

Availability of Appropriations: Purpose

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Availability of Appropriations: Purpose

A. General Principles

1. Introduction: 31 U.S.C. § 1301(a) This chapter introduces the concept of the “availability” of appropriations. The decisions are often stated in terms of whether appropriated funds are or are not “legally available” for a given obligation or expenditure. This is simply another way of saying that a given item is or is not a legal expenditure. Whether appropriated funds are legally available for something depends on three things:

- (1) The purpose of the obligation or expenditure must be authorized;
- (2) The obligation must occur within the time limits applicable to the appropriation; and
- (3) The obligation and expenditure must be within the amounts Congress has established.

Thus, there are three elements to the concept of availability: purpose, time, and amount. All three must be observed for the obligation or expenditure to be legal. Availability as to time and amount will be covered in Chapters 5 and 6. This chapter discusses availability as to purpose.

One of the most fundamental statutes dealing with the use of appropriated funds is 31 U.S.C. § 1301(a):

“Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.”

Simple, concise, and direct, this statute was originally enacted in **1809 (2 Stat, 535)** and is one of the cornerstones of congressional control over the federal purse. Since money cannot be paid from the Treasury except under an appropriation (U.S. Const. art. I, § 9, cl. 7), and since an appropriation must be derived from an act of Congress, it is for Congress to determine the purposes for which an appropriation may be used. Simply stated, 31 U.S.C. § 1301(a) says that public funds may be used only for the purpose or purposes for which they were appropriated. It prohibits charging authorized items to the wrong appropriation, and unauthorized items to any

appropriation. Anything less would render congressional control largely meaningless. One early Treasury Comptroller was of the opinion that the statute did not make any new law, but merely codified what was already required under the Appropriations Clause of the Constitution. 4 Lawrence, First Comp. Dec. 137, 142 (1883).

Administrative applications of the purpose statute can be traced back almost to the time the statute was enacted. See, for example, 36 Comp. Gen. 621, 622 (1957), which quotes part of a decision dated February 21, 1821. In an 1898 decision captioned “Misapplication of Appropriations,” the Comptroller of the Treasury talked about 31 U.S.C. §1301(a) in these terms:

“It is difficult to see how a legislative prohibition could be expressed in stronger terms. The law is plain, and any disbursing officer disregards it at his peril.” 4 Comp. Dec. 569, 570 (1898).

The starting point in applying 31 U.S.C. §1301(a) is that, absent a clear indication to the contrary, the common meaning of the words in the appropriation act and the program legislation it funds governs the purposes to which the appropriation may be applied. To illustrate, the Comptroller General held in 41 Comp. Gen. 255 (1961) that an appropriation available for the “replacement” of state roads damaged by nearby federal dam construction could be used only to restore those roads to their former condition, not for improvements such as widening. Similarly, funds provided for the modification of existing dams for safety purposes could not be used to construct a new dam, even as part of an overall safety strategy. B-215782, April 7, 1986.

If a proposed use of funds is inconsistent with the statutory language, the expenditure is improper, even if it would result in substantial savings or other benefits to the government. Thus, while the Federal Aviation Administration could construct its own roads needed for access to FAA facilities, it could not contribute a share for the improvement of county-owned roads, even though the latter undertaking would have been much less expensive. B-143536, August 15, 1960. See also 39 Comp. Gen. 388 (1959).

The concept of purpose permeates much of this publication. Thus, many of the rules discussed in Chapter 2 relate to purpose. For example:

- A specific appropriation must be used to the exclusion of a more general appropriation which might otherwise have been viewed as available for the particular item. Chapter 2, Section B.2.
- Transfer between appropriations is prohibited without specific statutory authority, even where reimbursement is contemplated. Chapter 2, Section B.3.

It follows that deliberately charging the wrong appropriation for purposes of expediency or administrative convenience, with the expectation of rectifying the situation by a subsequent transfer from the right appropriation, violates 31 U.S.C. §1301(a). 36 Comp. Gen. 386 (1956); 26 Comp. Gen. 902,906 (1947); 19 Comp. Gen. 395 (1939); 14 Comp. Gen. 103 (1934); B-97772, May 18, 1951; B-104135, August 2, 1951.¹ The fact that the expenditure would be authorized under some other appropriation is irrelevant. Charging the “wrong” appropriation, unless authorized by some statute such as 31 U.S.C. §1534, violates the purpose statute. For several examples, see GAO report entitled Improper Accounting for Costs of Architect of the Capitol Projects, PLRD-81-4 (April 13, 1981).

The transfer rule illustrates the close relationship between 31 U.S.C. §1301(a) and statutes relating to amount such as the Antideficiency Act, 31 U.S.C. 51341. An unauthorized transfer violates 31 U.S.C. §1301(a) because the transferred funds would be used for a purpose other than that for which they were originally appropriated. If the receiving appropriation is exceeded, the Antideficiency Act is also violated.

Although every violation of 31 U.S.C. §1301(a) is not automatically a violation of the Antideficiency Act, and every violation of the Antideficiency Act is not automatically a violation of 31 U.S.C. §1301(a), cases frequently involve elements of both. Thus, an expenditure in excess of an available appropriation violates both statutes. The reason the purpose statute is violated is that, unless the disbursing officer used personal funds, he or she must necessarily have used money appropriated for other purposes, 4 Comp. Dec. 314, 317 (1897). The relationship between purpose violations and the Antideficiency Act is explored further in Chapter 6.

¹ The situation dealt with in B-97772 and B-104135, advances of travel expenses to government employees serving as witnesses, is now authorized by 5 U.S.C. 55751.

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

Brief mention should also be made of the axiom that an agency cannot do indirectly what it is not permitted to do directly. Thus, an agency cannot use the device of a contract or grant to accomplish a purpose it could not do by direct expenditure. See 18 Comp. Gen. 285 (1938) (contract stipulation to pay wages in excess of Davis-Bacon Act rates held unauthorized). Similarly, a grant of funds for unspecified purposes would be improper. 55 Comp. Gen. 1059, 1062 (1976).

2. Determining Authorized Purposes

a. Statement of Purpose

Where does one look to find the authorized purposes of an appropriation? The first place, of course, is the appropriation act itself and its legislative history. If the appropriation is general, it may also be necessary to consult the legislation authorizing the appropriation, if any, and the underlying program or organic legislation, together with their legislative histories.

The actual language of the appropriation act is always of paramount importance in determining the purpose of an appropriation. Every appropriation has one or more purposes in the sense that Congress does not provide money for an agency to do with as it pleases, although purposes are stated with varying degrees of specificity. One end of the spectrum is illustrated by this old private relief act:

“[T]he Secretary of the Treasury . . . is hereby authorized and directed to pay to George H. Lott, a citizen of Mississippi, the sum of one hundred forty-eight dollars” Act of March 23, 1896, ch. 71, 29 Stat. 711.

This is one extreme. There is no need to look beyond the language of the appropriation; it was available to pay \$148 to George H. Lott, and for absolutely nothing else. Language this specific leaves no room for administrative discretion. For example, the Comptroller General has held that language of this type does not authorize reimbursement to an agency where the agency erroneously paid the

individual before the private act had been passed. In this situation, the purpose for which the appropriation was made had ceased to exist. B-151114, August 26, 1964.

At the other extreme, smaller agencies may receive only one appropriation. The purpose of the appropriation will be to enable the agency to carry out all of its various authorized functions. For example, the Consumer Product Safety Commission receives but a single appropriation “for necessary expenses of the Consumer Product Safety Commission.”² To determine permissible expenditures under this type of appropriation, it would be necessary to examine all of the agency’s substantive legislation, in conjunction with the “necessary expense” doctrine discussed later in this chapter.

Between the two extremes are many variations. A common form of appropriation funds a single program. For example, the Interior Department receives a separate appropriation to carry out the Payments in Lieu of Taxes Act.³ While the appropriation is specific in the sense that it is limited to PILT payments and associated administrative expenses, it is nevertheless necessary to look beyond the appropriation language and examine the PILT statute to determine authorized expenditures,

Once the purposes have been determined by examining the various pieces of legislation, 31 U.S.C. §1301(a) comes into play to restrict the use of the appropriation to these purposes only, together with one final generic category of payments—payments authorized under general legislation applicable to all or a defined group of agencies and not requiring specific appropriations. For example, legislation enacted in 1982 amended 12 U.S.C. § 1770 to authorize federal agencies to provide various services, including telephone service, to employee credit unions. Prior to this legislation, an agency would have violated 31 U.S.C. §1301(a) by providing telephone service to a credit union, even on a reimbursable basis, because this was not an authorized purpose under any agency appropriation. 60 Comp. Gen. 653 (1981). The 1982 amendment

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

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

made the providing of special services to credit unions an authorized agency function, and hence an authorized purpose, which it could fund from unrestricted general operating appropriations. 66 Comp.Gen. 356 (1987). Other examples are interest payments under the Prompt Payment Act and administrative settlements under \$2,500 under the Federal Tort Claims Act.

b. Specific Purpose Stated in Appropriation Act

Where an appropriation specifies the purpose for which the funds are to be used, 31 U.S.C. §1301(a) applies in its purest form to restrict the use of the funds to the specified purpose. For example, an appropriation for topographical surveys in the United States was held not available for topographical surveys in Puerto Rico. 5 Comp. Dec. 493 (1899). Similarly, an appropriation to install an electrical generating plant in the custom-house building in Baltimore could not be used to install the plant in a nearby post office building, even though the plant would serve both buildings and thereby reduce operating expenses. 11 Comp. Dec. 724 (1905). An appropriation for the extension and remodeling of the State Department building was not available to construct a pneumatic tube delivery system between the State Department and the White House. 42 Comp.Gen. 226 (1962). And, as noted previously, an appropriation for the “replacement” of state roads could not be used to make improvements on them. 41 Comp.Gen. 255 (1961).

The following cases will further illustrate the interpretation and application of appropriation acts denoting a specific purpose to which the funds are to be dedicated. In each of the examples, the appropriation in question was the United States Forest Service’s appropriation for the construction and maintenance of “Forest Roads and Trails.”

In 37 Comp.Gen. 472 (1958), the Forest Service sought to construct airstrips on land in or adjacent to national forests. The issue was the extent to which the costs could be charged to the Roads and Trails appropriation as opposed to other Forest Service appropriations such as “Forest Protection and Utilization.” At hearings before the appropriations committees, Forest Service officials had announced their intent to charge most of the landing fields to the Roads and Trails appropriation. The appropriation act in question provided that “appropriations available to the Forest Service for the current fiscal year shall be available for” construction of the landing fields up to a specified dollar amount, but the item was not mentioned in any of the individual appropriations. GAO concluded

that the proposal to indiscriminately charge the landing fields to Roads and Trails would violate 31 U.S.C. §1301(a). The Roads and Trails appropriation could be used for only those landing fields that were directly connected with and necessary to accomplishing the purposes of that appropriation. Landing fields not directly connected with the purposes of the Roads and Trails appropriation, for example, airstrips needed to assist in firefighting in remote areas, had to be charged to the appropriation to which they were related, such as Forest Protection and Utilization. The mere mention of intent at the hearings was not sufficient to alter the availability of the appropriations.

Later, in 53 Comp Gen. 328 (1973), the Comptroller General held that the Forest Roads and Trails appropriation could not be charged with the expense of closing roads or trails and returning them to their natural state, such activity being neither "construction" nor "maintenance."

Again, in B-164497(3), February 6, 1979, GAO decided that the Forest Service could not use the Roads and Trails appropriation to maintain a part of a federally-constructed scenic highway on Forest Service land in West Virginia, although the state was prevented from maintaining it due to the fact that the scenic highway was closed to commercial traffic. The Roads and Trails account was improper to charge with the maintenance because the term "forest road" was statutorily defined as a service or access road "necessary for the protection, administration, and utilization of the [national forest] system and the use and development of its resources." The highway, a scenic parkway reserved exclusively for recreational and passenger travel through a national forest, was not the type of forest road the appropriation was available to maintain. The decision further noted, however, that the Forest Protection and Utilization appropriation was somewhat broader and could be used for the contemplated maintenance.

A 1955 case illustrates a type of expenditure which could properly be charged to the Roads and Trails account. Construction of a timber access road on a national forest uncovered a site of old Indian ruins. Since the road construction itself was properly chargeable to the Roads and Trails appropriation, the Forest Service could use the same appropriation to pay the cost of archaeological and exploratory work necessary to obtain and preserve historical data from the ruins before they were destroyed by the

construction. (Rerouting was apparently not possible.) B-1 25309, December 6, 1955.⁴

In any case, an appropriation serves as a limitation, or more accurately, a series of limitations relating to time and amount in addition to purpose. In some situations, an appropriation is simultaneously a grant of authority. For example, 5 U.S.C. § 3109 authorizes agencies to procure the services of experts and consultants, but only “[w]hen authorized by an appropriation or other statute.” In contrast with the statute authorizing services for credit unions noted earlier, 5 U.S.C. § 3109 by itself does not authorize an agency to spend general operating appropriations to hire consultants. Unless an agency has received this authority somewhere in its permanent legislation, the hiring of consultants under section 3109 is an authorized purpose only if it is specified in the agency’s appropriation act.

c. Effect of Budget Estimates

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

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

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

⁴The protection of archaeological data is now provided by statute. See 16 U.S.C. § 469a-1 and the Archaeological Resources Protection Act of 1979, 16 U.S.C. §§ 470aa et seq.

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

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

A corollary to this rule is that the lack of a specific budget request for an item does not preclude an agency from making an expenditure for that item from a lump-sum appropriation which is otherwise available for items of that type. E.g., B-149163, June 27, 1962. See also 20 Comp. Gen. 631 (1941); B-198234, March 25, 1981.⁵ Suppose in our previous example the agency neglected to budget for incentive awards for FY 1990. Since incentive awards are an authorized category of expenditure under a Salaries and Expenses appropriation and do not require specific appropriation language, the agency’s 1990 S&E appropriation would be legally available for incentive awards, notwithstanding the absence of a budget estimate, provided the agency had enough discretionary money left in the account.

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

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

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

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

3. New or Additional Duties

Appropriation acts tend to be bunched at certain times of the year while substantive legislation may be enacted any time. A frequently recurring situation is where a statute is passed imposing new duties on an agency but not providing any additional appropriations. The question is whether implementation of the new statute must wait until additional funds are appropriated, or whether the agency can use its existing appropriations to carry out the new function, either pending receipt of further funding through the normal budget process or in the absence of additional appropriations (assuming in either case the absence of contrary congressional intent).

The rule is that existing agency appropriations which generally cover the type of expenditures involved are available to defray the expenses of new or additional duties imposed by proper legal authority. The test for availability is whether the duties imposed by the new law bear a sufficient relationship to the purposes for which the previously-enacted appropriation was made so as to justify the use of that appropriation for the new duties.

For example, in the earliest published decision cited for the rule, the Comptroller General held that the Securities and Exchange Commission could use its general operating appropriation for fiscal year 1936 to perform additional duties imposed on it by the later-enacted Public Utility Holding Company Act of 1935. 15 Comp. Gen. 167 (1935).

Similarly, the Interior Department could use its 1979 "Departmental Management" appropriation to begin performing duties imposed by the Public Utilities Regulatory Policies Act of 1978, and to provide reimbursable support costs for the Endangered Species

Committee and Review Board created by the Endangered Species Act Amendments of 1978. Both statutes were enacted after Interior's 1979 appropriation. B-195007, July 15, 1980.

The rule has also been applied to additional duties imposed by Executive Order. 32 Comp. Gen. 347 (1953); 30 Comp. Gen. 258 (1951).

Additional cases are 30 Comp. Gen. 205 (1950); B-21 1306, June 6, 1983; B-153694, October 23, 1964.

A variation occurred in 54 Comp. Gen. 1093 (1975). The unexpended balance of a Commerce Department appropriation, which had been used to administer a loan guarantee program and to make collateral protection payments under the Trade Expansion Act of 1962, was transferred to a similar but new program by the Trade Act of 1974. The 1974 statute repealed the earlier provisions. This meant that the transferred funds could no longer be used for expenses under the 1962 act—including payments on guarantee commitments—even though that was the purpose for which they were originally appropriated, unless the expenditures could also be viewed as relating to the Department's functions under the 1974 act. Applying the rationale of the later-imposed duty cases, the Comptroller General concluded that the purposes of the two programs were sufficiently related so that the Department could continue to use the transferred funds to make collateral protection payments and to honor guarantees made under the 1962 act.

A related question is the extent to which an agency may use current appropriations for preliminary administrative expenses in preparation for implementing a new law, prior to the receipt of substantive appropriations for the new program. Again, the appropriation is available provided it is sufficiently broad to embrace expenditures of the type contemplated. Thus, the National Science Foundation could use its fiscal year 1967 appropriations for preliminary expenses of implementing the National Sea Grant College and Program Act of 1966, enacted after the appropriation, since the purposes of the new act were basically similar to the purposes of the appropriation. 46 Comp. Gen. 604 (1967). The preliminary tasks in that case included such things as development of policies and plans, issuance of internal instructions, and the establishment of organizational units to administer the new program,

Similarly, the Bureau of Land Management could use current appropriations to determine fair market value and to initiate negotiations with owners in connection with the acquisition of mineral interests under the Cranberry Wilderness Act, even though actual acquisitions could not be made until funding was provided in appropriation acts. B-211306, June 6, 1983. See also B-153694, October 23, 1964; B-153694, September 2, 1964.

4. Termination of Program

If Congress appropriates money to implement a program, can the agency use that money to terminate the program? (Expenses of terminating a program could include such things as contract termination costs and personnel reduction-in-force expenses.)

If implementation of the program is mandatory, the answer is no. In 1973, for example, the administration attempted to terminate certain programs funded by the Office of Economic Opportunity, relying in part on the fact that it had not requested any funds for OEO for 1974. The programs in question were funded under a multiple-year authorization which directed that the programs be carried out during the fiscal years covered by the authorization. The United States District Court for the District of Columbia held that funds appropriated to carry out the programs could not be used to terminate them. Local 2677, American Federation of Government Employees v. Phillips, 358 F.Supp.60 (D.D.C. 1973). The court cited 31 U.S.C. §1301(a) as one basis for its holding. Id. at 76 n. 17. See also 63 Comp. Gen. 75,78 (1983).

Where the program is nonmandatory, the agency has more discretion, but there are still limits. In B-1 15398, August 1, 1977, the Comptroller General advised that the Air Force could terminate B-1 bomber production, which had been funded under a lump-sum appropriation and was not mandated by any statute. Later cases have stated the rule that an agency may use funds appropriated for a program to terminate that program where (1) the program is non-mandatory, and (2) the termination would not result in curtailment of the overall program to such an extent that it would no longer be consistent with the scheme of applicable program legislation. 61 Comp. Gen. 482 (1982) (Department of Energy could use funds appropriated for fossil energy research and development to terminate certain fossil energy programs); B-203074, August 6, 1981. Several years earlier, GAO had held that the closing of all Public

Health Service hospitals would exceed the Surgeon General's discretionary authority because a major portion of the Public Health Service Act would effectively be inoperable without the PHS hospital system. B-156510, February 23, 1971; B-156510, June 7, 1965.

The concepts are further illustrated in a series of cases involving the Clinch River Nuclear Breeder Reactor. In 1977, the administration proposed using funds appropriated for the design, development, construction, and operation of the reactor to terminate the project. Construction of a breeder reactor had been authorized, but not explicitly mandated, by statute. As contemplated by the program legislation, the Energy Research and Development Administration, the predecessor of the Department of Energy, had submitted program criteria for congressional approval. GAO reviewed the statutory scheme, found that the approved program criteria were "as much a part of [the authorizing statute] as if they were explicitly stated in the statutory language itself," and concluded that use of program funds for termination was unauthorized. B-1 15398, June 23, 1977. Two subsequent opinions reached the same conclusion, supported further by a provision in a 1978 supplemental appropriation act which specifically earmarked funds for the reactor. B-164105, March 10, 1978; B-164105, December 5, 1977,

By 1983 the situation had changed. Congressional support for the reactor had eroded considerably, no funds were designated for it for fiscal year 1984, and it became apparent that further funding for the project was unlikely. In light of these circumstances, GAO revisited the termination question and concluded that the Department of Energy now had a legal basis to use 1983 funds to terminate the project in accordance with the project justification data which provided for termination in the event of insufficient funds to permit effective continuation. 63 Comp.Gen. 75 (1983).

B. The "Necessary Expense" Doctrine

1. The Theory

The preceding discussion establishes the primacy of 31 U.S.C. §1301(a) in any discussion of purpose availability. The next point

to emphasize is that 31 U.S.C. §1301(a) does not require, nor would it be reasonably possible, that every item of expenditure be specified in the appropriation act. While the statute is strict, it is applied with reason.

The spending agency has reasonable discretion in determining how to carry out the objects of the appropriation. This concept, known as the “necessary expense doctrine,” has been around almost as long as the statute itself. An early statement of the rule is contained in 6 Comp. Gen. 619,621 (1927):

“It is a well-settled rule of statutory construction that where an appropriation is made for a particular object, by implication it confers authority to incur expenses which are necessary or proper or incident to the proper execution of the object, unless there is another appropriation which makes more specific provision for such expenditures, or unless they are prohibited by law, or unless it is manifestly evident from various precedent appropriation acts that Congress has specifically legislated for certain expenses of the Government creating the implication that such expenditures should not be incurred except by its express authority.”

The necessary expense rule is really a combination of two slightly different but closely related concepts:

(1) An appropriation made for a specific object is available for expenses necessarily incident to accomplishing that object unless prohibited by law or otherwise provided for. For example, an appropriation to erect a monument at the birthplace of George Washington could be used to construct an iron fence around the monument where administratively deemed necessary to protect the monument. 2 Comp. Dec. 492 (1896).

(2) Appropriations, even for broad categories such as salaries, frequently use the term “necessary expenses.” As used in this context, the term refers to “current or running expenses of a miscellaneous character arising out of and directly related to the agency’s work.” 38 Comp. Gen. 758,762 (1959); 4 Comp. Gen. 1063, 1065 (1925).

Although the theory is identical in both situations, the difference is that expenditures in the second category relate to somewhat broader objects.

The Comptroller General has never established a precise formula for determining the application of the necessary expense rule. In

view of the vast differences among agencies, any such formula would almost certainly be unworkable. Rather, the determination must be made essentially on a case-by-case basis.

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

(1) The expenditure must bear a logical relationship to the appropriation sought to be charged. In other words, it must make a direct contribution to carrying out either a specific appropriation or an authorized agency function for which more general appropriations are available.

(2) The expenditure must not be prohibited by law.

(3) The expenditure must not be otherwise provided for, that is, it must not be an item that falls within the scope of some other appropriation or statutory funding scheme.

E.g., 63 Comp. Gen. 422,427-28 (1984); B-230304, March 18, 1988.

a. Relationship to the
Appropriation

The first test—the relationship of the expenditure to the appropriation—is the one that generates by far the lion’s share of questions. On the one hand, the rule does not require that a given expenditure be “necessary” in the strict sense that the object of the appropriation could not possibly be fulfilled without it. Thus, the expenditure does not have to be the only way to accomplish a given object, nor does it have to reflect GAO’s perception of the best way to do it. Yet on the other hand, it has to be more than merely desirable or even important. E.g., 34 Comp. Gen. 599 (1955); B-42439, July 8, 1944. An expenditure cannot be justified merely because some agency official thinks it is a good idea.

The important thing is not the significance of the proposed expenditure itself or its value to the government or to some social purpose in abstract terms, but the extent to which it will contribute to accomplishing the purposes of the appropriation the agency wishes to charge. For example, the Forest Service can use its appropriation for “Forest Protection and Utilization” to buy plastic litter bags for use in a national forest. 50 Comp. Gen. 534 (1971). However, operating appropriations of the Equal Employment Opportunity Commission are not available to pay to the Internal Revenue Service taxes due on judgment proceeds recovered by the EEOC in an

enforcement action. While the payment would further a purpose of the IRS, it would not contribute to fulfilling the purposes of the EEOC appropriation. 65 Comp.Gen. 800 (1986).

If the basic test is the relationship of the expenditure to the appropriation sought to be charged, it should be apparent that the “necessary expense” concept is a relative one. As stated in 65 Comp. Gen. 738,740 (1986):

“We have dealt with the concept of ‘necessary expenses’ in a vast number of decisions over the decades. If one lesson emerges, it is that the concept is a relative one: it is measured not by reference to an expenditure in a vacuum, but by assessing the relationship of the expenditure to the specific appropriation to be charged or, in the case of several programs funded by a lump-sum appropriation, to the specific program to be served. It should thus be apparent that an item that can be justified under one program or appropriation might be entirely inappropriate under another, depending on the circumstances and statutory authorities involved.”

The evident difficulty in stating a precise rule emphasizes the role and importance of agency discretion. It is in the first instance up to the administrative agency to determine that a given item is reasonably necessary to accomplishing an authorized purpose. Once the agency makes this determination, GAO will normally not substitute its own judgment for that of the agency. In other words, the agency’s administrative determination of necessity will be given considerable deference. The standard GAO uses in evaluating purpose availability is summarized in the following passage from B-223608, December 19, 1988:

“When we review an expenditure with reference to its availability for the purpose at issue, the question is not whether we would have exercised that discretion in the same manner. Rather, the question is whether the expenditure falls within the agency’s legitimate range of discretion, or whether its relationship to an authorized purpose or function is so attenuated as to take it beyond that range.”

A decision on a “necessary expense” question therefore involves (1) analyzing the agency’s appropriations and other statutory authority to determine whether the purpose is authorized, and (2) evaluating the adequacy of the administrative justification, to decide whether the agency has properly exercised, or exceeded, its discretion.

The role of discretion in purpose availability is further complicated by the fact that not all federal establishments have the same range of discretion. For example, a government corporation with the authority to determine the character and necessity of its expenditures has, by virtue of its legal status, a broader measure of discretion than a “regular” agency. But even this discretion is not unlimited and is bound at least by considerations of sound public policy. See 14 Comp.Gen. 755 (1935), affirmed upon reconsideration in A-60467, June 24, 1936,

Two decisions involving the Bonneville Power Administration will illustrate. In 1951, the Interior Department asked whether funds appropriated to BPA could be used to enter into a contract to conduct a survey to determine the feasibility of “artificial nucleation and cloud modification” (artificial rainmaking in English) for a portion of the Columbia River drainage basin. If the amount of rainfall during the dry season could be significantly increased by this method, the amount of marketable power for the region would be enhanced. Naturally, BPA did not have an appropriation specifically available for rainmaking. However, in view of BPA’s statutory role in the sale and disposition of electric power in the region, GAO concluded that the expenditure was authorized. B-104463, July 23, 1951.

The Interior Department then asked whether, assuming the survey results were favorable, BPA could contract with the rainmakers. GAO thought this was going too far and questioned whether BPA’s statutory authority to encourage the widest possible use of electric energy really contemplated artificial rainmaking. GAO emphasized that the expenditure would be improper for a department or agency with the “ordinary authority usually granted” to federal agencies. However, the legislative history of BPA’s enabling statute indicated that Congress intended that it have a degree of freedom similar to public corporations and that it be largely free from “the requirements and restrictions ordinarily applicable to the conduct of Government business.” Therefore, while the Comptroller General expressly refused to “approve” the rainmaking contract, he felt compelled to hold that BPA’s funds were legally available for it. B-105397, September 21, 1951.

For the typical federal department or agency, the range of discretion will be essentially the same, with variations in the kinds of things justifiable under the necessary expense umbrella stemming

from program differences. For example, necessary expenses for an agency with law enforcement responsibilities may include items directly related to that authority which would be inappropriate for agencies without law enforcement functions. Thus, the Immigration and Naturalization Service could use its "salaries and expenses" appropriation to purchase and install lights, automatic warning devices, and observation towers along the boundary between the United States and Mexico. 29 Comp. Gen. 419 (1950). See also 7 Comp. Dec. 712 (1901). Similarly, in B-204486, January 19, 1982, the Federal Bureau of Investigation could buy insurance on an undercover business not so much to insure the property but to enhance the credibility of the operation.

The procurement of evidence is also authorized as a necessary expense for an agency with law enforcement responsibilities. For example, Forest Service appropriations could be used to pay towing and storage charges for a truck seized as evidence of criminal activities in a national forest. B-186365, March 8, 1977. See also 27 Comp. Gen. 516 (1948); 26 Comp. Dec. 780,783 (1920); B-56866, April 22, 1946.

