are talking about here from the basic issue of whether a given judgment is taxable. Damages received by judgment or settlement on account of personal injuries are excluded from gross income under 26 U.S.C. § 104(a)(2). Back pay awards are excluded in some situations, taxable in others. Back pay awarded under the Age Discrimination in Employment Act is not taxable as wages. Bennett v. United States, 30 Fed. Cl. 396 (1994). In United States v. Burke, 112 S. Ct. 1867 (1992), the Supreme Court resolved a longstanding issue by holding that a monetary settlement under Title VII of the Civil Rights Act of 1964 does not constitute "damages" for purposes of section 104(a)(2) but instead is gross income for federal income tax purposes. However, the holding applies only to Title VII as it existed prior to the Civil Rights Act of 1991, and is not dispositive on the issue of taxability under the amended version. In any event, GAO's position that it has no business unilaterally inserting the tax issue into the certification process has no bearing on whether the judgment is taxable or the recipient's liability for any tax.

There may, of course, be cases where the parties simply do not think of the tax withholding issue until after the judgment has been rendered. In such a case, as long as the parties agree to the withholding, there is no need to have the judgment modified just to reflect the withholding. If the parties agree to the deduction of a specified amount of withholding tax, even where the judgment itself is silent, GAO will implement that agreement in making settlement. B-124720/B-129346, September 23, 1981. Documentation of the agreement should be submitted with the payment request to GAO. If the amount to be withheld is not specified, GAO will withhold a flat 20 percent as a matter of policy. See B-187777, May 30, 1979 (non-decision letter).

If it is desired that appropriate deductions be made, they must be specified in the judgment or a written agreement signed by the judgment creditor. The judgment or agreement should specify the gross amount of the award and should indicate which deductions are to be made. Typical deductions are federal income tax, state income tax, retirement fund or social security contribution, Medicare tax, and Federal Employees' Group Life Insurance (FEGLI).[51] Any deductions made will be specified on the Certificate of

[50]The same principles apply to judgments obtained by the Equal Employment Opportunity Commission in enforcement actions. 65 Comp. Gen. 800 (1986).

[51]Other adjustments may also be appropriate which do not involve payments. E.g., B-213604, May 15, 1984 (restoration of annual and sick leave in wrongful separation case).

Settlement. If the judgment or agreement does not specify the dollar amount or applicable percentage rate for each deduction to be made, the information should be obtained from the employing agency and, together with an indication that the parties are in agreement, included with the payment request.

Some deductions, such as Civil Service Retirement and Social Security, require a contribution by the government as well as by the employee. If a judgment directs the payment of the government's as well as the employee's share, it is considered part of the judgment and payable from the permanent appropriation. If a judgment directs a particular deduction but is silent with respect to the government's share, the employee's share is payable from the permanent appropriation and the government's share is payable by the employing agency from agency funds. 58 Comp. Gen. 115 (1978). This decision overruled an earlier case (B-124720, May 15, 1961) which had held that there was no appropriation legally available to pay the government's share and it therefore had to be absorbed by the appropriate fund.

The question of deductions also arises in connection with judgments awarding back pay but not specifying the dollar amount to be paid. Under 58 Comp. Gen. 311 (1979), as noted earlier, these judgments may be paid from the permanent appropriation once GAO has been furnished an agreed-upon amount, determined either administratively or judicially as the specific case may require. If the parties cannot agree and the amount is determined in further litigation, the above principles will apply—that is, deductions will be made or not made depending on the terms of the court's order. Where the amount is agreed upon administratively, the employing agency will normally include in its computation the same deductions it would have made had it paid the salary directly. In such a case, it follows from 58 Comp. Gen. 311, although the point was not specifically addressed in that decision, that GAO will follow the terms of the agreement provided the conditions specified in the decision are met, primarily that there be written indication that the designated payment will be accepted in full and final satisfaction of the judgment.

F. Costs and Attorney's Fees

1. Costs

Costs are not taxable against the United States unless authorized by statute. 23 Comp. Gen. 805 (1944); United States v. Pacific Fruit & Produce Co., 138 F.2d 367 (9th Cir. 1943). This rule is simply another application of the doctrine of sovereign immunity. Cassata v. Federal Savings and Loan Insurance Corp., 445 F.2d 122, 125 (7th Cir. 1971). In recognition of this, Rule 54(d) of the Federal Rules of Civil Procedure states that "costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law." Prior to 1966, there was no general authority to tax costs against the United States. Under the version of 28 U.S.C. § 2412 then in effect (see 62 Stat. 973), costs were prohibited except under express statutory authority, which existed only in limited situations. Thus, there were many cases in which the United States was not liable for costs when it lost even though it could recover costs when it was the prevailing party.

In 1966, Congress amended 28 U.S.C. § 2412 to allow the taxation of costs against the government in all civil actions unless specifically prohibited. Under section 2412(a), except as otherwise specifically provided by statute—

> "costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity."

The costs are to be "limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation." Id. The purpose of the 1966 amendment was "to put private litigants and the United States on an equal footing regarding cost awards." 54 Comp. Gen. 22, 23 (1974).

Subsection 2412(c)(1) provides that costs awarded under subsection (a) shall be in addition to any relief provided in the judgment, and "shall be paid as provided in sections 2414 and 2517 of this title." This means that costs will be payable from the permanent judgment appropriation as long as the award is final and payment is not otherwise provided for.[52]

The authority to award costs under 28 U.S.C. § 2412(a) is not limited to cases involving money judgments. In other words, in order to be payable from the judgment appropriation, costs need not be incident to a money judgment which is payable from that appropriation. B-165149-O.M., September 23, 1968. In addition, the statute applies to costs on appeal to the extent authorized by law. Super Food Services, Inc. v. United States, 416 F.2d 1236, 1241 (7th Cir. 1969).

Costs may be included in a judgment on the merits or may be taxed separately, and may be submitted for payment after the underlying money judgment, if any, has been paid. If an award of costs is submitted after the underlying judgment is paid, it will be treated as a separate "judgment" and a separate Certificate of Settlement will be issued in accordance with the procedures previously described. If the costs are included as part of the judgment, they will be included with the judgment payment and paid in the same manner (i.e., to the plaintiff unless the judgment specifies otherwise).

Costs may be awarded against congressional litigants as well as agencies of the executive branch. However, a Member of Congress or a congressional committee or subcommittee does not have automatic access to the courts on behalf of the United States. To undertake any court action on behalf of the United States, the congressional litigant must be authorized by the appropriate body of Congress. Thus, in one case, an award of costs against a House subcommittee which had attempted to judicially enforce subpoenas without House authorization could not be paid from the permanent appropriation. B-194540-O.M., September 20, 1979.

Section 2412(a) does not authorize the awarding of all costs a party may incur, or all costs a court may feel like awarding. Rather, it authorizes only those costs "as enumerated in section 1920 of this title." Six categories of permissible costs are listed in 28 U.S.C. § 1920.

(1) Fees of the clerk and marshal. The activities for which United States marshals may charge fees are specified in 28 U.S.C. § 1921. In addition, it has been held that the fees of a private process server are taxable under 28

[52]For an unusual case in which a court ordered that certain costs be paid directly by counsel, see Inecon Agricorporation v. United States, 5 Cl. Ct. 507 (1984) (neither attorney showed up for scheduled argument).

U.S.C. § 1920. E.g., Alflex Corp. v. Underwriters Laboratories, Inc., 914 F.2d 175 (9th Cir. 1990), cert. denied, 112 S. Ct. 61.[53]

Storage charges assessed against the United States in connection with property seized by the Marshals Service pursuant to the execution of a warrant in rem are payable from appropriations of the Marshals Service and not the judgment appropriation. 62 Comp. Gen. 177 (1983).

(2) Fees of the court reporter for necessary stenographic transcripts.

(3) Fees and disbursements for printing and witnesses. Allowable fees and expenses of witnesses are specified in 28 U.S.C. § 1821.

Taxation of the fees and expenses of expert witnesses has been a controversial topic. The legislative history of the 1966 amendments to 28 U.S.C. § 2412 indicates that Congress did not intend to include costs in excess of the statutory amounts authorized by 28 U.S.C. § 1821. E.g., Harrisburg Coalition Against Ruining the Environment v. Volpe, 65 F.R.D. 608 (M.D. Pa. 1974). See also 54 Comp. Gen. 22, 23 (1974). Be that as it may, the courts were not uniform. See discussion in Murphy v. International Union of Operating Engineers, 774 F.2d 114, 132–34 (6th Cir. 1985). The Supreme Court resolved the issue in 1987, holding that federal courts must observe the limits of 28 U.S.C. §§ 1821 and 1920 when taxing the expenses of litigants' expert witnesses (as distinguished from court-appointed expert witnesses, discussed below), absent explicit statutory or contractual authorization to the contrary. Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987). Similarly, the nontestimonial services of experts are not taxable as costs under section 1920, although they may be recoverable if expressly authorized by a fee-shifting statute. West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991). See also 69 Comp. Gen. 160 (1990).

In United States Marshals Service v. Means, 741 F.2d 1053 (8th Cir. 1984), cert. denied, 492 U.S. 910 (1989), the government sought to evict a group of individuals from federal property. The defendants were indigent and could not afford the fees and expenses of the witnesses they wanted to subpoena. The court held that it could call the witnesses, and that it had discretionary power to order the government to advance the fees and

[53]We must emphasize that our discussion here is intended to provide an overview from the payment perspective, point out the pertinent statutes, and give a sampling of taxable items. There is a plethora of case law on what is or is not allowable, and, as is the case with Alflex (914 F.2d at 178 n.6), the courts are not always in agreement. Accordingly, it should not be assumed that the cases we have selected as illustrations are necessarily followed in all circuits. A useful reference is Laura B. Bartell, Taxation of Costs and Awards of Expenses in Federal Court, 101 F.R.D. 553 (1984).

expenses, later to be taxed as costs. The court emphasized that "this discretionary power is to be exercised only under compelling circumstances." Id. at 1059. (In this type of situation, the agency would presumably pay in the first instance, and could later be reimbursed from the judgment appropriation if the expenses were ultimately taxed against the United States as costs.)

(4) Necessary document reproduction fees. This includes photographic materials if necessarily obtained for use in the case. Maxwell v. Hapag-Lloyd Aktiengesellschaft, 862 F.2d 767, 770 (9th Cir. 1988). Also, although section 1920 does not specifically mention depositions, courts have generally construed subsections (2) and (4) as authorizing the taxation of the costs of depositions necessarily obtained for use in the case.[54]

(5) Docket fees under 28 U.S.C. § 1923. These were traditionally viewed as a type of attorney's fee. E.g., North Atlantic & Gulf S.S. Co. v. United States, 209 F.2d 487, 489–90 (2d Cir. 1954). They are now taxable as costs under 28 U.S.C. § 2412(a). 54 Comp. Gen. 22 (1974).

(6) Compensation of interpreters and expenses of special interpretation services (28 U.S.C. §§ 1827, 1828), and compensation of court-appointed experts. The inclusion of interpretation costs and expenses was not intended to authorize taxation of these items against the United States in criminal cases or civil actions brought by the United States; payment in these instances is to be made by the Administrative Office of the United States Courts from judiciary appropriations. 28 U.S.C. §§ 1827(g), 1828(c); S. Rep. No. 569, 95th Cong., 1st Sess. 13–14 (1977). The "experts" referred to are expert witnesses appointed by the court under Rule 706 of the Federal Rules of Evidence. See National Organization for the Reform of Marijuana Laws v. Mullen,[55] 828 F.2d 536, 545 n.7 (9th Cir. 1987). These are different from the expert witnesses referred to under subsection (3) above, which are the litigant's experts.

A major issue in the area of costs has been whether, in taxing costs against the United States under 28 U.S.C. § 2412(a), courts are limited to the items specified in 28 U.S.C. § 1920. Although not all agree, the answer appears to be yes. Many courts traditionally viewed their authority as limited by

[54]E.g., West Wind Africa Line, Ltd. v. Corpus Christi Marine Services Co., 834 F.2d 1232, 1237–38 (5th Cir. 1988); Ramos v. Lamm, 713 F.2d 546, 560 (10th Cir. 1983); Corsair Asset Management, Inc. v. Moskovitz, 142 F.R.D. 347, 353 (N.D. Ga. 1992).

[55]Every cause appears to have its champion.

section 1920. E.g., Commissioners of Highways of Annawan v. United States, 653 F.2d 292, 298 (7th Cir. 1981) (cannot tax attorney's travel expenses or witness fees in excess of amounts authorized by 28 U.S.C. § 1821); Photo Data, Inc. v. Sawyer, 533 F. Supp. 348, 353 (D.D.C. 1982) (disallowed overtime meals, car, local transportation); Norman v. United States, 74 F.R.D. 637 (D. Del. 1977) (disallowed attorney's air fare, meals, hotel accommodations). See also Harrisburg Coalition Against Ruining the Environment v. Volpe, 65 F.R.D. 608, 612 (M.D. Pa. 1974) ("As a general rule, expenses that are incident to the preparation of a case are not recoverable as costs").

However, this view as to the relationship between 28 U.S.C. §§ 2412(a) and 1920 was neither absolutely rigid nor universally held. Thus, for example, in Equal Employment Opportunity Commission v. Kenosha Unified School District No. 1, 620 F.2d 1220, 1227–28 (7th Cir. 1980), the court recognized the limitation of section 1920 but allowed costs of procuring statistical analyses and computer expenses based on a broad reading of subsection 1920(4), calling it an "exceptional case." The case of Engels v. United States, 2 Cl. Ct. 166 (1983), expresses at least what was then the Claims Court's position that it could go beyond section 1920 but must exercise that discretion sparingly. The court relied on language in Farmer v. Arabian American Oil Co., 379 U.S. 227 (1964). Finally, the court in National Organization for the Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 545–46 (9th Cir. 1987), effectively wrote the phrase "as enumerated in section 1920" out of the statute, at least within that circuit, by holding that the language is not "explicitly exclusive," and that a court may, under 28 U.S.C. § 2412(a), award against the United States any costs that it may award against a private party.

The Supreme Court's decision in Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437 (1987), should go far to resolve the issue. The Court stated that "§ 1920 now embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party" (id. at 440), and:

> "If Rule 54(d) grants courts discretion to tax whatever costs may seem appropriate, then § 1920, which enumerates the costs that may be taxed, serves no role whatsoever. We think the better view is that § 1920 defines the term 'costs' as used in Rule 54(d)." Id. at 441.

The Court also, at pages 442–43, specifically disapproved the language in the Farmer case which the Claims Court had relied on in Engels. A few years later, the Court said with respect to Crawford, "we held that [28 U.S.C.

§§ 1821 and 1920] define the full extent of a federal court's power to shift litigation costs absent express statutory authority to go further," and that Crawford held section 1920 "to be an express limitation upon the types of costs which, absent other authority, may be shifted by federal courts." West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83, 86–87 (1991). If this is true with respect to private litigants who do not have to overcome a sovereign immunity hurdle, the case is even stronger that section 1920 is exclusive when costs are being taxed against the United States.

Thus far, it appears that the courts are adhering to the seemingly clear signals of Crawford and Casey. See, e.g., Maxwell v. Hapag-Lloyd Aktiengesellschaft, 862 F.2d 767, 770 (9th Cir. 1988), rejecting an argument that Crawford applies only to expert witness fees (Crawford "strictly limits reimbursable costs to those enumerated in § 1920"); Miller v. Cudahy Co., 858 F.2d 1449, 1461 (10th Cir. 1988); Pershern v. Fiatallis North America, Inc., 834 F.2d 136, 140 (8th Cir. 1987); Corsair Asset Management, Inc. v. Moskovitz, 142 F.R.D. 347, 351 (N.D. Ga. 1992); Bee v. Greaves, 669 F. Supp. 372, 378–79 (D. Utah 1987).

There are, however, ripples on the pond. Even after Crawford and Casey, one lower court has cited National Organization for Reform of Marijuana Laws v. Mullen for the proposition that the enumeration in 28 U.S.C. § 1920 is not exclusive. Director, Office of Thrift Supervision v. Lopez, 141 F.R.D. 165, 167 (S.D. Fla. 1992). And another court has noted Crawford and then stated that it may award costs not specified in the statute, citing the language in Farmer that the Crawford court explicitly disapproved. Commercial Credit Equipment Corp. v. Stamps, 920 F.2d 1361, 1368 n.10 (7th Cir. 1990).