Cases involving fairs and expositions provide further illustration. For the most part, when Congress desires federal participation in fairs or expositions, it has authorized it by specific legislation. See, e.g., B-160493, January 16, 1967, discussing legislation which authorized federal participation in HemisFair 1968 in San Antonio. For another example, U.S. participation in the 1927 International Exposition in Seville, Spain, was specifically authorized by statute. See 10 Comp. Gen. 563,564 (1931).

However, specific statutory authority is not essential. If participation is directly connected with and is in furtherance of the purposes for which a particular appropriation has been made, and an appropriate administrative determination is made to that effect, the appropriation is available for the expenditure. 16 Comp. Gen. 53 (1936); 10 Comp. Gen. 282 (1930); 7 Comp. Gen. 357 (1927); 4 Comp. Gen. 457 (1924).⁴ Authority to disseminate information will generally provide adequate justification. E.g., 7 Comp. Gen. 357; 4 Comp. Gen. 457.

⁴A few early cases purporting to require specific authority, such as 2 Comp. Gen. 581 (1923), must be regarded as implicitly modified by the later cases.

In the absence of either statutory authority or an adequate justification under the necessary expense doctrine, the expenditure, like any other expenditure, is illegal. Thus, the Department of Housing and Urban Development had no authority to finance participation at a trade exhibition in the Soviet Union where HUD's primary purpose was to enhance business opportunities for American companies. 68 Comp. Gen. 226 (1989); B-229732, December 22, 1988. Regardless of whether it may or may not have been a good idea, commercial trade promotion is not, one of the purposes for which Congress appropriates money to HUD.

No discussion would be complete without some mention of the "marauding woodpecker" case. It appears that in 1951, "marauding woodpeckers" were causing considerable damage to government-owned transmission lines and the Southwestern Power Administration, Department of the Interior, wanted to buy guns with which to shoot the woodpeckers. Interior first went to the Army, but the Army advised that the types of guns and ammunition desired were not available, so Interior next came to GAO. The Comptroller General held that, if administratively determined to be necessary to protect the transmission lines, Interior could buy the guns and ammunition from the Southwestern Power Administration's construction appropriation. The views of the woodpeckers were not solicited. B-105977, December 3, 1951. Actually, this was not a totally novel issue. Several years earlier, GAO had approved the use of an Interior Department "maintenance of range improvements" appropriation for the control of coyotes, rodents, and other "predatory animals." A-82570, December 30, 1936. See also A-82570/B-120739, August 21, 1957.⁷

⁷Everyone loves a good animal case. Unfortunately, the animals in most GAO decisions are dead or, as in the cases cited in the text, soon to become dead. Readers interested more in amusement than precedent might also check out 7 Comp. Gen. 304 (1927) (removal of a horse "found dead lying on its back in a hole"); 18 Comp. Gen. 109 (1938) (another dead horse); B-86211, July 26, 1949 (death of hogs allegedly caused by being fed garbage purchased from Navy installation; it was pointed out that other hogs had eaten the same government-furnished garbage and managed to survive); B-47255, February 6, 1945 (burial of three dead bulls); 13-37205, October 19, 1943 (mule fell off cable swing bridge); A-92649, April 22, 1938 (still another dead horse); B-115434-O.M., June 19, 1953 (agency borrowed a bull from another agency for breeding purposes, then had it slaughtered when it became vicious). These cases are being memorialized here because they will probably never be cited anywhere else. Insects do not escape either. See 34 Comp. Gen. 236 (1954) (grasshopper control in national forests). We're still looking for cases on fish,

b. Expenditure Otherwise Prohibited

The second test under the necessary expense doctrine is that the expenditure must not be prohibited by law. As a general proposition, neither a necessary expense rationale nor the “necessary expense” language in an appropriation act can be used to overcome a statutory prohibition. E.g., 38 Comp. Gen. 758 (1959); 4 Comp. Gen. 1063 (1925). In the two cited decisions, the Comptroller General held that the necessary expense language did not overcome the prohibition in 41 U.S.C. § 12 against contracting for public buildings or public improvements in excess of appropriations for the specific purpose. In large measure, this is little more than an application of the rule against repeal by implication discussed in Chapter 2.

There are exceptions where applying the rule would make it impossible to carry out a specific appropriation. A very small group of cases stands for the proposition that, where a specific appropriation is made for a specific purpose, an expenditure which is “absolutely essential” to accomplishing the specific object may be incurred even though the expenditure would otherwise be prohibited. In order for this exception to apply, the expenditure must, literally be “absolutely essential” in the sense that the object of the appropriation could not be accomplished without it. Also, the rule would not apply to the use of a more general appropriation,

For example, in 2 Comp. Gen. 133 (1922), modifying 2 Comp. Gen. 14 (1922), an appropriation to provide air mail service between New York, Chicago, and San Francisco was held available to construct hangars and related facilities at a landing field in Chicago notwithstanding the requirement for a specific appropriation in 41 U.S.C. § 12. The reason was that it would have been impossible to provide the service, and hence to accomplish the purpose of the appropriation, without erecting the facilities. See also 17 Comp. Gen. 636 (1938) and 22 Comp. Dec. 317 (1916). (The 1938 decision cites the rule but the decision itself is an ordinary necessary expense case.)

An 1899 case, 6 Comp. Dec. 75, provides another good illustration of the concept. The building housing the Department of Justice had become unsafe and overcrowded. Congress enacted legislation to authorize and fund the construction of a new building for the Department. The statute specifically provided that the new building be constructed on the site of the old building, but did not address the question of how the Department would function during the construction period. The obvious solution was to rent another

building until the new one was ready, but 40 U.S.C. § 34 prohibits the rental of space in the District of Columbia except under an appropriation specifically available for that purpose, and the Department had no such appropriation. On the grounds that any other result would be absurd, the Comptroller of the Treasury held that the Department could rent interim space notwithstanding the statutory prohibition. While the decision was not couched in terms of the expenditure being “absolutely essential,” it said basically the same thing. Since the Department could not cease to function during the construction period, the appropriation for construction of the new building could not be fulfilled without the expenditure for interim space.

c. Expenditure Otherwise
Provided for

The third test is that an expenditure cannot be authorized under a necessary expense theory if it is otherwise provided for under a more specific appropriation or statutory funding mechanism. The fact that the more specific appropriation may be exhausted is immaterial. Thus, in B-139510, May 13, 1959, the Navy could not use its shipbuilding appropriation to deepen a channel in the Singing River near Pascagoula, Mississippi, to permit submarines then under construction to move to deeper water. The reason was that this was a function for which funds were traditionally appropriated to the Corps of Engineers, not the Navy. The fact that appropriations had not been made in this particular instance was irrelevant.

Similarly, the Navy could not use appropriations made for the construction or procurement of vessels and aircraft to provide housing for civilian employees engaged in defense production activities because funds for that purpose were otherwise available. 20 Comp. Gen. 102 (1940).

In a more recent case, Federal Prison Industries could use its revolving fund to build industrial facilities incident to a federal prison, or to build a residential camp for prisoners employed in federal public works projects, but could not use that fund to construct other prison facilities because such construction was statutorily provided for elsewhere. B-230304, March 18, 1988.

In these cases, the existence of a more specific source of funds, or a more specific statutory mechanism for getting them, is the governing factor and overrides the “necessary expense” considerations.

2. General Operating Expenses

An illustration of how the necessary expense concept works common to all agencies is the range of expenditures permissible under general operating appropriations. All agencies, regardless of program differences, have certain things in common. Specifically, they all have employees, occupy space in buildings, and maintain an office environment. To support these functions, they incur a variety of administrative expenditures. Some are specifically authorized by statute; others flow logically from the requirements of maintaining a workforce.

All agencies receive general operating appropriations for these administrative expenses. Depending largely on the size of the agency, they may be separate lump-sum appropriations or may be combined with program funds. The most common (but not the only) form of general operating appropriation is entitled “Salaries and Expenses.” Although an “S&E” appropriation may contain earmarks, it for the most part does not specify the types of “expenses” for which it is available. Employee salaries, together with related items such as agency contributions to health insurance and retirement, of course comprise the bulk of an S&E appropriation. This section summarizes some of the other items chargeable to S&E funds as necessary expenses of running the agency which are not covered elsewhere in this chapter.

a. Training

Training of government employees is governed by the Government Employees Training Act, 5 U.S.C. Chapter 41, aspects of which are discussed in several places in this chapter. The authority of the Government Employees Training Act is broad, but it is not unlimited. For example, tryouts for the United States Olympic Shooting Team do not constitute training under the Act. 68 Comp.Gen. 721 (1989), Nor do routine meetings, however formally structured, qualify as training. 68 Comp.Gen. 606 (1989). See also 68 Comp.Gen. 604 (1989),

For an entity not covered by the definition of “agency” in the Act, the authority to conduct training is limited. The particular training program must be (1) necessary to carry out the purpose for which the appropriation is made, (2) for a period of brief duration, and (3) special in nature. 36 Comp.Gen. 621 (1957) (including extensive citations to earlier decisions). See also 68 Comp.Gen. 127 (1988).

Training of nonfederal personnel, where necessary to the implementation of a federal program, is a straightforward “necessary

expense” question under the relevant program appropriation, E.g., 18 Comp. Gen. 842 (1939).

In B-148826, July 23, 1962, the Comptroller General held that the Defense Department could pay \$1 each to students participating in a civil defense training course as consideration for a release from liability,

b. Travel

Reimbursement for travel expenses incurred on official travel is now authorized by statute, E.g., 5 U.S.C. § 5702. However, even before the legislation was enacted, expenses incurred on authorized official travel were reimbursable as a necessary expense. 4 Comp. Dec. 475 (1898).

Of course there are limits, and expenses are reimbursable only to the extent authorized by statute and implementing regulations. Thus, in an early case, expenses of a groom and valet incurred by an Army officer in Belgium could not be regarded as necessary travel expenses and therefore could not be reimbursed from Army appropriations. 21 Comp. Dec. 627 (1915). See GAO’s Personnel Law Manuals for extensive coverage of travel entitlements.

Senior-level officials frequently travel for political purposes. As the Justice Department has pointed out, it is often impossible to neatly categorize travel as either purely business or purely political. To the extent it is possible to distinguish, appropriated funds should not be used for political travel. 6 Op. Off. Legal Counsel 214 (1982). GAO has conducted occasional reviews in this area, and has commented on the lack of legally binding guidelines against which to evaluate particular expenditures. E.g., Review of White House and Executive Agency Expenditures for Selected Travel, Entertainment, and Personnel Costs, AFMD-81-36 (March 6, 1981); Review of the Propriety of White House and Executive Agency Expenditures for Selected Travel, Entertainment, and Personnel Costs, FGMSD-81-13 (October 20, 1980).

Finally, there are situations in which expenses of congressional travel may be chargeable to the appropriations of other agencies. Under 31 U.S.C. § 1108(g):

“A mounts available under law are available for field examinations of appropriation estimates. The use of the amounts is subject only to regulations prescribed by the appropriate standing committees of Congress.

Thus, travel expenses of congressional committee members and staff incident to “field examinations” of appropriation requests may be charged to the agency whose programs and budget are being examined. B-214611, April 17, 1984; B-129650, January 2, 1957. Before the above provision was enacted as permanent legislation, similar provisions had appeared for many years in various appropriation acts. See 6 Comp. Gen. 836 (1927); 23 Comp. Dec. 493 (1917).

Travel expenses of congressional spouses (Members and staff) may not be paid from appropriated funds. B-204877, November 27, 1981.

c. Postage Expenses

Agencies are required to reimburse the Postal Service for mail sent by or to them as penalty mail. Reimbursement is to be made “out of any appropriations or funds available to them.” 39 U.S.C. § 3206(a). This statute amounts to an exception to the general purpose statute, 31 U.S.C. § 1301(a), in that the expenditure may be charged to any appropriation available to the agency. Penalty mail costs do not have to be charged to the particular bureau or activity which generated the cost. 33 Comp. Gen. 206 (1953). By virtue of this statutory authority, the use of appropriations for one component of an agency to pay penalty mail costs of another component funded under a separate appropriation does not constitute an unauthorized transfer of appropriations. 33 Comp. Gen. 216 (1953). The same principle applies to reimbursement for registry fees. 36 Comp. Gen. 239 (1956).

While agencies are not required by the statute to allocate penalty mail costs among using components on a pro rata basis, the Office of Management and Budget could require it for accounting and budgetary reasons. B-1 17401, February 13, 1957.

d. Books and Periodicals

Expenditures for books and periodicals are evaluated under the necessary expense rule. Thus, the American Battle Monuments Commission could use its Salaries and Expenses appropriation to buy books on military leaders to help it decide what people and events to memorialize. 27 Comp. Gen. 746 (1948).⁸

⁸Decisions in this area prior to 1946 applying a stricter standard, such as 21 Comp. Gen. 339 (1941) and 22 Comp. Dec. 317 (1916), should be disregarded as they reflected prohibitory legislation enacted in 1898 (30 Stat. 316) and repealed in 1946.

The National Science Foundation could subscribe to a publication called "Supervisory Management" to be used as training material in a supervisory training program under the Government Employees Training Act. If determined necessary to the course, the subscription could be paid from the Foundation's Salaries and Expenses appropriation. 39 Comp.Gen. 320 (1959). Similarly, the Interior Department's Mining Enforcement and Safety Administration could subscribe to the "Federal Employees News Digest" if determined to be necessary in carrying out the agency's statutory functions. 55 Comp.Gen. 1076 (1976).

Subsequently, when the Federal Employees News Digest came under some criticism, it became necessary to explain that a decision such as 55 Comp.Gen. 1076 is neither an endorsement of a particular publication nor an exhortation for agencies to buy it. It is merely a determination that the purchase is legally authorized. B-185591, February 7, 1985.

In B-171856, March 3, 1971, the Interior Department was permitted to purchase newspapers to send to a number of Eskimo families in Alaska. Members of the families had been transported to Washington (state) to help in fighting a huge fire, and the newspapers were seen as necessary to keep the families advised of the status of the operation and also as a measure to encourage future voluntarism.

e. **Miscellaneous Items Incident to the Federal Workplace** Agencies may spend their appropriations, within reason, to cooperate with government-sanctioned charitable fund-raising campaigns, including such things as permitting solicitation during working hours, preparing campaign instructions, and distributing campaign materials. 67 Comp.Gen. 254 (1988) (Combined Federal Campaign); B-155667, January 21, 1965; B-154456, August 11, 1964; B-119740, July 29, 1954. This does not, however, extend to giving T-shirts to Combined Federal Campaign contributors. 70 Comp.Gen. (B-240001, February 8, 1991).

An agency may use its general operating appropriations to fund limited amounts of promotional material in support of the United States savings bond campaign. B-225006, June 1, 1987.

Support which agencies are authorized by law to provide to federal credit unions may, if administratively determined to be necessary, include automatic teller machines. 66 Comp.Gen. 356 (1987). The

justification was adequate in that case because the facility in question operated on three shifts 7 days a week and the credit union could not remain open to accommodate workers on all shifts.

The Salaries and Expenses appropriation of the Internal Revenue Service could be used to procure credit bureau reports if administratively determined to be necessary in connection with investigating applicants for employment with the IRS. B-117975, December 29, 1953.

Outplacement assistance to employees maybe regarded as a legitimate matter of agency personnel administration if the expenditures are found to benefit the agency and are reasonable in amount. 68 Comp. Gen. 127 (1988). The Government Employees Training Act authorizes training in preparation for placement in another federal agency under conditions specified in the statute. 5 U.S.C. § 4103(b).

Otherwise unrestricted operating appropriations are available to protect a government official who has been threatened or is otherwise in danger, if the agency determines that the risk impairs the official's ability to carry out his or her duties and hence adversely affects the efficient functioning of the agency. Certain officials, specified in 18 U.S.C. § 3056(a), are entitled to Secret Service protection. 54 Comp. Gen. 624 (1975), as modified by 55 Comp. Gen. 578 (1975).

Payment of an honorarium to an invited guest speaker (other than a government employee) is permissible under a necessary expense rationale. See A-69906, March 16, 1936, in which payment of an honorarium by an agency of the District of Columbia Government was found to be an allowable administrative expense. See also B-20517, September 24, 1941.

Fees for the notarization of documents are properly payable from appropriated funds where no government notary is available. B-33846, April 27, 1943.

An agency's appropriations are not available to reimburse the Civil Service Retirement Fund for losses due to overpayments to a retired employee resulting from the agency's erroneous processing of information. 54 Comp. Gen. 205 (1974).

The Federal Reserve Board could not match employee contributions to an employee savings plan established by the Board. B-174174, September 24, 1971.

C. Specific Purpose Authorities and Limitations

1. Introduction

This section will explore a number of specific topics concerning purpose availability. Sections C.2 through C.16 cover areas which have generated considerable activity over the years and which require somewhat detailed presentation. While our topic selection is designed to highlight certain restrictions, our objective is to describe what is authorized as well as what is unauthorized. Most of the topics are a mixture of both.

Restrictions on the purposes for which appropriated funds maybe spent come from a variety of sources. Some may stem from the Constitution itself. An example is the prohibition on paying certain state and local taxes, Section C. 15. Others are found in permanent legislation, such as the restrictions on residential and long distance telephone service discussed in Section C.16.

A common source of purpose restrictions is the appropriation act itself. Restrictions are often included as provisos to the appropriating language or as general provisions or "riders." For example, B-202716, October 29, 1981, construes an appropriation act restriction prohibiting the use of Legal Services Corporation funds for the representation of illegal aliens. Another example is the restriction on "publicity and propaganda" expenditures found in some appropriation acts, discussed in Section C. 11.

Finally, a number of restrictions have evolved from decisions of the Comptroller General and his predecessor, the Comptroller of the Treasury. An example is the government's policy on self-insurance, Section C.10. The restrictions that have evolved administratively usually date back to the 19th Century, are firmly embedded in appropriations law, and for the most part have been recognized by

Congress at least implicitly by the practice of legislating the occasional exception.

Purpose restrictions will commonly prohibit the use of funds for an item except “under specific statutory authority, ” or except under “an appropriation specifically available therefor,” or similar language. The “specific authority” needed to create an exception in these situations need not be found in the appropriation act itself, but may be contained in authorizing or enabling legislation as long as it is clearly applicable to the appropriation sought to be charged. 23 Comp. Gen. 859 (1944); 16 Comp. Gen. 773 (1937). Of course, Congress is always free to legislate exceptions whether it has specifically reserved that prerogative to itself or not. Thus, an “unless otherwise authorized by law” clause largely restates what the law would be even without that language.

2. Attendance at Meetings and Conventions

Meetings have become a way of life in contemporary American society and the federal bureaucracy is no exception. It seems that there are meetings on just about everything. Quite often they can be very useful. They can also be expensive. It is no surprise that lots of meetings are held in places like Honolulu and San Francisco. This section will explore when appropriated funds may be used to send people, government employees and others, to meetings. Congress has passed a number of statutes in this area and the cases usually involve the interpretation and application of the various statutory provisions. For purposes of this discussion, the term “meeting” includes other designations such as conference, congress, convention, seminar, symposium, and workshop; what the particular gathering is called is irrelevant.

a. Government Employees

(1) Statutory framework

To understand the law in this area, it is necessary to understand the interrelationship of several statutes. Listed in the order of their enactment, they are: 5 U.S.C. 55946, 31 U.S.C. § 1345, 5 U.S.C. 54109, and 5 U.S.C. s 4110. This interrelationship is best seen by outlining the statutory evolution.

The first piece of legislation was enacted in 1912. As relevant here, section 8 of the Act of June 26, 1912, 37 Stat. 139, 184, prohibited the payment, without specific statutory authority, of the expenses

of attendance of an individual at meetings or conventions of members of a society or association. With exceptions to be noted below, this statute is now found at 5 U.S.C. § 5946. For the most part, it has always been viewed as applying to attendance by federal employees at non-federally sponsored meetings. See, e.g., B-140912, November 24, 1959.

There were many early cases under the 1912 statute. Since the prohibition is directed at meetings of a "society or association," other types of meetings were not covered. Thus, the Federal Power Commission could, if determined to be in the furtherance of authorized activities, send a representative to the World Power Conference (in Basle, Switzerland) since it was not a meeting of a "society or association." 5 Comp. Gen. 834 (1926). Similarly, the statute did not prohibit travel by United States Attorneys "to attend a conference of attorneys not banded together into a society or association, but called together for one meeting only for conference in a matter bearing directly on their official duties." 1 Comp. Gen. 546 (1922).

However, if a given gathering was viewed as a meeting or convention of a society or association, the expenses were consistently disallowed. E.g., 16 Comp. Gen. 252 (1936); 5 Comp. Gen. 599 (1926), affirmed by 5 Comp. Gen. 746 (1926); 3 Comp. Gen. 883 (1924). GAO often told agencies in those days that if they thought attendance would be in the interest of the government, they should present the matter to Congress. E.g., 5 Comp. Gen. at 747. In fact Congress granted specific authority to a number of agencies (for an example, see B-136324, August 1, 1958), and later, as will be seen below, enacted general legislation which renders 5 U.S.C. § 5946, as it relates to attendance at meetings, of very limited applicability.

The next congressional venture in this field was Public Resolution No. 2, 74th Congress, 49 Stat. 19 (1935), aimed primarily at restricting the use of appropriated funds to pay expenses of nongovernment persons at conventions. This statute, now codified at 31 U.S.C. § 1345, provides in relevant part:

"Except as specifically provided by law, an appropriation may not be used for travel, transportation, and subsistence expenses for a meeting. This section does not prohibit--

"(1) an agency from paying the expenses of an officer or employee of the United States Government carrying out an official duty; ."

Significantly, 31 U.S.C. § 1345 does not apply to government employees in the discharge of official duties. Thus, as of 1935, attendance by private parties at government expense was prohibited by 31 U.S.C. § 1345; attendance by government employees was prohibited by the 1912 statute for meetings of a society or association (regardless of the relationship to official duties), and by 31 U.S.C. § 1345 for other types of meetings unless attendance was in the discharge of official duties.

The next relevant legislative action came in 1958 with two provisions of the Government Employees Training Act, 72 Stat. 327. Section 10 of the Act, 5 U.S.C. § 4109, authorizes payment of certain expenses in connection with authorized training. Section 19(b) of the Act, 5 U.S.C. § 4110, makes travel appropriations available for expenses of attendance at meetings “which are concerned with the functions or activities for which the appropriation is made or which will contribute to improved conduct, supervision, or management of the functions or activities.” When Title 5 of the United States Code was remodified in 1966, qualifying language was added to 5 U.S.C. § 5946 to make it clear that the requirement for specific statutory authority no longer applied to the extent payment was authorized by 5 U.S.C. § 4109 or § 4110. See 38 Comp. Gen. 800 (1959).

With this statutory framework as background, it is now possible to attempt to state some rules.

A government employee may attend a non-government sponsored meeting at government expense (1) if it is part of an authorized training program under 5 U.S.C. 54109, or (2) if it is related to agency functions or management under 5 U.S.C. § 4110.

For example, the Labor Department could use its Salaries and Expenses appropriation to pay the attendance fees of its Director of Personnel at a conference of the American Society of Training Directors since the meeting qualified under the broad authority of 5 U.S.C. 54110.38 Comp. Gen. 26 (1958). The expenses of attendance may not be paid if the employing agency refuses to authorize attendance, even if authorization would have been permissible under the statute. B-164372, June 12, 1968. (This was sort of an odd case. An employee wanted to attend a conference in Tokyo, Japan. The agency refused authorization because the employee had announced his intention to resign after the conference. The

employee went anyway, and for some reason filed a claim for his expenses. GAO said no.) Where attendance is authorized, the fact that the sponsor is a profit-making organization is immaterial. B-161777, July 11, 1967.

The express inclusion of "management" in 5 U.S.C. § 4110 is significant. Before the Training Act, GAO had strictly construed grants of statutory authority for attendance at meetings as excluding meetings concerning general problems such as management which are common to all agencies. 37 Comp. Gen. 335 (1957). This type of meeting is now expressly authorized.

If neither 5 U.S.C. § 4109 nor 5 U.S.C. § 4110 applies and the meeting is a meeting of a "society or association," then it is subject to the prohibition of 5 U.S.C. § 5946.

The continuing viability of 5 U.S.C. § 5946 requires further elaboration. GAO held in 38 Comp. Gen. 800 (1959) that the Government Employees Training Act repealed section 5946 by implication to the extent that the two statutes were incompatible. While this is true, some of the language in that decision has generated some confusion. The decision stated that the restriction in section 5946 "is inapplicable so far as agencies and personnel covered by the Government Employees Training Act are concerned," and that those agencies no longer need to obtain specific appropriation provisions to authorize attendance at meetings. Of course this statement is based on the premise that an agency is not likely to seek, nor is Congress likely to grant, specific appropriation authority for an agency to send its employees to meetings which have nothing to do with agency business. Thus, it is not accurate to say that section 5946 simply no longer applies to civilian employees of the government. It does apply, except that its scope is considerably reduced by virtue of the broad authority of the Training Act. If attendance cannot be authorized under either of the Training Act provisions, 5 U.S.C. § 5946 still applies. This relationship is correctly stated in 55 Comp. Gen. 1332, 1335-36 (1976). For cases where expenses were disallowed because they could not be justified under these standards, see B-202028, May 14, 1981; B-195045, February 8, 1980; B-166560, May 27, 1969.

It is also possible for 31 U.S.C. § 1345 to apply to government employees, although it would be the rare case. As noted above,

31 U.S.C. § 1345 does not apply to government employees in the discharge of official duties. A number of earlier cases will be found which cite the statute in passing for this proposition. E.g., 27 Comp. Gen. 627 (1948); 26 Comp. Gen. 53 (1946); 22 Comp. Gen. 315 (1942); B-117137, September 25, 1953; B-87691, August 2, 1949; B-80621, October 8, 1948; B-77404, June 29, 1948; B-77613, June 23, 1948; B-13888, December 10, 1940.⁹

Since the exception for government employees in 31 U.S.C. § 1345 is limited to the discharge of official duties, the statutory prohibition applies to government employees to the extent that a given meeting is not part of the discharge of official duties. If a meeting is not part of authorized training under 5 U.S.C. § 4109 and cannot qualify as related to agency functions under 5 U.S.C. § 4110, it would certainly not be within the exception in 31 U.S.C. § 1345 for the discharge of official duties. If the meeting is a meeting of a "society or association," it is, as noted above, subject to 5 U.S.C. 85946. If the meeting is not a meeting of a "society or association" and is not within the exception for the discharge of official duties, 31 U.S.C. § 1345 would apply. An example of a situation in which this rationale might apply is B-195045, February 8, 1980, in which attendance expenses at an executive board meeting of the Combined Federal Campaign were disallowed. (The case was decided on the basis of regulations and prior decisions.)

(2) Inability to attend

If an employee is scheduled to participate in a meeting or conference and is unable to attend, the government may be liable for attendance fees in certain situations. Two cases will illustrate.

In B-159059, June 28, 1966, an Interior Department employee had been accepted to attend an energy seminar. The seminar announcement provided a cut-off date for cancellation of reservations but permitted substitutions. Due to the press of other necessary work, the employee did not attend the seminar, nor did he send a substitute or request cancellation before the cut-off date. GAO found that the sponsor's acceptance of the employee's application, which had

⁹All of these cases also involve the pre-Training Act version of 5 U.S.C. § 5946 and may no longer be valid to that extent. The editors have made no attempt to examine each of the cases from this perspective. Thus, while the pre-1958 cases remain valid to the limited extent that they involve 31 U.S.C. § 1345, the results in those cases may no longer apply in view of the subsequent enactment of 5 U.S.C. §§ 4109 and 4110.

been duly approved (in this particular case, the applicant was also the approving official), obligated the government to pay the seminar fee subject to timely cancellation. Since the agency failed to give timely notice of cancellation, it was liable for the seminar fee.

In another 1966 case, a Defense Department employee was scheduled to attend a training seminar in New York but a severe snow storm prevented him from leaving Washington. (By Washington standards, this could have been two inches.) Since the employee's nonattendance was in no way attributable to the organization conducting the seminar, GAO concluded (citing B-159059) that the seminar fee should be paid. GAO rejected a contention that the government's obligation should be excused on the grounds of impossibility (the employee's nonattendance resulted from natural forces) since the arrangement permitted substitution of personnel. B-159820, September 30, 1966.

(3) Federally-sponsored meetings

Federally-sponsored meetings for employees (intra-agency or inter-agency), such as management or planning seminars, are not prohibited by 5 U.S.C. § 5946 since they are not meetings of a "society or association," nor are they prohibited by 31 U.S.C. § 1345 because they concern the discharge of official duties. The authority for this type of meeting is essentially a "necessary expense" question.

An increasingly common type of agency meeting is the "retreat type" conference. In this situation, some agency official with authority to do so determines that the participants should get away from their normal work environment and its associated interruptions such as telephones. Frequently, they need to get just far enough away to justify the payment of per diem allowances. While this type of meeting maybe criticized as extravagant, it is within the agency's administrative discretion under the "necessary expense" rule and therefore not illegal. See B-193137, July 23, 1979.

Agency meetings at or near the participant's normal duty station may present special problems with respect to reimbursement for meals. In many cases, meals or snacks will be unauthorized even though there is nothing improper about conducting the meeting itself. This area is discussed in detail in Section C.5.

(4) Rental of space in District of Columbia

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

“NO contract shall be made for the rent of any building, or part of any building, to be used for the purposes of the Government in the District of Columbia, until an appropriation therefor shall have been made in terms by Congress, and this clause shall be regarded as notice to all contractors or lessors of any such building or any part of building.”

The statute does not prohibit the procurement of short-term conference facilities if otherwise proper. 54 Comp. Gen. 1055 (1975). In rendering this decision, which overruled several earlier cases, the Comptroller General relied heavily on the Federal Property Management Regulations, in which the General Services Administration construed the procurement of short-term conference facilities as a service contract rather than a rental contract.

However, the statute does prohibit the procurement of lodging accommodations in the District of Columbia in connection with a meeting or conference without specific statutory authority. 56 Comp. Gen. 572 (1977), modifying and affirming B-159633, September 10, 1974; 49 Comp. Gen. 305 (1969).¹⁰ In 56 Comp. Gen. 572, GAO approved payment to the hotel of the difference between full per diem and the reduced per diem actually paid to the participating employees. This is because the agency could, without violating the statute, have paid full per diem to the employees if they had made the arrangements themselves on an individual basis. Thus, the difference represented a cost the agency would have properly incurred had it not procured the accommodations directly.

(5) Military personnel

Attendance at meetings by military personnel is governed by 37 U.S.C. § 412:

“Appropriations of the Department of Defense that are available for travel may not, without the approval of the Secretary concerned or his designee, be used for expenses incident to attendance of a member of an armed force under that department at a meeting of a technical, scientific, professional, or similar organization.”

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

This statute, designed to provide a broad exception for the Defense Department from 5 U.S.C. § 5946, originated as an appropriation act rider in the mid-1940's and was enacted as permanent legislation by section 605 of the Department of Defense Appropriation Act for 1954, 67 Stat. 349,

The Government Employees Training Act, enacted in 1958 and discussed above, applies to civilian employees of the military departments but not to members of the uniformed services, 38 Comp. Gen. 312 (1958). Accordingly, the Comptroller General held in 1959 that the administrative approval specified in 37 U.S.C. § 412 was no longer required for civilian employees covered by the Training Act. However, the requirement of 37 U.S.C. § 412 remains applicable to members of the uniformed services. 38 Comp. Gen. 800 (1959). See also 55 Comp. Gen. 1332, 1335 (1976). The recodification of Title 37 in 1962 recognized this distinction and reworded the statute to its present form so as to apply only to members of the armed forces,

The administrative approval required by the statute is a prerequisite to the availability of the appropriation, and has the effect of removing the appropriation from the prohibition of 5 U.S.C. § 5946 to the extent of such approval. 34 Comp. Gen. 573, 575 (1955). Oral approval, if satisfactorily established by the record, is sufficient to meet the requirement of the statute. B-140082, August 19, 1959. However, where implementing departmental regulations establish more stringent requirements, such as advance approval in writing, the regulations will control. B-139173, June 2, 1959.

The administrative approval requirement of 37 U.S.C. § 412 does not apply to meetings sponsored by a federal department or agency. 50 Comp. Gen. 527 (1971).

b. Non-Government Personnel (1) 31 U.S.C. § 1345

Quoted previously, 31 U.S.C. § 1345 prohibits the payment of travel, transportation, or subsistence expenses of private parties at meetings without specific statutory authority.

The Comptroller General set the tone for GAO's approach to 31 U.S.C. § 1345 in two cases decided shortly after the statute was enacted. In 14 Comp. Gen. 638 (1935), the Comptroller held that the Federal Housing Administration could not pay the travel and lodging

expenses for attendance at meetings of private citizens who were cooperating with the FHA in a campaign to encourage the repair and modernization of real estate. GAO had no difficulty in finding that the statute barred payment:

“There seems very little if any room for doubt as to the reasonable meaning and legal effect of [31 U.S.C. § 1345]. Simply stated, it is that no convention or other form of assemblage or gathering may be lodged, fed, conveyed, or furnished transportation at Government expense unless authority therefor is specifically granted by law.” *Id.* at 640.

A few months later, relying on 14 Comp. Gen. 638, the Comptroller General held similarly that 31 U.S.C. § 1345 prohibited the American Battle Monuments Commission from providing transportation and refreshments for private individuals at monument dedication ceremonies in Europe. 14 Comp. Gen. 851 (1935). Other early decisions applying the statutory prohibition are 15 Comp. Gen. 1081 (1936); B-53554, November 6, 1945; B-27441, August 25, 1942; and A-66869, January 31, 1936.

Some more recent cases in which GAO found expenditures prohibited by 31 U.S.C. § 1345 are summarized below:

- The Environmental Protection Agency could not pay transportation and lodging expenses of state officials attending a National Solid Waste Management Association Convention. B-166506, July 15, 1975, affirmed in 55 Comp. Gen. 750 (1976).
- The Mine Safety and Health Administration, Department of Labor, could not pay travel and subsistence expenses of miners and mine operators attending safety and health training seminars. B-193644, July 2, 1979.
- Maritime Administration could not pay transportation and subsistence expenses of non-federal participants in a 2-week seminar for general publication maritime writers. B-168627, May 26, 1970.
- Navy could not pay for a dinner and cocktail party for non-government minority group leaders. B-176806-0. M., September 18, 1972.
- National Highway Traffic Safety Administration could not pay travel and lodging expenses of state officials at a workshop on odometer fraud. 62 Comp. Gen. 531 (1983).

GAO has not attempted to define precisely what types of gatherings are within the scope of the statutory prohibition. The determination is made on a case-by-case basis. The statutory language is

broad and could presumably be construed to cover any situation where two or more persons are gathered together in one place. However, GAO has never adopted such a rigid view. For example, in 45 Comp. Gen. 476 (1966), a certifying officer of the Department of Agriculture asked whether he could “properly certify for payment a voucher covering payment for rental of a chartered bus for the transportation of female guests from Albuquerque to Grants, New Mexico, and return, for purposes of providing social and recreational services to Job Corps enrollees.” (This is what the case says. The editors are not making it up.) The Comptroller General found that this was simply not the kind of “meeting” 31 U.S.C. § 1345 was intended to prohibit. Further, there was statutory authority for providing “recreational services” for the enrollees. Therefore, the expenditure was not illegal. The decision does not specify precisely what “social and recreational services” the women were bused in to provide.

As noted, the prohibition of 31 U.S.C. § 1345 can be overcome by specific statutory authority. An example of such authority is language in an appropriation act making the appropriation available for “expenses of attendance at meetings” or similar language.] See 34 Comp. Gen. 321 (1955); 24 Comp. Gen. 86 (1944); 17 Comp. Gen. 838 (1938); 16 Comp. Gen. 839 (1937); B-117137, September 25, 1953. (This is the same language used before enactment of the Government Employees Training Act to grant exceptions from 5 U.S.C. § 5946.)

In one case, less-than-specific authority was found adequate. In 35 Comp. Gen. 129 (1955), GAO considered a statute which (1) provided for a “White House Conference on Education;” (2) specified that the conference be broadly representative of educators and other interested persons from all parts of the United States; and (3) authorized appropriations necessary for the “administration” of the act. The decision held this sufficient to make the ensuing appropriations available for the travel costs of the invitees. While the decision does not mention 31 U.S.C. § 1345, the distinction is readily apparent. Here, holding the conference was more than merely a legitimate means of implementing the enabling statute; it was the very purpose of the statute and hence the only means. See also

¹¹ In some cases, the authority has been made permanent. An example is 31 U.S.C. § 326(a) for the Treasury Department, construed in 37 Comp. Gen. 708 (1958). Another example is subsection (2) of 31 U.S.C. § 1345 concerning meetings of 4-H Clubs, noted in B-166506, July 15, 1975.

35 Comp. Gen. 198 (1955) (discussing other funding issues under the same legislation). A more recent case applying 35 Comp. Gen. 129 to a similar situation is B-242880, March 27, 1991.

However, general statutory authority to disseminate information to the public, or to promote or encourage cooperation with the private sector, or to provide technical assistance or education to specified segments of the private sector, is not sufficiently specific to overcome 31 U.S.C. § 1345. See 62 Comp. Gen. 531 (1983); B-193644, July 2, 1979; B-166506, July 15, 1975; B-168627, May 26, 1970.

A distinction must be drawn between the authority to sponsor a meeting and the authority to pay the types of expenses prohibited by 31 U.S.C. § 1345. An agency maybe able to do the former but not the latter. Thus, in B-166506, July 15, 1975, GAO pointed out that the Environmental Protection Agency could hold a solid waste management convention as a legitimate means of implementing its functions under the Solid Waste Disposal Act. What it could not do without more specific statutory authority was pay the travel and lodging expenses of the state participants. Sponsoring the meeting itself is essentially a “necessary expense” question. See also 62 Comp. Gen. 531 (1983). Cf. 45 Comp. Gen. 333 (1965); B-147552, November 29, 1961.

Thus, depending on the agency’s statutory authority, it maybe authorized to incur such expenses as renting conference facilities, financing the participation of its own employees, bringing in guest speakers, both federal and non-federal, and preparing and disseminating literature. The prohibition of 31 U.S.C. s 1345 comes into play only when the agency purports to pay the travel, transportation, or subsistence expenses of non-federal attendees.

Another thing the agency may be able to do is permit the use of government facilities for the meeting. For example, in B-168627, May 26, 1970, while the Maritime Administration could not pick up the tab for the participation of non-government persons at a seminar, it could permit the seminar to be held at the United States Merchant Marine Academy. The rule, stated in that decision, is that an agency has authority to grant to a private individual or business a “revocable license” to use government property, subject to termination at any time at the will of the government, provided that such use does not injure the property in question and serves some purpose useful or beneficial to the government.

(2) Invitational travel

Another statute we should note is 5 U.S.C. 95703, which provides:

“An employee serving intermittently in the Government service as an expert or consultant . . . or serving without pay or at \$1 a year, may be allowed travel or transportation expenses, under this subchapter, while away from his home or regular place of business and at the place of employment or service. ”

This statute originated as an appropriation act rider in 1945 and was enacted as permanent legislation the following year as section 5 of the Administrative Expenses Act of 1946 (60 Stat. 608). To the extent it authorizes payment in the so-called “invitational travel” situation—a private party called upon by the government to confer or advise on government business—it represents a limited exception to 31 U.S.C. § 1345.

Even before 5 U.S.C. § 5703 was enacted, GAO had recognized that a private individual “invited” by the government to confer on official business was entitled to reimbursement of travel expenses if specified in the request and justified as a necessary expense. 8 Comp. Gen. 465 (1929); 4 Comp. Gen. 281 (1924); A-41751, April 15, 1932.

The enactment of 31 U.S.C. § 1345 in 1935 did not change this. Thus, the Comptroller General recognized in 15 Comp. Gen. 91,92 (1935) that while the newly-enacted statute might prohibit the payment of expenses of private individuals called together as a group, it would not apply to “individuals called to Washington or elsewhere for consultation as individuals. ” See also A-81080, October 27, 1936. Viewed in this light, the 1946 enactment of 5 U.S.C. § 5703 in large measure merely gave express congressional sanction to a rule that had already developed in the decisions.

Although GAO did not directly address the relationship between 5 U.S.C. § 5703 and 31 U.S.C. § 1345 until 1976 (55 Comp. Gen. 750, below), the relevant principles were established in several earlier cases. In one of GAO’S earliest decisions under 5 U.S.C. 55703, the Comptroller General held that persons who are not government officers or employees may, “when requested by a proper officer to travel for the purpose of conferring upon official Government matters,” be regarded as persons serving without pay and therefore entitled to travel expenses under 5 U.S.C. § 5703. 27 Comp. Gen. 183 (1947), See also 39 Comp. Gen. 55 (1959). Thus, the rule of 8 Comp.

Gen. 465 now had a statutory basis. A critical prerequisite is this: In order to qualify under 5 U.S.C. 55703, the individual must be performing a direct service for the government. 37 Comp. Gen. 349 (1957),

Once the proposition of 27 Comp. Gen. 183 is accepted, it is but a short step to recognizing that a private individual called upon to advise on government business may be called upon to do so in the form of making a presentation at a meeting or conference. See, for example, B-1 11310, September 4, 1952, and 33 Comp. Gen. 39 (1953), in which payment under 5 U.S.C. § 5703 was authorized. The statute could not reasonably be limited to “one-on-one” consultations. As stated in B-196088, November 1, 1979, “[i]t is not unusual for the Government to invite an individual with a particular expertise to attend a meeting and to share the benefit of his views without compensation other than by way of reimbursement for his travel and transportation expenses.”

Thus, travel expenses of private individuals “invited” to participate in meetings sponsored by the National Center for Productivity and Quality of Working Life were properly paid under 5 U.S.C. 95703, B-192734, November 24, 1978. Similarly, the Internal Revenue Service could invoke 5 U.S.C. § 5703 to buy lunches for guest speakers invited to participate in a ceremony observing National Black History Month since the ceremony was an authorized part of the agency’s formal program to advance equal opportunity objectives. 60 Comp. Gen. 303 (1981).

There is a limit to this rationale and a point at which 5 U.S.C. § 5703 collides head-on with 31 U.S.C. 51345. This point was discussed in 55 Comp. Gen. 750 (1976) and reiterated in B-193644, July 2, 1979. As noted above, 55 Comp. Gen. 750 affirmed B-166506, July 15, 1975, holding that 31 U.S.C. § 1345 prohibited the Environmental Protection Agency from paying travel and lodging expenses of state officials at a solid waste management convention; B-193644 reached the same result for safety and training seminars for miners and mine operators. In both cases, the Comptroller General rejected the suggestion that the expenses could somehow be authorized under the “invitational travel” statute. In neither case were the attendees providing a direct service for the government, even though in both cases the government may have derived some incidental benefit in terms of enhancement of program objectives. The following passage illustrates the “collision point:”

“We thus do not believe that [5 U.S.C. § 5703] was ever intended to establish the proposition that anyone may be deemed a person serving without compensation merely because he or she is attending a meeting or convention, the subject matter of which is related to the official business of some Federal department or agency . . . We believe that being called upon to confer with agency staff on official business is different from attending a meeting or convention in which a department or agency is also interested.” 55 Comp. Gen. at 752-53.

Thus, 5 U.S.C. § 5703 permits an agency to invite a private individual (or more than one) to a meeting or conference at government expense, but only if that individual is legitimately performing a direct service for the government such as making a presentation or advising in an area of expertise. However, it is not a device for circumventing 31 U.S.C. § 1345. The “direct service” test is not met merely because the agency is interested in the subject matter of the conference or because the conference will enhance the agency’s program objectives.

(3) Use of grant funds

One of the principles of grant law is that, where a grant is made for an authorized grant purpose, the grant funds in the hands of the grantee largely lose their identity as federal funds and are no longer subject to many of the restrictions applicable to the direct expenditure of appropriations. One of those restrictions which does not apply to grant funds in the hands of a grantee is 31 U.S.C. § 1345.

For example, the American Law Institute could use funds provided by the Environmental Protection Agency in the form of a statutorily authorized training grant to defray transportation and subsistence expenses of law students and practicing environmental lawyers at an environmental law seminar. 55 Comp. Gen. 750 (1976). For this result to apply, the grant must be made for an authorized grant purpose and there must be no provision to the contrary in the grant agreement. Once these conditions are met, the grantee’s use of the funds is not impaired by 31 U.S.C. 51345. However, an agency may not use the grant mechanism for the sole purpose of circumventing 31 U.S.C. § 1345, that is, to do indirectly that which it could not do directly. In other words, if an agency makes a grant for an authorized purpose, and the grantee sponsors a meeting or conference as a means of implementing that purpose, the grantee’s use of the funds will not be restrained by 31 U.S.C.

51345. However, unless otherwise authorized, the agency could not make the grant for the purpose of sponsoring the conference and thereby permitting payments it could not make by direct expenditure.

Depending on the precise statutory authority involved, there may be situations in which sponsoring or helping to sponsor a conference is itself an authorized grant purpose. One example is B-83261, February 10, 1949 (grant to American Cancer Society under Public Health Service Act).

The treatment of grant funds described above does not apply to procurement contracts. 62 Comp.Gen. 531 (1983),

3. Attorney's Fees

a. Introduction

Questions on the availability of appropriated funds to pay attorney's fees arise in many contexts. Attorney's fees awarded by courts are discussed in Chapter 14. This section deals with administrative payments.

Traditionally, the United States has followed what has come to be known as the "American Rule," that each party in litigation or administrative proceedings is personally responsible for his or her own attorney's fees. In other words, in the absence of statutory authority to the contrary, the losing party may not be forced to pay the winner's attorney. *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240 (1975).

One application of the American Rule is that a claimant who prosecutes an administrative claim against the United States is not entitled to reimbursement of legal fees unless authorized by statute. E.g., 57 Comp. Gen. 554 (1978); 49 Comp. Gen. 44 (1969); 37 Comp. Gen. 485,487 (1958); B-189045, January 26, 1979. To illustrate, a vendor who successfully filed a claim for the payment of goods sold and delivered to a Navy vessel was not entitled to reimbursement of attorney's fees. B-187877, April 14, 1977. Similarly non-reimbursable were legal fees incurred incident to prosecuting a claim for damages for breach of an oral agreement. B-188607, July 19, 1977. "Fairness" and "decency," however appealing, do not compensate

for the lack of statutory authority. 67 Comp. Gen. 574,576 (1988); 57 Comp. Gen. 856,861 (1978).

Payments to attorneys also arise in a number of situations which are, strictly speaking, not applications of the American Rule, that is, which do not involve payment of fees to a “prevailing party.” The approach in these cases is to look first for statutory authority and if express statutory authority does not exist, apply the various principles discussed throughout this publication, such as the necessary expense doctrine.

For example, a private attorney sought reimbursement for out-of-pocket expenses he incurred incident to a “special proceeding” initiated by the Nuclear Regulatory Commission to investigate charges of misconduct raised by the attorney against NRC staff members and by the staff members against the attorney. There was no statutory authority to reimburse the attorney, nor could the payment be justified as a necessary expense since it was not reasonably necessary to carrying out NRC functions. Therefore, payment was unauthorized. B-192784, January 10, 1979. In another case, the Small Business Administration could not reimburse a bank for legal fees the bank incurred in protecting its interest in an SBA-guaranteed loan since SBA neither contracted with the attorney nor did it benefit from his services. B-187950, April 26, 1977.

The Justice Department has held that legal fees incurred by a Cabinet nominee in connection with Senate confirmation hearings, for services rendered before the nominating administration took office, could be paid either from Presidential Transition Act appropriations or from private sources, 5 Op. Off. Legal Counsel 126 (1981),

The remainder of this section will discuss the situations which have been most commonly addressed in decisions of the Comptroller General.

b. Hiring of Attorneys by Government Agencies

During the first century of the Republic, government agencies who needed lawyers either as counselors or litigators simply went out and hired them. Not only was this system expensive (payments from the public treasury are not conducive to reduced fees), it resulted in inconsistencies in the government’s legal position. Congress remedied the situation in 1870 by creating the Department of Justice, headed by the Attorney General. Act of June 22, 1870, 41st Cong., 2d Sess., ch. 150, 16 Stat. 162.

To assure that the objectives of the 1870 legislation would be achieved, Congress included section 17 which (a) prohibited executive agencies from employing attorneys at the expense of the United States, and (b) prohibited payments to attorneys, except those employed by the Justice Department, unless the Attorney General certified that the services could not be performed by the Justice Department. The two parts of section 17 subsequently became Revised Statutes §§ 189 and 365.

As the federal government grew in size and complexity, it became apparent that the need for centralization of legal services within the Justice Department related primarily to the specialty of litigation. Thus, with congressional approval, federal agencies regularly employed attorneys to serve as legal advisers. (The term “Attorney-Adviser” is still commonly used to designate staff attorneys in many government agencies.) When Title 5 of the United States Code was remodified in 1966, the successors of Revised Statutes §§ 189 and 365 were combined into the new 5 U.S.C. § 3106. This statute, reflecting the evolved state of the law, prohibits agencies, unless otherwise authorized by law, from employing attorneys “*for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested.” The agencies are required to refer such matters to the Justice Department.¹² Thus, agencies routinely employ attorneys to provide legal services other than litigation, but may not employ attorneys as litigators unless they have statutory authority to conduct their own litigation or unless that authority has been delegated to them by the Attorney General.

Normally, in view of the existence of the Justice Department and the agency’s own staff attorneys, the need for a federal agency to retain private counsel should rarely occur. Indeed, GAO has found it unauthorized for an agency to retain private counsel to provide legal opinions on matters within the Justice Department’s jurisdiction under statutes such as 28 U.S.C. §§ 511-514. 16 Comp. Gen. 1089 (1937). In limited situations, the Comptroller General has held that the retention of private attorneys as experts or consultants under 5 U.S.C. § 3109 is authorized. For example, in B-192406, October 12,

¹²Many early decisions will be found dealing with Revised Statutes §§ 189 and 365. E.g.,⁶ Comp. Gen. 517 (1927); 5 Comp. Gen. 382 (1925). For the most part they may be disregarded as applying statutory provisions which have since become obsolete. However, decisions under R.S. §§ 189 and 365 remain valid to the extent they concern the elements of those statutes which survived into 5 U.S.C. § 3106. E.g., 32 Comp. Gen. 118 (1952).

1978, GAO concluded that the (then) Civil Service Commission could hire a private law firm under 5 U.S.C. § 3109 to serve as “special counsel” to the Chairman to investigate alleged merit system abuses, since the matter was not covered by 5 U.S.C. § 3106 nor otherwise under the jurisdiction of the Justice Department. Similarly, the Navajo and Hopi Indian Relocation Commission could retain a private attorney under 5 U.S.C. § 3109 as an independent contractor to handle matters beyond the Justice Department’s jurisdiction, where the workload was insufficient to justify hiring a full-time attorney. B-1 14868.18, February 10, 1978.

For similar holdings, see *Boyle v. United States*, 309 F.2d 399 (Ct. Cl. 1962) (retired government patent lawyer retained on part-time basis); 61 Comp.Gen. 69 (1981) (U.S. Advisory Commission on Public Diplomacy could hire law firm to provide legal analysis of its authority and independence); B-210518, January 18, 1984 (Environmental Protection Agency could retain private counsel to provide independent analysis of issues relating to congressional contempt citation of Administrator); B-133381, July 22, 1977; B-141529, July 15, 1963.

Agencies may have specific authority to retain special counsel in addition to the lawyers on the regular payroll. For example, appropriations for the Federal Communications Commission have traditionally included “special counsel fees.” The Comptroller General has construed this authority as permitting contractual arrangements with former employees as retired annuitants to perform functions for which they were uniquely qualified. Since the appropriation provision constitutes independent authority, the contracts are not subject to the salary limitations of 5 U.S.C. § 3109.53 Comp. Gen. 702 (1974); B-180708, January 30, 1976. However, the authority is limited to services of the legal profession and does not embrace “counsel” in a broader sense. B-180708, July 22, 1975.

c. Suits Against Government Officers and Employees

At one time, government employees were considered largely immune from being sued for actions they took while performing their official duties. This is no longer true. For a variety of reasons, it is no longer uncommon for a government employee to be sued in his individual capacity for something he did (or failed to do) while performing his job. For example, the Supreme Court held in 1978 that an Executive official has only a “qualified immunity” for so-called “constitutional torts” (alleged violations of constitutional rights), *Butz v. Economou*, 438 U.S. 478 (1978). In any event,

regardless of whether the employee ultimately wins or loses, he has to defend the suit and therefore will need professional legal representation.

As a general proposition, GAO considers the hiring of an attorney to be a matter between the attorney and the client, and this is no less true when the client is a government officer or employee. E.g., 55 Comp. Gen. 1418, 1419 (1976). However, the decisions have long recognized another principle as well: Where an officer of the United States is sued because of some official act done in the discharge of an official duty, the expense of defending the suit should be borne by the United States. E.g., 6 Comp. Gen. 214 (1926). This section will discuss when appropriated funds may be used for attorney's fees to defend a government officer or employee,

Generally, when a present or former employee is sued for actions performed as part of his official duties, his defense is provided by the Department of Justice. In order for a given case to be eligible for Justice Department representation, the Justice Department must determine that the employee's action which gave rise to the suit was performed within the scope of federal employment, and that providing representation is in the interest of the United States.

The role of the Justice Department derives from a number of statutory provisions: 28 U.S.C. §§ 515-519, 543, and 547. See also Executive Order No. 6166, 55 (1933). These provisions establish the Justice Department as the government's litigator,¹³ which for the most part means representation by Justice Department attorneys. To reinforce these provisions, 5 U.S.C. 53106, previously noted, prohibits executive or military agencies from employing attorneys for the conduct of litigation in which the United States or one of its agencies or employees is a party or is interested. The agencies must refer such matters to the Justice Department. The Justice Department has also issued implementing regulations, found at 28 C.F.R. §§ 50.15 and 50.16.¹⁴ This statutory and regulatory scheme is designed to encourage employees to vigorously carry out their

¹³For a discussion of the historical evolution and current legal basis of the Attorney General's role as "chief litigator," see 6 Op. Off. Legal Counsel 47 (1982). In addition, an agency may call upon the Justice Department for help in performing the legal investigation of any claim pending in that agency. 28 U.S.C. § 514.

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

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

However, the Attorney General's decision to provide or not provide counsel to an individual employee sued for official actions is discretionary and not subject to judicial review. Falkowski v. Equal Employment Opportunity Commission, 783 F.2d 252 (D.C. Cir. 1986), cert. denied, 478 U.S. 1014. The Attorney General may take into consideration "how blameworthy or litigation-prone the employee seeking representation may be." Id. at 254.

In addition, the Comptroller General has recognized that the statutes cited above authorize the Justice Department to retain private counsel, payable from Justice Department appropriations, if determined necessary and in the interest of the United States. E.g., B-22494, January 10, 1942. For example, the Justice Department will not provide representation if the employee is the target of a criminal investigation, but may authorize private counsel at Justice Department expense if a decision to seek an indictment has not yet been made. The Justice Department may also authorize private counsel if it perceives a conflict of interest between the legal or factual positions of different government defendants in the same case. 28 C.F.R. §§ 50.15 and 50.16. See 2 Op. Off. Legal Counsel 66 (1978); 56 Comp. Gen. 615,621-624 (1977);¹⁵ B-150136/B-130441, May 19, 1978; B-130441, May 8, 1978; B-130441, April 12, 1978.

Thus, an employee who learns that he is being sued should first explore the possibility of obtaining representation through the Justice Department. Procedures for requesting representation are found in 28 C.F.R. § 50.15(a). The importance of this step must be emphasized. If the employee fails to immediately seek Justice Department representation, he may find, as discussed below, that he is stuck footing the bill for his attorney's fees even in cases where the expense might otherwise have been paid by the government.

If Justice Department representation is unavailable, there are limited situations in which appropriations of the employing agency may be available to retain private counsel. Generally, before an

¹⁵56 Comp. Gen. 615 dealt with civil actions against employees under section 7217 of the Internal Revenue Code for improper disclosure of tax returns. Section 7217 has since been repealed, and the remedy is now a suit for damages against the United States under 26 U.S.C. 57431.

agency can consider using its own funds, Justice Department representation must first have been sought and must be appropriate but unavailable, and representation must be in the interest of the United States. The employee's personal interest in the outcome does not automatically preempt a legitimate government interest. The two may exist side-by-side.