An approach more likely to be followed is reflected in the statement that Crawford "limits judicial discretion with regard to the kind of expenses that may be recovered as costs; it does not, however, prevent courts from interpreting the meaning of the phrases used in § 1920." West Wind Africa Line, Ltd. v. Corpus Christi Marine Services Co., 834 F.2d 1232, 1238 (5th Cir. 1988). See also Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble Co., 924 F.2d 633, 643 (7th Cir. 1991); Alflex Corp. v. Underwriters Laboratories, Inc., 914 F.2d 175, 177 (9th Cir. 1990), cert. denied, 112 S. Ct. 61. Continuing litigation in the area seems guaranteed.

Also, it must be emphasized that the fact that an item is not specifically enumerated in 28 U.S.C. § 1920 does not necessarily mean that it may not be recoverable on some other basis. As we will see, certain otherwise nontaxable items may be awarded as expenses under an attorney's fee statute. From GAO's perspective, if an item is taxed against the United States under 28 U.S.C. § 2412(a), the award is final and payment is not otherwise provided for, it will be certified for payment under 31 U.S.C. § 1304 regardless of GAO's views as to the propriety of the award. See 41 Comp. Gen. 583 (1962).

The topic of special masters has also generated a measure of controversy. The Department of Justice has concluded that special masters' expenses are not taxable under 28 U.S.C. § 2412(a).[56] Prior to the Supreme Court's decision in Crawford, several courts had held that the expenses of special masters could be taxed as costs against the United States, notwithstanding their absence from 28 U.S.C. § 1920. National Organization for the Reform of Marijuana Laws v. Mullen, 828 F.2d 536, 545–46 (9th Cir. 1987);[57] Young v. Pierce, 640 F. Supp. 1476 (E.D. Tex. 1986), vacated on other grounds, 822 F.2d 1368 (5th Cir. 1987); National Association of Radiation Survivors v. Turnage, 115 F.R.D. 543, 560–61 (N.D. Cal. 1987). Crawford and Casey would seem to support the Justice Department's position. However, a 1989 case followed Mullen, Pierce, and Turnage, without discussing the effect of Crawford. Trout v. Ball, 705 F. Supp. 705 (D.D.C. 1989). Stay tuned.

Finally, note that 28 U.S.C. § 2412(a) is limited to civil actions. There is no comparable statute authorizing the taxation of costs against the United States in criminal cases. B-163717, April 16, 1968; B-137681, November 19, 1958 (stating the rule without further discussion).

[56]Memorandum from the Attorney General, Department Policy Regarding Special Masters, March 13, 1986; Departmental Policy on Special Masters, Op. Off. Legal Counsel, October 2, 1984. As noted in the 1984 opinion, special masters' expenses, while not taxable as costs, may nevertheless be recoverable under some fee-shifting statutes. An example is the Freedom of Information Act. Washington Post v. U.S. Department of Defense, 789 F. Supp. 423 (D.D.C. 1992). As further noted in the 1986 Attorney General memorandum and in Special Masters Project: Authority for the United States to Pay for Special Masters, Op. Off. Legal Counsel, November 8, 1984, the United States may agree to the appointment of a special master in certain cases, in which event the expenses are payable from the litigation budget of the litigating agency. See also B-234793.2, June 5, 1989.

[57]Mullen was decided 3 months after Crawford but makes no mention of it, most likely because it was not brought to the court's attention. Whether the Ninth Circuit would continue to follow Mullen may be questioned, especially in light of that Circuit's subsequent adherence to Crawford in Maxwell v. Hapag-Lloyd Aktiengesellschaft, cited in the text.

2. Attorney's Fees

"To the old adage that death and taxes share a certain inevitable character, federal judges may be excused for adding attorneys' fees cases." Kennedy v. Whitehurst, 690 F.2d 951, 952 (D.C. Cir. 1982).[58]

a. Introduction

In England, it is customary for the loser to pay the winner's attorney's fees. This is called the "English Rule." The United States follows the so-called "American Rule" that the prevailing litigant or claimant is ordinarily not entitled to recover attorney's fees from the loser absent statutory authorization. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Key Tronic Corp. v. United States, 114 S. Ct. 1960 (1994). Combining this with the explicit exclusion of attorney's fees from recoverable costs in 28 U.S.C. § 2412(a) and the concept of sovereign immunity, the starting point is the established principle that attorney's fees may not be awarded against the United States in the absence of express statutory authority. Statutory authority in this context means federal (not state) statutory authority. See, e.g., Knight v. United States, 982 F.2d 1573 (Fed. Cir. 1993).

These days, fee-shifting in litigation involving the United States seems to have become more the rule than the exception.[59] There are well over 100 federal fee-shifting statutes on the books. A comprehensive (although incomplete) listing may be found in an appendix to the dissenting opinion of Justice Brennan in Marek v. Chesny, 473 U.S. 1, 43–51 (1985). Many of these statutes apply to the United States by their own specific terms; the majority do not. The latter group is now generally applicable to the United States by virtue of the Equal Access to Justice Act, discussed later in this section.

Questions as to when fees are or are not allowable under a particular statute or how they should be calculated are beyond the scope of this work. In an often-quoted passage, the Supreme Court lamented that a

[58]If you don't like this one, we could have used the quote suggesting an analogy between attorney's fees and paying tribute to Genghis Khan. See In re Four Star Terminals, Inc., 42 B.R. 419, 428 n.2 (Bankr. D. Alaska 1984).

[59]Everyone, so it seems, is telling lawyer jokes these days, so we might as well jump in. The following quotation is taken from Judge Wilkey's dissenting opinion in Copeland v. Marshall, 641 F.2d 880, 929–30 n.53 (D.C. Cir. 1980):

"An immediately deceased lawyer arrived at the Pearly Gates to seek admittance from St. Peter. The Keeper of the Keys was surprisingly warm in his welcome: 'We are so glad to see you, Mr. ___. We are particularly happy to have you here, not only because we get so few lawyers up here, but because you lived to the wonderful age of 165.' Mr. ___ was a bit doubtful and hesitant. 'Now, St. Peter, if there's one place I don't want to get into under false pretenses, it's Heaven. I really died at age 78.' St. Peter looked perplexed, frowned, and consulted the scroll in his hand. 'Ah, I see where we made our mistake as to your age. We just added up your time sheets!"

"request for attorney's fees should not result in a second major litigation." Hensley v. Eckerhart, 461 U.S. 424, 437 (1983). Notwithstanding this admonition, the volume of case law has become staggering. As we said in our section on costs, our objective here is a limited one—to present an overview from the payment perspective.

In a few instances, attorney's fees are paid from the amount recovered in the underlying suit, and are allowable up to a specified maximum percentage of the recovery. Examples are the Federal Tort Claims Act (28 U.S.C. § 2678) and the Social Security Act (42 U.S.C. § 406). Statutory restrictions of this type have been upheld, even against a pre-existing contingent fee agreement. Calhoun v. Massie, 253 U.S. 170 (1920); Capital Trust Co. v. Calhoun, 250 U.S. 208 (1919); Paul v. United States, 687 F.2d 364 (Ct. Cl. 1982), cert. denied, 461 U.S. 927. In the far more common situation, however, the statute authorizes the court to award reasonable attorney's fees to the prevailing party separate from and in addition to any monetary recovery in the underlying judgment.

As with costs, an award of attorney's fees may be included in a judgment on the merits or (more commonly) may be made in a separate judgment or order. Like other money judgments against the United States, judgments awarding attorney's fees are generally payable from the permanent judgment appropriation as long as the award is final and payment is not otherwise provided for. If the fee award is separate from the judgment on the merits, then the order awarding the fees must itself be final. B-190940, September 21, 1978. As discussed earlier under the Finality heading, interim awards of attorney's fees have received slightly different treatment in the courts in a number of cases.

Fee-shifting statutes are usually designed to serve several purposes. One is to facilitate the enforcement of the public policy reflected in the underlying legislation. A law making discrimination illegal, for example, would be largely empty if the victims are unable to invoke the law because they cannot afford to go to court. Another frequent purpose is deterrence. E.g., Copeland v. Marshall, 641 F.2d 880, 895 (D.C. Cir. 1980) (Title VII of the Civil Rights Act). The existence of deterrence as an objective points up a major flaw, at least from the broader social perspective, in the unreimbursed use of the permanent judgment appropriation. We quote from Judge Wilkey's dissenting opinion in Copeland v. Marshall:

"Attorney's fees are meant to serve some purpose of deterring discrimination. They doubtless do in the private sector. [Footnote omitted.] But when attorney's fees come straight out of the United States Treasury, as in the present case, they exert no deterrent effect whatsoever against the persons responsible for the discrimination. In the private sector there is a justifiable punitive element. Attorney's fees impact on the profit picture of the corporation; the same executive management which is responsible for tolerating or encouraging discrimination are the same executives who are responsible for the profit of the corporation, so they are penalized in the pocketbook. No such deterrence applies to the Government, i.e., the Labor Department budget was never touched, will never be touched, by the award . . . in this case. Both the back pay and the attorney's fee come out of the general taxpayer contributed funds of the U.S. Treasury. By their strict analogy to the private sector, the majority has validated deterrent or punitive action against the U.S. taxpayer." Id. at 912.

In some instances, such as subsection (d) of the Equal Access to Justice Act, Congress has recognized this by requiring payment from agency funds. Of course, agency funds also come from the taxpayer's pocket, so either way the taxpayer foots the bill. To the extent an agency can simply request and receive additional funds to budget for fee awards, deterrence may be frustrated even under a system of agency payment. Real deterrence requires not only agency payment but a requirement that the agency absorb the fee awards in its existing budget. But even here, there is the risk of the agency's funding the awards not by trimming fat or waste but by cutting back on other needed programs, perhaps even programs designed to benefit those the fee awards were intended to help. In sum, while it may be true that use of the judgment appropriation defeats deterrence, a simple requirement to use agency funds, without a consideration of complex budgetary and social issues, does not guarantee it either.

b. Statutes Applicable by Their Terms to the United States

Prior to the enactment of the Equal Access to Justice Act in 1980, Congress had dealt with fee-shifting on a piecemeal basis. Out of the 100-plus fee-shifting statutes on the books, approximately 30 expressly make the United States liable for attorney's fees in specific contexts. They mostly predate the Equal Access to Justice Act and operate independent of it. Prominent examples are 42 U.S.C. § 2000e-5(k) (Title VII of the Civil Rights Act of 1964) and 5 U.S.C. § 552(a)(4)(E) (Freedom of Information Act). A number of others were enacted in the 1970s in connection with various "citizen suit" provisions.[60]

As with judgments generally, judicial fee awards under statutes in this category are payable from the judgment appropriation if final and not

[60]E.g., 42 U.S.C. § 6305(d) (Energy Policy and Conservation Act); 42 U.S.C. § 4911(d) (Noise Control Act of 1972); 33 U.S.C. § 1365(d) (Water Pollution Control Act).

otherwise provided for. 63 Comp. Gen. 260, 261 (1984). Some illustrative cases in which fee awards were found payable under 31 U.S.C. § 1304 are:

- Fees awarded against the Equal Employment Opportunity Commission in enforcement actions brought by the EEOC under Title VII of the Civil Rights Act. B-167015, May 31, 1979. Since the statute authorizes awards to a "prevailing party," it made no difference that the EEOC was the losing plaintiff rather than the losing defendant.
- Fees awarded against the government under the Freedom of Information Act. B-173761, April 6, 1976 (internal memorandum).
- Fees awarded to the subject of an independent counsel investigation under 28 U.S.C. § 593 (Ethics in Government Act). B-218727.2-O.M., June 9, 1986.
- Fees awarded against the Environmental Protection Agency in citizen suits under the Federal Water Pollution Control Act. B-193284, May 3, 1979. This question arose because section 517 of the Act authorizes appropriations to EPA "to carry out this Act" but expressly excludes several sections. It does not, however, exclude section 505 which authorizes the fee awards. By itself, a blanket authorization of appropriations applicable to an entire program statute which includes a fee-shifting provision would make no difference. However, the specific exclusions suggested the possibility that, under the maxim "expressio unius est exclusio alterius,"[61] Congress may have intended that the awards be paid from EPA's appropriations. The decision reviewed pertinent legislation and legislative history, and concluded that the authorization provision was not intended to affect the source of funds for payment of the awards.

A somewhat unusual fee provision in this group is 5 U.S.C. § 552b(i), the Government in the Sunshine Act. It states that "[i]n the case of assessment of costs against an agency, the costs may be assessed by the court against the United States." Under this language, the payment source would appear to depend on whether the award is made against the agency (agency funds) or the United States (judgment appropriation).[62]

[61]Literally, "the expression of the one is the exclusion of the other." Where a provision in a statute specifies A, B, and D, it is normally presumed that Congress intended not to include C, absent indications to the contrary.

[62]If there were no difference in payment source, it would make absolutely no difference whether the award was against the agency or the United States, and the legislative history makes clear that the quoted language was intended to give the court discretion. See, e.g., H.R. Rep. No. 880, 94th Cong., 2d Sess., pt. I at 18, reprinted at 1976 U.S. Code Cong. & Admin. News 2183, 2199.

c. Equal Access to Justice Act

In 1980, Congress enacted a major piece of fee-shifting legislation—the Equal Access to Justice Act, affectionately known as EAJA.[63] EAJA did the following things:

- Created a new 5 U.S.C. § 504 to authorize fee-shifting in certain administrative situations.
- Amended 28 U.S.C. § 2412. The pre-existing provisions for costs were basically re-enacted as subsections (a) and (c)(1). The new judicial fee-shifting provisions became subsections (b), (c)(2), and (d).

In the context of judicial awards, EAJA enacted two significant fee-shifting provisions, subsections (b) and (d). Some confusion in usage has arisen from inconsistent use of the term "EAJA" to refer to all of 28 U.S.C. § 2412, subsections (b) and (d), subsection (d) alone, or any of the foregoing together with 5 U.S.C. § 504. Before jumping to conclusions, the reader should always carefully examine the specific context.

(1) Awards under 28 U.S.C. § 2412(b)

One of EAJA's major fee-shifting provisions is subsection (b). It authorizes fee awards to prevailing parties against the United States in civil actions "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award," unless expressly prohibited by statute. 28 U.S.C. § 2412(b). As the quoted language clearly implies, subsection (b) covers two general situations.

First, we noted earlier that many fee-shifting statutes do not by their terms apply to the United States. Subsection (b) makes the United States liable under these statutes. Thus, if a fee-shifting statute specifically includes the United States or federal agencies, it applies of its own force; if it does not specifically include the United States or federal agencies, it nevertheless applies by virtue of EAJA subsection (b). An example of a statute now

[63]The original EAJA was Pub. L. No. 96-481, Title II, 94 Stat. 2325 (1980). Portions of the original law were experimental, with a 3-year "sunset" date. Those portions were amended and made permanent by Pub. L. No. 99-80, 99 Stat. 183 (1985).

applicable to the United States under subsection (b) is the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988.[64]

In addition, subsection (b) makes the United States liable for fee awards under Rule 37 of the Federal Rules of Civil Procedure (certain discovery violations). S. Rep. No. 253, 96th Cong., 1st Sess. 4 ("Fees may also be recovered against the United States under rule 37"), 19 (1979); M.A. Mortenson Co. v. United States, 996 F.2d 1177 ((Fed. Cir. 1993); National Lawyers Guild v. Attorney General, 94 F.R.D. 600, 615 n.32 (S.D.N.Y. 1982); B-217990.2-O.M., November 29, 1984; 6 Op. Off. Legal Counsel 525 (1982). The same result has been applied to awards under Rule 11. Adamson v. Bowen, 855 F.2d 668 (10th Cir. 1988).[65]

Second, although there had been exceptions, the prevailing view had been that fees could not be awarded against the United States under the various common-law (i.e., judicially-created) exceptions to the American Rule (bad faith, common benefit, common fund). See S. Rep. No. 253 at 3–4; H.R. Rep. No. 1418, 96th Cong., 2d Sess. 8–9, 17 (1980). Subsection (b) makes the United States liable under these common law exceptions as well.

Payment of subsection (b) awards is fairly straightforward. They are paid from the permanent judgment appropriation unless otherwise provided for in a particular case, except that an award based on a finding of bad faith must be paid from agency funds. 28 U.S.C. § 2412(c)(2); 63 Comp. Gen. 260 (1984); B-218504, May 10, 1985; 6 Op. Off. Legal Counsel 525 (1982).

An interesting pre-EAJA case applying the "common fund" theory is Red School House, Inc. v. Office of Economic Opportunity, 386 F. Supp. 1177 (D. Minn. 1974). The OEO had suspended funding on a grant the court found to have been previously approved. The grant funds had already been transferred to a commercial bank. The court found that OEO had acted

[64]This seems to have given birth to a whole new field of litigation. For example, the United States may be liable for fees if it violates one of the provisions of law cited in 42 U.S.C. § 1988, but this does not extend to suits analogous to those brought against state officials under those provisions. E.g., Premachandra v. Mitts, 753 F.2d 635 (8th Cir. 1985); Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 735 F.2d 895 (5th Cir. 1984); Lauritzen v. Lehman, 736 F.2d 550 (9th Cir. 1984). Also, a suit against a federal official in his or her individual capacity cannot generate a fee award against the United States under section 1988. Kentucky v. Graham, 473 U.S. 159 (1985); Bergman v. United States, 648 F. Supp. 351 (W.D. Mich. 1986).

[65]Rule 11 sanctions may be assessed against the party or the attorney personally. The inclusion of Rule 11 sanctions under EAJA subsection (b) has no relevance in the latter situation. In assessing sanctions against the attorney, several courts have taken an extra step and expressly prohibited reimbursement or indemnification from any source. E.g., Derechin v. State University of New York, 963 F.2d 513, 519 (2d Cir. 1992) (citing several other cases).

improperly and in bad faith. The court then awarded attorney's fees against OEO based in part on OEO regulations and, drawing an analogy to the "common fund" theory, held that the fees were payable from the funds allocated to the grant and on deposit in the bank. "Common fund" fee awards against the United States or a federal agency are uncommon. Limited experience suggests that payment needs to be reviewed on a case-by-case basis.

(2) Awards under 28 U.S.C. § 2412(d)

EAJA's second major fee-shifting provision in the litigation context is subsection (d). Generally speaking, it applies to any civil action brought by or against the United States except tort cases or cases subject to some other fee-shifting statute. It is thus sort of a "catch-all."

A prevailing party (other than the United States) who meets specified financial eligibility criteria may apply to the court for a fee award under subsection (d). Fees will be awarded unless the court finds that "the position of the United States was substantially justified or that special circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). The "substantially justified" determination includes the underlying administrative action as well as the government's position in the lawsuit. Id. § 2412(d)(1)(B). Once the party makes the fee application, the burden shifts to the United States to establish that its position was substantially justified. E.g., Rawlins v. United States, 8 Cl. Ct. 355 (1985). Fees are limited to $75 per hour, but courts may award higher amounts based on cost-of-living increases or other special factors. 28 U.S.C. § 2412(d)(2)(A). An award may be reduced or denied if the prevailing party has "unduly and unreasonably protracted" the case. Id. § 2412(d)(1)(C).

A fee award under EAJA is made to the party, not to the attorney. FDL Technologies, Inc. v. United States, 967 F.2d 1578 (Fed. Cir. 1992); Phillips v. General Services Administration, 924 F.2d 1577 (Fed. Cir. 1991). See also United States v. McPeck, 910 F.2d 509, 513 (8th Cir. 1990).

The meaning of "substantially justified" has been much litigated. The Supreme Court spoke to the issue in Pierce v. Underwood, 487 U.S. 552 (1988), defining the term to mean a position which is justified to a degree that could satisfy a reasonable person, in other words, a position having a reasonable basis in both law and fact. The same case addressed the amount of the fee and identified a number of factors that may not be used as "special factors" to justify exceeding the cap: novelty and difficulty of issues; undesirability of the case; work and ability of counsel (except for counsel with "distinctive knowledge or specialized skill" relevant to the case); results obtained; customary fees and awards in other cases; contingent nature of the fee. Id. at 571–74.[66]

The original EAJA encompassed the Court of Claims as well as the district courts. When the Court of Claims was split in 1982 into the Claims Court and Court of Appeals for the Federal Circuit,[67] the applicability of EAJA to the new Claims Court came into question. The courts upheld the jurisdiction of the Claims Court, now the Court of Federal Claims, to make EAJA awards. Essex Electro Engineers, Inc. v. United States, 757 F.2d 247 (Fed. Cir. 1985); Laboratory Supply Corp. v. United States, 5 Cl. Ct. 28 (1984). The 1985 EAJA amendments codified this result (28 U.S.C. § 2412(d)(2)(F)), and added boards of contract appeals (id. § 2412(d)(2)(E)). Legislation in 1992 added the Court of Veterans Appeals.[68]

A perusal of the case annotations in the United States Code Annotated or United States Code Service will indicate the types of actions to which subsection (d) has been applied. Two may be mentioned briefly:

- Subsection (d) awards may be made in Social Security Act cases, but an attorney receiving fees under both EAJA and 42 U.S.C. § 406 must refund the smaller fee to the claimant. Pub. L. No. 99-80, § 3, 99 Stat. 186 (1985).
- Subsection (d) applies to condemnation actions, but only if the amount of the final judgment (settlements are expressly excluded), exclusive of interest, is closer to the property owner's valuation testimony than it is to the government's. 28 U.S.C. § 2412(d)(2)(H). (A different approach was needed to determine "prevailing party" in condemnation cases because, with rare exceptions, the government always "wins" in the sense that it gets the property.)

Prior to the 1985 amendments, the payment provisions for subsection (d) were ambiguous and confusing, indicating that awards should generally be paid from agency funds, but that the judgment appropriation might be available as a "back-up" in certain unspecified situations. By virtue of

[66]A later case confirmed that a "reasonable attorney's fee" may not include a contingency enhancement. City of Burlington v. Dague, 112 S. Ct. 2638 (1992). While Dague dealt with the fee-shifting provisions of the Solid Waste Disposal Act and Clean Water Act, the Court made clear that its holding applies to all similar statutes. Id. at 2641.

[67]Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

[68]Federal Courts Administration Act of 1992, § 506, 106 Stat. 4506, 4513.

other language in the original EAJA, however, GAO and the Justice Department had concluded that the judgment appropriation could not be used for subsection (d) awards without further legislative action.[69]

The 1985 amendments ended the uncertainty by providing that subsection (d) awards "shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise." 28 U.S.C. § 2412(d)(4). The Senate Judiciary Committee explained that this requires subsection (d) awards to be "paid from the offending agency's budget and not from the judgment fund." S. Rep. No. 586, 98th Cong., 2d Sess. 17 (1984).

Subsection (d) awards are thus payable from agency operating appropriations; specific, line-item, or "earmarked" appropriations are not required. Electrical District No. 1 v. Federal Energy Regulatory Commission, 813 F.2d 1246 (D.C. Cir. 1987); 63 Comp. Gen. 260, 263 (1984); 62 Comp. Gen. 692, 697 (1983); B-231771, December 7, 1988; B-212585, March 29, 1984; B-40342.1, May 15, 1981; 6 Op. Off. Legal Counsel 204, 209–12 (1982).

The Electrical District case considered the effect of an appropriation act provision that "[n]one of the funds in this Act shall be used to pay the expenses of, or otherwise compensate, parties intervening in regulatory or adjudicatory proceedings funded in this Act." 813 F.2d at 1247 n.3. While the provision effectively precluded EAJA awards attributable to participation in agency administrative proceedings funded under that appropriation act, the court held that it did not bar a subsection (d) award for fees attributable to participation in judicial proceedings, which of course were not funded under the agency's appropriation act. Congress rejoined by amending the appropriation restriction for the following fiscal year to state that it "bars payment to a party intervening in an administrative proceeding for expenses incurred in appealing an administrative decision to the courts." See 67 Comp. Gen. 553, 556 (1988).

Fees reasonably incurred in pursuit of an EAJA application may also be compensable. Brewer v. American Battle Monuments Commission, 814 F.2d 1564, 1570 (Fed. Cir. 1987); Rawlins v. United States, 8 Cl. Ct. 355, 359 (1985).

[69] 63 Comp. Gen. 260 (1984); 62 Comp. Gen. 692 (1983); B-40342.2, October 21, 1981; 7 Op. Off. Legal Counsel 230 (1983) (preliminary print); 6 Op. Off. Legal Counsel 204 (1982).

d. Tax Cases

Fee-shifting in tax cases has evolved through several permutations. Prior to 1976, there was no general authority to award attorney's fees against the United States in civil tax cases. In that year, Congress amended the Civil Rights Attorney's Fees Awards Act to make it applicable to the United States to the limited extent of actions to enforce, or charging violations of, the Internal Revenue Code. 42 U.S.C. § 1988 (1976 ed.). These awards were viewed as payable from the judgment appropriation. B-158810, February 22, 1977.

When Congress enacted the Equal Access to Justice Act in 1980, it was intended that subsection (d) pick up the tax cases. To that end, the original EAJA repealed that portion of 42 U.S.C. § 1988 which dealt with fee awards against the United States in tax cases. Pub. L. No. 96-481, § 205(c), 94 Stat. 2330. However, while EAJA adequately covered awards by district courts or the Court of Federal Claims, it did not apply to the Tax Court. Bowen v. Commissioner, 706 F.2d 1087 (11th Cir. 1983).

In 1982, as part of the Tax Equity and Fiscal Responsibility Act of 1982, Congress enacted a new provision to deal with fee awards in tax cases. Pub. L. No. 97-248, § 292, 96 Stat. 572 (1982). This new provision became section 7430 of the Internal Revenue Code, 26 U.S.C. § 7430. Section 7430 generally followed the EAJA subsection (d) approach, but did not include a specific payment provision. The 1982 legislation also amended EAJA to make it inapplicable to cases covered by the new IRC § 7430. 28 U.S.C. § 2412(e). Section 7430 is exclusive with respect to matters within its coverage. Smith v. Brady, 972 F.2d 1095, 1099 (9th Cir. 1992).

In 63 Comp. Gen. 470 (1984), the Comptroller General reviewed IRC § 7430 and concluded that payment of the awards was not otherwise provided for. Thus, awards made by the district courts or the Court of Federal Claims were payable from the judgment appropriation. However, there was nothing in 31 U.S.C. § 1304 that could reasonably be construed as covering the Tax Court. The decision therefore concluded that Tax Court awards under section 7430 could not be paid from any existing source of funds. GAO recommended a legislative solution. In 1986, Congress amended section 7430 to make Tax Court awards payable "in the same manner as such an award by a district court." Pub. L. No. 99-514, § 1551(f), 100 Stat. 2753 (1986), codified at 26 U.S.C. § 7430(d)(2). Thus, all awards under IRC § 7430 are now payable from the judgment appropriation.

e. Expenses

As noted above, the fact that a particular item may not be taxable as a cost under 28 U.S.C. § 2412(a) does not necessarily mean that it is not recoverable under some other authority. Specifically, the typical attorney's fee statute permits the recovery of certain "expenses" in addition to the fee itself. Expenses authorized as part of a fee award are in addition to costs taxable under 28 U.S.C. § 2412(a).

It has been said that "costs and expenses are not synonymous but are words of art." Bennett v. Department of the Navy, 699 F.2d 1140, 1144 (Fed. Cir. 1983). The term "expenses" for purposes of a fee-shifting statute usually means "those reasonable and necessary out-of-pocket expenses of providing a lawyer's services that are not covered by the hourly rate [and] that are routinely paid by counsel and billed to the client for services rendered." Id. at 1145.[70] There is no uniform test for determining when expenses will qualify as part of an attorney's fee. Id. at 1143. Rather, exactly what items may be recovered will depend in large measure on the language of the particular fee statute, its legislative history, and the case law that has developed under it and similarly-worded statutes.

The characterization of a given item as a cost or an expense may determine whether it is recoverable at all. Depending on the particular case, a prevailing party may be able to recover (a) costs plus fees and expenses, (b) costs but not fees and expenses, or (c) fees and expenses but not costs. For example, in the Bennett case cited above, the court upheld a decision by the Merit Systems Protection Board that it could, as part of a fee award under 5 U.S.C. § 7701(g), include expenses such as travel of counsel, postage, and telephone tolls, but not deposition costs or witness fees. Note that each item is either a cost or an expense, but not both. The items allowed as expenses would not be taxable as costs under 28 U.S.C. § 2412(a). The items disallowed would be taxable costs, except that the MSPB, as an administrative body, does not have the authority to tax costs under section 2412(a). Thus, the deposition costs and witness fees could not be awarded.

The case of Mennor v. Fort Hood National Bank, 829 F.2d 553 (5th Cir. 1987), illustrates the relationship between costs and expenses under Title VII of the Civil Rights Act. Although the case involves private litigants, it is nevertheless relevant because Title VII's fee provision (42 U.S.C. § 2000e-5(k)) makes the United States liable the same as a private party. The plaintiff sought costs of general copying and taking depositions. These

[70]Similar formulations are "incidental expenses of attorneys that are routine to all litigation and routinely billed to private clients," Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43, 54 (D.C. Cir. 1987), vacated in part on other grounds, 857 F.2d 1516 (D.C. Cir. 1988); "reasonable out-of-pocket expenditures of the attorney beyond normal overhead," Allen v. Freeman, 122 F.R.D. 589, 591 (S.D. Fla. 1988).

were taxable as costs under 28 U.S.C. § 1920. The plaintiff also sought recovery of costs of attorney postage, attorney long-distance telephone use, and attorney mileage (on the attorney's car, not on the attorney). These items, said the court, were not taxable as costs under 28 U.S.C. § 1920, but could be awarded as part of the attorney's fees under the "supplemental power" of the Title VII fee provision.

Similarly, the fee provision of the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d), has been held to permit an award of otherwise nontaxable items. Save Our Cumberland Mountains, Inc. v. Hodel, 826 F.2d 43, 53–54 (D.C. Cir. 1987), vacated in part on other grounds, 857 F.2d 1516 (D.C. Cir. 1988).

The fees and expenses of experts have produced a minor flood of litigation. The Supreme Court has held that a fee-shifting statute does not include expert fees unless specified. West Virginia University Hospitals, Inc. v. Casey, 499 U.S. 83 (1991). The case includes an extensive listing of statutes containing the requisite authority. Id. at 88–89 and n.4. One of the Court's examples was EAJA subsection (d), which authorizes "fees and other expenses" and defines expenses as including the reasonable expenses of expert witnesses and of "any study, analysis, engineering report, test or project" found necessary for the preparation of the case. 28 U.S.C. § 2412(d)(2)(A).

The court considered this authority in City of Brunswick v. United States, 661 F. Supp. 1431 (S.D. Ga. 1987), rev'd on other grounds, 849 F.2d 501 (11th Cir. 1988). The court held that the listing of permissible expenses in subsection (d) is illustrative rather than exclusive, and, consistent with Casey, that expert witness expenses under that subsection are not limited by the statutory amounts specified in 28 U.S.C. § 1821, nor is an award limited to the fees of experts who actually testified as witnesses. 661 F. Supp. at 1444–45. Thus, while the fees and expenses of expert witnesses are limited by 28 U.S.C. § 1821 when they are being taxed as costs under 28 U.S.C. §§ 2412(a) and 1920, they are not so limited when they are allowable as expenses under a fee-shifting statute. In agreement that the listing is not exclusive is, e.g., Oliveira v. United States, 827 F.2d 735, 744 (Fed. Cir. 1987).

In 1991, Congress amended 42 U.S.C. § 1988 (the statute involved in Casey) and the fee-shifting provision of Title VII of the Civil Rights Act of 1964 to expressly add expert fees and thus conform to the requirements of Casey. Civil Rights Act of 1991, Pub. L. No. 102-166, § 113, 105 Stat. 1071, 1079

(1991). Nevertheless, the Casey holding continues to apply to any fee-shifting statutes which do not expressly include expert fees. E.g., Gray v. Phillips Petroleum Co., 971 F.2d 591 (10th Cir. 1992) (Age Discrimination in Employment Act).

An item starting to appear with increased frequency is the expenses of computerized legal research. While not taxable as a cost, computerized legal research has been viewed as an allowable expense under fee-shifting statutes. E.g., Hirschey v. FERC, 777 F.2d 1, 6 (D.C. Cir. 1985) (EAJA subsection (d)); Allen v. Freeman, 122 F.R.D. 589, 592 (S.D. Fla. 1988) (42 U.S.C. § 1988); Keyava Construction Co. v. United States, 15 Cl. Ct. 135, 140–41 (1988) (EAJA subsection (d)). Contra Corsair Asset Management, Inc. v. Moskovitz, 142 F.R.D. 347, 353 (N.D. Ga. 1992) (court regarded research as an element of overhead, noting that lawyers do not customarily bill separately for use of the firm library).