One case, 53 Comp. Gen. 301 (1973), dealt with suits against federal judges and other judicial officers. The suits arise in a variety of contexts, often involving collateral attacks on the judges' rulings in original actions. While many of the suits are frivolous, some sort of defense, even if only a pro forma submission, is almost always necessary. In many cases, such as actions where no personal relief is sought against the judicial officer, or in potential conflict of interest situations, the Justice Department has determined that it cannot or will not provide representation. The Comptroller General held that judiciary appropriations are available to pay the costs of litigation, including "minimal fees" to private attorneys, if determined to be in the best interest of the United States and necessary to carry out the purposes of the appropriation. However, the Comptroller General added that (1) the Justice Department must have declined representation, although individual requests are not required for cases falling within the Attorney General's stated policy; (2) the determination of necessity cannot be made by the individual defendant but must be made by the Administrative Office of the U.S. Courts; and (3) the Administrative Office should make full disclosure to the appropriate congressional committees. Under similar circumstances, appropriations for the public defender service are available to defend federal public defenders appointed under the Criminal Justice Act who are sued for actions taken within the scope of their duties. Id. at 306.

In 55 Comp. Gen. 408 (1975), the United States Attorney had agreed to defend a former Small Business Administration employee who was sued for acts performed within the scope of his employment. The U.S. Attorney later withdrew from the case even though the government's interest in defending the former employee continued. In order to protect his own interests, the employee retained the services of a private attorney. Since the Justice Department had determined that it was in the interest of the United States to defend the employee and had undertaken to provide him with legal representation, the Comptroller General held that SBA could reimburse the employee for legal fees incurred as a result of his

obtaining private counsel when representation by the United States subsequently became unavailable.

While 53 Comp. Gen. 301 and 55 Comp. Gen. 408 are widely viewed as establishing the concept that, in appropriate circumstances, agency appropriations may be available to pay private attorney's fees to defend an employee, several later cases established some of the limits on the concept.

If the employee fails to request Justice Department representation in a timely fashion, the employee may be forced to bear the expense of any private legal fees incurred. In B-195314, June 23, 1980, an employee of the Internal Revenue Service was sued for improper disclosure of confidential information. The employee requested Justice Department representation, but not until after she had hired a private attorney to file an answer in order to avoid a default judgment. The Justice Department agreed to provide representation, but declined to pay the private legal fees since the case was not within either of the situations permitted under the Justice Department regulations. Since the facts could not support a finding that Justice Department representation was appropriate but unavailable, IRS appropriations could not be used either. The need to take prompt action to avoid a default judgment makes no difference since the regulations expressly provide for provisional representation on the basis of telephone contact.

If the actions giving rise to the suit are not within the scope of the employee's official duties, even though related, there is no entitlement to government representation and hence no legal basis to reimburse attorney's fees. For example, in 57 Comp. Gen. 444 (1978), a Department of Agriculture employee was sued for libel by his supervisor because of allegations contained in letters the employee had written to various public officials. At the employee's insistence, Agriculture wrote to the Justice Department to request representation. However, Agriculture concluded that, while some of the employee's actions had been within the scope of his official duties, others—such as writing letters to the President and to a Senator—were not. Before Justice reached its decision, the employee retained private counsel and was successful in having the suit dismissed. Subsequently, Justice determined that the employee would not have been eligible for representation since Agriculture had been unwilling to say that all of the employee's actions were within the scope of his official duties. On this basis, GAO found no

entitlement to government representation and disallowed the employee's claim for reimbursement of his legal fees.

Similarly, GAO denied a claim for legal fees where an Army Reserve member on inactive duty was arrested by the FBI, charged with larceny of government property, and the charge was later dismissed. The government property involved consisted of service weapons and ammunition. The member had been authorized to retain weapons and ammunition in his personal possession, although it is not clear from the decision how this authority justified the possession of seven guns and over 100,000 rounds of ammunition, which is what the FBI found. In any event, the member's actions did not result from the performance of required official duties but were at best permissible under existing regulations. Therefore, there was no entitlement to either government-furnished or government-financed representation. B-185612, August 12, 1976.

A related situation is where an employee incurs legal fees defending against a fine. In the section of this chapter on Fines and Penalties, a distinction is drawn between an action which is a necessary part of an employee's official duties and an action which, although taken in the course of performing official duties, is not a necessary part of them. By logical application of this reasoning, where the fine itself is not reimbursable, related legal fees are similarly non-reimbursable. Thus, in 57 Comp. Gen. 270 (1978), the Comptroller General held that the employing agency could not pay legal fees incurred by one of its employees defending against a reckless driving charge, where the Justice Department had declined to provide representation or to authorize retention of private counsel. See also B-192880, February 27, 1979 (non-decision letter).

Questions over reimbursement of legal fees also arise in a number of non-judicial contexts. In B-193712, May 24, 1979, GAO concluded that the Central Intelligence Agency could reimburse a staff psychiatrist, who had been directed to prepare a psychological profile of Daniel Ellsberg as part of his official duties, for the cost of legal representation before congressional investigating committees and professional organizations. While the Justice Department regulations authorize representation at congressional proceedings on the same basis as in lawsuits (28 C.F.R. § 50.15(a)), this is not an area within Justice's exclusive representation authority. Therefore,

while it may be desirable to first request Justice Department representation, failure to do so in this case did not preclude the use of CIA appropriations, based on an administrative determination that the psychiatrist's activities were necessary to carry out authorized CIA functions. As in the judicial context, payment is generally unauthorized where it is not in furtherance of an official agency interest. See GAO report, Postal Service: Board of Governors' Contract for Legal Services, GAO/GGD-87-12 (February 1987) (questioning propriety of payment of legal fees of Board member incident to congressional investigation of pre-nomination activities).

The Justice Department will not provide representation in administrative disciplinary proceedings because of the potential conflict in the event the employee later sues the government. In one case, GAO concluded that the Nuclear Regulatory Commission could retain private counsel to represent two NRC staff members at a disciplinary proceeding where the agency determined that the employees had been acting within the scope of their authority. B-127945, April 5, 1979. See also B-192784, January 10, 1979.

In another case, however, 58 Comp. Gen. 613 (1979), the Securities and Exchange Commission could not reimburse the legal fees of an SEC employee at a disciplinary hearing even though the proceeding was ultimately resolved in the employee's favor. The distinction is that in the NRC case, the misconduct charge had been raised and pursued by a third party, whereas in the SEC case, while the charge was initially raised by an outside party, it was pursued based on the SEC's independent determination to investigate the allegation. Also, the determination to provide legal representation must be made at the outset of the proceedings and not at the end based on the outcome. GAO reached the same result in B-212487, April 17, 1984 (Inspector General misconduct investigation).

An agency may use its appropriated funds to provide legal representation for an employee brought before the Merit Systems Protection Board on complaint by the MSPB Special Counsel, if the agency determines that the employee's conduct was in furtherance of or incident to carrying out his or her official duties, and that providing representation would be in the government's interest. 67 Comp. Gen. 37 (1987); 61 Comp. Gen. 515 (1982). If the agency makes the required determinations, the expenditure is viewed as a "necessary expense" of the agency or function. While the necessary

expense theory is the legal basis, the underlying policy is expressed in the following excerpt:

“Surely federal employees must be answerable for illegal conduct. Yet it can be in the interest of neither the government as a whole nor the taxpayers we serve to have employees afraid to function out of fear of being bankrupted by a lawsuit arising out of the good faith performance of their jobs.” 67 Comp. Gen. at 37-38.

Appropriated funds may not be used to pay legal fees incurred by an “alleged discriminating official” in a discrimination complaint 61 Comp. Gen. 411 (1982); B-201183, February 1, 1985.

Government-financed legal counsel was also held improper at a grievance hearing where the legal liability of the employee was not an issue and the purpose of the hearing was solely to develop facts. 55 Comp. Gen. 1418 (1976).

Where reimbursement of legal fees under the above principles is authorized, it is a discretionary payment and not a legal entitlement of the employee. The agency’s responsibilities and discretion are summarized in the following paragraph from 67 Comp. Gen. 37, 38 (1987):

“[I]t should be understood that payment in this type of case is not a legal liability on the part of the agency, but is essentially a discretionary payment. As such, an agency is not required to pay the entire amount of the fees actually charged in any given case. The controlling concept under fee-shifting statutes is a ‘reasonable’ attorney’s fee, and there is a vast body of judicial precedent applying this concept under statutes such as the Back Pay Act. and Title VII of the Civil Rights Act. This body of precedent is available to provide guidance to agencies in evaluating the reasonableness of claims. Also, since payment is discretionary, an agency is free to formulate administrative policies with respect to treatment of claims of this type. Of course, any such policies should be applied fairly and consistently.”

The preceding cases have all involved legal fees incurred for representation of the employee. A different situation occurred in 59 Comp. Gen. 489 (1980). In 1969, local police raided a Chicago apartment housing members of the Black Panther Party. The raid erupted into violence and two of the occupants were killed. Subsequently, the surviving occupants and the estates of the deceased sued state law enforcement officials and several agents of the Federal Bureau of Investigation, alleging violations of civil rights and

the Illinois wrongful death statute. The Justice Department represented the federal defendants, who were being sued in their individual capacities.

As the litigation progressed, a possibility emerged that the court might grant the plaintiffs an award of attorney's fees, in part against the FBI agents. The Justice Department asked whether FBI appropriations would be available to reimburse such an award. In the past, the Comptroller General has at times declined to render decisions on questions which are premature and essentially hypothetical. Here, however, in view of the legal strategy proposed by the Justice Department (the case also involved issues raising the potential liability of the United States), it was important to know if the fees could be reimbursed because if they could not, it might be necessary for the defendants to retain private counsel to represent their interests. The Comptroller General resolved the question by applying the necessary expense doctrine. If the FBI made an administrative determination, supported by substantial evidence, that the actions giving rise to the award constituted officially authorized conduct and were taken as a necessary part of the defendants' official duties, it could reimburse the award from its Salaries and Expenses appropriation.

Finally, the concept of using agency appropriations for legal fees when Justice Department representation is unavailable has arisen in one context that is unrelated to suits against government employees. Under 25 U.S.C. § 175, the United States Attorneys will generally represent Indian tribes, and under 25 U.S.C. § 13, the Bureau of Indian Affairs may spend money appropriated for the benefit of Indians for general and incidental expenses relating to the administration of Indian affairs. Construing these provisions, the Comptroller General has held that the Bureau of Indian Affairs could use appropriated funds to pay legal fees incurred by Indian tribes in judicial litigation, including intervention actions and cases where the tribe is the plaintiff, when conflict of interest makes Justice Department representation unavailable. However, the Bureau must first give the Justice Department the option of providing or declining to provide representation. The Bureau may also use appropriated funds for legal fees of Indian tribes in administrative

proceedings in which the Justice Department does not participate. 56 Comp. Gen. 123 (1976).

d. Claims by Federal Employees

(1) Discrimination proceedings

Title VII of the Civil Rights Act of 1964, made applicable to the federal government by the Equal Employment Opportunity Amendments of 1972, broadly prohibits employment discrimination based on race, color, religion, sex, or national origin. Two statutory provisions are relevant to the awarding of attorney's fees. Judicial awards, covered in Chapter 14, are governed by 42 U.S.C. § 2000e-5(k), which authorizes courts to award reasonable attorney's fees to non-federal prevailing parties. In addition, 42 U.S.C. § 2000e-16(b) directs the (former) Civil Service Commission to enforce Title VII in the federal government "through appropriate remedies . . . as will effectuate the policies of this section." The enforcement function was transferred to the Equal Employment Opportunity Commission in 1978,

The concept of administrative fee awards developed largely as the result of a series of court decisions. First, the courts held that a court can award attorney's fees to include compensation for services performed in related administrative proceedings as well as the lawsuit itself. Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977); Johnson v. United States, 554 F.2d 632 (4th Cir. 1977). Then, the District Court for the District of Columbia held that Title VII authorized the administrative awarding of attorney's fees. Patton v. Andrus, 459 F. Supp. 1189 (D.D.C. 1978); Smith v. Califano, 446 F. Supp. 530 (D.D.C. 1978). However, this view was not unanimous. The court in Noble v. Claytor, 448 F. Supp. 1242 (D.D.C. 1978), held that there was no authority for administrative awards and that only the court could award fees.

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

EEOC issued interim regulations on April 9, 1980 (45 Fed. Reg. 24130) and subsequently finalized them. The regulations, found at

29 C.F.R. 51613.271, provide for awards of reasonable attorney's fees both by EEOC and by the agencies themselves. With the issuance of these regulations, federal agencies now have the requisite authority. B-199291, June 19, 1981; B-195544, May 7, 1980 (non-decision letter).

Attorney's fees awarded under the EEOC regulations are payable from the employing agency's operating appropriations and not from the permanent judgment appropriation established by 31 U.S.C. § 1304,64 Comp. Gen. 349,354 (1985); B-199291, June 19, 1981.

GAO will not review awards of, nor consider claims for, attorney's fees under Title VII. 69 Comp. Gen. 134 (1989); 61 Comp. Gen. 326 (1982).

Title VII is not the only statute prohibiting discrimination in federal employment. Discrimination on the basis of age or handicap is prohibited, respectively, by the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq., and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq. The EEOC has enforcement responsibility for federal employment under these statutes as well as Title VII. II;

Initially, GAO had held that the EEOC could provide by regulation for the awarding of attorney's fees at the administrative level under the Age Discrimination in Employment Act and the Rehabilitation Act, just as in the Title VII situation. 59 Comp. Gen. 728 (1980). Subsequently, the courts held that the Age Discrimination in Employment Act did not authorize fees at the administrative level, and GAO partially overruled 59 Comp. Gen. 728 in 64 Comp. Gen. 349 (1985). However, that portion of 59 Comp. Gen. 728 dealing with the Rehabilitation Act remains valid. See also B-204156, September 13, 1982. This treatment is consistent with the EEOC regulations, which authorize administrative fee awards under Title VII and the Rehabilitation Act, but not the Age Discrimination Act. See 29 C. F. R. § 1613.271(d).

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

¹⁶EEOC is not responsible for the entire Rehabilitation Act. The Architectural and Transportation Barriers Compliance Board is responsible for insuring compliance with the standards prescribed in the Architectural Barriers Act of 1968. 29 U.S.C. § 792.

had alleged both age and sex discrimination. Based on the agency's assertion that the result would have been the same if the employee had pursued only the sex discrimination charge, GAO concluded that the agency was not required to "apportion" the attorney's fee claim between the two charges and that the entire fee claim could be paid.

(2) Other employee claims

Prior to October 1978, there was no authority to award attorney's fees to federal employees in connection with claims, grievances, or administrative proceedings involving back pay, adverse personnel actions, or other personnel matters. During this time period, GAO consistently denied claims for attorney's fees based on the general rule barring the payment of legal fees in the absence of statutory authority. E.g., 52 Comp. Gen. 859 (1973) (administrative grievance proceeding); B-167461, August 9, 1978 (unfair labor practice proceeding); B-184200, April 13, 1976 (reduction in grade); B-183038, May 9, 1975 (improper removal for disciplinary reasons).

In October 1978, the Civil Service Reform Act added two attorney's fee provisions as part of its general overhaul of the system.

First, it authorized the Merit Systems Protection Board to require the employing agency to pay reasonable attorney's fees if the employee is the prevailing party and the Board determines that the fee award is "warranted in the interest of justice." 5 U.S.C. § 7701(g). Fees awarded under this provision are payable directly to the attorney, not the party. Jensen v. Department of Transportation, 858 F.2d 721 (Fed. Cir. 1988).

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

¹⁷The term "appropriate authority" includes the head of the employing agency, a court, the Office of Personnel Management, the Merit Systems Protection Board (but not the MSPB Special Counsel, 59 Comp. Gen. 107 (1979)), the Comptroller General (see, e.g., 63 Comp. Gen. 170 (1984) and 62 Comp. Gen. 464 (1983)), the Equal Employment Opportunity Commission, the Federal Labor Relations Authority, plus a few others, 5 C.F.R. § 550.803.

recover reasonable attorney's fees in addition to back pay. Id. § 5596(b). See generally B-231813, August 22, 1989.

Regulations to implement the Back Pay Act are issued by the Office of Personnel Management and are found at 5 C.F.R. Part 550, Subpart H. Under the regulations, fees may be awarded only if the "appropriate authority" determines that payment is in the interest of justice, applying standards established by the Merit Systems Protection Board under 5 U.S.C. § 7701.5 C.F.R. § 550.807(c)(1). The standards are set forth in Allen v. United States Postal Service, 2 M.S.P.R. 420 (1980), and discussed in Sterner v. Department of the Army, 711 F.2d 1563 (Fed. Cir. 1983), and in 62 Comp. Gen. 464 (1983).

GAO will not review decisions awarding or declining to award, nor consider claims for, fees under 5 U.S.C. § 7701.63 Comp. Gen. 170, 174 (1984); 61 Comp. Gen. 578 (1982); 61 Comp. Gen. 290 (1982). The Back Pay Act regulations provide for review of fee determinations only "if provided for by statute or regulation," 5 C.F.R. § 550.806(g). Thus, absent some statute or regulation to the contrary, GAO will similarly decline to review fee determinations under 5 U.S.C. § 5596 where the "appropriate authority" is someone other than the Comptroller General. 61 Comp. Gen. 290 (1982).

Under a provision added in 1989, if an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the Board's decision is based on a finding of a "prohibited personnel practice" (defined in 5 U.S.C. § 2302), "the agency involved shall be liable" to the complainant for reasonable attorney's fees. The same liability applies with respect to appeals from the Board, regardless of the basis of the decision. 5 U.S.C. § 1221(g), added by the Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16,30.

Employee claims outside the scope of the Back Pay Act or the MSPB authority remain subject to the general rule prohibiting fee awards except under specific statutory authority. Thus, administrative claims for attorney's fees were denied in the following situations:

- Applicant for employment with Nuclear Regulatory Commission successfully challenged adverse information in security investigation file. B-194507, August 20, 1979.

- Employee obtained continuance in divorce proceedings. Continuance was necessitated by temporary duty assignment. B-197950, September 30, 1980.
- Former employee successfully prosecuted administrative patent interference action against National Aeronautics and Space Administration. B-193272, August 21, 1981.
- Fees incurred incident to prosecution of claim for relocation expenses. 68 Comp.Gen. 456 (1989); B-186763, March 28, 1977.
- Employee, selling residence incident to transfer of duty station, incurred legal fees in excess of customary range of charges for services rendered. B-200207, September 29, 1981. (Legal fees within customary range of charges are reimbursable. See cases cited in B-200207.)
- Administrative grievance proceeding involving neither an appeal to the Merit Systems Protection Board nor a reduction or denial of pay or allowances. 68 Comp.Gen. 366 (1989); 61 Comp.Gen. 411 (1982).

The same rule applies to expert witness expenses incurred by an employee. They are reimbursable only under specific statutory authority. In 67 Comp.Gen. 574 (1988), a Department of Energy employee had requested an administrative hearing incident to a security clearance. The agency, due to the sudden unavailability of its witness, was forced to reschedule the hearing. The employee's witness, a clinical psychologist, was unable to reschedule his patients to fill the now freed-up time slot, and charged the employee for the 3 hours he had set aside to testify. GAO found no authority to reimburse the employee.

e. Criminal Justice Act

The Criminal Justice Act, 18 U.S.C. § 3006A, was originally enacted in 1964 and substantially amended on several subsequent occasions. Reflecting a series of Supreme Court decisions on the right of a criminal defendant to counsel, the Act establishes a system of government-financed counsel for indigent defendants in federal criminal cases. In general, any person charged with a felony or misdemeanor, including juvenile delinquency, and who is "financially unable to obtain adequate representation" is eligible for counsel under the Act. Counsel is to be provided at every stage of the proceeding, from the first appearance before a magistrate through appeal, including appropriate ancillary matters. As the Supreme Court has expanded the right to counsel to encompass every meaningful stage at which significant rights may be affected (see, e.g.,

Miranda v. Arizona, 384 U.S. 436 (1966)), the right to counsel under the Criminal Justice Act has similarly expanded.

The lawyers, who are court-appointed, may be private attorneys appointed on an individual basis or members of a Federal Public Defender Organization or Community Defender Organization established and funded under the Act. The attorneys are paid at rates of compensation specified in the statute. Appropriations are made to the Judiciary to carry out the Act and payments are supervised by the Administrative Office of the United States Courts.

(1) Types of actions covered

Originally, GAO had held that the Criminal Justice Act did not apply to probation revocation proceedings. 45 Comp.Gen. 780 (1966). Subsequently, following the Supreme Court's holding in Mempa v. Rhay, 389 U.S. 128 (1967), GAO modified the 1966 decision to recognize the applicability of the Act to probation proceedings coupled with deferred sentencing. However, GAO continued to hold the Act inapplicable to a "simple" probation revocation proceeding (one not involving deferred sentencing). 50 Comp.Gen. 128 (1970). Two months after the issuance of 50 Comp.Gen. 128, Congress passed Public Law 91-447, substantially amending the Criminal Justice Act. One of the changes made by these amendments was to expressly cover probation proceedings. The legislative history of Public Law 91-447 indicates that it was intended to recognize Mempa v. Rhay. H.R. Rep. No. 1546, 91st Cong., 2d Sess. 7 (1970). GAO has not had occasion to issue any further decisions on probation proceedings.

Another change made by the 1970 amendments was to add parole revocation proceedings, with counsel to be provided at the discretion of the court or magistrate. Subsequent legislation made appointment of counsel mandatory, and the Comptroller General held that appropriations under the Criminal Justice Act are available to provide counsel for indigents at parole revocation and parole termination proceedings under the Parole Commission and Reorganization Act. B-156932, June 16, 1977.

Representation may be provided, at the discretion of the court or magistrate, to an indigent prosecuting a writ of habeas corpus (28 U.S.C. §§ 2241, 2254, 2255). 18 U.S.C. § 3006A(a)(2). This authority does not extend to civil rights actions brought by indigent prisoners

under 42 U.S.C. § 1983.53 Comp. Gen. 638 (1974); B-139703, June 19, 1975.

In 51 Comp. Gen. 769 (1972), GAO held that the Criminal Justice Act applied to prosecutions brought in the name of the United States in the District of Columbia Superior Court and Court of Appeals. In 1974, Congress passed the District of Columbia Criminal Justice Act (Public Law 93-412), which established a parallel criminal justice system for the District of Columbia patterned after 18 U.S.C. § 3006A. With the enactment of this legislation, the Criminal Justice Act was amended to remove the District of Columbia courts from its coverage. GAO considered the D.C. statute in 61 Comp. Gen. 507 (1982) and construed it to include sentencing. The result should apply equally to the federal statute inasmuch as the language being construed is virtually identical in both laws.

(2) Miscellaneous cases

When a court appoints an attorney under the Criminal Justice Act, the government's contractual obligation, and hence the obligation of appropriations, occurs at the time of the appointment and not when the court reviews the voucher for payment, even though the exact amount of the obligation is not determinable until the voucher is approved. Where fiscal year appropriations are involved, the Administrative Office of the U.S. Courts must record the obligation based on an estimate, and the payment is chargeable to the fiscal year in which the appointment was made. 50 Comp. Gen. 589 (1971).

An attorney appointed and paid under the Criminal Justice Act does not thereby enter into an employer-employee relationship with the United States for purposes of the dual compensation laws. 44 Comp. Gen. 605 (1965). (This decision pre-dated the 1970 amendments to the Criminal Justice Act which created the Federal Public Defender Organizations, and would presumably not apply to full-time salaried attorneys employed by such organizations.)

An attorney regularly employed by the federal government who is appointed by a court to represent an indigent defendant, in either federal or state cases, may not be excused from duty without loss of pay or charge to annual leave. 61 Comp. Gen. 652 (1982); 44 Comp. Gen. 643 (1965).

An attorney appointed under the Criminal Justice Act is expected to use his or her usual secretarial resources. As a general proposition, secretarial and other overhead expenses are reflected in the statutory fee and are not separately reimbursable. However, there may be exceptional situations, and if the attorney can demonstrate to the court that extraordinary stenographic or other secretarial-type expenses are necessary, they may be reimbursed from Criminal Justice Act appropriations. 53 Comp. Gen. 638 (1974).

f. Equal Access to Justice Act

A significant diminution of the American Rule occurred in 1980 with the enactment of the Equal Access to Justice Act (EAJA), which authorizes the awarding of attorney's fees and expenses in a number of administrative and judicial situations where fee-shifting had not been previously authorized. This section describes the authority for administrative awards.

The administrative portion of the EAJA is found in 5 U.S.C. § 504. There are four key elements to the statute:

(1) The administrative proceeding generating the fee request must be an "adversary adjudication," defined as an adjudication under the Administrative Procedure Act in which the position of the United States is represented by counsel or otherwise. §§ 504(a)(1), (b)(1)(C). The definition excludes adjudications to fix or establish a rate or to grant or renew a license, but proceedings involving the suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license are covered if they otherwise qualify.¹⁸ (.application in the context of government procurement is discussed separately later.)

(2) The party seeking fees must be a "prevailing party other than the United States." § 504(a)(1). The meaning of "prevailing party" is to be determined by reference to case law under other fee-shifting statutes.¹⁹ Of course before you can be a "prevailing party" you must first be a "party," and the law prescribes financial and other eligibility criteria. § 504(b)(1)(B).

(3) The law is not self-executing The party must, within 30 days after final disposition of the adversary adjudication, submit an

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

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

application to the agency showing that it is a prevailing party and meets the eligibility criteria, documenting the amount sought, and alleging that the position of the United States was not “substantially justified.” § 504(a)(2). If the United States appeals the underlying merits, action on the application must be deferred until final resolution of the appeal. *Id.*

(4) If the above criteria are met, the fee award is mandatory unless the agency adjudicative officer finds that “the position of the agency was substantially justified or that special circumstances make an award unjust.” § 504(a)(1).²⁰ Substantial justification or lack thereof is to be determined “on the basis of the administrative record as a whole, which is made in the adversary adjudication.” *Id.* The “position of the agency” includes the agency’s action or failure to act which generated the adjudication as well as the agency’s position in the adjudication itself, § 504(b)(1)(E). A party who “unreasonably protracts” the proceedings risks reduction of the award. *Id.*; § 504(a)(3).

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

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

²⁰ A position is “substantially justified” if it is “justified to a degree that could satisfy a reasonable person.” *Pierce v. Underwood*, 487 U.S. 552,565 (1988).

²¹ *Pierce v. Underwood*, *supra* note 20, identified a number of factors that may not be used as “special factors” to justify exceeding the cap: novelty and difficulty of issues; undesirability of the case; work and ability of counsel (except for counsel with “distinctive knowledge or specialized skill” relevant to the case); results obtained; customary fees and awards in other cases; contingent nature of the fee 487 U.S. at 571-74.

Payment of awards under 5 U.S.C. § 504 is addressed in §504(d):

“Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.”²²

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

The obligation of the agency’s appropriations occurs when the agency issues its decision on the fee application. 62 Comp. Gen. 692,699 (1983). This determines the fiscal year to be charged.

Section 504 permits fee awards to interveners who otherwise meet the statutory criteria. 62 Comp. Gen. at 693. As noted in that decision, the Administrative Conference expressed the same position in the preamble to an earlier version of the model rules, although commenting further that interveners would rarely be in a position to actually receive awards. *Id.* at 693-94. A specific appropriation act restriction on compensating interveners will override the more general authority of 5 U.S.C. § 504. 62 Comp. Gen. 692; Electrical District No. 1 v. Federal Energy Regulatory Commission, 813 F.2d 1246 (D.C. Cir. 1987); Business and Professional People for the Public Interest v. Nuclear Regulatory Commission, 793 F.2d 1366 (D.C. Cir. 1986) (court agreed with result in 62 Comp. Gen. 692, implicitly accepting premise that EAJA itself could apply to interveners).

We previously reviewed statutory authorities for awarding attorney’s fees in a variety of matters involving federal employees. Some mention of EAJA in this context is necessary, if only to point out that the law is not entirely settled. The Court of Appeals for the Federal Circuit has held that 5 U.S.C. § 504 does not authorize the MSPB to award attorney’s fees in cases involving employee selection or tenure. Gavette v. Office of Personnel Management, 808 F.2d 1456 (Fed. Cir. 1986); Olsen v. Department of Commerce, Census Bureau. 735 F.2d 558 (Fed. Cir. 1984). This is because the

²²This provision was added in 1985. The payment provision in the original EAJA was complex and confusing. The amendment was designed to preclude payment under 31 U.S.C. § 1304, the permanent judgment appropriation.

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

definition of “adversary adjudication” in section 504 refers to 5 U.S.C. § 554 (part of the Administrative Procedure Act), which expressly excludes “the selection or tenure of an employee.” This was consistent with an earlier decision of the District of Columbia Circuit. Hoska v. Department of the Army, 694 F.2d 270 (D.C. Cir. 1982). However, the court in Miller v. United States, 753 F.2d 270 (3d Cir. 1985), reached a contrary result.