To sum up, costs and expenses are two different things. A prevailing party may be able to recover either or both, depending on the particular statutory authorities involved. Allowable expenses may also vary under different fee statutes. A useful starting point for further exploration is the previously cited article by Laura B. Bartell, 101 F.R.D. at 589–96.

When expenses are allowed together with attorney's fees under a fee statute, the expenses are part of the same award and will be payable from the same source as the fees.

From the payment perspective, the costs-expenses distinction will be relevant in some cases and not relevant in others. In the typical Title VII case against a federal agency, for example, the distinction is largely immaterial because both are paid from the judgment appropriation. In an EAJA subsection (d) case, however, the distinction becomes important because the costs under 28 U.S.C. § 2412(a) will be payable from the judgment appropriation whereas the fees and expenses are payable from agency funds. See, e.g., B-231771, December 7, 1988.

f. Summary

A prevailing party in a civil action against the United States, a federal agency, or a federal official in his or her official capacity, may be able to recover attorney's fees under one of three mutually exclusive approaches.

First, if there is a fee-shifting statute applicable to the case which specifically includes the United States, such as Title VII of the Civil Rights Act or the Freedom of Information Act, then that statute and the standards under it will govern. Cases in this category are wholly independent of the Equal Access to Justice Act.

Second, if there is a fee-shifting statute applicable to the case which does not specifically include the United States, or if there is an applicable common-law basis for a fee award, fees must be sought under EAJA subsection (b). The standards under subsection (b) and the particular statute or common-law exception will govern. The "substantially justified" standard of subsection (d) has no relevance to this category.

Third, if neither of the above is the case, then fees must be sought under EAJA subsection (d), alleging that the government's position was not substantially justified.

Unless otherwise provided for in a particular case, costs taxed under 28 U.S.C. § 2412(a), and fees and expenses awarded under a statute specifically applicable to the United States or under EAJA subsection (b), except for bad faith awards, are payable from the permanent judgment appropriation. Fees and expenses under EAJA subsection (d), and bad faith awards under subsection (b), are payable from agency operating appropriations.

G. Interest

The computation and addition of interest, where proper, is part of GAO's judgment certification process. Entitlement to interest has generated a degree of controversy unapproached by any other aspect of the payment of judgments. The law in this area is complex and often highly technical, as the discussion in this section will reflect.

1. The No-Interest Rule

The starting point is the rule, derived essentially from the concept of sovereign immunity, that interest is not recoverable against the United States unless expressly provided by statute or contract. The Supreme Court has recognized and applied this rule on numerous occasions. E.g., Library of Congress v. Shaw, 478 U.S. 310 (1986);[71] United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951); United States v. N.Y. Rayon Importing Co., 329 U.S. 654 (1947); United States ex rel. Angarica v. Bayard, 127 U.S. 251 (1888).

The right to recover interest from the United States requires a waiver of sovereign immunity "separate from a general waiver of immunity to suit."

[71]The cases cited in the text are cited solely to document the no-interest rule. The right to recover interest in the specific context, as in Shaw for example, may have subsequently changed.

Shaw, 478 U.S. at 314; Thompson v. Kennickell, 797 F.2d 1015, 1017 (D.C. Cir. 1986), cert. denied, 480 U.S. 905; Jetco, Inc. v. United States, 11 Cl. Ct. 837, 850 (1987). This does not mean that the interest waiver must be in a separate statute; what it means is that a waiver of sovereign immunity with respect to interest must itself be explicit, and will not be inferred from a general waiver of immunity to suit.

Interest may be of two types: postjudgment (interest on the judgment) or prejudgment (interest on the claim upon which the judgment was founded). As the cases cited throughout this discussion make clear, the no-interest rule applies equally to both types. Where prejudgment interest is authorized, it may, depending on the terms of the relevant statute, run to the date of payment or the date of the judgment. In the latter case, the prejudgment interest becomes part of the judgment amount to which any authorized postjudgment interest is applied. See, e.g., B-111945, November 13, 1952.

Courts are not authorized to award interest against the United States on the basis of equity or because payment has been delayed, even if the delay can be termed unreasonable. United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 660 (1947); Tillson v. United States, 100 U.S. 43, 47 (1879); Lichtman v. Office of Personnel Management, 835 F.2d 1427 (Fed. Cir. 1988); Gray v. Dukedom Bank, 216 F.2d 108, 110 (6th Cir. 1954); Muenich v. United States, 410 F. Supp. 944, 947 (N.D. Ind. 1976); United States v. James, 301 F. Supp. 107, 132 (W.D. Tex. 1969); Economy Plumbing & Heating Co. v. United States, 470 F.2d 585, 594 (Ct. Cl. 1972); Hoffman Construction Co. v. United States, 7 Cl. Ct. 518, 527–28 (1985); B-214289, October 23, 1985 (non-decision letter).

Interest is often found in masquerade but the courts will unmask the intruder. In United States v. Mescalero Apache Tribe, 518 F.2d 1309 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976), the Court of Claims stated:

> "[The] no-interest rule applies to any incremental damages sought to be assessed against the United States, whether it be designated interest, as such, or is designated by some other terminology which has the same effect . . . . [Emphasis in original.]
>
> "[T]he character or nature of interest cannot be changed by calling it damages, loss, earned increment, just compensation, discount, offset, or penalty, or any other term, because it is still interest and the no-interest rule applies to it." Id. at 1321, 1322 (internal quotation marks omitted).

In Library of Congress v. Shaw, noted above, the award was not called "interest," but was designated as an increase in a fee award to compensate for delay in payment. In invalidating the award, the Supreme Court brushed aside the designation and looked at the substance. The Shaw Court cited Mescalero Apache Tribe with approval, adding that "the force of the no-interest rule cannot be avoided simply by devising a new name for an old institution." 478 U.S. at 321. Similarly unauthorized is interest disguised as "liquidated damages" under the Fair Labor Standards Act. Doyle v. United States, 931 F.2d 1546 (Fed. Cir. 1991). See also United States ex rel. Angarica v. Bayard, 127 U.S. 251, 259–60 (1888); Ramsey v. United States, 101 F. Supp. 353, 356 (Ct. Cl. 1951), cert. denied, 343 U.S. 977; Moran Brothers Co. v. United States, 61 Ct. Cl. 73, 106 (1925); B-226231, October 23, 1987.

For purposes of the no-interest rule, it makes no difference whether a claimant was obliged to borrow money and pay interest on it, or merely lost the use of the money but was not forced to borrow. Komatsu Manufacturing Co. v. United States, 131 F. Supp. 949 (Ct. Cl. 1955) and cases cited.

There are two nonstatutory exceptions to the no-interest rule, noted in the Shaw decision, 478 U.S. at 317 n.5. The first is a taking of property or a property interest which entitles a claimant to just compensation under the Fifth Amendment of the Constitution. The second is "where the Government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." Id. Each of these situations will be discussed separately later in this section.

If a judgment is silent as to interest, or if it provides for interest in general terms such as "interest as authorized by law" or "interest as provided by law," the settlement process will include the determination of whether interest is authorized. In cases where interest is payable, the computation of that interest (i.e., the determination of the proper beginning and ending dates and the application of the proper rate of interest) is part of the settlement process. Absent some statutory provision to the contrary, GAO will use the formula traditionally employed by the accounting officers and described in Chapter 12 under the Interest heading. That formula applies to judgments as well as administrative claims. See B-60952, July 2, 1953.

As we will see, the no-interest rule has lost many of its teeth by virtue of the nonstatutory exceptions and a large number of statutory interest provisions. However, in situations not covered by either a statutory authorization or one of the nonstatutory exceptions, it continues to apply with full force. A few examples are Doyle v. United States, 931 F.2d 1546 (Fed. Cir. 1991) (Fair Labor Standards Act); Lichtman v. Office of Personnel Management, 835 F.2d 1427 (Fed. Cir. 1988) (wrongfully denied annuity benefits); Sansom v. United States, 707 F. Supp. 1296 (N.D. Fla. 1989) (attorney's fees under 26 U.S.C. § 7430); Ulmet v. United States, 19 Cl. Ct. 527 (1990) (back pay, allowances, and back retirement pay to military officer).

2. Specific Interest Statutes

Congress has authorized the recovery of interest, subject to varying conditions, in a number of specific contexts. If one of these specific interest statutes applies to a given case, then that statute will of course govern. In some cases interest is a statutory entitlement; in others it is merely an authorization and must be affirmatively awarded. The following listing is intended to be reasonably comprehensive as of the date of this publication.

a. Back Pay Act

The Back Pay Act, 5 U.S.C. § 5596, authorizes the payment of back pay to a federal employee who is found by "appropriate authority," including a court, to have suffered a withdrawal or reduction of all or part of his or her pay, allowances, or differentials as the result of an unjustified or unwarranted personnel action.

Prior to late 1987, interest was not authorized on claims or judgments under the Back Pay Act. E.g., Fitzgerald v. Staats, 578 F.2d 435 (D.C. Cir. 1978), cert. denied, 439 U.S. 1004; Van Winkle v. McLucas, 537 F.2d 246 (6th Cir. 1976), cert. denied, 429 U.S. 1093.

This was changed by legislation in December 1987. Public Law 100-202, the continuing resolution for fiscal year 1988, added a new subsection (b)(2) to 5 U.S.C. § 5596 (100 Stat. 1329-430). Under subsection (b)(2), back pay under the Act "shall be payable with interest," calculated from the effective date of the withdrawal or reduction of pay to a date not more than 30 days prior to the date of payment. The applicable interest rate is the rate for tax overpayments determined under section 6621(a)(1) of the Internal Revenue Code, 26 U.S.C. § 6621(a)(1). Interest is payable from the same source as the back pay in a given case, and is to be compounded daily. The interest provision is limited to the back pay itself and does not apply to attorney's fees.

Subsection (b)(2) applies to administrative awards under the Back Pay Act, which are payable from agency funds, as well as judicial awards. The Office of Personnel Management's implementing regulations are found at 5 C.F.R. § 550.806 (1992).

The Back Pay Act does not apply to military personnel. Sanders v. United States, 594 F.2d 804 (Ct. Cl. 1979). Thus, pay cases involving military personnel remain subject to the no-interest rule. Ulmet v. United States, 19 Cl. Ct. 527 (1990).

b. Wrongful Tax Levy

Under section 7426 of the Internal Revenue Code, 26 U.S.C. § 7426, if the Internal Revenue Service has seized money or property under a tax levy, a person claiming an interest in the property levied upon (other than the person against whom the tax was assessed) can sue to challenge the propriety of the levy.

If the court determines that the levy was improper, 26 U.S.C. § 7426(g) provides for the judgment to include interest. If the levy was executed on money, interest runs from the date the IRS received the money to the date of payment of the judgment. If the levy was executed on other property which has been sold, interest runs from the date of the sale to the date of payment of the judgment. The applicable rate of interest is the tax overpayment rate determined under 26 U.S.C. § 6621(a)(1). Interest is to be compounded daily. Id. § 6622(a).

In Hammond Co. v. United States, 568 F. Supp. 309 (S.D. Cal. 1983), the IRS issued a notice of levy on money which had been seized by the Federal Bureau of Investigation. The levy was subsequently found to be improper. The court refused to apply a theory of "constructive possession" under section 7426(g), and denied interest for the time the money had been held by the FBI. Under the statute, the court pointed out, interest runs from the date of receipt by the IRS, not the date of the levy.

c. Tax Refund Judgments

When a taxpayer receives a judgment "for any overpayment in respect of any internal revenue tax," 28 U.S.C. § 2411 provides that "interest shall be allowed" from the date of the payment or collection of the overpayment to a date, to be determined by the IRS, preceding the date of the refund check by not more than 30 days.

As with judgments under 26 U.S.C. § 7426, the applicable interest rate is the tax overpayment rate (26 U.S.C. § 6621(a)(1)), which, under 26 U.S.C. § 6622(a), is to be compounded daily.

The statute also provides that a tender of payment (with interest) by check any time after the judgment becomes final will stop the running of interest, whether or not the judgment creditor accepts the check.

d. Equal Access to Justice Act

The original enactment of the Equal Access to Justice Act in 1980 made no mention of interest. This did not prevent claimants from seeking interest, but the courts held that there was no authority for interest on fee awards under either subsection (b) or subsection (d) of 28 U.S.C. § 2412. International Woodworkers of America v. Donovan, 769 F.2d 1388 (9th Cir. 1985); Arvin v. United States, 742 F.2d 1301 (11th Cir. 1984); Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 735 F.2d 895 (5th Cir. 1984).

When EAJA was made permanent in 1985, Congress added an interest provision, codified at 28 U.S.C. § 2412(f):

> "If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance."

Note that this is a limited authorization. Interest is not automatic, but is payable only if there has been an unsuccessful appeal by the government. The rate is the 52-week Treasury bill rate determined under 28 U.S.C. § 1961(a), and the statute specifies the beginning and ending dates. An illustrative case making an award under this provision is Haitian Refugee Center v. Meese, 791 F.2d 1489, 1501 (11th Cir. 1986).

The legislative history states that this provision "was adopted at the recommendation of the Comptroller General and meets the objections found in the President's veto message."[72] A brief explanation may be helpful since the reference to the Comptroller General does not refer to any formal GAO document and this explanatory material, to our knowledge, cannot be found elsewhere.

Legislation to make EAJA permanent had passed both Houses of Congress and had been sent to the President in late 1984. It included a provision which would have required interest on all awards under 28 U.S.C. § 2412 not paid within 60 days from the date of the award. GAO found several

[72]H.R. Rep. No. 120, 99th Cong., 1st Sess. 19 (1985), reprinted in 1985 U.S. Code Cong. & Admin. News 132, 147.

problems with the interest provision. In many respects, it would have had the undesirable result of giving attorneys more favorable treatment than their clients. Also, although the government's payment record in this area is generally good, payment within 60 days would be impossible in most cases since the payment process cannot begin until a determination is made with respect to appeal. The problems were outlined in a letter to the relevant congressional committees, B-40342.4, October 5, 1984.

The scheduled adjournment of Congress made consideration of these comments impossible. However, the President agreed, found other portions of the bill objectionable as well, and, while endorsing the underlying policy of EAJA, vetoed the legislation on November 8, 1984.[73]

Congress resumed consideration of the legislation the following year. The interest provision now found at 28 U.S.C. § 2412(f) was designed to address the problems identified by the President and the Comptroller General. The basic thrust—interest only in the case of an unsuccessful appeal by the United States—was patterned after similar provisions in 31 U.S.C. § 1304(b) and 28 U.S.C. § 2516(b), to be discussed later in this section. Unlike 31 U.S.C. § 1304(b), however, interest under 28 U.S.C. § 2412(f) is computed from the date of the award and there is no requirement for filing with GAO or with anyone else. The reason is that subsection 2412(f) applies to all awards under section 2412—costs under subsection (a) and fees under subsections (b) and (d). Since some subsection (b) awards and all subsection (d) awards are paid directly by the agency concerned and are not processed through GAO, an attempt to incorporate the filing requirement of 31 U.S.C. § 1304(b) would have produced an interest provision of unwarranted complexity. In informal consultations, GAO agreed that this new provision would adequately meet the concerns expressed in 1984.

e. Court of International Trade

The Court of International Trade was created by the Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727. Under 28 U.S.C. § 2644, if the plaintiff in an action under section 515 of the Tariff Act of 1930 (19 U.S.C. § 1515) obtains monetary relief by judgment or stipulation, interest "shall be allowed." The monetary relief consists of the refunding of liquidated duties or other customs charges or exactions. Interest runs from the date of the filing of the summons to the date of the refund, at the rate established under section 6621 of the Internal Revenue Code.

[73]Memorandum of Disapproval of H.R. 5479, 20 Weekly Comp. Pres. Doc. 1814 (November 8, 1984).