Prior to Gavette, the Board had taken the position that the existence of other fee-shifting statutes made EAJA inapplicable. Social Security Administration v. Goodman, 28 M.S.P.R. 120, 126 (1985). However, in view of the implication of Gavette that EAJA might apply in cases not involving employee selection or tenure, the Board reopened the Goodman appeal, found that fees could be awarded in that case under 5 U.S.C. § 7701, and declined to comment further on the applicability of EAJA. Social Security Administration v. Goodman, 33 M.S.P.R. 325, 326-27 n.1 (1987).

GAO held in 68 Comp. Gen. 366 (1989) that EAJA did not authorize a fee award to an employee who prevailed in an agency grievance proceeding which did not meet the standard of an “adversary adjudication.” (This being the case, it was irrelevant whether or not the grievance involved selection or tenure.)

Where a Board decision is appealed to the courts, including a decision involving selection or tenure, the majority view is that EAJA permits the court to award fees for the judicial proceedings, the relevant standard now being a “civil action” under 28 U.S.C. § 2412(d) rather than an “adversary adjudication” under 5 U.S.C. § 504. Brewer v. American Battle Monuments Commission, 814 F.2d 1564 (Fed. Cir. 1987); Gavette, 808 F.2d at 1462-65; Miller, 753 F.2d at 274-75; Olsen, 735 F.2d at 561. Here, however, the Hoska case is in disagreement.

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

g. Contract Matters

(1) Bid protests

Prior to 1984, attorney's fees incurred by a bidder for a government contract in pursuing a bid protest with GAO were not compensable. 57 Comp. Gen. 125, 127 (1977); B-197174, August 25, 1980; B-192910, April 11, 1979. The question arose again upon enactment of the Equal Access to Justice Act in 1980. However, since a bid protest at GAO is not an adversary adjudication governed by the Administrative Procedure Act, EAJA was equally unavailing. 63 Comp. Gen. 541 (1984); 62 Comp. Gen. 86 (1982); B-211 105.2, January 19, 1984.

Fee-shifting authority came with enactment of the Competition in Contracting Act of 1984.²⁴ Now, upon determining that a solicitation or contract award violates a statute or regulation, the Comptroller General "may declare an appropriate interested party to be entitled to" bid and proposal preparation costs and the costs of filing and pursuing the protest, including reasonable attorney's fees. The costs and fees are payable from the contracting agency's procurement appropriations. 31 U.S.C. § 3554(c).

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

GAO's bid protest authority is not exclusive. A protester may seek resolution with the contracting agency, or may go directly to court in lieu of filing a protest with GAO, or may seek judicial review of a GAO decision. 31 U.S.C. 53556. Once a case is in court, 31 U.S.C. § 3554(c) is out of the picture, and the court may consider a fee application under the judicial portion of EAJA. E.g., Essex Electro Engineers, Inc. v. United States, 757 F.2d 247 (Fed. Cir. 1985); Laboratory Supply Corporation of America v. United States, 5 Cl. Ct. 28 (1984).

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

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

involving automatic data processing procurements. Upon finding that the contracting agency has violated a statute, regulation, or delegation of procurement authority, the GSBCA may award the costs of filing and pursuing the protest, including reasonable attorney's fees, and bid and proposal preparation costs. The awards are payable, at least in the first instance, from the permanent judgment appropriation, 31 U.S.C. § 1304.40 U.S.C. § 759(f)(5). Questions have arisen as to whether the payments must be reimbursed from the contracting agency's appropriations, but there has thus far been no definitive determination. E.g., United States v. Julie Research Laboratories, Inc., 881 F.2d 1067 (Fed. Cir. 1989) (question viewed as an "intra-government dispute" not presenting a justiciable controversy)

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

(2) Contract disputes

Under the original (1980) version of the Equal Access to Justice Act, the Court of Appeals for the Federal Circuit held that (1) a court., reviewing a decision of an agency board of contract appeals, could, under the judicial portion of EAJA, make a fee award covering services before both the board and the court, but that (2) boards of contract appeals were not authorized to independently make EAJA fee awards. Fidelity Construction Co. v. United States, 700 F.2d 1379 (Fed. Cir. 1983), cert. denied, 464 U.S. 826.

The 1985 EAJA amendments legislatively overturned Fidelity to the extent it held 5 U.S.C. § 504 inapplicable to boards of contract appeals. Specifically, the law amended the definition of "adversary adjudication" to expressly include appeals to boards of contract appeals under the Contract Disputes Act. The 1985 amendments also added language to 28 U.S.C. § 2412(d) to make it clear that fee awards are authorized when a contractor appeals a contracting officer's decision directly to court instead of to a board of contract

appeals, as authorized by the Contract Disputes Act. (As noted in the preceding paragraph, appeals to court from board decisions were already covered.)

h. Public Participation in Administrative Proceedings: Funding of Interveners

A number of regulatory agencies conduct administrative proceedings and take actions that have a direct public impact. A prime example is licensing. An important concern has been that the agency may not receive a balanced presentation of viewpoints. The reason is that the industries being regulated usually have adequate resources to ensure representation of their interests, while lack of resources may preclude participation by various non-industry “public interest” representatives.

The Comptroller General has had frequent occasion to consider questions of intervener funding. An “intervenor” in this context means someone who is not a direct party to the proceedings. Stated briefly, the rule is that an agency may use its appropriations to fund intervener participation, including attorney’s fees, if—

1. Intervener participation is authorized, either expressly by statute or by necessary implication derived from a regulatory or licensing function;
2. The agency determines that the participation is reasonably necessary to a full and fair determination of the issues before it; and
3. The intervener could not otherwise afford to participate.

This is essentially an application of the “necessary expense” doctrine discussed previously in this chapter. Thus, intervener funding does not require express statutory authority, but it must relate to accomplishing the objectives of the appropriation sought to be charged, and of course must not be otherwise prohibited. The agency must have authority to encourage or accept intervener participation in connection with an authorized function for which its appropriations are available. In this sense, it may be said that intervener funding must have a statutory foundation.

Historically the concept of intervener funding emerged in the early 1970’s. In 1970, the Federal Trade Commission held that an indigent respondent in an FTC hearing was entitled to government-furnished counsel. *American Chinchilla Corp.*, 1970 Trade Reg. Rep. 119059. Following the Chinchilla case, the FTC asked whether it

could pay certain related expenses for the indigent respondent, such as transcript costs and attorney's expenses. It also asked whether it could pay the same expenses when incurred by an indigent intervenor rather than the respondent.

In the first of the intervenor cases, B-139703, July 24, 1972, GAO answered "yes" to both questions. Noting that FTC had statutory authority to grant intervention "upon good cause shown," the Comptroller General responded to the intervenor question as follows:

"Thus, if the Commission determines it necessary to allow a person to intervene in order to properly dispose of a matter before it, the Commission has the authority to do so. As in the case of an indigent respondent, and for the same reasons, appropriated funds of the Commission would be available to assure proper case preparation. "

A few years later, the Nuclear Regulatory Commission asked whether it was authorized to provide financial assistance to participants in its adjudicatory and rulemaking proceedings. Finding that NRC had statutory authority to admit intervenors, the Comptroller General applied the "necessary expense" rationale of B-139703, and answered "yes." B-92288, February 19, 1976.

In this decision, GAO explained why the "American rule" as set forth in Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240 (1975), does not apply to bar the payment of attorney's fees. The distinction is that the American rule limits the power of a court or an agency to require an unwilling defendant to pay the attorney's fees of a prevailing plaintiff or intervenor. In cases like B-139703 and B-92288, an administrative body, exercising its rulemaking function, is attempting to encourage public participation in its proceedings. It does this by willingly assuming representation costs for intervenors who would otherwise be financially unable to participate, in order to obtain their input for a balanced rulemaking effort. Only by obtaining a balanced view can the agency perform its function of protecting the public interest.

Next, in a letter to the Chairman of the Oversight and Investigations Subcommittee of the House Committee on Interstate and Foreign Commerce, GAO advised that the rationale of B-92288, February 19, 1976, applied equally to nine agencies under the Subcommittee's jurisdiction. The nine were: Federal Communications

Commission, Federal Trade Commission, Federal Power Commission, Interstate Commerce Commission, Consumer Product Safety Commission, Securities and Exchange Commission, Food and Drug Administration, Environmental Protection Agency, and National Highway Traffic Safety Administration. B-180224, May 10, 1976.

GAO pointed out in the same letter that there were several possible ways of providing assistance to qualifying participants:

1. Provision of funds directly to participants.
2. Modification of agency procedural rules so as to ease the financial burdens of public participation.
3. Provision of technical assistance by agency staff. However, this cannot include assigning staff members to participants to help them with their advocacy positions.
4. Provision of legal assistance by agency staff, but again not as advocates.
5. Creation of an independent public counsel. However, the public counsel cannot be beyond the agency's jurisdiction and control.
6. Creation of a consumer assistance office, as long as it remains under the agency's jurisdiction and control and does not act as an advocate.

In subsequent decisions and advisory opinions, GAO examined aspects of the programs of several specific agencies. In each case, GAO consistently applied the rationale of the earlier decisions. The cases are:

- Environmental Protection Agency: 59 Comp. Gen. 424 (1980); B-180224, April 5, 1977.
- Federal Communications Commission: B-139703, September 22, 1976.
- Food and Drug Administration: 56 Comp. Gen. 111 (1976).
- Nuclear Regulatory Commission: 59 Comp. Gen. 228 (1980).
- Economic Regulatory Administration (a component of the Department of Energy): B-192213 -O. M., August 29, 1978; letter report EMD-78-111, October 2, 1978.

While the decisions have consistently upheld the legality of intervenor funding under the necessary expense theory, GAO has nevertheless emphasized the desirability of an agency's seeking specific statutory authority to embark on a public participation program. E.g., B-180224, May 10, 1976; B-92288, February 19, 1976. Congress has acted in several instances, authorizing intervenor funding in some cases and prohibiting it in others.

For example, the Federal Trade Commission was given specific authority to fund intervenor participation in 1975 by the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. § 57a(h). Under this legislation, payments for legal services may not exceed the costs actually incurred, even though the participant uses "house counsel" whose rate of pay is lower than prevailing rates. 57 Comp. Gen. 610 (1978). Similarly, the Environmental Protection Agency has intervenor funding authority under the Toxic Substances Control Act, 15 U.S.C. § 2605(c), and the Consumer Product Safety Commission has such authority under the Consumer Product Safety Act, 15 U.S.C. § 2056(c).

Restrictions in appropriation acts have prohibited intervenor funding programs for several agencies. For example, a provision in the Nuclear Regulatory Commission's 1981 appropriation prohibited the use of funds for the expenses of intervenors. The Comptroller General construed this restriction as prohibiting the NRC from adopting a "cost reduction program" of providing transcripts and other documents free to intervenors. B-200585, December 3, 1980. However, NRC could reduce the number of copies of documents required to be filed. *Id.* Also, NRC could decide to provide free transcripts to all parties, intervenors included, without violating the restriction. B-200585, May 11, 1981. Other cases construing the NRC restriction, or successor versions, are Business and Professional People for the Public Interest v. Nuclear Regulatory Commission, 793 F.2d 1366 (D.C. Cir. 1986); 67 Comp. Gen. 553 (1988); and 62 Comp. Gen. 692 (1983).

Appropriation act restrictions have also prohibited intervenor funding by the Economic Regulatory Administration and the Federal Energy Regulatory Commission. A case involving the FERC prohibition is Electrical District No. 1 v. Federal Energy Regulatory Commission, 813 F.2d 1246 (D.C. Cir. 1987). In addition, the conference committee on the 1980 appropriation for the National

Highway Traffic Safety Administration and the former Civil Aeronautics Board directed that no funds be allocated by these agencies for intervener funding programs.²⁵

A restriction contained solely in legislative history and not carried into the statutory language itself is not legally binding on the agency. The history of the NRC prohibition will illustrate this. For fiscal year 1980, the prohibition was expressed in committee reports but not in the appropriation act itself. Accordingly, GAO told NRC that, while it would be well advised to postpone its program, the restriction was not legally binding. 59 Comp. Gen. 228 (1980). For fiscal year 1981, the prohibition was written into NRC's appropriation act. Similarly, the restriction noted above for the transportation agencies later "graduated" to a general provision in the statute.²⁶

One court has disagreed with the GAO decisions. Greene County Planning Board v. Federal Power Commission, 559 F.2d 1227 (2d Cir. 1976), cert. denied, 434 U.S. 1086.²⁷ There, after several years of litigation, the plaintiff Board had finally prevailed in its attempt to compel relocation of a proposed high kilovolt power line through a scenic portion of the county. The only question remaining was the ability of the Federal Power Commission to reimburse the plaintiff's attorney's fees. (Though not "indigent," the counsel fees had drained a disproportionate amount of the county's resources.) The FPC had denied reimbursement on the grounds that the Board was protecting its own, not the public, interest and because it thought it lacked authority to reimburse the fees. After first concluding that the issue should be remanded to the FPC so that it could determine the propriety of reimbursement in accordance with the Comptroller General's decisions, the Second Circuit Court of Appeals granted a rehearing en bane. On rehearing, the majority opinion held that the FPC lacked authority to reimburse the attorney's fees. 559 F.2d at 1238.

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

²⁶E.g., Department of Transportation and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-164, 5306, 103 Stat. 1069, 1092 (1989).

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

Subsequently, both GAO and the Justice Department's Office of Legal Counsel took the position that Greene County IV applied only to the former Federal Power Commission, and not to other federal agencies or even to the agencies which succeeded to the FPC's responsibilities. 59 Comp. Gen. 228 (1980); 2 Op. Off. Legal Counsel 60 (1978). In addition, the United States District Court for the District of Columbia has likewise determined that Greene County IV does not extend generally to all agencies. Chamber of Commerce v. United States Department of Agriculture, 459 F. Supp. 216 (D.D.C. 1978), upholding the authority of the Department of Agriculture to fund a consumer study on the impact of certain proposed rules.

Thus, to determine whether a given agency has intervener funding authority, it is necessary first to examine the legislation, including appropriation acts, applicable to that agency, as well as pertinent judicial decisions. In the absence of statutory direction one way or the other, and if there are no judicial decisions on point, it is then appropriate to apply the necessary expense rationale of the GAO decisions.

The more recent decisions have somewhat refined the standards expressed in the earlier cases. For example, in order to constitute a "necessary expense," the participation does not have to be absolutely indispensable in the sense that the issues could not be decided without it. It is sufficient for the agency to determine that a particular expenditure for participation can reasonably be expected to contribute substantially to a full and fair determination of the issues, 56 Comp. Gen. 111 (1976). This is consistent with the application of the necessary expense doctrine in other contexts as discussed throughout this chapter. Assuming the requisite statutory basis for intervention exists, the determination of necessity must be made by the administering agency itself, not by GAO. *Id.* See also B-92288, February 19, 1976.

The standard of the participant's financial status was discussed in 59 Comp. Gen. 424 (1980). While the participant need not be literally indigent, the authority to fund intervener participation extends only to individuals and organizations which could not afford to participate without the assistance. In making this determination, the agency should consider the income and expense statements, as well as the net assets, of an applicant. An applicant does not qualify for assistance merely because it cannot afford to participate in all activities it desires. The applicant is expected to

choose those activities it considers most significant and to allocate its resources accordingly,

Some of the earlier cases held that advance funding was prohibited by 31 U.S.C. 53324.56 Comp. Gen. 111 (1976); B-139703, September 22, 1976. However, in view of the Federal Grant and Cooperative Agreement Act of 1977, an agency with statutory authority to extend financial assistance in the form of grants may be able to utilize advance funding in its public participation program. A 1980 decision, 59 Comp. Gen. 424, applied this concept to the program of the Environmental Protection Agency.

The decisions have all dealt with participation in the agency's own proceedings. There would generally be no authority to fund intervenor participation in someone else's proceedings, for example, participation by a state agency in a state utility ratemaking proceeding. B-178278, April 27, 1973 (non-decision letter).

Finally, the GAO decisions in no way imply that an agency is compelled to fund intervenor participation. They hold merely that, if the various standards are met, an agency has the authority to do so if it wishes. See B-92288, February 19, 1976.

A summary and discussion of intervenor funding through early 1981 may be found in a GAO report entitled Review of Programs for Reimbursement for Public Participation in Federal Rulemaking Proceedings, PAD-81-30 (March 4, 1981). See also "Payment of Intervenor's Expenses in Agency Regulatory Proceedings" by Rollee H. Efros, in Cases in Accountability: The Work of the GAO, Erasmus H. Kloman ed. (Westview Press 1979), pp. 171-181.

4. Compensation Restrictions

"If an officer is not satisfied with what the law gives him for his services, he may resign." Embry v. United States, 100 U.S. 680, 685 (1879), quoted in Lincoln v. United States, 418 F. Supp. 1094, 1095 (N.D. Cal. 1976).

As a general proposition, restrictions on the compensation of federal employees are regarded as matters of personnel law, and are covered in GAO's Civilian and Military Personnel Law Manuals. However, they may also be viewed as restrictions on the "purpose availability" of appropriations. We treat two compensation-related topics in this chapter—the restriction on employing aliens and the statutes concerning forfeiture of retirement annuities and retired

pay—as illustrations of the different ways in which Congress may exercise its constitutional role of controlling the public purse by prescribing the purposes for which appropriated funds may be used. The provision on aliens is a restriction appearing in annual appropriation acts. The forfeiture statutes are permanent provisions found in the United States Code; while not phrased in terms of appropriation restrictions, the effect is the same.

a. Employment of Aliens

For many years, with minor variations from year to year, various appropriation acts have included provisions restricting the federal employment of aliens. The typical prohibition, with exceptions to be noted below, bars the use of appropriated funds to pay compensation to any officer or employee of the United States whose post of duty is in the continental United States unless that person is a United States citizen. In more recent years, the prohibition has appeared as a general provision in the Treasury, Postal Service, and General Government appropriation acts, applicable to funds contained “in this or any other act.”²⁸ A recurring general provision in the Defense Department appropriation act exempts Defense Department personnel from the alien restriction.²⁹

The prohibition applies to all appropriated funds unless expressly provided otherwise. Therefore, it applies to the special deposit accounts established by statute for the Senate and House restaurants since these accounts amount to permanent indefinite appropriations. 50 Comp. Gen. 323 (1970). It also applies to working capital funds supported by appropriations. B-161976, August 10, 1967.³⁰

There are a number of statutory exceptions to the restriction on compensating aliens. As noted, one significant exemption is for Defense Department personnel. See B-188507, December 16, 1977; B-110831, August 4, 1952. Others are 42 U.S.C. § 2473(c)(10)

²⁸ For example, the 1990 provision is found in Pub. L. h-o. 101-136, § 603, 103 Stat. 783, 816 (1989).

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

³⁰ The cited decision refers to the Naval Industrial Fund established under 10 U.S.C. § 2208. The decision makes no mention of the statutory exemption for the Defense Department, which was in effect in 1967. For purposes of this discussion, whether B-161976 could have been disposed of more simply based on the DOD exemption is irrelevant. The decision is cited here merely for the proposition noted in the text.

(National Aeronautics and Space Administration, permanent legislation); 2 U.S.C. § 169 (Library of Congress, derived from annual appropriation acts); 22 U.S.C. § 1474(1) (limited permanent authority for United States Information Agency); and 22 U.S.C. § 2672 (limited permanent authority for State Department). Since appropriation act exceptions may appear, disappear, or vary from time to time, it is important to scrutinize the relevant appropriation act for any given year. Absent an applicable exception, the general prohibition will apply. For an illustration of the complexities that may arise when the provisions vary from year to year, see 57 Comp. Gen. 172 (1977). GAO has supported enactment of the general restriction as permanent legislation. B-130733, March 6, 1957.

In addition to the agency-wide exemptions noted above, the alien restriction itself contains a number of exceptions. Several of these are summarized below.

Declaration of intention exception. The prohibition does not apply to a person in the federal service on the date of enactment of the appropriation act who is actually residing in the United States, is eligible for citizenship, and has filed a declaration of intention to become a citizen. The employee must have filed the declaration prior to the date of enactment. Subsequent filing will not cure the disqualification. 17 Comp. Gen. 1104 (1938). A declaration timely filed but which had become void by operation of law due to lapse of time has also been held insufficient. B-138854, April 1, 1959.

Specific country exceptions. The statute typically exempts nationals of certain specified countries. The countries specified in any given appropriation act change from time to time according to the political climate. The exception usually includes the Philippines and the Baltic countries (Lithuania, Latvia, and Estonia). B-134230, November 18, 1957. Dual citizenship will not negate the exception as long as one of the countries is within the exception, even where the individual has entered the United States from the non-exempt country. B-194929, June 20, 1979.

Allied country exception. The prohibition does not apply to nationals of "countries allied with the United States in the current defense effort." GAO will not decide whether a country meets this test. The determination is the responsibility of the employing agency, perhaps with the assistance of the State Department. GAO will not question a determination based on reasonable grounds.

35 Comp. Gen. 216 (1955); B- 151064, March 25, 1963; B-146142, June 22, 1961; B-139667, June 22, 1959. The reason for GAO's position is that "it is not the responsibility nor the proper province of the accounting officers to initially determine political facts." B-107288, February 14, 1952; B-107579, February 14, 1952.

GAO will, however, venture an assertion in the more obvious cases. Thus, Canada meets the test. B-133877, October 16, 1957; B-188852, July 19, 1977. So does Japan. B-113780, March 4, 1953. Russia was allied with the United States during World War II but no longer is, or at least wasn't in 1955. 35 Comp. Gen. 216 (1955). The Republic of China was allied with the United States during World War II. B-178882, May 7, 1974, The Republic of China (Taiwan) still is. B-161976, August 10, 1967. Romania probably is not, or at least was not as of B-119760, April 27, 1954. Even in these cases, the determination, strictly speaking, is up to the employing agency.

Allegiance exception. The prohibition does not apply to a person who "owes allegiance to the United States." This means "absolute and permanent allegiance" as distinguished from "qualified and temporary allegiance." 17 Comp. Gen. 1047 (1938); B-1 19760, April 27, 1954. The exemption was apparently prompted by a concern for a very limited class—"Filipinos in the service of the United States on March 28, 1938." 17 Comp. Gen. at 1048.

The allegiance exception includes a clause to the effect that a signed affidavit will be regarded as prima facie evidence of allegiance. This clause has been construed to apply to non-citizen nationals and not to non-national aliens. Yuen v. Internal Revenue Service, 497 F. Supp. 1023 (S. D.N.Y. 1980), aff'd, 649 F.2d 163 (2d Cir. 1981). The district court opinion includes an exhaustive review of legislative history.

Emergency exception. The prohibition does not apply to "temporary employment in the field service. . . as a result of emergencies." The term "emergency" in this context means "flood, fire, or other catastrophe." B-146142, June 22, 1961.

An alien appointed in contravention of the statutory prohibition may not retain compensation already paid. 35 Comp. Gen. 216 (1955); 18 Comp. Gen. 815 (1939). (The statute expressly gives the United States the right to recover.) If there is no statutory bar—for

example, if the employment would have qualified under the “allied country” exception but the agency failed to make the required determination—the alien may be paid as a “de facto employee.” Earlier decisions distinguished between appointments “void ab initio” and those that are merely “voidable.” E.g., 37 Comp. Gen. 483 (1958); 35 Comp. Gen. 216 (1955); B-178882, August 29, 1973; B-188852, July 19, 1977. The distinction proved confusing and GAO has moved away from it. The current rule is stated in 58 Comp. Gen. 734 (1979). For further information on de facto employees and their specific entitlements, see GAO’s Civilian Personnel Law Manual.

As a final note, the Supreme Court in 1976 invalidated a Civil Service Commission regulation requiring citizenship as a prerequisite to federal employment. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). The Court did not, however, invalidate the appropriation act restrictions. See B-188507, December 16, 1977. The Yuen litigation cited earlier specifically upheld the restriction against a charge of violation of the Equal Protection clause.

b. Forfeiture of Annuities and Retired Pay

(1) General principles

Under 5 U.S.C. § 8312 (the so-called “Hiss Act”), a civilian employee of the United States or a member of the uniformed services who is convicted of certain criminal offenses relating to the national security will forfeit his or her retirement annuity or retired pay. Further, the annuity or retired pay may not be paid to the convicted employee’s survivors or beneficiaries. The offenses which will result in forfeiture are specified in the statute. Examples are: gathering or delivering defense information to aid a foreign government; gathering, transmitting, or losing defense information; disclosure of classified information; espionage; sabotage; treason; rebellion or insurrection; seditious conspiracy; advocating the overthrow of the government; enlistment to serve in an armed force against the United States; and certain violations of the Atomic Energy Act. In addition, perjury by falsely denying the commission of one of the specified offenses is itself an offense for purposes of forfeiture.

An employee for purposes of 5 U.S.C. § 8312 includes a Member of Congress and an individual employed by the government of the District of Columbia. 5 U.S.C. § 8311(l). The specific types of retirement

annuities and retired pay subject to forfeiture are enumerated in 5 U.S.C. §§ 831 1(2) and (3).

Since 5 U.S.C. § 8312 imposes a forfeiture, it is penal in nature. Therefore, it must be strictly construed. GAO will not construe the statute as applicable to situations which are not expressly covered by its terms. 35 Comp. Gen. 302 (1955).

In the absence of an authoritative judicial decision to the contrary, the effective date of a conviction for stoppage of retired pay should be determined in a manner which will result in the least expenditure of public funds. Thus, the date a guilty verdict is returned should be considered the date of conviction rather than a later date when the judgment is ordered executed, and retired pay should be stopped the following day. 39 Comp. Gen. 741 (1960). Using the cited decision to illustrate: the jury returned a guilty verdict on December 2, 1959; judgment was entered on January 29, 1960; the date of conviction is December 2, 1959, and retired pay should be stopped effective December 3.

In the absence of an authoritative judicial decision to the contrary, a plea of "nolo contendere" should be regarded as a conviction for purposes of 5 U.S.C. § 8312. 41 Comp. Gen. 62 (1961).

(2) The Alger Hiss case

The event which, more than any other single incident, gave rise to the original enactment of 5 U.S.C. § 8312, was the case of Alger Hiss. A former State Department employee, Hiss was convicted in 1950 of perjury stemming from testimony before a grand jury investigating alleged espionage violations. When Hiss was released from prison after serving his sentence, considerable public and congressional attention was directed at the fact that he was still entitled to receive his government pension. Given the political climate of the times, the result was the enactment of 5 U.S.C. § 8312 in 1954 (68 Stat. 1142).

Hiss applied for his pension in 1967 and the (then) Civil Service Commission denied the application based on 5 U.S.C. § 8312. Hiss subsequently sued for restoration of his forfeited pension. In Hiss v. Hampton, 338 F. Supp. 1141 (D.D.C. 1972), the court, finding that the statute had been aimed more at punishing Alger Hiss than regulating the federal service, held 5 U.S.C. § 8312 to be an ex post

facto law and therefore unconstitutional as it had been applied to Hiss for conduct which occurred prior to the date of its enactment. Therefore, the court ordered the Civil Service Commission to pay Hiss his annuity retroactively with interest.

The Hiss case gave rise to two GAO decisions—52 Comp. Gen. 175 (1972), affirmed by B-115505, December 21, 1972—holding that the interest payable to Hiss, as with the annuity itself, must be paid from the Civil Service Retirement Fund rather than the permanent judgment appropriation, 31 U.S.C. § 1304. The court case and decisions are summarized in B-1 15505, May 15, 1973.

(3) Types of offenses covered

Under the original version of 5 U.S.C. § 8312, forfeiture was not strictly limited to national security offenses. An employee could lose his or her retirement annuity or retired pay simply by committing a felony “in the exercise of his authority, influence, power, or privileges as an officer or employee of the Government.” There were numerous examples of forfeitures for such infractions as falsifying a travel voucher or using a government-owned vehicle for personal purposes.³¹

Recognizing that in many cases the punishment was too severe for the offense, especially in cases where the offense occurred after many years of government service, Congress amended the statute in 1961 (75 Stat. 640) to limit it to offenses relating to national security and to “retroactively remove therefrom those provisions of the statute which prohibited payment of annuities and retired pay to persons who commit offenses, acts or omissions which do not involve the security of the United States.” 41 Comp. Gen. 399, 400 (1961). Thus, numerous offenses which would have caused forfeiture before 1961 no longer do. See, e.g., B-155823, September 15, 1965 (conspiracy to embezzle government funds); B-155558, November 25, 1964 (false statement). Of course, to the extent that the pre-1961 decisions establish principles apart from the specific offenses involved, such as the general principles noted above, they remain valid.