Through the end of 1993, Congress has not amended 28 U.S.C. § 2644 to reflect the 1986 amendment to 26 U.S.C. § 6621 which established separate overpayment and underpayment rates.

f. Judgment Offsets

As discussed earlier in this chapter, GAO has statutory authority to withhold payment of a judgment in order to set off debts owed to the United States by the judgment creditor. 31 U.S.C. § 3728. The statute includes an interest provision, 31 U.S.C. § 3728(c). If the government ultimately recovers less than the amount withheld, the balance must be paid over to the plaintiff with 6 percent interest for the time it has been withheld.

g. Contract Disputes Act

Section 12 of the Contract Disputes Act of 1978, 41 U.S.C. § 611, directs the payment of interest on contract claims from the date the contracting officer receives the claim to the date of payment. It applies whether the claim is allowed by the contracting officer, a board of contract appeals, or a court. The statute is described and discussed further under the Interest heading in Chapter 12.

h. Reimbursement to Medicare Providers

If a Medicare provider seeks judicial review of an adverse determination by the Provider Reimbursement Review Board, the reviewing court may award interest in accordance with 42 U.S.C. § 1395oo(f)(2). A case discussing the basic statutory requirements is Tucson Medical Center v. Sullivan, 947 F.2d 971 (D.C. Cir. 1991). The courts are not in agreement as to the proper rate of interest under this provision. See Sunshine Health Systems, Inc. v. Bowen, 842 F.2d 1097 (9th Cir. 1988), cert. denied, 488 U.S. 965; St. Joseph's Hospital v. Blue Cross and Blue Shield Ass'n, 721 F. Supp. 1160 (N.D. Cal. 1989); St. Agnes Hospital v. Bowen, 707 F. Supp. 24 (D.D.C. 1989).

i. Title VII of the Civil Rights Act

In the first wave of interest litigation to arise after Title VII was made applicable to the federal government, the courts held that there was no authority to award interest.[74] When the Back Pay Act was amended in 1987 to include an interest provision, some courts found the requisite waiver of

[74]Saunders v. Claytor, 629 F.2d 596 (9th Cir. 1980), cert. denied, 450 U.S. 980; Blake v. Califano, 626 F.2d 891 (D.C. Cir. 1980); DeWeever v. United States, 618 F.2d 685 (10th Cir. 1980); Fischer v. Adams, 572 F.2d 406 (1st Cir. 1978); Richerson v. Jones, 551 F.2d 918 (3d Cir. 1977). This result applied to attorney's fees as well as back pay awards. Library of Congress v. Shaw, 478 U.S. 310 (1986).

sovereign immunity in the amended Back Pay Act, but they were not sure how far they could stretch this approach.[75]

In 1991, Congress amended Title VII (specifically, 42 U.S.C. § 2000e-16) to specify that "the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties." Civil Rights Act of 1991, Pub. L. No. 102-166, § 114, 105 Stat. 1071, 1079. The legislative history makes clear that this authority is intended to apply to attorney's fees as well as awards of back pay and other monetary damages. H.R. Rep. No. 40(I), 102d Cong., 1st Sess. 85–87 (1991), and H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 33–34 (1991), reprinted in 1991 U.S. Code Cong. & Admin. News 623–25 and 727, respectively. Apart from this, precisely how the authority is to be applied is not specified.

j. Superfund

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) was enacted in 1980 and substantially amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1613 (1986).

Section 120, 42 U.S.C. § 9620, makes federal agencies liable under section 107 to the same extent as any nongovernmental entity. Section 107, 42 U.S.C. § 9607, prescribes liability for response costs and other items resulting from the release of certain hazardous substances. Under the amended section 107(a), a judgment for amounts recoverable under that section is to include interest at the rate specified for interest on investments of the Hazardous Substance Superfund determined in accordance with 26 U.S.C. § 9507(d). Section 106(b)(2), 42 U.S.C. § 9606(b)(2), includes similar language with respect to claims for reimbursement from Superfund. It appears that these provisions apply to judgments against the United States. See Santa Fe Pacific Realty Corp. v. United States, 780 F. Supp. 687, 696–97 (E.D. Cal. 1991); B-245482, April 8, 1992 (internal memorandum).[76]

[75]Brown v. Secretary of the Army, 918 F.2d 214 (D.C. Cir. 1990), aff'g Mitchell v. Secretary of Commerce, 715 F. Supp. 409 (D.D.C. 1989), and Brown v. Marsh, 713 F. Supp. 20 (D.D.C. 1989), cert. denied, 112 S. Ct. 57; Smith v. Brady, 744 F. Supp. 925 (N.D. Cal. 1990); Lee v. Brady, 741 F. Supp. 990 (D.D.C. 1990); Parker v. Burnley, 703 F. Supp. 925 (N.D. Ga. 1988). Contra, Roepsch v. Bentsen, 846 F. Supp. 1363 (E.D. Wis. 1994).

[76]The CERCLA/SARA legislation is enormously complex, and federal liability may arise in different contexts. Judgments and Justice Department compromise settlements for response costs or natural resource damages under CERCLA are, as a general proposition, payable under 31 U.S.C. § 1304 since there is nothing in the Superfund legislation or legislative history to make them "otherwise provided for," although actual determinations are made on a case-by-case basis. 73 Comp. Gen. 46 (1993).

k. Suits in Admiralty Act and Public Vessels Act

A money judgment against the United States in a "libel in personam" under the Suits in Admiralty Act may include interest to the date of payment. The rate is 4 percent, except that a higher rate is allowable if stipulated in the contract, if any, upon which the suit was based. 46 U.S.C. App. § 743. Interest may not accrue prior to the filing of the suit except pursuant to an express contract stipulation. Id. § 745. Sample cases are Central Rivers Towing, Inc. v. City of Beardstown, 750 F.2d 565 (7th Cir. 1984); SCNO Barge Lines, Inc. v. Sun Transportation Co., 595 F. Supp. 356 (E.D. Mo. 1984).

Compound interest is not authorized. In one case, lower courts had awarded 4 percent prejudgment interest to the date of the decree, and 4 percent postjudgment interest on the sum of principal plus prejudgment interest from the date of the decree to the date of payment. "Compound interest is not presumed to run against the United States" said the Supreme Court, reversing the award of compound interest as improper. United States v. Isthmian Steamship Co., 359 U.S. 314, 325 (1959).

The Public Vessels Act incorporates the interest provisions of the Suits in Admiralty Act, except that interest may not accrue prior to the date of the judgment except pursuant to an express contract stipulation. 46 U.S.C. App. § 782. A sample case is Blevins v. United States, 769 F.2d 175 (4th Cir. 1985).

3. Nonstatutory Exceptions

a. Fifth Amendment Takings

As noted earlier, there are two nonstatutory exceptions to the no-interest rule. The first is Fifth Amendment takings. It must be emphasized that the term "just compensation" does not in and of itself create or imply an entitlement to interest. In order for the right to interest to exist independent of statute, there must be a cognizable claim to just compensation under the Fifth Amendment. Thus, where the Fifth Amendment is not involved, a statute providing for just compensation is not sufficient to authorize interest absent an express provision for interest. United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951); United States v. 106.64 Acres of Land, 264 F. Supp. 199 (D. Neb. 1967). Similarly, if an interest provision is derived from statute in a situation where interest is not required by the Fifth Amendment, Congress can repeal the provision as long as the repeal does not affect rights which have become vested by final judgment. 5 Op. Off. Legal Counsel 235 (1981).

The taking exception is a discrete concept and cannot be used to open the back door to otherwise unauthorized interest awards. Thus, failure to pay interest on a claim or judgment, even a claim for refund of an overpayment, is not a "taking" of private property in violation of the Fifth Amendment. Getty Oil Co. v. United States, 767 F.2d 886 (Fed. Cir. 1985). Similarly, delay in paying a judgment is not a constitutional taking. Alaska Airlines, Inc. v. Johnson, 8 F.3d 791, 798 (Fed. Cir. 1993). "A party cannot be said to be deprived of his property in a judgment because at the time he is unable to collect it." Louisiana ex rel. Folsom v. Mayor of New Orleans, 109 U.S. 285, 289 (1883). See also B-173904, February 18, 1972 (GAO rejected claim that delay in payment of judgment resulting from need to get specific congressional appropriation constituted a compensable Fifth Amendment taking).

(1) Direct condemnation

Apart from the relatively infrequent legislative taking, the United States acquires land by condemnation either by invoking the Declaration of Taking Act (40 U.S.C. § 258a), in which event title vests in the United States the moment the declaration is filed, or by following the "complaint only" procedure (authorized generally by 40 U.S.C. § 257), under which the government does not acquire title until it tenders payment.

For takings under the Declaration of Taking Act, the Fifth Amendment would require interest even if the statute were silent. However, the Declaration of Taking Act has always included a provision for interest. Prior to 1986, the rate was fixed by statute at 6 percent. See 40 U.S.C. § 258a (1982 ed.). As interest rates rose dramatically during the 1970s, the courts began to award higher rates, holding that the statutory 6 percent rate was a floor rather than a ceiling. The rationale was that interest is an element of the just compensation mandated by the Constitution, and as such, the right cannot be diminished by Congress, in this instance by failing to amend a statutory rate which had become economically obsolete. United States v. 329.73 Acres of Land, 704 F.2d 800 (5th Cir. 1983); United States v. Blankinship, 543 F.2d 1272 (9th Cir. 1976). See also Miller v. United States, 620 F.2d 812, 837 (Ct. Cl. 1980).

In 1986, Congress amended the Declaration of Taking Act to replace the 6 percent rate with a rate based on the yield of 52-week Treasury bills. 40 U.S.C. § 258e-1, added by Pub. L. No. 99-656, 100 Stat. 3668 (1986). Interest is payable on the amount of the judgment in excess of the amount previously deposited with the court, and runs from the date of taking to the date of payment. The rate is the same as the rate determined under 28 U.S.C. § 1961(a), discussed later in this section, and is compounded annually. The one difference is that, under 40 U.S.C. § 258e-1, the rate is adjusted at the beginning of each additional year.

The interest provision of the Declaration of Taking Act applies only in the absence of a governing contract. Albrecht v. United States, 329 U.S. 599 (1947); Oliver v. United States, 155 F.2d 73 (8th Cir. 1946).

In a "complaint only" condemnation, the judgment establishing the value of the property operates essentially as an offer which the government may choose to accept by tendering payment. The taking does not occur unless and until the government tenders payment. Kirby Forest Industries v. United States, 467 U.S. 1 (1984). The judgment does not include interest because the value of the property can rise or fall before the "taking" occurs, but there must be some procedure for modifying the award to account for material changes in value between the time of valuation and time of payment. Id. at 16–19.

(2) Inverse condemnation

The jurisdictional basis for inverse condemnation suits is the Tucker Act—28 U.S.C. §§ 1346(a)(2) (district courts, claims under $10,000) and 1491 (Court of Federal Claims, claims over $10,000). The essence of the suit is a claim for a taking deemed compensable under the Fifth Amendment. Thus, inverse condemnation judgments commonly include interest. The Declaration of Taking Act, of course, does not apply.

The Court of Federal Claims uses the Contract Disputes Act rate for periods commencing January 1, 1980, in Fifth Amendment taking cases. Whitney Benefits, Inc. v. United States, 18 Cl. Ct. 394, 416 (1989), aff'd, 926 F.2d 1169 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 406; Houser v. United States, 12 Cl. Ct. 454 (1987); Jones v. United States, 3 Cl. Ct. 4 (1983).[77] The court adopted this approach "[f]or purposes of uniformity in compensation of claims against the Government, flexibility in administration, notice to the public, and judicial efficiency." Foster v. United States, 3 Cl. Ct. 738, 745 (1983), aff'd mem., 746 F.2d 1491 (Fed. Cir. 1984), cert. denied, 471 U.S. 1053. The interest has traditionally been simple interest. Yaist v. United States, 17 Cl. Ct. 246, 261–62 (1989). However, the Court of Federal Claims has awarded compound interest where there has been a long delay

[77]See also Formanek v. United States, 26 Cl. Ct. 332, 341 n.11 (1992); Economic Development and Industrial Corp. v. United States, 13 Cl. Ct. 590 (1987); Henry v. United States, 8 Cl. Ct. 389 (1985); Cloverport Sand & Gravel Co. v. United States, 6 Cl. Ct. 178 (1984).

between the "taking" and payment. Bowles v. United States, 31 Fed. Cl. 37 (1994); Whitney Benefits, Inc. v. United States, 30 Fed. Cl. 411 (1994).

(3) Delay compensation in patent infringement cases

The unauthorized manufacture or use of a patented device by or for the use of the United States is viewed as the taking of a property interest analogous to an eminent domain taking. Calhoun v. United States, 453 F.2d 1385, 1391 (Ct. Cl. 1972). The remedy is a suit in the Court of Federal Claims under 28 U.S.C. § 1498 for "reasonable and entire compensation." As an application of the Fifth Amendment taking concept, patent infringement judgments against the United States may include interest. Waite v. United States, 282 U.S. 508 (1931). Interest in patent infringement cases has become known as "delay compensation."

The rate to be applied as delay compensation in patent infringement cases has caused its share of litigation. Prior to 1977, the Court of Claims applied a flat 4 percent rate. In Pitcairn v. United States, 547 F.2d 1106 (Ct. Cl. 1977), cert. denied, 434 U.S. 1051, the court held that the 4 percent rate had become economically outmoded, and established a stepped percentage rate varying from 4 percent for the years 1947–1955 to 7.5 percent for the years 1971–1975. In Tektronix, Inc. v. United States, 552 F.2d 343, 352–53 (Ct. Cl. 1977), the court announced that it would apply the Pitcairn rates in future cases unless, for years after 1975, the claimant could affirmatively demonstrate that the rate should differ from the 7.5 percent rate set for 1971–1975.

In subsequent cases, the Court of Claims and its successors have used the rates determined under section 6621 of the Internal Revenue Code for post-1975 periods. Dynamics Corp. of America v. United States, 5 Cl. Ct. 591 (1984), aff'd in part and rev'd in part on other grounds, 766 F.2d 518 (Fed. Cir. 1985); Bendix Corp. v. United States, 676 F.2d 606 (Ct. Cl. 1982). Subsequent to the 1986 amendment to 26 U.S.C. § 6621 which established separate overpayment and underpayment rates, the court has referred to the rate for "overpayments" in Dynamics Corp., 5 Cl. Ct. at 617, and the "rate paid on tax refunds" in ITT Corp. v. United States, 17 Cl. Ct. 199, 239 (1989). (The court used the 52-week Treasury bill rate in ITT Corp., based on the agreement of the parties.)

It is also possible that the court may some day establish a common rate for both inverse condemnation and patent infringement cases, although it has thus far declined to do so.[78]

As with inverse condemnation judgments, delay compensation in patent infringement cases has traditionally been limited to simple interest. Dynamics Corp., 5 Cl. Ct. at 619. However, the Court of Appeals for the Federal Circuit has suggested that compound interest may be more appropriate in certain cases. Dynamics Corp., 766 F.2d 518 at 520. Following this suggestion, the Claims Court awarded compound interest in ITT Corp., cited above.

GAO will not automatically add interest in a patent infringement case. It is viewed as a judicial function and must be expressly awarded in the judgment. 59 Comp. Gen. 380 (1980).

Delay compensation has been denied where a judgment under 28 U.S.C. § 1498 was based on a stipulation of settlement which purported to be in full satisfaction of all claims and which did not specifically provide for interest. Simmonds Precision Products, Inc. v. United States, 183 Ct. Cl. 969 (1968); Regent Jack Mfg. Co. v. United States, 179 Ct. Cl. 924 (1967); 59 Comp. Gen. 380 (1980).

b. Commercial Ventures

The second nonstatutory exception to the no-interest rule is what we will call the “commercial venture” exception. It originated essentially with the Supreme Court’s decision in Standard Oil Co. v. United States, 267 U.S. 76 (1925). The United States, under World War I legislation, had insured a steamship against certain war risks. The steamship sunk, and the main issue in the litigation was whether the insurance policy applied to the facts of the case. The Supreme Court found the policy applicable, and also awarded interest. Speaking for the Court, Justice Holmes said:

> “Some question was made as to the allowance of interest. When the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business.”

Id. at 79. Five years later, in a case often cited in tandem with Standard Oil, the Court distinguished Standard Oil and denied interest to the beneficiary

[78]“This court is of the opinion that the goal of establishing a uniform policy regarding delay compensation in eminent domain cases, although desirable, must give way to the established law that there is no fixed formula for establishing compensation for fifth amendment takings.” ITT Corp., 17 Cl. Ct. at 236.

of a soldier under a government-issued life and disability insurance policy. United States v. Worley, 281 U.S. 339 (1930).

One group of "commercial venture" cases follows fairly directly from Standard Oil. In Bituminous Casualty Corp. v. Lynn, 503 F.2d 636 (6th Cir. 1974), the court awarded interest on a recovery under a reinsurance contract issued by the Department of Housing and Urban Development. Citing the Standard Oil and Worley cases, the court noted the "well defined" exception to the no-interest rule when a federal agency "embarks on a business venture" with the power to sue and be sued. Id. at 643. The court stated three grounds for the interest award: HUD's sue-and-be-sued clause, the "self-supporting nature" of the HUD program, and the fact that the transactions resembled those of private parties. Id. at 645.

More recently, the Court of Appeals for the Fifth Circuit analyzed Standard Oil and Worley and denied interest in R&R Farm Enterprises, Inc. v. Federal Crop Insurance Corp., 788 F.2d 1148 (5th Cir. 1986) (rice crop insurance policy issued by FCIC), and in A.L.T. Corp. v. Small Business Administration, 823 F.2d 126 (5th Cir. 1987). These cases state the test as whether the agency's activity is primarily commercial and whether it aspires to profitability. R&R, 788 F.2d at 1153; A.L.T., 823 F.2d at 128.[79]

Another group of cases involves the United States Postal Service. The court in Nagy v. United States Postal Service, 773 F.2d 1190 (11th Cir. 1985), awarded interest on back pay in a Title VII discrimination case. Similar holdings are Perez v. United States, 830 F.2d 54 (5th Cir. 1987) (Federal Tort Claims Act judgment); Hall v. Bolger, 768 F.2d 1148 (9th Cir. 1985) (interest on attorney's fees in handicap discrimination case); White v. Bloomberg, 501 F.2d 1379 (4th Cir. 1974) (interest on award under pre-1988 version of Back Pay Act). The rationale of these cases is that the Postal Service's sue-and-be-sued clause is a waiver of sovereign immunity which subjects it to liability for interest. The nature of the Postal Service's "business," its funding structure, and its self-sufficiency or lack thereof do not appear to have been significant factors apart from passing mention in Perez that the Postal Service "is designed to be self-supporting and to operate very much like a commercial business." 830 F.2d at 60.

[79]Some years earlier, in Payne v. Panama Canal Company, 607 F.2d 155 (5th Cir. 1979), the court awarded prejudgment interest in a suit under the Back Pay Act. The case was decided before the Back Pay Act was amended to expressly authorize interest. At the time, the (former) Panama Canal Company was a government corporation authorized to sue and be sued, but the extent to which the sue-and-be-sued clause weighed in the court's decision is debatable.

The courts of appeals split on whether prejudgment interest could be awarded against the Postal Service in Title VII cases under the pre-1991 version of the statute. The Eighth Circuit disagreed with Nagy and held that interest was not authorized. Loeffler v. Carlin, 780 F.2d 1365 (8th Cir. 1985), aff'd en banc, Loeffler v. Tisch, 806 F.2d 817 (8th Cir. 1986). The Supreme Court granted certiorari in the Loeffler case and agreed with the Nagy result. Loeffler v. Frank, 486 U.S. 549 (1988). For our purposes here, the crucial passage in the Court's decision is the following:

> "By launching 'the Postal Service into the commercial world,' and including a sue-and-be-sued clause in its charter, Congress has cast off the Service's 'cloak of sovereignty' and given it the 'status of a private commercial enterprise.' . . . It follows that Congress is presumed to have waived any otherwise existing immunity of the Postal Service from interest awards."

Id. at 556. The Court further noted that the interest award would not be inconsistent with the Postal Service's enabling legislation (Postal Reorganization Act), would not threaten "grave interference" with the Service's operations, and was not contrary to anything in the legislative history of the Service's sue-and-be-sued authority. Id. at 556–57. Thus, since prejudgment interest could be awarded against a private Title VII defendant, it could be awarded against the Postal Service. See also Maksymchuk v. Frank, 987 F.2d 1072 (4th Cir. 1993).

Based on the Supreme Court's Loeffler formulation, it seems clear that the "commercial venture" exception to the no-interest rule requires several things. First, there must be a sue-and-be-sued clause. Second, the agency or program involved must be one that Congress has "launched into the commercial world." A sue-and-be-sued clause alone is not enough. Pender Peanut Corp. v. United States, 21 Cl. Ct. 95 (1990). Finally, liability for interest must not be inconsistent with the relevant enabling or program legislation.

Applying the Loeffler criteria, courts have refused to apply the "commercial venture" exception to federal agencies which do not have sue-and-be-sued clauses and which are engaged in primarily governmental, as opposed to commercial, functions. McGehee v. Panama Canal Commission, 872 F.2d 1213 (5th Cir. 1989) (unlike the Panama Canal Company which it replaced, the Commission is not a corporation and was not given sue-and-be-sued authority); Wilson v. United States, 756 F. Supp. 213 (D.N.J. 1991) (former Veterans Administration).

4. 28 U.S.C. § 1961 and the Federal Courts Improvement Act

A law has been on the books since 1842 authorizing postjudgment interest on district court civil judgments against private litigants. The statute had been variously designated over the years, most recently as 28 U.S.C. § 1961 (1976 ed.). Prior to 1982, the rate was the rate allowed by state law.

The courts had uniformly held that the pre-1982 version of 28 U.S.C. § 1961 did not apply to suits against the United States. United States v. Sherman, 98 U.S. 565, 567 (1878);[80] Huntley v. Southern Oregon Sales, Inc., 104 F.2d 153 (9th Cir. 1939); Reed v. Howbert, 77 F.2d 227 (10th Cir. 1935); United States v. 125.71 Acres of Land, 54 F. Supp. 193, 195 (W.D. Penn. 1944). See also B-191028, March 27, 1978. The most recent and most definitive ruling on this point was Holly v. Chasen, 639 F.2d 795 (D.C. Cir. 1981), cert. denied, 454 U.S. 822, holding that 28 U.S.C. § 1961 did not authorize interest on a judgment awarding attorney's fees against the United States under the Freedom of Information Act.

In 1982, Congress amended 28 U.S.C. § 1961 by section 302 of the Federal Courts Improvement Act (FCIA), 96 Stat. 25, 55 (1982). Subsections (a) and (b) provide as follows:

"(a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. . . .

"(b) Interest shall be computed daily to the date of payment except as provided in section 2516(b) of this title and section 1304(b) of title 31, and shall be compounded annually."

Thus, subsection (a) replaced the former reference to rates under state law with a uniform federal rate based on the yield of 52-week Treasury bills. Subsection (b) makes interest run to the date of payment except as provided in the two referenced statutes, discussed later in this section, dealing with interest on certain judgments against the United States.

Given the cross-references in subsection (b), or perhaps even without them, it was inevitable that the applicability of 28 U.S.C. § 1961 to the United States would again come into question. It did, and with a vengeance. We cite below decisions of United States Courts of Appeals from six different circuits holding that 28 U.S.C. § 1961, as amended by the

[80]While the Court referred only to "Federal legislation" and did not cite the predecessor of 28 U.S.C. § 1961, there was at the time no other "Federal legislation" providing for postjudgment interest to which the Court could possibly have been referring.

FCIA, is not a waiver of sovereign immunity and does not by itself authorize postjudgment interest against the United States:

- District of Columbia Circuit: Thompson v. Kennickell, 797 F.2d 1015 (D.C. Cir. 1986), cert. denied, 480 U.S. 905. This case includes a detailed and comprehensive analysis of the law with respect to postjudgment interest against the United States. The court concluded that if Congress had intended "the massive increase in the government's liability for post-judgment interest" (id. at 1025) that would result from construing the FCIA as a waiver of sovereign immunity, it would have done so in a more explicit manner.
- Fourth Circuit: Blevins v. United States, 769 F.2d 175 (4th Cir. 1985).
- Fifth Circuit: A.L.T. Corp. v. Small Business Administration, 823 F.2d 126 (5th Cir. 1987). See also Knights of the Ku Klux Klan v. East Baton Rouge Parish School Board, 735 F.2d 895 (5th Cir. 1984).
- Eighth Circuit: Rimmel v. Mercantile Trust Co. National Association, 774 F.2d 279 (8th Cir. 1985).
- Ninth Circuit: Bernardi v. Yeutter, 951 F.2d 971, 976 (9th Cir. 1991); International Woodworkers v. Donovan, 769 F.2d 1388 (9th Cir. 1985).
- Eleventh Circuit: Arvin v. United States, 742 F.2d 1301 (11th Cir. 1984).

Several district courts have made the same point. E.g., Wilson v. United States, 756 F. Supp. 213 (D.N.J. 1991); Easley v. United States, 719 F. Supp. 145 (W.D.N.Y. 1989); Sansom v. United States, 707 F. Supp. 1296 (N.D. Fla. 1989); Squillacote v. United States, 626 F. Supp. 127 (E.D. Wis. 1985). And see In re Tecumseh Construction Co., 157 B.R. 471 (Bankr. E.D. Cal. 1993).

It should be clear from other portions of our discussion that Congress has chosen to deal with the topic of interest against the United States on a situational basis, enacting or amending legislation in specific contexts as deemed necessary or desirable. This long-standing pattern is further evidence that Congress is not likely to have changed the fundamental premise of 28 U.S.C. § 1961 without doing so in a much more explicit manner. See, e.g., Arvin, 742 F.2d at 1304.

Thus, it would appear safe to regard the proposition as settled that 28 U.S.C. § 1961 does not waive the government's sovereign immunity with respect to postjudgment interest. It may be relevant in other ways, such as prescribing the proper rate of interest in certain cases, but the underlying authority to award the interest must be found elsewhere.

5. Judgments of the Court of Federal Claims

The Court of Claims was established in 1855[81] and empowered to render judgments against the United States in 1863.[82] In 1982, it was replaced with two new courts. The trial function (the former trial commissioners) became the United States Claims Court and the appellate function became the Court of Appeals for the Federal Circuit.[83] In 1992, the Claims Court was renamed the Court of Federal Claims.[84] Prior to 1982, there was no intermediate appellate court and appeals from Court of Claims judgments were taken directly to the Supreme Court. Since 1982, appeals go first to the Federal Circuit and then to the Supreme Court.

We address here situations not governed by any of the previously noted specific interest statutes or nonstatutory exceptions.

Prejudgment interest is governed by 28 U.S.C. § 2516(a), which essentially codifies the traditional no-interest rule:

> "Interest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof."

The statute means exactly what it says. The authority to award interest may not be implied, nor may it be derived from some expression of intent not reflected in explicit statutory or contractual language. United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1947).

Postjudgment interest is authorized only when the United States appeals to the Supreme Court and loses, and then only from the date a copy of the judgment is filed with GAO to the mandate of affirmance. The authority is found in 3 statutes which must be read together. First is 28 U.S.C. § 2516(b), as amended in 1982 by the Federal Courts Improvement Act:

> "Interest on a judgment against the United States affirmed by the Supreme Court after review on petition of the United States is paid at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately before the date of the judgment.

[81]Act of February 24, 1855, ch. 122, 10 Stat. 612.

[82]Act of March 3, 1863, ch. 92, § 3, 12 Stat. 765.

[83]Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

[84]Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, Title IX, 106 Stat. 4506, 4516.

Next, 31 U.S.C. § 1304(b)(1)(B) prescribes the beginning and ending dates for interest authorized under 28 U.S.C. § 2516(b) by making the judgment appropriation available for interest—

"on a judgment of the Court of Appeals for the Federal Circuit or the United States Court of Federal Claims under section 2516(b) of title 28, only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance."

The third statute is 28 U.S.C. § 1961, also as amended by the Federal Courts Improvement Act. Subsection (a), quoted earlier in this section, establishes a uniform federal rate for postjudgment interest (which 28 U.S.C. § 2516(b) essentially duplicates). Subsection (b), also quoted earlier, makes section 1961 expressly subject to 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b). Portions of subsection (c) are set forth below:

"(c)(1) This section shall not apply in any judgment of any court with respect to any internal revenue tax case. Interest shall be allowed in such cases at [the appropriate rate determined under 26 U.S.C. § 6621].

"(2) Except as otherwise provided in paragraph (1) of this subsection, interest shall be allowed on all final judgments against the United States in the United States Court of Appeals for the Federal Circuit, at the rate provided in subsection (a) and as provided in subsection (b).

"(3) Interest shall be allowed, computed, and paid on judgments of the United States Court of Federal Claims only as provided in paragraph (1) of this subsection or in any other provision of law."

"Any other provision of law" means a statute expressly authorizing interest on Court of Federal Claims judgments against the United States. Jetco, Inc. v. United States, 11 Cl. Ct. 837 (1987). See also Ulmet v. United States, 19 Cl. Ct. 527, 536–37 (1990). One such statute, of course, is 28 U.S.C. § 2516(b).

Analyzing the language of these 3 statutes together, it is possible to formulate some rules. For tax cases, the applicable rate of interest is governed by the interest provisions of the Internal Revenue Code.[85] For nontax cases not subject to some other specific interest provision:[86]

- If the United States does not appeal from a Court of Federal Claims judgment, there is no interest.[87]
- If a Court of Federal Claims judgment is appealed to the Federal Circuit and affirmed, interest does not accrue during that appeal no matter who files what.
- If the United States appeals from the Federal Circuit to the Supreme Court (petition for certiorari), and the Supreme Court affirms the Federal Circuit, interest is payable, at the 52-week Treasury bill rate set forth in 28 U.S.C. § 2516(b), from the date the plaintiff files a copy of the judgment with GAO to the Supreme Court's mandate of affirmance or the end of the term at which the judgment was affirmed, whichever occurs sooner (31 U.S.C. § 1304(b)(2)).

The concept of 28 U.S.C. § 2516(b) and 31 U.S.C. § 1304(b)—interest only when the government unsuccessfully takes the case to the Supreme Court and then only between specified beginning and ending dates—goes back to 1863.[88] Historically, interest was not allowable during the period that determinations by trial commissioners were under review by the full Court of Claims. While some details have changed from time to time (for example, the shift in 1982 from a flat 4 percent rate to the Treasury bill rate), the basic concept has been followed ever since.

To understand the effect of the Federal Courts Improvement Act of 1982, resort to the legislative history is very helpful. The substantive changes to 28 U.S.C. §§ 1961 and 2516(b) stem from Unprinted Amendment No. 766, and the legislative history consists of comments by Senator Grassley and two letters from the Office of Management and Budget. This material, found at 127 Cong. Rec. 29865–67 (1981) and discussed in Ulmet v. United States, 19 Cl. Ct. 527 (1990), clearly establishes the intent to retain the concept of interest only in cases of an unsuccessful appeal to the Supreme Court.

[85]"Tax cases" in this context does not mean any case in which the IRS happens to be involved. The term refers to refund actions by "taxpayers who have overpaid their taxes . . . and are within the administrative system providing for the recovery of overpaid taxes." Economy Plumbing & Heating Co. v. United States, 470 F.2d 585, 592 (Ct. Cl. 1972).

[86]These rules also reflect the Justice Department's interpretation. See Department of Justice, Commercial Litigation Branch Monograph, Interest on Claims By and Against the Government 7–9 (June 1984).

[87]Dictum to the contrary in Squillacote v. United States, 626 F. Supp. 127, 130 (E.D. Wis. 1985), apparently prompted by misunderstandings of the parties, is incorrect.

[88]Act of March 3, 1863, ch. 92, § 7, 12 Stat. 765, 766.

Since the essence of the old law—interest only in cases affirmed by the Supreme Court—has been retained, much of the pre-1982 case law remains relevant. Thus, the "date of the mandate of affirmance" in this context means the date the mandate is issued. 5 Comp. Gen. 832 (1926). Interest is not authorized where the Supreme Court denies the government's petition for certiorari. 30 Comp. Gen. 238 (1950); 7 Comp. Gen. 128 (1927). However, if the Supreme Court reduces and affirms a Court of Federal Claims judgment, interest is payable on the reduced amount if the other statutory conditions are met. 4 Comp. Dec. 571 (1898).

The statutes discussed in this section do not authorize interest in cases of delay resulting from various postjudgment motions or from the government's consideration of whether to seek further review, including any permissible extensions of time. 62 Comp. Gen. 4 (1982). Delays of this sort are compensable only if and to the extent they are included within the permissible range of interest accrual specified in the governing statutes.

What about compound interest, or interest on interest? When might prejudgment and postjudgment interest both be available on the same judgment? As noted earlier, if prejudgment interest is authorized and stops at the date of the judgment, it is considered part of the judgment and any authorized postjudgment interest would be computed on the sum of principal plus prejudgment interest. B-111945, November 13, 1952. However, the postjudgment interest statutes do not apply to a judgment, or portion thereof, which itself provides for interest beyond its entry. Cherokee Nation v. United States, 270 U.S. 476 (1926); 18 Comp. Gen. 873 (1939). Thus, a judgment which awards prejudgment interest to the date of payment does not earn postjudgment interest in addition, regardless of appeals or filings. (This principle would seem equally applicable to district court judgments.)