The original 1954 enactment of 5 U.S.C. § 8312 did not expressly cover offenses under the Uniform Code of Military Justice, and this

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

omission generated many GAO decisions prior to the 1961 amendment. E.g., 40 Comp. Gen. 601 (1961); 38 Comp. Gen. 310 (1958); 35 Comp. Gen. 302 (1955). The UCMJ decisions came to an abrupt halt with the enactment of the 1961 amendment. The current version of 5 U.S.C. 88312 expressly covers UCMJ offenses, again limited to national security violations. Now, a conviction under the UCMJ will produce a forfeiture if the offense involves certain UCMJ articles specified in the statute, or if it involves any other article of the UCMJ where the charges and specifications describe a violation of certain of the U.S. Code offenses, and if the “executed sentence” includes death, dishonorable discharge, or dismissal from the service.

(4) Related statutory provisions

When a forfeiture is invoked under 5 U.S.C. § 8312, the individual is entitled to a refund of his contribution toward the annuity less any amounts already paid out or refunded. 5 U.S.C. 58316.

Forfeiture may not be invoked where an individual is convicted of an offense “as a result of proper compliance with orders issued, in a confidential relationship, by an agency or other authority” of the United States Government or the District of Columbia government, 5 U.S.C. § 8320.

If a payment of annuity or retired pay is made in violation of 5 U.S.C. § 8312 “in due course and without fraud, collusion, or gross negligence, ” the relevant accountable officer will not be held responsible. 5 U.S.C. § 8321.

In addition to 5 U.S.C. 58312, retirement annuities or retired pay may be forfeited for willful absence from the United States to avoid prosecution for a section 8312 offense (5 U.S.C. § 8313); refusal to testify in national security matters (5 U.S.C. § 8314);³² or knowingly falsifying certain national security-related aspects of a federal or District of Columbia employment application (5 U.S.C. § 8315).

³²Construed by the Justice Department as applicable to proceedings involving the individual’s own loyalty or knowledge of activities or plans that pose a serious threat to national security. 1 Op. Off. Legal Counsel 252 (1977).

5. Entertainment— Recreation—Morale and Welfare

a. Introduction

The concept to be explored in this section is the rule that appropriated funds may not be used for entertainment except when specifically authorized by statute and also authorized or approved by proper administrative officers, E.g., 43 Comp.Gen. 305 (1963). The basis for the rule is that entertainment is essentially a personal expense even where it occurs in some business-related context. Except where specifically appropriated for, entertainment cannot normally be said to be necessary to carry out the purposes of an appropriation.

The reader will readily note the sharp distinction between government practice and corporate practice in this regard. "Entertainment" as a business-related expense is an established practice in the corporate sector. No one questions that it can be equally business-related for a government agency. The difference—and the policy underlying the rule for the government—is summarized in the following passage from B-223678, June 5, 1989:

"The theory is not so much that these items can never be business-related, because sometimes they clearly are. Rather, what the decisions are really saying is that, because public confidence in the integrity of those who spend the taxpayer's money is essential, certain items which may appear frivolous or wasteful—however legitimate they may in fact be in a specific context—should, if they are to be charged to public funds, be authorized specifically by the Congress."

(1) Application of the rule

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

The question in B-170938, October 30, 1972, was whether the entertainment prohibition applied to the revolving fund of the National Credit Union Administration. The fund is derived from fees collected from federal credit unions and not direct appropriations from the Treasury. Nevertheless, the authority to retain and use the collections constitutes a continuing appropriation since, but

for that authority, the fees would have to be deposited in the Treasury and Congress would have to make annual appropriations for the agency's expenses. Therefore, the revolving fund could not be used for entertainment.

There are three situations in which the rule has not been applied. The first is certain government corporations. For example, the Corporation for Public Broadcasting, since it was established as a private non-profit corporation and is not an agency or establishment of the United States Government (notwithstanding that it receives appropriations), could use its funds to hold a reception in the Cannon House Office Building. B-131935, July 16, 1975.

The rule has also been held not to apply to government corporations which are classed as government agencies but which have statutory authority to determine the character and necessity of their expenditures. B-127949, May 18, 1956 (Saint Lawrence Seaway Development Corporation); B-35062, July 28, 1943. There are limits, however. See, e.g., B-45702, November 22, 1944, disallowing the cost of a "luncheon meeting" of government employees.

The second exception is donated funds where the recipient agency has statutory authority to accept and retain the gift. The availability of donated funds for entertainment is discussed further, with case citations, in Chapter 6.

The third exception, infrequently applied, is for certain commissions with statutory authority to procure supplies, services, or property, and to make contracts, without regard to the laws and procedures applicable to federal agencies, and to exercise those powers that are necessary to enable the commission to carry out the purposes for which it was established efficiently and in the public interest. B-138969, April 16, 1959 (Lincoln Sesquicentennial Commission); B-138925, April 15, 1959 (Civil War Centennial Commission); B-129102, October 2, 1956 (Woodrow Wilson Foundation).

(2) What is entertainment?

The Comptroller General has not attempted a precise definition of the term "entertainment." In one decision, GAO noted that one court had defined the term as "a source or means of amusement, a diverting performance, especially a public performance, as a concert, drama, or the like." Another court said that entertainment

“denotes that which serves for amusement and amusement is defined as a pleasurable occupation of the senses, or that which furnishes it, as dancing, sports, or music. ” 58 Comp.Gen. 202, 205 (1979),³³ overruled on other grounds by 60 Comp.Gen. 303 (1981).

For purposes of this discussion, the term “entertainment,” as used in decisions of the Comptroller General and Comptroller of the Treasury, is an “umbrella” term which includes: food and drink, either as formal meals or as snacks or refreshments; receptions, banquets, and the like; music, live or recorded; live artistic performances; and recreational facilities. Our treatment includes one other category which, even though not “entertainment” as such, is closely related to the entertainment cases: facilities for the welfare or morale of employees.

Earlier decisions from time to time had occasion to address the components of entertainment. Can it include liquor? Responding to an inquiry from the Navy, a Comptroller of the Treasury, obviously not a teetotaler, said: “Entertainments. . . without wines, liquors or cigars, would be like the play of Hamlet with the melancholy Dane entirely left out of the lines. ” 14 Comp. Dec. 344,346 (1907).³⁴

In a 1941 decision (B-20085, September 10, 1941), the Coordinator of Inter-American Affairs asked whether authorized entertainment could include such items as cocktail parties, banquets and dinners, theater attendance, and sightseeing parties. The Comptroller General, recognizing that an appropriation for entertainment conferred considerable discretion, replied, in effect, “all of the above.”

That’s entertainment.

b. Food for Government Employees

It maybe stated as a general rule that appropriated funds are not available to pay subsistence or to provide free food to government employees at their official duty stations (“at headquarters”). In addition to the obvious reason that food is a personal expense and government salaries are presumed adequate to enable employees to

³³Citing, respectively, *People v. Klaw*, 106 N.Y.S. 341, 351 (Ct. Gen. Sess. 1907), and *Young v. Board of Trustees of Broadwater County High School*, 90 Mont. 576, 4 P.2d 725, 726 (1931).

³⁴The Comptroller’s comments should not be confused with the rule that alcoholic beverages are not reimbursable as subsistence expenses. B-164366, March 31, 1981; 8-164366, August 16, 1968; B-157312, May 23, 1966. The exclusion applies even against a claim that consumption of alcohol is required by religious beliefs. B-202124, July 17, 1981.

eat regularly,³⁵ furnishing free food might violate 5 U.S.C. § 5536, which prohibits an employee from receiving compensation in addition to the pay and allowances fixed by law. See, e.g., 68 Comp. Gen. 46,48 (1988); 42 Comp. Gen. 149, 151 (1962); B-140912, November 24, 1959.

The “free food” rule applies to snacks and refreshments as well as meals. For example, in 47 Comp. Gen. 657 (1968), the Comptroller General held that Internal Revenue Service appropriations were not available to serve coffee to either employees or private individuals at meetings. Similarly prohibited was the purchase of coffeemakers and cups. Although serving coffee or refreshments at meetings may be desirable, it is not a “necessary expense” in the context of appropriations availability. See also B-159633, May 20, 1974.

The question of food for government employees arises in many contexts and there are certain well-defined exceptions. For example, the government may pay for the meals of civilian and military personnel in travel status because there is specific statutory authority to do so.³⁶ The rule and exception are illustrated by 65 Comp. Gen. 16 (1985), in which the question was whether the National Oceanic and Atmospheric Administration could provide in-flight meals, at government expense, to persons on extended flights on government aircraft engaged in weather research. The answer was yes for government personnel in travel status, no for anyone else, including government employees not in official travel status.

While feeding employees may not be regarded as a “necessary expense” as a general proposition, it may qualify when the agency is carrying out some particular statutory function where the necessary relationship can be established. Thus, in B-201186, March 4, 1982, it was a permissible implementation of a statutory accident prevention program for the Marine Corps to setup rest stations on highways leading to a Marine base to serve coffee and doughnuts to Marines returning from certain holiday weekends. Another

³⁵ “Feeding oneself is a personal expense which a Government employee is expected to bear from his or her salary.” 65 Comp. Gen. 738,739 (1986).

³⁶ 5 (J. SC. § 5702 (civilian employees); 37 U. SC. § 404 (military personnel)). We do no more here than note the existence of the authority. The entitlements of government employees while *on* official travel or temporary duty are covered in GAO’s Personnel Law Manuals. Brief mention should be made, however, of the rule that snacks and refreshments which are not part of a regular meal are not necessary subsistence expenses and hence not reimbursable. B-185826, May 28, 1976; 13-167820, October 7, 1969.

example is 65 Comp. Gen. 738 (1986) (refreshments at awards ceremonies), discussed later in this section, Exceptions of this type illustrate the relativity of the necessary expense doctrine pointed out earlier in our general discussion.

We turn now to a discussion of the rule and its exceptions in several other contexts.

(1) Working at official duty station under unusual conditions

The well-settled rule is that the government may not furnish free food (the decisions sometimes get technical and use terms like “per diem” or “subsistence”) to employees at their official duty station, even when they are working under unusual circumstances.³⁷

An early illustration is 16 Comp. Gen. 158 (1936), in which the expense of meals was denied to an Internal Revenue investigator who was required to maintain a 24-hour surveillance. The reason payment was denied is that the investigator would presumably have eaten (and incurred the expense of) three meals a day even if he had not been required to work the 24-hour shift.

Payment was also denied in 42 Comp. Gen. 149 (1962), where a postal official had bought carry-out restaurant food for postal employees conducting an internal election who were required to remain on duty beyond regular working hours.³⁸

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

- Federal mediators required to conduct mediation sessions after regular hours. B-169235, April 6, 1970; B-141142, December 15, 1959.
- District of Columbia police officers involved in clean-up work after a fire in a municipal building. B-1 18638.104, February 5, 1979.
- Geological Survey inspectors at offshore oil rigs who had little alternative than to buy lunch from private caterers at excessive prices. B-194798, January 23, 1980. See also B-202104, July 2, 1981 (Secret Service agents on 24-hour-a-day assignment required to buy meals at high cost hotels).

³⁷The cases under this heading obviously do not involve “entertainment” as most of us understand the term. The rule, however, fits under the same conceptual umbrella.

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

- Law enforcement personnel retained at staging area for security purposes prior to being dispatched to execute search warrants. B-234813, November 9, 1989.
- Air Force enlisted personnel assigned to a security detail at an off-base social event. B-232112, March 8, 1990.

An exception was permitted in 53 Comp. Gen. 71 (1973). In that case, the unauthorized occupation of a building in which the Bureau of Indian Affairs was located necessitated the assembling of a cadre of General Services Administration special police, who spent the whole night there. Agency officials purchased and brought in sandwiches and coffee for the cadre. GAO concluded that it would not question the agency's determination that the expenditure was incidental to the protection of government property during an extreme emergency, and approved reimbursement. The decision emphasized, however, that it was an exception and that the rule still stands.

A similar exception was permitted in B-189003, July 5, 1977, where agents of the Federal Bureau of Investigation had been stranded in their office during a severe blizzard in Buffalo, New York. The area was in a state of emergency and was later declared a national disaster area. GAO agreed with the agency's determination that the situation presented a danger to human life.

The rationale of 53 Comp. Gen. 71 and B-189003 was applied in B-232487, January 26, 1989, for government employees required to work continually for a 24-hour period to evacuate and secure an area threatened by the derailment of a train carrying toxic liquids.

The exception, however, is limited. The requirement to remain on duty for a 24-hour period, standing alone, is not enough. In B-185159, December 10, 1975, for example, the cost of meals was denied to Treasury Department agents required to work over 24 hours investigating a bombing of federal offices. The Comptroller General pointed out that dangerous conditions alone are not enough. Under the exception established in 53 Comp. Gen. 71, it is necessary to find that the situation involves imminent danger to human life or the destruction of federal property. Also, in that case, the agents were only investigating a dangerous situation which had already occurred and there was no suggestion that any further bombings were imminent. A similar case is B-217261, April 1, 1985, involving a Customs Service official required to remain in a motel

room for several days on a surveillance assignment. See also 16 Comp. Gen. 158 (1936) and B-202104, July 2, 1981.

Short of the emergency situation described in B-189003, July 5, 1977, inclement weather is not enough to support an exception. There are numerous cases in which employees have spent the night in motels rather than returning home in a snowstorm, in order to be able to get to work the following day. Reimbursement for meals has consistently been denied. 68 Comp. Gen. 46 (1988); 64 Comp. Gen. 70 (1984); B-226403, May 19, 1987; B-200779, August 12, 1981; B-188985, August 23, 1977. It makes no difference that the employee was directed by his or her supervisor to rent the room (B-226403 and B-188985),³⁹ or that the federal government in Washington was shut down (68 Comp. Gen. 46).⁴⁰

Naturally, statutory authority will overcome the prohibition. Thus, where the Veterans Administration had statutory authority to accept uncompensated services and to contract for related "necessary services," the VA could, upon an administrative determination of necessity, contract with local restaurants for meals to be furnished without charge to uncompensated volunteer workers at VA outpatient clinics when their scheduled assignment. extended over a meal period. B-14,5430, May 9, 1961. There is also authority to make subsistence payments to law enforcement officials and members of their immediate families when threats to their lives force them to occupy temporary accommodations. 5 U.S.C. § 5706a.

(2) Attendance at meetings and conferences

In Section C.2 of this chapter, we discuss when appropriated funds may be used to finance the attendance of government employees at meetings and conferences. This section addresses when the government may pay for meals at meetings and conferences when attendance is authorized under the principles and statutes set forth in Section C.2.

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

⁴⁰ While the storm in 68 Comp. Gen. 46 was certainly more than flurries, it nevertheless remains the case that the government in Washington will be disrupted by storms that do not approach the severity of the Buffalo blizzard in B-189003. There is also a practical distinction. To feed and lodge a potentially large number of employees every time it snows in Washington is simply not realistic.

For meetings sponsored by non-government organizations, the attendee will commonly be charged a fee, usually but not necessarily called a registration fee. If a single fee is charged covering both attendance and meals and no separate charge is made for meals, the government may pay the full fee, assuming of course that funds are otherwise available for the cost of attendance. 38 Comp.Gen. 134 (1958); B-66978, August 25, 1947. The same is true for an evening social event where the cost is a mandatory non-separable element of the registration fee. 66 Comp.Gen. 350 (1987).

If a separate charge is made for meals, the government may pay for the meals if there is a showing that (1) the meals are incidental to the meeting, (2) attendance of the employee at the meals is necessary to full participation in the business of the conference, and (3) the employee is not free to take the meals elsewhere without being absent from essential formal discussions, lectures, or speeches concerning the purpose of the conference. B-160579, April 26, 1978; B-166560, February 3, 1970. Absent such a showing, the government may not pay for the meals. B-154912, August 26, 1964; B-152924, December 18, 1963; B-95413, June 7, 1950; B-88258, September 19, 1949. As an examination of the cited cases will reveal, these rules apply regardless of whether the conference takes place within the employee's duty station area or someplace else.

Where the government is authorized to pay for meals under the above principles, the employee normally cannot be reimbursed for purchasing alternate meals. See B-193504, August 9, 1979; B-186820, February 23, 1978. Personal taste is irrelevant. Thus, an employee who, for example, loathes broccoli will either have to eat it anyway, pay for a substitute meal from his or her own pocket, or go without. For an employee on travel or temporary duty status, which is where this rule usually manifests itself, per diem is reduced by the value of the meals provided. E.g., 60 Comp.Gen. 181, 183-84 (1981). The rule will not apply, however, where the employee is unable to eat the meal provided (and cannot arrange for an acceptable substitute) because of bona fide medical or religious reasons. B-231703, October 31, 1989 (per diem not required to be reduced where employee, an Orthodox Jew who could not obtain kosher meals at conference, purchased substitute meals elsewhere).

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

free food to employees at their official duty stations. Thus, the cost of meals and coffee breaks could not be provided for government officials attending a one-day conference on implementation of the Speedy Trial Act. B-188078, May 5, 1977. Similarly, meals could not be provided at a conference of field examiners of the National Credit Union Administration. B-180806, August 21, 1974. Use of appropriated funds was prohibited for coffee breaks at a management seminar, B-159633, May 20, 1974; meals served during “working sessions” at Department of Labor business meetings, B-168774, January 23, 1970; and meals at monthly luncheon meetings for officials of law enforcement agencies, B-198882, March 25, 1981. See also 47 Comp. Gen. 657 (1968); B-45702, November 22, 1944.

In B-137999, December 16, 1958, the commissioners of the Outdoor Recreation Resources Review Commission had statutory authority to be reimbursed for actual subsistence expenses. This was held to include the cost of lunches during meetings at a Washington hotel. However, the cost of lunches for staff members of the Commission could not be paid.

Merely calling the cost of meals a “registration fee” will not avoid the prohibition. In a 1975 case, the cost of meals was disallowed for Army employees at an Army-sponsored “Operations and Maintenance Seminar.” The charge had been termed a registration fee but covered only luncheons, dinner, and coffee breaks. B-182527, February 12, 1975. See also B-195045, February 8, 1980.

In B-187150, October 14, 1976, grant funds provided to the Government of the District of Columbia under the Social Security Act for personnel training and administrative expenses could not be used to pay for a luncheon at a 4-hour conference of officials of the D.C. Department of Human Resources. The conference could not be reasonably characterized as training and did not qualify as an allowable administrative cost under the program regulations.

This is not to say that the rules for meals at non-government meetings and conferences will never apply to government-sponsored meetings at the employee’s duty station. In 1980, the President’s Committee on Employment of the Handicapped held its annual meeting in the Washington Hilton Hotel. The affair was to last for three days and included a luncheon and two banquets. There was no registration fee for the meeting but there were charges for the

meals. GAO's Equal Employment Opportunity Office planned to send three employees to the meeting and asked whether the agency could pick up the tab for the meals.

The three employees were to make a presentation at the meeting and it seemed clear that attendance was authorized under 5 U.S.C. 94110. Also, if a registration fee were involved, the prior decisions noted above would presumably have answered the question. The Comptroller General reviewed the precedents such as B-160579, April 26, 1978, and B-166560, February 3, 1970, and took the logical step of applying them to the situation at hand. Thus, GAO could pay for the meals if administrative determinations were made that (1) the meals were incidental to the meeting, (2) attendance at the meals was necessary for full participation at the meeting, and (3) the employees would miss essential formal discussions, lectures, or speeches concerning the purpose of the meeting if they took their meals elsewhere. B-198471, May 1, 1980.⁴¹

This decision, so it seems, became perceived as the loophole through which the lunch wagon could be driven. So apparently compelling is the quest for free food that it became necessary to issue several additional decisions to clarify B-198471 and to explain precisely what the rationale of that decision does and does not authorize.

In 64 Comp. Gen. 406 (1985), the Comptroller General held that the cost of meals could not be reimbursed for employees attending monthly meetings of the Federal Executive Association within their duty station area. The meetings were essentially luncheon meetings at which representatives of various government agencies could discuss matters of mutual interest. The decision stated:

“What distinguishes [B-198471] is that the President’s annual meeting was a 3-day affair with meals clearly incidental to the overall meeting, while in [the cases in which reimbursement has been denied] the only meetings which “took place were the ones which took place during a luncheon meal. . . . In order to meet the three-part test [of B-198471], a meal **must** be part of a formal meeting or conference that includes not only functions such as speeches or business carried out during a seating at a meal but also includes substantial

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

functions that take place separate from the meal. [W]e are unwilling to conclude that a meeting which lasts no longer than the meal during which it is conducted qualifies for reimbursement, ” *Id.* at 408,

A similar case the following year, 65 Comp. Gen. 508 (1986), reiterated that the above-quoted test of 64 Comp. Gen. 406 must precede the application of the three-part test of B-198471. The three-part test, and hence the authority to reimburse, relates to a meal which is incident to a meeting, not a meeting which is incident to a meal. 65 Comp. Gen. at 510; 64 Comp. Gen. at 408.

Two 1989 decisions, 68 Comp. Gen. 604 and 68 Comp. Gen. 606, defined the rules further, holding that 5 U.S.C. § 4110 and B-198471 do not apply to purely internal business meetings or conferences sponsored by government agencies. Noting that this result is consistent with the legislative history of 5 U.S.C. § 4110 as summarized in prior decisions,⁴² both decisions stated:

“We think . . . that there is a clear distinction between the payment of meals incidental to formal conferences or meetings, typically externally organized or sponsored, involving topical matters of general interest to governmental and nongovernmental participants, and internal business or informational meetings primarily involving the day-to-day operations of government. With respect to the latter, 5 U.S.C. § 4110 has little bearing . . .,” 68 Comp. Gen. at 605 and 608.

One of the decisions went a step further and commented that the claim in 65 Comp. Gen. 508 “should have been summarily rejected based on the application of the general rule.” 68 Comp. Gen. at 609.

Naturally, if the meeting or conference does not have the necessary connection with official agency business, the cost of meals may not be paid regardless of who sponsors the meeting or where it is held. Thus, a registration fee consisting primarily of the cost of a luncheon was disallowed for three Community Services Administration employees attending a Federal Executive Board meeting at which Combined Federal Campaign awards were to be presented.

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

B-195045, February 8, 1980.⁴³ Similarly, an employee of the Department of Housing and Urban Development could not be reimbursed for meals incident to meetings of a local business association. B-166560, May 27, 1969.

In a 1981 case, the Internal Revenue Service bought tickets for several of its agents to attend the Fourth Annual Awards and Scholarship Dinner of the National Association of Black Accountants. The purposes of attending the banquet were to establish contacts for recruitment purposes and to demonstrate the commitment of the IRS to its equal opportunity program. However, attendance could not be authorized under either 5 U.S.C. § 4109 or 5 U.S.C. § 4110, and the expenditure was therefore prohibited by 5 U.S.C. § 5946. B-202028, May 14, 1981.

Before we depart the topic, two cases involving a different twist—payment for meals not eaten—deserve mention. In B-208729, May 24, 1983, the Army Missile Command sponsored a luncheon to commemorate Dr. Martin Luther King, Jr., open to both government employees and members of the local community. Attendees were to be charged a fee for the lunch. In order to secure the necessary services, the Army contracted with a caterer (in this case the local Officers Club), guaranteeing a minimum revenue based on the anticipated number of guests. Bad weather on the day of the luncheon resulted in reduced attendance. Under the circumstances, GAO approved payment of the guaranteed minimum as a program expense.

GAO similarly approved payment of a guaranteed minimum balance in B-230382, December 22, 1989, this time involving the Army's "World-Wide Audio Visual Conference." As in B-208729, attendees were charged for the meal but attendance was less than expected. This case had two additional complications. First, the official who made the arrangements lacked the authority to do so. Payment could therefore be authorized only on a quantum meruit basis.

⁴³A later decision, 67 Comp. Gen. 254 (1988), held that agencies may spend appropriated funds, within reason, to support efforts to solicit contributions to the CFC from their employees. While 67 Comp. Gen. 254 did not involve meals, it nevertheless raises the question of whether this aspect of B-195045 (insufficient relationship for purposes of 5 U.S.C. § 4110) would still be followed. **Either way, the disallowance in B-195045 was correct because the meeting was within the "duty station area" and the fee was little more than a disguised charge for the lunch.**

Second, the arrangements also included a buffet, open bar, and several coffee breaks. Payment for these items could not be authorized, even under the quantum meruit concept, since they would not have been authorized had proper procurement procedures been followed.

(3) Government Employees Training Act

Under the Government Employees Training Act, an agency may pay, or reimburse an employee for, necessary expenses incident to an authorized training program. 5 U.S.C. § 4109. The Comptroller General has held that the government can provide meals under this authority if the agency determines that the providing of meals is necessary to achieve the objectives of the training program. 48 Comp. Gen. 185 (1968); 39 Comp. Gen. 119 (1959); B-193955, September 14, 1979. The government may also furnish meals to non-government speakers as an expense of conducting the training. 48 Comp. Gen. 185.

In 50 Comp. Gen. 610 (1971), the Training Act was held to authorize the procurement of catering services for a Department of Agriculture training conference where government facilities were deemed inadequate in view of the nature of the program.

The fact that an agency characterizes its meeting as “training” is not controlling. In other words, for purposes of authorizing the government to feed participants, something does not become “training” simply because it is called “training.” In B-168774, September 2, 1970, headquarters employees of the (then) Department of Health, Education, and Welfare met with consultants in a nearby hotel at what the agency termed a “research training conference.” However, the conference consisted of little more than “working sessions” and included no employee training as defined in the Government Employees Training Act. Therefore, the cost of meals could not be paid. See also 68 Comp. Gen. 606 (1989); B-208527, September 20, 1983; B-187150, October 14, 1976; B-140912, November 24, 1959.

In 65 Comp. Gen. 143 (1985), GAO held that a Social Security Administration employee who had been invited as a guest speaker at the opening day luncheon of a legitimate agency training conference in the vicinity of her duty station could be reimbursed for the cost of the meal. The decision unfortunately confuses 5 U.S.C.

§§ 4109 and 4110 by analyzing the case under section 4110 yet concluding that reimbursement is authorized “as a necessary training expense,” which is the standard under section 4109.

(4) Award ceremonies

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

In 65 Comp. Gen. 738, the Social Security Administration asked whether it could use operating appropriations, apart from its limited entertainment appropriation, to provide refreshments at its annual awards ceremony. GAO observed that the Incentive Awards Act (5 U.S.C. § 4503) authorizes agencies to “pay a cash award to, and incur necessary expense for the honorary recognition of” employees. The decision reasoned that the concept of a necessary expense is, within limits, a relative one based on the relationship of the expenditure to the particular appropriation or program involved. Thus, while the necessary relationship does not exist with respect to an agency’s day-to-day operations, the agency would be within its legitimate discretion to determine that refreshments would materially enhance the effectiveness of a ceremonial function, specifically in this case an awards ceremony which is a valid component of the agency’s statutorily authorized awards program.

The decision essentially followed B-167835, November 18, 1969, which had concluded that the Incentive Awards Act authorized the National Aeronautics and Space Administration to fund part of the cost of a banquet at which the President was to present the Medal of Freedom to the Apollo 11 astronauts. What made the fuller treatment in 65 Comp. Gen. 738 necessary was that a 1974 decision, B-114827, October 2, 1974, had found the cost of refreshments at an awards ceremony under the Incentive Awards Act payable only from specific entertainment appropriations. The 1986 case partially modified B-114827 to the extent it had held that an entertainment appropriation was the only available funding source. Finally, 65 Comp. Gen. 738 distinguished 43 Comp. Gen. 305 (1963), which had disallowed the cost of refreshments at an awards ceremony for persons who were not federal employees (and therefore not authorized

under the Incentive Awards Act nor governed by the “necessary expense” language of that statute).

The Government Employees Incentive Awards Act does not apply to members of the armed forces. However, the uniformed services have similar authority, including the identical “necessary expense” language, in 10 U.S.C. § 1124. Therefore, 65 Comp. Gen. 738 applies equally to award ceremonies conducted under the authority of 10 U.S.C. 51124.⁶⁵ Comp. Gen. at 739 n.2.

(5) Cafeterias and lunch facilities

The government has no general responsibility to provide luncheon facilities for its employees. 10 Comp. Gen. 140 (1930).⁴⁴ However, plans for the construction of a new government building may include provision for a lunch room or cafeteria, in which event the appropriation for construction of the building will be available for the lunch facility. 9 Comp. Gen. 217 (1929).