One final statute, 28 U.S.C. § 2517(b), warrants brief mention. It provides that "[p]ayment of any such judgment and of interest thereon shall be a full discharge to the United States of all claims and demands arising out of the matters involved in the case or controversy," unless designated a partial judgment. This subsection is not an independent authorization of interest. 40 Comp. Gen. 286 (1960); B-158778, April 14, 1966. Rather, it merely states the effect that payment, including interest where authorized, shall have; that is, claims for additional amounts arising out of the same matters may not be allowed. 40 Comp. Gen. at 287; 53 Comp. Gen. 813 (1974). Although not similarly specified by statute, payment of a district court judgment will have the same effect. 59 Comp. Gen. 624 (1980).

6. District Courts: 31 U.S.C. § 1304(b)

For certain district court judgments, 31 U.S.C. § 1304(b)(1)(A) provides:

> "Interest may be paid from the appropriation made by this section—(A) on a judgment of a district court, only when the judgment becomes final after review on appeal or petition by the United States Government, and then only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance[.]"

While this provision may at first glance appear to be an authorization, it is in reality a limitation and by itself authorizes nothing.

a. Applicability

(1) Federal Tort Claims Act

When you eliminate the cases subject to the previously noted specific interest statutes or nonstatutory exceptions, by far the largest remaining category of cases which generate money judgments against the United States are suits under the Federal Tort Claims Act (FTCA).

Prejudgment interest is expressly prohibited by the FTCA itself. Under 28 U.S.C. § 2674, the United States "shall not be liable for interest prior to judgment." The plain meaning of this is to prohibit "compensation for the use of money damages prior to the judgment awarding those damages." Southern Pacific Transp. Co. v. United States, 471 F. Supp. 1186, 1197 (E.D. Cal. 1979).

Prior to the enactment of the judgment appropriation, postjudgment interest was authorized on FTCA judgments, at a statutory rate of 4 percent, from the date of the judgment to a date not to exceed 30 days after enactment of an appropriation to pay the judgment. See 28 U.S.C. § 2411(b) (1976 ed.). This provision never applied to all district court judgments, only to "actions instituted under section 1346 of this title," which included the FTCA.

When the judgment appropriation was originally enacted in 1956, one of the main objectives was "to reduce the total amount of interest paid by the government." H.R. Rep. No. 2638, 84th Cong., 2d Sess. 72 (1956). A more detailed explanation of this purpose is found in a statement by the Office of Management and Budget,[89] relevant portions of which are quoted in 58 Comp. Gen. 67, 71 (1978) and 62 Comp. Gen. 4, 7–8 (1982). The interest reduction would occur by modifying the district court interest

[89]Hearings on Supplemental Appropriation Bill, 1957, Before Subcomm. of the House Comm. on Appropriations, 84th Cong., 2d Sess., pt. 2, at 883–885 (1956).

provisions—the then-existing 28 U.S.C. § 2411(b)—to make them consistent with those for the Court of Claims (interest only where the government unsuccessfully appeals). Congress did not amend 28 U.S.C. § 2411(b) directly, but instead modified it by enacting 31 U.S.C. § 1304(b)(1)(A). The intent was unmistakable as the original version of subsection (b)(1)(A) explicitly referenced 28 U.S.C. § 2411(b). The very fact that judgments could now be paid promptly upon becoming final would also contribute to reducing the amount of interest the government would otherwise be required to pay.

Since the original judgment appropriation applied only to judgments not in excess of $100,000, the larger judgments continued to be governed by 28 U.S.C. § 2411(b).[90] When the $100,000 ceiling was removed in 1977, once again a stated purpose was to reduce the amount of interest payable by the United States.[91] This would be done by making judgments in excess of $100,000 subject to the restrictions of 31 U.S.C. § 1304(b)(1)(A).

The rationale of subsection (b)(1)(A) is the same as the rationale of the old 28 U.S.C. § 2411(b)—to compensate a successful plaintiff for substantial government-caused delay in receiving payment. Before 1956, the delay was inherent in all cases by virtue of the need to await specific appropriations. Now, with this no longer a concern, subsection (b)(1)(A) recognizes the one situation—an appeal by the government—in which actions by the government (apart from processing delays, which have never been compensable) can still produce a significant delay in payment.

Notwithstanding the apparent clarity of the statutory language, postjudgment interest on FTCA judgments became the subject of seemingly endless litigation. The courts firmly established that interest could not be awarded except in compliance with 31 U.S.C. § 1304(b)(1)(A). E.g., Reminga v. United States, 695 F.2d 1000 (6th Cir. 1982), cert. denied, 460 U.S. 1086; Rooney v. United States, 694 F.2d 582 (9th Cir. 1982); DeLucca v. United States, 670 F.2d 843 (9th Cir. 1982); United States v. Culp, 346 F.2d 35 (5th Cir. 1965).[92]

[90]See, e.g., Bonn v. Puerto Rico Int'l Airlines, Inc., 518 F.2d 89, 95 (1st Cir. 1975); Layne v. United States, 460 F.2d 409, 412 (9th Cir. 1972).

[91]S. Rep. No. 64, 95th Cong., 1st Sess. 206 (1977); H.R. Rep. No. 68, 95th Cong., 1st Sess. 184 (1977).

[92]See also Kelley v. United States, 568 F.2d 259, 268 (2d Cir. 1978), cert. denied, 439 U.S. 830; Black v. United States, 444 F.2d 1215, 1217 (10th Cir. 1971); United States v. Varner, 400 F.2d 369 (5th Cir. 1968); United States v. Maryland ex rel. Meyer, 349 F.2d 693 (D.C. Cir. 1965); United States v. Wells, 337 F.2d 615 (5th Cir. 1964); United States v. Jacobs, 308 F.2d 906 (5th Cir. 1962); Chicago, Rock Island & Pacific Ry. Co. v. United States, 206 F. Supp. 795 (S.D. Iowa 1962).

Similar claims were presented to the Comptroller General. In the typical case, either the government did not appeal or the judgment was not filed with GAO. The result was consistently the same: interest was not allowable unless the conditions specified in 31 U.S.C. § 1304(b) had been met. The most comprehensive discussion in the GAO decisions is found in B-191028, March 27, 1978.[93]

In 1982, the Federal Courts Improvement Act replaced the old 4 percent interest rate with a rate based on the yield of 52-week Treasury bills. At the same time, the 1982 legislation repealed 28 U.S.C. § 2411(b) and struck the specific reference to it in 31 U.S.C. § 1304(b)(1)(A). This made it possible to argue that Congress intended to withdraw its waiver of sovereign immunity for postjudgment interest on FTCA judgments. However, nowhere in the legislative history of the 1982 legislation is there the slightest hint of an intent to produce this result. Accordingly, although neither agency has formally addressed the point, GAO and the Justice Department continue to regard interest on FTCA judgments as payable if the conditions of subsection (b)(1)(A) are satisfied.

The courts have also continued to apply subsection (b)(1)(A) to judgments under the Federal Tort Claims Act. See, e.g., Andrulonis v. United States, 26 F.3d 1224 (2d Cir. 1994); Transco Leasing Corp. v. United States, 992 F.2d 552 (5th Cir. 1993); Desart v. United States, 947 F.2d 871 (9th Cir. 1991); Starns v. United States, 923 F.2d 34 (4th Cir. 1991); Lucas v. United States, 807 F.2d 414 (5th Cir. 1986); Cardillo v. United States, 767 F.2d 33 (2d Cir. 1985); MacDonald v. United States, 825 F. Supp. 683 (M.D. Pa. 1993).[94] See also Wilson v. United States, 756 F. Supp. 213 (D.N.J. 1991) (court refused to award interest under 28 U.S.C. § 1961).

As a final note, another phrase in 31 U.S.C. § 1304 has caused some confusion. The "appropriating language" found at 31 U.S.C. § 1304(a) makes the appropriation available for "interest and costs specified in the judgments or otherwise authorized by law." On the surface, this appears to

[93]A few others are 44 Comp. Gen. 421 (1965); B-180210, February 27, 1974; B-160583, January 11, 1967; B-144182, October 19, 1960.

[94]Also: Hull by Hull v. United States, 971 F.2d 1499, 1506–09 (10th Cir. 1992); Brooks v. United States, 757 F.2d 734 (5th Cir. 1985); Gross v. United States, 723 F.2d 609 (8th Cir. 1983); Moyer v. United States, 612 F. Supp. 239 (D. Nev. 1985); Goodkin v. United States, 600 F. Supp. 1459 (E.D.N.Y. 1985). With this many cases on the books in addition to the plain language of the statute, one might almost be tempted to regard it as negligence for a plaintiff's attorney to fail to file a copy of the judgment with GAO. In Wolfe v. Gilreath, 699 S.W. 2d 805 (Tenn. App. 1985), clients sued their attorney for legal malpractice on precisely those grounds. While the suit turned out to be barred by the statute of limitations, the court felt that "defendant, in fact, had been guilty of negligence which had caused the loss of the interest on their judgments." Id. at 807.

permit interest by the simple device of including it in the judgment. Such an interpretation would have the anomalous result of effectively abolishing the no-interest rule with respect to judgments through a statute intended to reduce interest costs. The only legislative history addressing this language is a brief discussion appearing on page 885 of the Hearings cited previously. It explains that the purpose of the "interest . . . specified in the judgment" language was merely to permit the payment of prejudgment interest in cases where awarding it is discretionary with the court, and this has been GAO's consistent interpretation. B-236958, October 3, 1989 (non-decision letter); B-163682, March 18, 1968; B-141540, March 24, 1960.

(2) The "Little Tucker Act"

As noted above, prior to 1982, 31 U.S.C. § 1304(b)(1)(A) was expressly limited to judgments covered by 28 U.S.C. § 2411(b), which in turn applied to "actions instituted under" 28 U.S.C. § 1346. Section 1346 is the jurisdictional provision for three types of suits which can result in money judgments against the United States—tax cases, Federal Tort Claims Act, and the district court portion of the Tucker Act (non-tort claims not exceeding $10,000, the so-called "Little Tucker Act"). Since tax cases were governed by other specific interest provisions, the old 28 U.S.C. § 2411(b) applied essentially to the Federal Tort Claims Act and the "Little Tucker Act." Thus, prior to 1982, the rules for postjudgment interest on Federal Tort Claims Act judgments applied equally to "Little Tucker Act" judgments. E.g., Eastern Service Mgmt. Co. v. United States, 363 F.2d 729 (4th Cir. 1966); United States v. Mississippi Valley Barge Line Co., 285 F.2d 381 (8th Cir. 1960); B-182346, February 4, 1975.[95]

Under the restructuring brought about by the Federal Courts Improvement Act of 1982, Little Tucker Act judgments are now appealed to the Court of Appeals for the Federal Circuit rather than to the numbered circuits. Thus, interest on Little Tucker Act judgments is now governed by the rules applicable to the Court of Federal Claims and Federal Circuit. Zumerling v. Marsh, 783 F.2d 1032 (Fed. Cir. 1986). See also Thompson v. Kennickell, 797 F.2d 1015, 1026 n.7 (D.C. Cir. 1986), cert. denied, 480 U.S. 905.

[95]One will find the occasional aberration. For example, Caola v. United States, 404 F. Supp. 1101 (D. Conn. 1975), was a "Little Tucker Act" case in which the court awarded interest under 28 U.S.C. § 2411(b). However, in a subsequent unpublished order (Civil No. H75-110, April 10, 1978), the court agreed to reconsider the propriety of the interest award. The judgments in that case were in fact paid without interest.

(3) Other situations

Prior to 1982, there could be no "other situations." The explicit statutory language of 31 U.S.C. § 1304(b)(1)(A) precluded its application beyond the situations noted above. For example, actions under Title VII of the Civil Rights Act are not brought under the jurisdictional authority of 28 U.S.C. § 1346 but under separate jurisdictional provisions of the Civil Rights Act itself. Thus, subsection (b)(1)(A) was inapplicable by its terms, and interest was not payable on Title VII judgments regardless of appeals or filings. B-195809-O.M., March 30, 1981.

By the repeal of 28 U.S.C. § 2411(b) and the elimination of the reference to it in 31 U.S.C. § 1304(b)(1)(A), the Federal Courts Improvement Act at least changed the nature of the analysis. It is now necessary to address whether 31 U.S.C. § 1304 is a waiver of sovereign immunity. If it is, then it can be argued that subsection (b)(1)(A) applies across the board because the language that limited its application from 1956 to 1982 is no longer there. If it is not, then its application has not expanded from what it was before the 1982 amendments.

In Thompson v. Kennickell, 797 F.2d 1015 (D.C. Cir. 1986), cert. denied, 480 U.S. 905, the court considered this precise issue. Although the case involved interest on a Title VII judgment and its result has been presumably superseded by the Civil Rights Act of 1991, it remains important for its extensive discussion of postjudgment interest against the United States both before and after the Federal Courts Improvement Act. The plaintiff argued that, because of the repeal of 28 U.S.C. § 2411(b), postjudgment interest is now payable on all district court judgments because the alternative—the elimination of previously authorized interest on Federal Tort Claims Act and Little Tucker Act judgments—could not have been intended. The court disagreed. While declining to address the possible curtailment of previously available interest, the court found no new waiver of sovereign immunity in the 1982 legislation. Section 1304, noted the court, "refers to statutory provisions other than itself to determine when the United States must pay post-judgment interest." Id. at 1021 n.1.

Similarly, Arvin v. United States, 742 F.2d 1301, 1305 (11th Cir. 1984), found no waiver of sovereign immunity in 31 U.S.C. § 1304.[96] In view of this, in conjunction with the previously cited line of cases holding that 28 U.S.C.

[96]In contrast, the courts in Andrulonis v. United States, 26 F. 3d 1224 (2d Cir. 1994), and MacDonald v. United States, 825 F. Supp. 683 (M.D. Pa. 1993), did regard section 1304 as a waiver of sovereign immunity, but were applying it in the context of a Federal Tort Claims Act judgment.

§ 1961 does not waive sovereign immunity, and the legislative history of the Federal Courts Improvement Act amendments as detailed in Kennickell, it would appear that the scope of 31 U.S.C. § 1304(b) has not expanded by virtue of the 1982 legislation.

A case we should note although its impact should be minimal is United States v. Wilson, 926 F.2d 725 (8th Cir. 1991). The United States brought a quiet title action as trustee on behalf of an Indian tribe against non-Indian defendants. The tribe prevailed on its claim, but the United States was ordered to compensate the defendants for improvements they had made while in possession of the disputed land. The district court also ordered the United States to pay postjudgment interest in accordance with 31 U.S.C. § 1304. The defendants appealed, seeking interest from the date of judgment to the date of payment. The appellate court affirmed the district court's judgment, noting that the order to pay postjudgment interest had not been appealed and therefore was the "law of the case."

b. Implementation

(1) Filing procedures

Interest begins to accrue from the date a "transcript of the judgment" is filed with GAO. 31 U.S.C. § 1304(b)(1)(A). The editors of this chapter confess that they have not the slightest idea what a "transcript" of a judgment is. Generally speaking, a simple photocopy of the judgment will suffice, and this in fact is what is most commonly filed. Also, an "abstract of judgment" (a form obtained from the court) will be accepted.

A judgment is considered "filed" on the earliest day it is received by any GAO employee. For example, judgments are occasionally submitted to one of GAO's regional offices and then forwarded to Washington. The date of receipt in the regional office is the date of filing.

The statute does not specify who is required to file the copy of the judgment with GAO, but it is clearly the plaintiff's responsibility. The first case to squarely address this issue was Lennon v. United States, E.D.N.Y., No. 76-C-396, mem. op. dated October 1, 1979. The plaintiff had argued that it should be the responsibility of the United States Attorney and that the U.S. Attorney's knowledge of the judgment should be "imputed" to GAO. The court disagreed and denied a motion for interest, concluding that (a) since postjudgment interest is for the plaintiff's benefit, the responsibility of taking the protective measure of filing should also rest with the plaintiff, and (b) construing the statute to place the burden on the government would render it meaningless. Subsequent published decisions have removed all doubt, and have consistently refused to adopt a "constructive filing" approach. Reminga v. United States, 695 F.2d 1000 (6th Cir. 1982), cert. denied, 460 U.S. 1086; Rooney v. United States, 694 F.2d 582 (9th Cir. 1982); Moyer v. United States, 612 F. Supp. 239 (D. Nev. 1985).[97] As a practical matter, GAO will not disallow interest if the judgment is filed by someone other than the plaintiff, but it must nevertheless be viewed as the plaintiff's primary responsibility.

In a class action or multiple-plaintiff suit, the statute does not require a filing by each individual plaintiff. A filing by any plaintiff or by class counsel will operate on behalf of the entire class and will satisfy the statutory requirement. See Larionoff v. United States, D.D.C., No. 626-73, mem. op., December 29, 1977, aff'd per curiam, D.C. Cir., No. 78-1010, July 17, 1978.

When filing a judgment with GAO for purposes of 31 U.S.C. § 1304(b), it is desirable for evidentiary purposes to use Certified Mail, Return Receipt Requested. A simple transmittal letter stating that the judgment is being filed in accordance with 31 U.S.C. § 1304(b) also will not hurt. Normally, correspondence received by GAO is machine-stamped with the date of receipt.

(2) Unsuccessful government appeal

One of the essential prerequisites to interest under 31 U.S.C. § 1304(b)(1)(A) is an unsuccessful appeal by the government. If there is no appeal, there is no entitlement to interest even though there may have been substantial delay in settlement of the claim. In B-182346, February 4, 1975, interest was denied where a judgment was not appealed but was nevertheless not submitted for payment until a year after it was issued. However, in a 1978 decision, interest was paid where the plaintiff had filed the judgment with GAO and the government had filed a notice of appeal but failed to prosecute the appeal and, after considerable delay, consented to dismiss the appeal. Even though there was technically no "mandate of affirmance," the filing of the notice of appeal effectively prevented prompt payment. Thus, the case was viewed as falling within the scope of section 1304(b) when construed in light of its purpose—to compensate a plaintiff for substantial delay in payment caused by the government's action in filing an appeal. 58 Comp. Gen. 67 (1978). In 59 Comp. Gen. 259 (1980), this principle was applied, and interest held payable, in a case where the

[97]Earlier cases in which the issue was not raised had also treated the filing as the plaintiff's responsibility. Varner, 400 F.2d at 372; Maryland ex rel. Meyer, 349 F.2d at 694–95; Culp, 346 F.2d at 36. This is also supported by legislative history. Hearings, supra note 89, at 884.

appeal was unrelated to the merits of the underlying judgment, but rather was an appeal from the denial of a motion to reopen the judgment to direct the withholding of federal income tax. Thus, the appeal may be an appeal on a collateral issue, but there must be an appeal. Postjudgment motions will not suffice to trigger interest under section 1304(b). 62 Comp. Gen. 4 (1982).

In another case, the government filed a notice of appeal with the district court and subsequently changed its mind. Normally, the district court would automatically transmit the notice to the court of appeals. Before that could happen in this case, however, the area suffered an earthquake which disrupted the operation of both the courts and the Postal Service. This allowed the government to retrieve its notice of appeal before it was transmitted to the appellate court. Based on the reasoning of 62 Comp. Gen. 4 and its predecessors, interest was nevertheless allowed. B-239559, May 22, 1990 (internal memorandum).

A 1994 case found the requirement for a government appeal satisfied where the United States did not appeal directly but joined, and filed a brief in support of, an appeal filed by a co-defendant. Andrulonis v. United States, 26 F.3d 1224 (2d Cir. 1994).

(3) Interest accrual period

Interest under section 1304(b) runs "through the day before the date of the mandate of affirmance." Prior to the 1982 recodification of Title 31, the statute read simply "to the date of the mandate of affirmance." An early draft of the recodification changed this to "through the date of the mandate of affirmance." GAO pointed out that, under the interest formula traditionally used by the accounting officers, the computation included the beginning date or the ending date, but not both. E.g., B-60952, July 2, 1953. Thus, the draft would have made a substantive change in the law, which is beyond the scope of a recodification. To avoid this and also remove the perceived ambiguity of the pre-1982 language, the recodifiers settled upon the "through the day before" language.

Where the appeal is dismissed or withdrawn and there is no mandate of affirmance, interest will cease to accrue on the earlier of the date of dismissal or the date the Justice Department certifies to GAO that no further review will be sought. See 59 Comp. Gen. 259, 261 (1980); 58 Comp. Gen. 67, 73 (1978).

Multiple appeals in the same case may produce more than one mandate of affirmance. This was the case in Transco Leasing Corp. v. United States, 992 F.2d 552 (5th Cir. 1993), in which the appellate court had affirmed the judgment on the first appeal but remanded it for recomputation of damages. The second appeal dealt with interest. The court held that the mandate issuing from the first appeal was the operative mandate for interest accrual purposes. Id. at 556.

(4) Types of appellate action

When the appellate chain in a given case produces more than one judgment, questions may arise as to which judgment should be regarded as the final judgment for interest purposes. Under current law, the question is relevant primarily for fixing the reference point for determining the proper rate of interest under 28 U.S.C. § 1961(a). Although several of the cases noted below dealt with obsolete versions of the statutes and therefore the interest accrual dates are no longer applicable, the cases are nevertheless useful by analogy in answering this question and generally in illustrating how 31 U.S.C. § 1304(b) is applied.

Obviously, a judgment which is affirmed on appeal "qualifies" under section 1304(b). In one case, the original district court judgment was reversed by the court of appeals. The Supreme Court reversed and remanded, and the court of appeals then affirmed the original judgment but reduced the amount. Interest was held payable (under the old 28 U.S.C. § 2411(b)) on the reduced amount from the date of the original district court judgment. B-97757, October 24, 1950. In another case, the original judgment, affirmed on appeal, was lost from the court records during the appeal process, and a new judgment was signed with a later date. The first judgment was regarded as the final judgment for interest purposes. B-185455-O.M., February 9, 1976.

Under one judicial formulation, the original judgment is the operative judgment for interest purposes when it is "substantially affirmed" on appeal, including appellate modification or remand for recalculation of damages. Transco Leasing Corp. v. United States, cited above. Of course, if the recalculation produces a higher award, interest is applied to the original amount as that is the amount which was substantially affirmed. E.g., Desart v. United States, 947 F.2d 871 (9th Cir. 1991).

Where a judgment is reversed and remanded, opinions are split. What appears to be the majority view is that portions of the judgment unaffected by the reversal should be treated as though affirmed (whether expressly affirmed or not), and that the original judgment remains the operative judgment for interest purposes, adjusted of course to reflect the results of the appeal. E.g., Brooks v. United States, 757 F.2d 734 (5th Cir. 1985); Perkins v. Standard Oil Co., 487 F.2d 672 (9th Cir. 1973). See also Mascuilli v. United States, 383 F. Supp. 50 (E.D. Pa. 1974), aff'd mem., 519 F.2d 1398 (3d Cir. 1975). Cases reaching a contrary result are Merchants Matrix Cut Syndicate, Inc. v. United States, 284 F.2d 456 (7th Cir. 1960), and Mosby v. United States, 33 Ct. Cl. 58 (1897).

Where a judgment is vacated rather than reversed, precedent is sparse. In United States v. Brooks, 176 F.2d 482 (4th Cir. 1949), a judgment was vacated and remanded with instructions to consider reducing damages. GAO concluded that the vacated judgment was not the final judgment for interest purposes. B-62830, August 31, 1950. In accord is the Mascuilli case cited above, in which the court refused to award interest on a Public Vessels Act judgment from the date of a prior judgment which had been vacated on appeal. After the vacated judgment, there were 3 subsequent judgments, 2 of which were reversed and remanded. The court awarded interest from the date of the first of the "reversed and remanded" judgments on the theory that this was the judgment "that finally settled the issue of liability between the parties." 383 F. Supp. at 53. See also Turner v. Japan Lines, Ltd., 702 F.2d 752, 754 (9th Cir. 1983).

(5) Interest calculation

When interest is payable under 31 U.S.C. § 1304(b), the rate is the 52-week Treasury bill rate determined under 28 U.S.C. § 1961(a) with reference to the original judgment. It is applied on a fixed-rate basis and does not vary with respect to a particular judgment. Once the rate is determined for a given judgment, it remains the same throughout the accrual period. Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 838–39 (1990); Campbell v. United States, 809 F.2d 563, 573 (9th Cir. 1987).

Prior to the Federal Courts Improvement Act of 1982, postjudgment interest under section 1304(b) was simple interest. However, 28 U.S.C. § 1961(b) now provides for annual compounding. The plain terms of the statutes would seem to indicate that compounding against the United States can apply only where the period between the date of filing with GAO and the mandate of affirmance exceeds one year, and this is how GAO in fact applies the statute. E.g., B-219881.4, October 20, 1987 (non-decision letter).

(6) Addressing interest in the judgment

When the conditions of 31 U.S.C. § 1304(b) are satisfied, interest attaches by force and operation of law. There is no need for the judgment to expressly award interest. Campbell v. United States, 809 F.2d 563, 570 (9th Cir. 1987); United States v. Maryland ex rel. Meyer, 349 F.2d 693, 696 (D.C. Cir. 1965). If it is desired to say something about interest in the judgment, GAO's recommendation is that general language be used, such as "interest as provided by law," which GAO reads as meaning "as and to the extent provided by law," in which event interest is added or not added, depending on compliance with the statute. Courts have viewed the phrase "as provided by law" similarly. See Black v. United States, 444 F.2d 1215, 1217 (10th Cir. 1971); Higginson v. Schoeneman, 190 F.2d 32, 34 (D.C. Cir. 1951); Economy Plumbing & Heating Co. v. United States, 470 F.2d 585, 593–94 (Ct. Cl. 1972).

Occasionally, a court will include an interest provision in a judgment which is clearly inconsistent with 31 U.S.C. § 1304(b) or is otherwise improper. As the many cases cited throughout this section make clear, the inclusion of a contrary interest provision is grounds for the government to seek modification of the judgment. Thus, if a judgment is submitted for payment which contains an award of interest in non-discretionary language inconsistent with existing law, it will be returned with a recommendation to seek appropriate modification. Experience has shown that frequently plaintiff's counsel, upon being confronted with the governing statutes and case law, will agree not to pursue the interest claim, in which event there is no need to go back to court. In other cases, it may be necessary to seek judicial modification by motion or appeal. If attempts at judicial modification are unsuccessful and the Justice Department then determines that judicial modification is not possible, the award will be certified for payment in accordance with its terms. See 38 Comp. Gen. 12 (1958); B-183576, August 26, 1977. In no event, however, can interest be paid for any period beyond the date the judgment itself was paid. See B-200460, November 18, 1980. Payment in these cases merely recognizes the duty to comply with a court order which can no longer be modified through established channels, and is not given precedential value.

7. Government Interest Rates

Throughout this discussion, we have noted several different interest rates the government uses in different contexts. At one time, the congressional approach was to simply set a rate by statute. A few of these survive, examples being 4 percent under the Suits in Admiralty and Public Vessels

Acts and 6 percent under 31 U.S.C. § 3728, the judgment offset statute. In more recent times, however, presumably in recognition of the volatility of the economy, the trend has been toward the use of fluctuating rates, with the governing statute merely prescribing the process for determining the rate. Our purpose here is simply to present some summary information on the fluctuating rates most commonly encountered in the "claims and judgments" area.

a. 52-Week Treasury Bill Rate

(1) Uses

- Postjudgment interest both in favor of and (where authorized) against the United States. 28 U.S.C. §§ 1961, 2516(b).
- Interest as part of just compensation under the Declaration of Taking Act. 40 U.S.C. § 258e-1.
- Costs and attorney's fees under 28 U.S.C. § 2412 affirmed on appeal. Id. § 2412(f).

(2) How established

A new rate is set with each auction of 52-week Treasury bills, currently once a month. The rate is based on the equivalent coupon issue yield of the average accepted auction price. The equivalent coupon issue yield is sometimes called the "investment rate," to be distinguished from the "discount rate" which is usually somewhat lower.

(3) How applied

The applicable rate is the rate for the last auction held immediately prior to the date of the judgment. See B-231615.2, March 1, 1990 (non-decision letter). The rate is a fixed rate and does not vary with respect to a particular judgment.

(4) How to find it

The Administrative Office of the United States Courts is responsible for notifying all federal judges. 28 U.S.C. § 1961(a). The Bureau of the Public Debt issues a press release for each auction. The Justice Department publishes listings periodically in the United States Attorneys' Bulletin.

b. Renegotiation Act Rate

(1) Uses

- Payment of claims and judgments under the Contract Disputes Act. 41 U.S.C. § 611.
- "Interest penalties" under the Prompt Payment Act. 31 U.S.C. § 3902(a).
- Inverse condemnation judgments in the Court of Federal Claims.

(2) How established

The Secretary of the Treasury sets a new rate each 6 months, effective January 1 and July 1 of each year, based on current private commercial interest rates for new 5-year loans. Pub. L. No. 92-41, § 2(a), 85 Stat. 97 (1971). (The provision is no longer carried in the United States Code.)

(3) How applied

For Contract Disputes Act payments, the rate is applied on a variable basis unless otherwise specified in the judgment or award. Starting with the rate for the period which includes the date on which interest begins to run (Pub. L. No. 92-41, § 2(a)(1)), the rate then rises or falls for each 6 months or fraction thereof within the accrual period. The Court of Federal Claims uses the same approach in inverse condemnation cases. For Prompt Payment Act procedures, see OMB Circular No. A-125.

(4) How to find it

The Treasury Department publishes each new rate in the Federal Register. 31 U.S.C. § 3902(a).

c. Internal Revenue Code Rate

(1) Uses

- Several uses under the Internal Revenue Code: interest on underpayments and overpayments, suits for wrongful levy, etc. E.g., 26 U.S.C. §§ 6343, 6601, 6602, 6611, 7426; 28 U.S.C. §§ 1961(c)(1), 2411.
- Certain money judgments by the Court of International Trade. 28 U.S.C. § 2644.
- Delay compensation in patent infringement judgments in the Court of Federal Claims.
- Back pay under the Back Pay Act (overpayment rate). 5 U.S.C. § 5596(b)(2)(B).

(2) How established

Prior to 1987, the Secretary of the Treasury established a single rate for both overpayments (what the IRS pays you) and underpayments (what you pay the IRS). Since January 1, 1987, there have been separate overpayment and underpayment rates. The underpayment rate is one percentage point higher (surprise). The rate is determined quarterly. See 26 U.S.C. § 6621 for details.

(3) How applied

For Internal Revenue Code uses, the relevant Code provision specifies whether to use the overpayment or underpayment rate. For interest payments pursuant to 28 U.S.C. §§ 1961(c)(1) or 2411 or any provision of the Internal Revenue Code, interest is compounded daily. 26 U.S.C. § 6622.

(4) How to find it

The Internal Revenue Service announces each new rate in the form of a Revenue Ruling, usually accompanied by a news release. The Revenue Rulings are eventually incorporated into the hardbound "Cumulative Bulletin" volumes. Current Revenue Rulings can also be found in various commercial tax services.

d. Treasury Tax and Loan Account Rate

(1) Uses

- Interest on debts owed to the United States unless otherwise specified in an applicable statute, statutory regulation, or contract. 31 U.S.C. §§ 3717(a)(1), (g).
- Prejudgment interest on litigated debt claims.
- Evaluation of cost-effectiveness of cash discounts. Treasury Financial Manual, Vol. I, § 6-8040.30.

(2) How established

This rate is also called the "current value of funds" rate. Treasury sets the rate by October 31 of each year, effective the following January 1, based on an average of the current value of funds to Treasury. Treasury may change the rate for a calendar quarter if the average rate at the close of the prior calendar quarter is at least 2 percentage points more or less than the existing published rate. 31 U.S.C. § 3717(a).

(3) How applied

For purposes of 31 U.S.C. § 3717, the rate is applied as a fixed rate. Once the rate is established for a given debt, it stays the same for the duration of the indebtedness unless the debtor has defaulted on a repayment agreement. 4 C.F.R. § 102.13(c). On litigated debt claims (i.e., claims by the United States, as opposed to claims against the United States), the Justice Department will normally compute interest at the "tax and loan account" rate up to the date of judgment.

(4) How to find it

Treasury publishes the annual rate and any quarterly changes in two formats—a notice in the Federal Register and a Treasury Financial Manual Bulletin.

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