An agency may subsidize the operation of an employees’ cafeteria if the expenditure is administratively determined to be necessary to the efficiency of operations and a significant factor in the hiring and retaining of employees and in promoting employee morale. B-216943, March 21, 1985; B-169141, November 17, 1970; B-169141, March 23, 1970. See also B-204214, January 8, 1982 (temporarily providing paper napkins in new government cafeteria) and GAO report entitled Benefits GSA Provides by Operating Cafeterias in Washington, D. C., Federal Buildings, LCD-78-316 (May 5, 1978).

The purchase of equipment for use in other than an established cafeteria may also be authorized in certain circumstances. In B-173149, August 10, 1971, GAO approved the purchase of a set of stainless steel cooking utensils for use by air traffic controllers to prepare food at a flight service station. There were no other readily accessible eating facilities and the employees were required to remain at their post of duty for a full 8-hour shift. Similar cases are:

- B-180272, July 23, 1974: purchase of a sink and refrigerator to provide lunch facilities for the Occupational Safety and Health Review

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

Commission where there was no government cafeteria on the premises.

- B-210433, April 15, 1983: purchase of microwave oven by Navy facility to replace non-working stove. Facility was in operation 7 days a week, some employees had to remain at their duty stations for 24-hour shifts, and there were no readily accessible eating facilities in the area during nights and weekends.

c. Entertainment for
Government Employees Other
Than Food

(1) Miscellaneous cases

There have been relatively few cases in this area, probably because there are few situations in which entertainment for government employees could conceivably be authorized.

An early decision held that 10 U.S.C. § 4302, which authorizes training for Army enlisted personnel "to increase their military efficiency and to enable them to return to civilian life better equipped for industrial, commercial, and business occupations," did not include sending faculty members and students of the Army Music School to grand opera and symphony concerts. 4 Comp. Gen. 169 (1924). Another decision found it improper to hire a boat and crew to send federal employees stationed in the Middle East on a recreational trip to the Red Sea. B-126374, February 14, 1956.

A 1970 decision deserves brief mention although its application will be extremely limited. Legislation in 1966 established the Wolf Trap Farm Park in Fairfax County, Virginia, as a park for the performing arts and directed the Interior Department to operate and maintain it. A certifying officer of the National Park Service asked whether he could certify a voucher for symphony, ballet, and theater tickets for Wolf Trap's Artistic Director. The Comptroller General held that such payments could be made if an appropriate Park Service official determined that attendance was necessary for the performance of the Artistic Director's official duties. The justification was that the Artistic Director attended these functions not as personal entertainment but so that he could review the performances to determine which cultural and theatrical events were appropriate for booking at Wolf Trap. B-168149, February 3, 1970. As noted, this case would seem to have little precedent value except for the Artistic Director at Wolf Trap.

(2) Cultural awareness programs

One area that has generated several decisions, and a change in GAO's position, has been equal employment opportunity special emphasis or cultural awareness programs. There are many areas in which the law undergoes refinement from time to time but remains essentially unchanged. There are other areas in which the law has changed to reflect changes in American society. This is one of those latter areas.

The issue first arose in 58 Comp. Gen. 202 (1979). In that case, the Bureau of Mines, Interior Department, in conjunction with the Equal Employment Opportunity Commission, sponsored a program of live entertainment for National Hispanic Heritage Week. The program consisted of such items as a lecture and demonstration of South American folk music, a concert, a slide presentation, and an exhibit of Hispanic art and ceramics. The decision concluded that, while the Bureau's Spanish-Speaking Program was a legitimate component of the agency's overall EEO program, appropriated funds could not be used to procure entertainment. This holding was followed in two more cases, B-194433, July 18, 1979, and B-199387, August 22, 1980.

In 1981, however, GAO reconsidered its position. The Internal Revenue Service asked whether it could certify a voucher covering payments for a performance by an African dance troupe and lunches for guest speakers at a ceremony observing National Black History Month. The Comptroller General held the expenditure proper in 60 Comp. Gen. 303 (1981). The decision stated:

"[W]e now take the view that we will consider a live artistic performance as an authorized part of an agency's EEO effort if, as in this case, it is part of a formal program determined by the agency to be intended to advance EEO objectives, and consists of a number of different types of presentations designed to promote EEO training objectives of making the audience aware of the culture or ethnic history being celebrated." *Id.* at 306.

Further, the lunches for the guest speakers could be paid under 5 U.S.C. § 5703 if they were in fact away from their homes or regular places of business. The prior inconsistent decisions—58 Comp. Gen. 202, B-194433, and B-199387—were overruled.

It should be emphasized that the prior decisions were overruled only to the extent inconsistent with the new holding. Two specific elements of 58 Comp. Gen. 202 were not involved in the 1981 decision and remain valid. First, use of appropriated funds to serve meals or refreshments remains improper except under specific statutory authority. 58 Comp. Gen. at 206.⁴⁵ Second, 58 Comp. Gen. 202 found the purchase of commercial insurance on art objects improper. *Id.* at 207. This portion also remains valid.

The decision at 60 Comp. Gen. 303 was expanded in B-199387, March 23, 1982, to include small “samples” of ethnic foods prepared and served during a formal ethnic awareness program as part of the agency’s equal employment opportunity program. In the particular program being considered, the attendees were to pay for their own lunches, with the ethnic food samples of minimal proportion provided as a separate event. Thus, the samples could be distinguished from meals or refreshments, which remain unauthorized. (The decision did not specify how many “samples” an individual might consume in order to develop a fuller appreciation.)

Although 60 Comp. Gen. 303 was not cast in precisely these terms, it is another example of the “theory of relativity” in purpose availability to which we have alluded in various places in this chapter. Equality in all aspects of federal employment is now a legal mandate. An agency is certainly within its discretion to determine that fostering racial and ethnic awareness is a valid—perhaps indispensable—means of advancing this objective. This being the case, it is not at all far-fetched to conclude that certain expenditures that might be wholly inappropriate in other contexts could reasonably relate to this purpose. Thus, hiring an African dance troupe could not be justified to further an objective of, for example, conducting a financial audit or constructing a building or procuring a tank, but the relationship changes when the objective is promoting cultural awareness.

Once the concept of the preceding paragraph is understood, it should be apparent why, in 64 Comp. Gen. 802 (1985), GAO distinguished the cultural awareness cases and concluded that the Army

⁴⁵Compare B-208729, May 24, 1983, in which an Army Unit sponsored a catered luncheon to commemorate Dr. Martin Luther King, Jr., but—properly-charged attendees for the meal.

could not use appropriated funds to provide free meals for handicapped employees attending a luncheon in honor of National Employ the Handicapped Week. This is not to say that an agency's EEO program should not embrace the handicapped—on the contrary, it can, should, and is required to—but merely that “[u]nlike ethnic and cultural minorities, handicapped persons do not possess a common cultural heritage” within the intended scope of the cultural awareness cases. *Id.* at 804 (quoting from the request for decision).

d. Entertainment of Non-Government Personnel

Just as the entertainment of government personnel is generally unauthorized, the entertainment of non-government personnel is equally impermissible. The basic rule is the same regardless of who is being fed or entertained: Appropriated funds are not available for entertainment, including free food, except under specific statutory authority.

Two of the most frequently cited decisions for this proposition are 5 Comp. Gen. 455 (1925) and 26 Comp. Gen. 281 (1946). In 5 Comp. Gen. 455, expenditures by two Army officers for entertaining officials of foreign governments while making arrangements for an around-the-world flight were disallowed. In 26 Comp. Gen. 281, appropriations were held unavailable for dinners and luncheons for “distinguished guests” given by a commissioner of the Philippine War Damage Commission. Other early decisions on point are: 5 Comp. Gen. 1018 (1926); B-85555, June 6, 1949; and A-10221, October 8, 1925. A limited exception was recognized in B-22307, December 23, 1941, to permit entertainment of officials of foreign governments incident to the gathering of intelligence for national security.

As with the cases dealing with government employees, a large proportion of the decisions tend to involve food. In 43 Comp. Gen. 305 (1963), funds were not available to furnish food or refreshments at “recognition ceremonies” for volunteers at Veterans Administration field stations. The ceremonies had been designed as an inducement to the volunteers to continue rendering service. Naturally, the situation would be permissible under specific statutory authority. B-152331, November 19, 1975. Other examples are 26 Comp. Gen. 281, cited above, and B-138081, January 13, 1959, disallowing the cost of a breakfast meeting with Canadian officials called at the initiative of the Chairman of the Securities and Exchange Commission,

Several more recent decisions illustrate the continued application of the rule and some of the exceptions permitted by statute. In 68 Comp. Gen. 226 (1989), the Department of Housing and Urban Development used its research and technology appropriations for entertainment expenses incident to a trade show it sponsored in the Soviet Union. Since HUD had no authority to sponsor the show, the related expenditures were improper. The decision further pointed out that, even if the trade show itself had been authorized, the research and technology appropriations still would not have been available for entertainment, although HUD could then have used its "official reception and representation" funds. See also 65 Comp. Gen. 16 (1985) (free in-flight meals during weather research flight unauthorized for non-government personnel).

In 57 Comp. Gem 806 (1978), the Comptroller General held that appropriations available to the judiciary for jury expenses could not be used to buy coffee and refreshments for jurors during recesses in trial proceedings. The situation was analogized to the cases prohibiting the purchase of food from appropriated funds for employees working under unusual conditions. The decision noted that statutory authority existed to pay actual subsistence expenses for jurors under sequestration, not an issue in the case at hand. The relevant appropriation language was subsequently amended to provide for refreshments, and the authority was made permanent in 1989.⁴⁶

In a 1979 decision, appropriations of the Equal Employment Opportunity Commission were found not available to host a reception for Hispanic leaders in conjunction with a planning conference. B-193661, January 19, 1979. The case fell squarely within the general rule. So did B-205292, June 2, 1982, involving a Fourth of July fireworks display by a Navy station, justified as a community relations measure. While good community relations may be desirable for all government agencies, fireworks are not necessary to the operation and maintenance of the Navy.

The propriety of using appropriated funds to furnish luncheons to public school officials in conjunction with Marine Corps recruiting programs was considered in B-162642, August 9, 1976. A statute authorized reimbursement of necessary expenses incurred by

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

recruiters, and applicable regulations permitted the reimbursement to include small amounts spent for occasional lunches, snacks, or non-alcoholic beverages, GAO, however, did not consider a planned luncheon involving a formal presentation with a guest speaker as within the intended scope of the statute or regulations. Since the statute and regulations were broadly worded, payment in that case was authorized. The decision cautioned, however, against incurring similar expenses in the future unless the regulations were first revised to provide adequate guidelines and limitations.

The National Park Service has authority to provide for “interpretive demonstrations” at Park Service sites. 16 U.S.C. §1a-2(g). GAO reviewed this authority and its legislative history in 68 Comp. Gen. 544 (1989), concluding that it could properly include some level of entertainment, as long as it was sufficiently related to the significance of the particular site. Thus, there was no objection to the 1988 Railroader’s Festival at the Golden Spike National Historic Site, which included musical entertainment by a band specializing in railroad and 19th century western American music. (Golden Spike is the site of the completion of the first U.S. transcontinental railroad in 1869.) Similarly within this authority was the decoration of a historic ranch house at the Grant-Kohrs Ranch National Historic Site to “interpret” how the ranch celebrated Christmas during the frontier era. B-226781, January 11, 1988. However, an “open house” with refreshments and a visit by Santa Claus had “too indirect and conjectural a bearing” on the Park Service’s mission and was therefore unauthorized. *Id.*

No discussion of entertainment would be complete without B-182357, December 9, 1975. The Foreign Assistance Act of 1961, as amended, authorized funds for an informational program to give foreign military trainees a greater exposure to American culture. To implement the program, the Department of Defense setup a program whereby officers would serve as escorts for foreign military trainees to impart to them an active appreciation of American values and ideals. The case involved a voucher submitted by a civilian employee of the Navy for expenses incurred as escort officer for a group of 12 senior foreign naval officers being trained in the United States. The voucher included visits to a variety of restaurants, night clubs, and bars. One of the items was a visit to the Boston Playboy Club. The claimant justified the visit as “symbolic of the United States” and “one of the most enjoyable experiences” the trainees had during their stay in America. Apparently

to get more symbolism, the party returned for a second visit. In reviewing the case, the Comptroller General noted that, under the statutory program, the funds could have been given directly to the trainees to be spent as they desired, and the agency would therefore have considerable discretion in spending the money for the trainees. In addition, the regulations provided “no guidance whatsoever” on the limits of the program. Somewhat reluctantly, the Comptroller General was forced to conclude that “the lack of adequate guidance to the escort officer leaves us no alternative but to allow him credit for the expenses incurred.”

e. Recreational and Welfare
Facilities for Government
Personnel

(1) The rules: older cases and modern trends

The basic rule for recreational facilities—which, as we shall see, has become more flexible in recent years—was established in early decisions: Appropriations are not available unless the expenditure is authorized by express statutory provision or by necessary implication. Thus, in 18 Comp. Gen. 147 (1938), appropriations for a river and harbor project on Midway Island were held not available to provide recreational facilities such as athletic facilities and motion pictures for the working force. Similarly, in 27 Comp. Gen. 679 (1948), the Comptroller General advised that Navy appropriations were not available to hire full-time or part-time employees to develop and supervise recreational programs for civilian employees of the Navy. The reason in both cases was that the expenditure would have at best only an indirect bearing on the purposes for which the appropriations were made.

Other early decisions applying the general rule are B-49169, May 5, 1945 (rental of motion picture by Bonneville Power Administration); B-37344, October 14, 1943 (footballs and basketballs for employees in Forest Service camps); and A-55035, May 19, 1934 (billiard tables for Tennessee Valley Authority employees). In B-49169, the Comptroller General pointed out that the Administrator’s authority to make such expenditures as he “may find necessary” does not mean anything he may approve, regardless of its nature, but the expenditures must bear a direct relationship to the purposes to be accomplished under the particular legislation.

It follows that, as a general proposition, appropriated funds may not be used to underwrite travel to sports or recreational events since this is not the performance of public business. E.g., 42 Comp.

Gen. 233 (1962). Of course, the particular circumstances may warrant an exception. Thus, appropriations for “student athletic and related activities” at the Federal Law Enforcement Training Center may be used to provide limited off-site busing to shopping centers, recreational facilities, and places of worship in the nearest town several miles away. The students—government employees in travel status—must live at the Center for several weeks, most do not have cars, and there is no public transportation to the nearest town. B-214638, August 13, 1984.

One area in which recreational and welfare expenditures have been permitted with some regularity is where employees are located at a remote site, where such facilities would not otherwise be available. Expenditures were permitted in the following cases:

- Purchase of ping pong paddles and balls by the Corps of Engineers to equip a recreation room on a seagoing dredge. B-61076, February 25, 1947.
- Transportation of musical instruments, billiard and ping pong tables, and baseball equipment, obtained from surplus military stock, to isolated Weather Bureau installations in the Arctic. B-144237, November 7, 1960.
- Purchase of playground equipment for children of employees living in a government-owned housing facility in connection with the operation of a dam on the Rio Grande River in an isolated area. 41 Comp.Gen. 264 (1961). The agency in that case had statutory authority to provide recreational facilities for employees and the question was whether that authority extended to employees’ families as well. It did.
- Use of an appropriation of the Federal Aviation Administration for construction of “quarters and related accommodations” to provide tennis courts and playground facilities in an isolated sector of the Panama Canal Zone. B-173009, July 20, 1971.
- Purchase of a television set and antenna for use by the crew on a ship owned by the Environmental Protection Agency. The ship was used to gather and evaluate water samples from the Great Lakes and cruises lasted for up to 15 days. The alternative would have been to extend the length of the cruises to permit more frequent docking. 54 Comp.Gen. 1075 (1975).
- Provision of television services for National Weather Service employees on a remote island in the Bering Sea. The agency was authorized to furnish recreational facilities by the Fur Seal Act of

1966, but the statute also required that the employees be charged a reasonable fee. B-186798, September 16, 1976.

In recent decades, the role of certain “employee welfare” activities in employee morale and productivity has been increasingly recognized. In some instances, the recognition has been accompanied by statutory authority. For example, the Defense Department has specific authority to use appropriated funds for welfare and recreation. The authority originated in general provisions contained in annual appropriation acts, and was made permanent in 1983.⁴⁷

The civilian agencies generally do not have comparable statutory authority, and decisions must be made, for the most part, under 31 U.S.C. §1301(a) and the necessary expense doctrine. Even here, however, the rather strict rule of the early decisions has undergone some liberalization, even in non-remote locations. While the general rule expressed in 18 Comp. Gen. 147 and 27 Comp. Gen. 679 remains as a bar to indiscriminate expenditures, it may now be said that an agency has reasonable discretion to spend its money for employee welfare purposes if the expenditure can be said to enhance employee morale and to be a significant factor in hiring and retention. The test remains one of necessity, but it is evaluated in terms of the agency’s legitimate interest in the welfare, morale, and productivity of its employees. Determinations must be made on a case-by-case basis.

A good illustration of this evolution is the treatment of programmed “incentive music” (sometimes called “Muzak”⁴⁸ or, by its detractors, “elevator music”). When GAO first visited the issue, it concluded that an agency could not, within its legitimate range of discretion, find this to be a “necessary expense.” B-86148, November 8, 1950. The issue arose again 20 years later when the Bureau of the Public Debt, Treasury Department, asked if it could use its Salaries and Expenses appropriation to provide programmed incentive music for its employees. The system had been installed by a previous tenant and the speakers were located in central work areas rather than in private offices. The Bureau pointed out that private concerns had found that such music enhanced employee

⁴⁷Department of Defense Appropriation Act, 1984, Pub. L. No. 98-212, 6735, 97 Stat. 1421, 1444 (1983) (“appropriations for the current fiscal year and hereafter for operation and maintenance of the active forces shall be available for welfare and recreation”).

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

morale by “creating a pleasantly stimulating and efficient atmosphere during the workday” and helped to minimize employee boredom. GAO had rejected similar arguments in the 1950 decision. This time, GAO concurred, accepting the Bureau’s justification that the expenditure would improve employee morale and increase productivity. 51 Comp.Gen. 797 (1972), overruling B-86148. In terms of the legal principle involved, whether GAO agreed with the justification or not was irrelevant; all that matters is that the determination is now viewed as a proper exercise of agency discretion.

Another example of a permissible expenditure in this area is the subsidization of employee cafeterias, previously discussed. Still another is parking facilities, discussed later in the section on personal expenses. Two items covered in the section on health and medical care—physical fitness activities and smoking cessation programs—further illustrate evolving trends in the area of employee welfare and morale. A final example is our next topic, child care.

(2) Child care

Like the cultural awareness programs previously discussed, child care is another example of evolution in the law to accommodate a changing society. Not too many decades ago, questions of using appropriated funds to provide child care services for government employees would not have received serious consideration. The typical government employee (male) simply did not need them because his spouse stayed home to take care of the kids. In fact, comprehensive child care legislation was vetoed as recently as 1971.⁴⁹

Times have changed and the federal government, as an employer, is not immune from the changes. The number of single-parent families in America has increased dramatically, as has the number of two-parent families in which both parents work, out of either economic necessity, personal choice, or some combination of factors. The

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

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

GAO's first written discussion of the authority to spend appropriated funds to provide child care services for government employees, B-39772 -0. M., July 30, 1976, was not a decision to another agency but an internal memorandum from the General Counsel analyzing GAO's own authority. GAO was considering establishing a day care center in its own building, to be funded and operated by employees. GAO's administrative officials wanted to know what kinds of support the agency could or could not provide without statutory authority, which, at the time, did not exist.

The General Counsel analyzed the questions from the perspective of purpose availability, and concluded that the Comptroller General could allocate space in the GAO building for a day care center; could use GAO's appropriations to renovate the space and buy equipment; and could assume part or all of the rent payable to the General Services Administration for the space.

However, before any of these things could be done, the Comptroller General, as the agency head, would first have to determine that the expenditure would materially contribute to recruiting or retaining staff or maintaining employee morale and hence efficiency and productivity. Because of the lack of statutory authority, the memorandum cautioned that GAO should disclose any substantial capital expenditures for renovation in its budget presentation and to the Appropriations Committees if it chose to take such action. See also B-205342, December 8, 1981 (non-decision letter), reiterating the general conclusion of the 1976 memorandum. As it turned out, GAO did not establish a day care center until after the enactment of 40 U.S.C. § 490b, discussed below.

Prior to the enactment of more general legislation in 1985, some agencies had authority to provide day care facilities under agency-specific legislation. For example, legislation authorized the (then) Department of Health, Education, and Welfare to donate space for day care centers. In 57 Comp. Gen. 357 (1978), the Comptroller

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

General held that the use of the term “donate” gave the agency discretion to provide the space without charge, or to lease space in other buildings for that purpose if suitable space was not available in buildings the agency already occupied. Also, as we have seen, the Defense Department has specific authority to use Operation and Maintenance appropriations for welfare expenditures.

In 1985, Congress enacted 40 U.S.C. § 490b, which authorizes, but does not require, federal agencies to provide space and services for child care centers. The term “services” is defined as including “lighting, heating, cooling, electricity, office furniture, office machines and equipment, telephone service (including installation of lines and equipment. . .), and security systems. . . .” *Id.* § 490 b(b)(3) .6’ The space and services maybe provided with or without charge.

The Comptroller General’s first opportunity to construe 40 U.S.C. § 490b came in response to an arbitration panel award that included a union day care proposal for the children of civilian employees. Council 214, American Federation of Government Employees, AFL-CIO, 15 F. L.R.A. 151 (1984), aff’d sub nom. Department of the Air Force v. Federal Labor Relations Authority, 775 F.2d 727 (6th Cir. 1985). The FLRA directed the Air Force to incorporate the award in its collective bargaining agreement,⁵² and the Air Force in turn asked GAO whether, under 40 U.S.C. § 490b, it had authority to use its appropriations to implement the award. The resulting decision, 67 Comp. Gen. 443 (1988), reached the following conclusions:

- The Air Force can, either with or without charge, allot space in government buildings under its control for child care facilities for civilian employees, and can provide the services outlined in the statute.
- The Air Force can use its appropriations to renovate, modify, or expand the space allotted to make it suitable for use as a child care facility,
- The Air Force can expand existing child care facilities for military personnel to accommodate the children of civilian employees.

⁵¹The definition was patterned generally after the statute authorizing agencies to provide space to federal credit unions, 12 U.S.C. § 1770, discussed in 66 Comp. Gen. 356 (1987).

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

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

In 70 Comp. Gen. (B-239708, January 31, 1991), GAO concluded that 40 U.S.C. § 490b does not preclude the General Services Administration from leasing space or constructing buildings for child care facilities if there is insufficient space available in existing federal buildings. The authority in section 490b to use existing space is not exclusive. (The 1988 decision to the Air Force, 67 Comp. Gen. 443, had expressed a contrary view and was overruled to that extent.)

In late 1989, Congress enacted new child care legislation for the armed forces, including the authority to use fees collected from parents. Military Child Care Act of 1989, title XV of the National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, 103 Stat. 1352, 1589 (1989).

f. Reception and
Representation Funds

Implicit in all of our discussion of entertainment is the point that otherwise improper expenditures may be authorized under specific statutory authority. Congress has long recognized that many agencies have a legitimate need for items that otherwise would be prohibited as entertainment, and has responded by making limited amounts available for official entertainment to those agencies which can justify the need. Entertainment appropriations originated from the need to permit officials of agencies whose activities involve substantial contact with foreign officials to reciprocate for courtesies extended to them by foreign officials. For example, the State Department would find it difficult to accomplish its mission if it could not spend any money entertaining foreign officials. In fact, some of the early entertainment appropriations were limited to entertaining non-U.S. citizens, and some could only be spent overseas. An example of the latter type is discussed in B-46169, December 21, 1944. Restrictions of this nature have become increasingly uncommon.

Entertainment appropriations may take various forms. Some agencies have their own well-established structures which may include permanent legislation. For example, the State Department has permanent authorization to pay for official entertainment. 22 U.S.C. § 4085. See also 22 U.S.C. 52671, which authorizes expenditures for

“unforeseen emergencies” which may include official entertainment in certain contexts. The authority of 22 U.S.C. § 4085 is implemented by means of annual appropriations under the heading “Representation Allowances.”⁵³ State Department representation allowances have been found available for rental of formal evening wear by embassy officials accompanying the Ambassador to the United Kingdom in presenting his credentials to the Queen, 68 Comp.Gen. 638 (1989); hiring extra waiters and busboys to serve at official functions at foreign posts, 64 Comp.Gen. 138 (1984); and meals for certain embassy officials at Rotary Club meetings in Tanzania, if approved by the local Chief of Mission, B-232165, June 14, 1989. A GAO fact sheet reviewing expenditures at selected overseas posts is Representational Funds: State Department Expenditures at Selected Posts, GAO/NSIAD-87-73FS (February 1987).

The Defense Department also has its own structure. Under 10 U.S.C. §127, the Secretary of Defense, or of a military department, within the limitations of appropriations made for that purpose, may use funds to “provide for any emergency or extraordinary expense which cannot be anticipated or classified.” When so provided in an appropriation, the official may spend the funds “for any purpose he determines to be proper.” Annual Operation and Maintenance appropriations include amounts for “emergencies and extraordinary expenses.”⁵⁴ Although the title is not particularly revealing, it has long been understood that official representation expenses are charged to this account. See Internal Controls: Defense’s Use of Emergency and Extraordinary Funds, GAO/AFMD-86-44 (June 4, 1986); DOD Use of Official Representation Funds to Entertain Foreign Dignitaries, GAO/ID-83-7 (December 29, 1982); 69 Comp.Gen. 197 (1990) (reception for newly assigned commander at U.S. Army School of the Americas); B-221257-O. M., February 6, 1986.

With these two major exceptions, most agencies follow a similar pattern and receive their entertainment funds, if they receive them at all, simply as part of their annual appropriations. The appropriation may specify that it will be available for “entertainment.” See, e.g., B-20085, September 10, 1941. Far more commonly, however,

⁵³E.g., Pub. L. No. 101-162, 103 Stat. 988, 1007 (1989) (FY1990).

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

the term used in the appropriation is “official reception and representation.” This has come to be the technical “appropriations language” for entertainment.

While we cannot guarantee that one does not exist somewhere, we have not found a congressional definition of the term “official reception and representation.” Absent a definition, we found it instructive to review agency justifications to see what sort of authority Congress thought it was conferring. The term seems to have originated—or at least became more widespread—in the early 1960’s. We identified the first appearance of the term for a number of agencies, and selected two, the Departments of Agriculture and Interior, as illustrative. Both agencies first received “official R&R” funds in their appropriations for fiscal year 1963.⁵⁵

The Department of Agriculture explained that the Secretary frequently finds it necessary to provide a luncheon or similar courtesy to various individuals and small groups in the conduct of official business, to promote effective working relationships with farm, trade, industry, and other groups which are directly related to accomplishing the Department’s work. Such official courtesies benefit the government, and the Secretary and Under Secretary should not be required to bear these expenses from their own personal funds as was then the case. In conclusion, the justification observed that “[i]t is unseemly that the hospitality should always be left to the visitor.”⁵⁶ Similarly, the Department of the Interior explained that its request for “not to exceed \$2,000 for official reception and representation expenses” was intended to provide authority to use appropriated funds for expenses incurred by the Secretary “in fulfilling the courtesy and social responsibilities directly associated with his official duties, ” in situations much like those the Agriculture Department had noted. Such official expenses, the justification asserted, “rightly should be borne by the Government rather than be financed from personal funds.”⁵⁷

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

⁵⁶Department of Agriculture Appropriations for 1963: Hearings before the Subcomm. on Department of Agriculture and Related Agencies Appropriations of the House Comm. on Appropriations, 87th Cong., 2d Sess. pt. 4, at 2090-91 (1962).

⁵⁷Interior Department and Related Agencies Appropriations for 1963: Hearings on H.R. 10802 before a Subcomm. of the Senate Comm. on Appropriations, 87th Cong., 2d Sess. 550 (1962).

One point that is clear from these excerpts is that an R&R appropriation, whatever its origins may have been, is not limited to the entertainment of foreign nationals, unless of course the appropriation language so provides. The experience of the former Department of Health, Education, and Welfare provides further evidence that, absent some indication to the contrary, Congress does not intend that an "official R&R" appropriation be limited to entertaining foreign nationals. The Secretary of HEW first received an entertainment appropriation in HEW's FY 1960 appropriation act, but it was limited to certain foreign visitors.⁵⁸ The language was changed to "official reception and representation" in HEW's FY 1964 appropriation." The conference report on the 1964 appropriation explained that the change was intended to expand the scope of the appropriation to include U.S. citizens as well as foreign visitors.⁶⁰

It is clear that R&R appropriations have traditionally been sought, justified, and granted in the context of an agency's need to interact with various non-government individuals or organizations. Precisely who these individuals or organizations might be will vary with the agency. Of course, the fact that the thrust of the appropriation is the entertainment of non-government persons does not mean that government persons are precluded. For example, it has long been recognized that persons from other agencies (and by necessary implication members of the host agency as well) may be included incident to an authorized entertainment function for non-government persons. E.g., B-84184, March 17, 1949.

An agency has wide discretion in the use of its R&R appropriation. 61 Comp. Gen. 260,266 (1982); B-212634, October 12, 1983. As a general proposition, "official agency events, typically characterized by a mixed ceremonial, social and/or business purpose, and hosted in a formal sense by high level agency officials" and relating to a function of the agency will not be questioned. B-223678, June 5, 1989. Accordingly, R&R funds have been found available for the following:

⁵⁸Pub. L. No. 86-158, § 209, 73 Stat. 3391355 (1959),

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

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

- Christmas party for government officials and their spouses or guests, held by Secretary of the Interior at the Custis-Lee Mansion. 61 Comp.Gen. 260 (1982), affirmed upon reconsideration, B-206173, August 3, 1982.
- Party for various government officials and their families or guests held on July 4 by Secretary of Interior to celebrate Independence Day. B-212634, October 12, 1983.
- Luncheon incident to “graduation ceremony” for Latin American students being trained by the Bureau of Labor Statistics. B-84184, March 17, 1949.
- Entertainment of British war workers visiting various American cities as guests of the British Ministry of Information. B-46169, August 18, 1945.⁶¹

In a case previously noted in our coverage of award ceremonies, the Veterans Administration could not use its general appropriations to provide refreshments at an awards ceremony for volunteers, but it could use its R&R appropriation. 43 Comp.Gen. 305 (1963). An agency may also use its R&R funds, although it is not required to, for refreshments at award ceremonies under the Government Employees’ Incentive Awards Act. 65 Comp.Gen. 738, 741 n.5.

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

A case relied on in B-223678 was B-122515, February 23, 1955, in which the Comptroller General held that a “representation allowance” similar to the State Department appropriation discussed above could be used to purchase printed invitation cards and envelopes in connection with an official function at an overseas mission. In 42 Comp.Gen. 19 (1962) and in B-131611, May 24, 1957, however, a similar appropriation to the Foreign Agricultural Service

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

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

was not available for printed invitations because an executive order provided that the Foreign Agricultural Service was to be governed by State Department regulations, and the applicable State Department regulations prohibited the use of representation allowances for printing cards.

Notwithstanding the discretion it confers, an R&R appropriation is not intended to permit government officials to feed themselves and one another incident to the normal day-to-day performance of their jobs. Thus, GAO has held that R&R funds may not be used to provide food or refreshments at intra-government work sessions or routine business meetings, even if held outside of normal working hours. B-223678, June 5, 1989.

A final but significant limitation on the use of representation funds stems from the appropriation language itself—R&R appropriations are made for the expenses of official reception and representation activities. There must be some connection with official agency business. Thus, it would be improper to use representation funds for a social function hosted and attended by private parties, such as a breakfast for Cabinet wives. 61 Comp.Gen. 260 (1982), affirmed upon reconsideration, B-206173, August 3, 1982. Similarly, R&R funds may not be used for entertainment incident to an activity which is itself unauthorized. 68 Comp.Gen. 226 (1989) (entertainment incident to trade show in Soviet Union which agency had no authority to sponsor). The impropriety of the underlying activity necessarily “taints” the entertainment expenditures.

6. Fines and Penalties

As a general proposition, no authority exists for the federal government to use appropriated funds to pay fines or penalties incurred as a result of its activities or those of its employees.

In the most common situation, a fine is assessed against an individual employee for some action he or she took in the course of performing official duties. The cases frequently involve traffic violations. The rule is that appropriated funds are not available to pay the fine or reimburse the employee. The theory is that, while an employee may have certain discretion as to precisely how to perform a given task, the range of permissible discretion does not include violating the law. If the employee chooses to violate the law, he is acting beyond the scope of his authority and must bear any resulting liability as his personal responsibility.

The earliest case stating the rule appears to be B-58378, July 31, 1946. Holding that a government employee ticketed for parking a government vehicle in a “no parking” zone could not be reimbursed, the Comptroller General stated:

“[T]here is not known to this office any authority to use appropriated moneys for payment of the amount of a fine imposed by a court on a Government employee for an offense committed by him while in the performance of, but not as a part of, his official duty. Such fine is imposed on the employee personally and payment thereof is his personal responsibility. ”

The rule applies to forfeitures of collateral as well as fines.
B-102829, May 8, 1951.

The first published decision stating the rule, and the case most often cited, is 31 Comp. Gen. 246 (1952). A government employee double-parked a government vehicle to make a delivery. While the employee was inside the building, the inner vehicle drove away, leaving the government vehicle unattended in the middle of the street, whereupon it was ticketed. Citing B-58378 and B-102829, the Comptroller General held that the employee could not be reimbursed from appropriated funds for the amount of the fine.⁶³

GAO has applied the rule even in a case where the employee could establish that the speedometer on the government vehicle was inaccurate. B-173660, November 18, 1971. While at first glance this might seem like a harsh and unfair result, it in fact was not, at least in that particular case. In that case, the employee was ticketed for driving at 85 mph. The speedometer at the time read a mere 73 mph. Conceding the established inaccuracy of the speedometer, the employee nevertheless, by observing other vehicles on the road and applying common sense, should have suspected that he was driving at an excessive rate of speed.

The very statement of the rule as quoted above from B-58378 suggests that there maybe situations in which reimbursement is permissible. The exception occurred in 44 Comp. Gen. 312 (1964). In connection with the case of Sam Giancana v. J. Edgar Hoover, 322 F.2d 789 (7th Cir. 1963), an agent of the Federal Bureau of Investigation was ordered by the court to answer certain questions. Based

⁶³For other cases involving motor vehicle violations, see 57 Comp. Gen. 270 (1978); B-147420, April 18, 1968; B-168096-0.M., August 31, 1976; B-147420, July 27, 1977 (non-decision letter); B-173783.188, March 24, 1976 (non-decision letter).

on Justice Department regulations and specific instructions from the Attorney General, the FBI agent refused to testify and was fined for contempt of court. The contempt order was upheld in *Sam Giancana v. Marlin W. Johnson*, 335 F.2d 372 (7th Cir. 1964). Finding that the employee had incurred the fine by reason of his compliance with Department regulations and instructions and that he was without fault or negligence, GAO held that the FBI could reimburse the agent from its Salaries and Expenses appropriation under the “necessary expense” doctrine.⁶⁴

Subsequently, some people thought that 31 Comp. Gen. 246 and 44 Comp. Gen. 312 appeared inconsistent, and GAO has discussed the two lines of reasoning in several later decisions. The distinction is this: In 31 Comp. Gen. 246, the offense was committed while performing official duties but it was not a necessary part of those duties. The employee could have made the delivery without parking illegally. The fine in 44 Comp. Gen. 312 was “necessarily incurred” in the sense that the employee was following his agency’s regulations and the instructions of his agency head. Thus, the actions that gave rise to the contempt fine could be viewed as a necessary part of the employee’s official duties, although certainly not in the sense that it would have been physically impossible for the employee to have done anything else.

Applying these concepts, the Comptroller General held in B-205438, November 12, 1981, that the Federal Mediation and Conciliation Service could reimburse a former employee for a contempt fine levied against him for refusal to testify, pursuant to agency regulations and instructions, on matters discussed at a mediation session at which he was present while employed by the agency.

Reimbursement was denied, however, in B-186680, October 4, 1976. There, a Justice Department attorney was fined for contempt for missing a court-imposed deadline. The attorney had been working under a number of tight deadlines and argued that it was impossible to meet them all. However, he had not been acting in compliance with regulations or instructions, had exercised his own judgment in missing the deadline in question, and the record did not support a determination that he was without fault or negligence in

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

the matter. Therefore, the case was governed by 31 Comp.Gen. 246 rather than 44 Comp.Gen. 312.

Reading all of these cases together, it seems fair to state that the mere fact of compliance with instructions will not by itself be sufficient to authorize reimbursement. There must be some legitimate government interest to protect. Thus, it would not be sufficient to instruct an employee to refuse to testify where the purpose is to avoid embarrassment or to avoid the disclosure of government wrongdoing. Similarly, it would follow that the prohibition against reimbursement of traffic fines could not be circumvented merely because some supervisor instructed a subordinate to park illegally.

The two lines of cases were discussed in the specific context of traffic violations in B-107081, January 22, 1980, a response to a Member of Congress. Summarizing the rules discussed above, the Comptroller General pointed out that they applied equally to law enforcement personnel. However, the Comptroller General alluded to one situation in which reimbursement might be authorized—a parking fine incurred by a law enforcement official as a necessary part of an official investigation. An example might be parking an unmarked undercover vehicle during a surveillance where there was no other feasible alternative. Compare 38 Comp.Gen. 258 (1958) concerning the reimbursement of parking meter fees.

Another situation in which a fine was held reimbursable is illustrated in 57 Comp.Gen. 476 (1978). Forest Service employees had loaded logs on a truck to transport them from Virginia to West Virginia. In Virginia, the driver was fined for improper loading (overweight on rear axle). The employees had loaded the logs in a forest, and there was no way for them to have checked the weight. The fine did not result from any negligent or intentional act on the part of the driver. Under these circumstances, the Comptroller General found that the fine was not for any personal wrongdoing by the employee but was, in effect, a citation against the United States. Therefore, Forest Service appropriations were available to reimburse the fine. This situation is distinguishable from the case of an overweight fine levied against a commercial carrier, which is not reimbursable. 35 Comp.Gen. 317 (1955). A more recent case discussing similar issues in the context of a leased vehicle is 70 Comp.Gen. (B-239511, December 31, 1990).

Similar reasoning applies with respect to penalties in the form of liquidated damages assessed against a government employee who fails to either use or cancel airline reservations in accordance with the carrier's applicable tariff. If the charges are unavoidable in the conduct of official travel or are incurred for reasons beyond the traveler's control and acceptable to the agency concerned, they may be reimbursed from the agency's travel appropriations. However, if the charges are not unavoidable in the performance of official business nor incurred for reasons beyond the employee's control and acceptable to the agency, they are personal to the employee and may not be reimbursed. 41 Comp.Gen. 806 (1962).

The cases discussed so far have all involved fines levied against individual employees. Questions may also arise over the liability of a federal agency for a fine or civil penalty. The question is essentially one of sovereign immunity. In order for a federal agency to be liable for a fine or penalty, there must be an express statutory waiver of sovereign immunity. E.g., Ohio v. United States Department of Energy, 904 F.2d 1058 (6th Cir. 1990).

For example, the Clean Air Act provides for the administrative imposition of civil penalties for violation of state or local air quality standards. The statute directs the federal government to comply with these standards and makes government agencies liable for the civil penalties to the same extent as nongovernmental entities. In view of this express waiver of sovereign immunity, the Comptroller General held that agency operating appropriations are available, under the "necessary expense" theory, to pay administratively imposed civil penalties under the Clean Air Act. B-191747, June 6, 1978. If the penalty is imposed by court action, it maybe paid from the permanent judgment appropriation, 31 U.S.C. 51304. However, if there is no legitimate dispute over the basis for liability or the amount of the penalty, an agency may not avoid use of its own appropriations by the simple device of refusing to pay and forcing the state or local authority to sue. 58 Comp.Gen. 667 (1979).

Absent the requisite statutory waiver of sovereign immunity, the agency's appropriations would not be available to pay a fine or penalty. For example, in 65 Comp.Gen. 61 (1985), appropriated funds were not available to pay a "fee," which was clearly in the nature of a penalty, imposed by a City of Boston ordinance for equipment malfunctions resulting in the transmission of false fire

alarms. See also B-227388, September 3, 1987 (no authority to pay false alarm fines imposed by municipality).

What about a penalty assessed by one federal agency against another? In B-161457, May 9, 1978, the Comptroller General held that, absent a statute specifically so providing, an agency's appropriations are not available to pay penalties assessed by the Internal Revenue Service for late filing or underpayment of employment taxes. The reason is that this would constitute a use of the funds for a purpose other than that for which they were appropriated.

7. Firefighting and Other Municipal Services

a. Firefighting Services: Availability of Appropriations

A frequent subject of inquiry has been the authority of the federal government to voluntarily contract, or to pay involuntary assessments, for firefighting services rendered by local governments to federal property and buildings. The general rule is: If the political subdivision rendering the service is required by law to extinguish fires within its boundaries, then the United States cannot make additional payments in any form to underwrite that legal responsibility. The earliest published decision containing a detailed discussion of the rule and its rationale is 24 Comp. Gen. 599 (1945).

The rule proceeds from the premise that firefighting is a governmental rather than a proprietary or business function. Where a local firefighting organization (city or county fire department, fire protection district, etc.) is required by local law to cover a particular territorial area and to respond to fires without direct charge to the property owners, this duty extends to federal as well as non-federal property within that territorial area. A charge to appropriated funds under these circumstances would amount to a tax or a payment in lieu of taxes and would, absent specific statutory "authority, violate the government's constitutional immunity from taxation. It follows that the government may not contract for firefighting services which it would be legally entitled to receive in any event,⁶⁵ nor may it reimburse a political subdivision for the

⁶⁵In addition to the cases cited in the text, see B-131932, March 13, 1958; B-125617, April 11, 1956; B-126228, January 6, 1956; B-105602, December 17, 1951; B-40387-0.M., June 24, 1966

additional costs incurred in fighting a federal fire.⁶⁶ See 53 Comp. Gen. 410 (1973) and cases cited therein. In addition to the taxation problem, use of appropriated funds for this purpose would violate 31 U.S.C. § 1301(a). 32 Comp. Gen. 91 (1952).

Limited reimbursement authority now exists by virtue of the Federal Fire Prevention and Control Act of 1974, discussed later in this section. The present discussion concerns the availability of appropriations apart from that limited authority,

In applying the rule, it is irrelevant that a city cannot regulate building and fire codes for structures on a military establishment within the city limits. 24 Comp. Gen. 599 (1945). Also, the rule applies equally when the fire protection is provided by a volunteer fire department performing the mandatory governmental function for a political subdivision. The fact that the firefighters are unpaid does not affect the local government unit's legal duty to render the service. 26 Comp. Gen. 382 (1946); B-47142, April 3, 1970.

In 53 Comp. Gen. 410 (1973), GAO denied a claim by the St. Louis Community Fire Protection District and several surrounding fire districts and departments for equipment losses and supplemental payroll expenses incurred in fighting a massive fire at the St. Louis Federal Records Center. The St. Louis CFPD could not be reimbursed because the Records Center was within its territorial responsibility. The surrounding fire districts were also under a duty to respond to the alarm because they had entered into mutual aid agreements with the St. Louis CFPD which had the effect of extending their own areas of responsibility.

In some rural areas, firefighting services maybe unavailable or very limited. In such areas, the government may have to provide its own fire protection. The Comptroller General had held, in 32 Comp. Gen. 91 (1952), that an agency could not enter into "mutual aid agreements" to extend that service to the general community beyond the boundaries of government property, even where the local inhabitants were predominantly government employees and where the additional protection could be accomplished without additional expense. Later, Congress enacted legislation specifically authorizing reciprocal agreements for mutual aid. 42 U.S.C.

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

§§1856–1856d. This statutory authority is limited to mutual aid agreements and does not authorize an agency to enter into an agreement to reimburse a political subdivision for services unilaterally provided to the government. 35 Comp.Gen. 311, 313 (1955); B-126228, January 6, 1956; B-40387-0. M., June 24, 1966. An agency participating in a mutual aid agreement under this authority may contribute, on a basis comparable to other participants, to a common fund to be used for training and equipment incident to responding to fires and related emergencies such as hazardous waste accidents. B-222821, April 6, 1987.

If the government may not contract for or reimburse fire protection services which a local entity is legally required to provide, it follows that the government may not pay a “service charge” for fire protection provided by a municipality with respect to federal property within the city limits, at least where the assessment for fire protection is normally included in the city’s property tax. In 49 Comp.Gen. 284 (1969), the city of New London, Connecticut, sought to charge the government on a direct cost-related basis for fire protection afforded the United States Coast Guard Academy. Fire protection was included in the city’s real estate tax and the “service charge” was to apply only to tax-exempt property. In view of the city’s duty to provide fire protection to the Academy, the Comptroller General found the proposed charge to be an unconstitutional tax on the government. See also B-160936, March 13, 1967. However, a flat-fee service charge levied by a utility district for extinguishing a fire in a postal vehicle was held permissible where the utility district was under no legal obligation to provide the service, B-123294, May 2, 1955.

In B-168024, December 13, 1973, a city was required to provide fire protection to all property within its boundaries, but was given the option under state law of financing the fire protection by service charges rather than from general tax revenues. In these circumstances, it was held that the United States could pay a valid service charge, although the charge in that particular case was held to be a tax and therefore invalid because it was based on the value of the property rather than the quantum of services provided. The decision contains a useful discussion of the distinction between a service charge and a tax.⁶⁷

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

Because the rule is predicated on the existence of state laws requiring political subdivisions to provide firefighting services, it would not apply in instances where there is no entitlement to service. Thus, reimbursement was allowed in 3 Comp. Gen. 979 (1924) where a fire unit had no legal duty to respond to an emergency call outside its district. It was further noted that there was no violation of the prohibition on accepting voluntary services found in 31 U.S.C. § 1342 (part of the Antideficiency Act). Similarly, a contractual agreement for fire protection with the nearest fire district may be proper where the federal property in question is not served by any fire district. 35 Comp. Gen. 311 (1955). Under the same theory, the Comptroller General held that the Bureau of Indian Affairs could make a financial contribution to the "Community Fire Truck," a volunteer firefighting organization which otherwise would have been under no obligation to respond to fires at an Indian school outside the limits of the city served by the organization. 34 Comp. Gen. 195 (1954). See also B-163089, February 8, 1968; B-123294, May 2, 1955. However, there is no authority to pay for fire services rendered without a pre-existing legal obligation if such services were necessary to protect adjoining state or privately-owned property as to which such a legal duty existed. 30 Comp. Gen. 376 (1951).

A variation occurred in B-116333-O.M., October 15, 1953, in which it was held permissible to reimburse a private firefighting enterprise for repair and maintenance service to hydrants and fire alarm boxes on a government-owned and operated housing facility, irrespective of the duty of the municipality.

In the analysis of legal duty to provide protection, it is irrelevant that the government may have engaged in an activity causing the fire, 32 Comp. Gen. 401 (1953); B-167709, September 9, 1969; B-147731, December 28, 1961; B-6400, August 28, 1940.⁶⁸ Similarly, there is no estoppel created by the fact that the United States operated its own fire protection at a given installation for a period of time. If the legal duty to provide protection exists, the United States is entitled to claim protection at any time its own service

⁶⁸A claim for expenses (as opposed to damages) incurred by a state in suppressing a fire starting on federal property and allegedly caused by the negligence of a federal employee is not a claim for injury or loss of property under the Federal Tort Claims Act and is therefore not cognizable under that Act. Oregon v. United States, 308 F.2d 568 (9th Cir. 1962), cert. denied, 372 U.S. 941; California v. United States, 307 F.2d 941 (9th Cir. 1962), cert. denied, 372 U.S. 941; B-163089, October 19, 1970.

becomes obsolete, undesirable, or uneconomical. B-129013, September 20, 1956; B-126228, January 6, 1956.

An exception to the general rule may exist in the case of a “federal enclave.” This term usually describes large tracts of land held under exclusive federal jurisdiction. In 45 Comp. Gen. 1 (1965), the Comptroller General held that, despite locally available protection, a federal enclave could provide its own fire protection on a contract basis. Further, adjacent land under federal control but not part of the federal enclave could be protected under the same contractual arrangement. However, an additional factor in 45 Comp. Gen. 1 was that legitimate doubt existed as to whether the fire district was under a legal obligation under state law to provide services to the federal property involved, and the district had petitioned the state government to redraw its boundaries to exclude the federal property. The effect of this factor is unclear, and since that time, no case has been decided in which a federal enclave was involved. Note that the threatened exclusion of the federal property was based on a legitimate doubt as to whether protection was required by state law. If protection is required, exclusion would be improper. See B-129013, September 20, 1956. Cf. B-192641, May 2, 1979 (non-decision letter) (questioning a redistricting to exclude federal property which was not a federal enclave).

A 1981 decision addressed the authority of the Bureau of Land Management to contract with rural fire districts in Oregon and Washington for fire protection and firefighting services for federally-owned timberlands in those states. The Comptroller General reviewed the principles and precedents established over the years and concluded that, since the fire districts were legally required to protect the federal tracts, the Bureau could not enter into the desired contracts without specific statutory authority. However, Bureau installations with a federally-maintained firefighting capacity could enter into mutual aid agreements under 42 U.S.C. 81856, discussed above. 60 Comp. Gen. 637 (1981).

b. Federal Fire Prevention and Control Act of 1974

In light of the huge losses suffered by local fire districts in the 1973 St. Louis Records Center fire, the need for some legislative action became apparent. The result was section 11 of the Federal Fire Prevention and Control Act of 1974, 15 U.S.C. 82210. This provision allows a fire service fighting a fire on federal property to file a claim for the direct expenses and direct losses incurred. The claim

is filed with the United States Fire Administration, Federal Emergency Management Agency (FEMA).⁶⁹ The amount allowable is the amount by which the additional firefighting costs, over and above the claimant's normal operating costs, exceed the total of any payments made by the United States to the claimant or its parent jurisdiction for the support of fire services on the property in question, including taxes and payments in lieu of taxes.

FEMA, upon determining the amount allowable, must forward it to the Treasury Department for payment. The Comptroller General has determined that section 11 constitutes a permanent indefinite appropriation for the payment of these claims. B-160998, April 13, 1978. Disputes under section 11 maybe adjudicated in the United States Claims Court. FEMA has issued implementing regulations at 44 C.F.R. Part 151.

Notwithstanding this authority, the decisions discussed previously in this section remain significant for several reasons, First, they define the extent to which an agency may use its own appropriations apart from 15 U.S.C. 52210. Second, they define the extent to which an agency may contract for fire protection services. Finally, section 11 provides that payment shall be subject to reimbursement by the federal agency under whose jurisdiction the fire occurred, "from any appropriations which may be available or which may be made available for the purpose, " Although no decision has been rendered on this point, it would seem that the existing body of decisions provides a starting point in determining the extent to which an agency's operating appropriations "may be available" to make this reimbursement.

c. Other Municipal Services

The principles involved in the firefighting cases are relevant to other municipal services as well.

The closest analogy is police protection. Like fire protection, police protection is a mandatory governmental function. Thus a municipality may not levy direct charges against the United States for ordinary police protective services provided within its area of jurisdiction. 49 Comp. Gen. 284,286-87 (1969); B-187733, October 27, 1977. However, the United States may pay on a quantum meruit basis for police services over and above the ordinary level, where

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

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

The same principles have been applied to emergency ambulance services required to be furnished by a municipality. 49 Comp. Gen. 284. However, contracts with state or local governments or private entities for ambulance services have been held permissible where there was no requirement for the political subdivision involved to provide ambulance services without direct charge. 51 Comp. Gen. 444 (1972), modifying B-172945, June 22, 1971; B-198032, June 3, 1981. Another example is the maintenance of public highways. See B-199205, April 27, 1981.

A charge for services rendered by a state or local government to the United States is to be distinguished from a tax; the former may be paid while the latter may not. E.g., 20 Comp. Gen. 748 (1941). While this distinction does not apply to mandatory governmental functions such as police and fire protection, it has frequently been cited in connection with such things as water and sewer services. As a general proposition, a charge for water and/or sewer services is a permissible service charge rather than a tax if it is based on the quantum of direct services actually furnished. See 31 Comp. Gen. 405 (1952) (assessment for water/sewer services levied on city-wide basis rather than quantum of service rendered held a tax); 29 Comp. Gen. 120 (1949) (sewer service charge held payable on quantum meruit basis); 20 Comp. Gen. 206 (1940) (water charge held to be a tax where it was levied as a flat charge rather than on the basis of actual water consumption). See also 49 Comp. Gen. 284 (1969); B-168024, December 13, 1973; B-105117, March 16, 1953.

- A reasonable charge based on the quantum of direct services actually furnished need not be considered a tax even though the services in question are provided to the taxpayers of the political subdivision without a direct charge, provided of course that the political subdivision is not required by law to furnish the service without direct charge. Such a charge may be paid if it is applied equally to all tax-exempt property, but not if it applies only to federal tax-exempt property. 50 Comp. Gen. 343 (1970).

A sewer service charge which is otherwise proper maybe paid in advance if required by local law, notwithstanding 31 U.S.C. s 3324. The government's liability would also include late payment penalties to the extent required by local law. 39 Comp. Gen. 285 (1959).

GAO has applied the same principles to charges for 9-1-1 emergency service. In a series of cases, GAO examined 9-1-1 charges in several states and found that they amounted to a tax and therefore could not be assessed against the United States or its agencies. 66 Comp. Gen. 385 (1987) (Florida); 65 Comp. Gen. 879 (1986) (Maryland); 64 Comp. Gen. 655 (1985) (Texas); B-230691, May 12, 1988 (Tennessee); B-239608, December 14, 1990 (non-decision letter) (Rhode Island). One decision stated:

“In our view, telephone access to police, fire and other municipal services is intrinsically connected to the services themselves. The fact that 9-1-1 service is more technologically sophisticated than normal telephone access does not change its essential character. ” 66 Comp. Gen. at 386.

In each case, the charges were included in telephone bills, with the telephone company acting as collection agent for the relevant governmental authority. As noted in 66 Comp. Gen. 385, 387, a 9-1-1 fee might be properly payable if a telephone company installed and operated the system itself and, as with directory assistance for example, offered the service as a component of its regular communications services. However, in none of the situations examined was this the case.

Several characteristics of the systems support the conclusion of non-liability: the service is provided by a local government or quasi-governmental unit; public funding of the service requires legal authority such as an ordinance or referendum; and the charge is not related to actual levels of service but is based on a flat rate per telephone line. 65 Comp. Gen. at 881. It is irrelevant that the 9-1-1 charge is called a “service charge” (B-230691) or a “service fee” (64 Comp. Gen. 655), or that state law provides that the charge shall not be construed as a tax (B-230691), or that the local government has threatened to cut off access (66 Comp. Gen. 385). The same analysis produced the same result in B-227388, September 3, 1987, in which a municipality tried to charge a federal agency a registration fee for 9-1-1 services.

The distinction between “vendor taxes” and “vendee taxes” discussed later in this chapter, i.e., the applicability or non-applicability to the government depending on the “legal incidence” of the tax, applies as well to 9-1-1 charges. Thus, in B-238410, September 7, 1990, GAO considered the Arizona 9-1-1 statute, found that it was a vendor tax and, distinguishing the prior 9-1-1 decisions, concluded that it could be assessed against the federal government.

A final group of cases involves the installation of traffic signals. At one point, GAO took the position, subsequently modified, that appropriated funds could not be used to pay for or contribute to the installation of traffic signals on public roads or highways, regardless of the resulting benefit to the government. Traffic control, so the reasoning went, is a municipal service financed by tax revenues the same as police or firefighting services, for which payment by a federal agency is not permissible. 51 Comp.Gen. 135 (1971); 36 Comp.Gen. 286 (1956).

A different situation was presented in 55 Comp.Gen. 1437 (1976). There, a state highway bisected an Army installation and the Army wanted to install a traffic light to regulate traffic at the intersection of the state highway and a road on the Army facility. Local authorities had agreed to repair and maintain the light if the Army would purchase and install it. Since the light would be located on federal property and would be for the primary benefit of the federal facility, even though it would regulate traffic on the state highway as well, GAO distinguished the prior cases and concluded that the Army could use its appropriations for the proposed expenditure.

In 1982, GAO modified the prior decisions and held that traffic signals at or near a federal facility, where the federal facility is the primary beneficiary and benefit to the general public is incidental, should be governed by the same tests applicable to other municipal services. If the state or local government is legally required to provide the service to all residents free of charge, the federal agency may not pay. If, however, the service is not legally required and the charge does not discriminate against the United States—i.e., any other resident would be subject to a similar charge—then the appropriations of the benefiting agency may be used. 61 Comp.Gen. 501 (1982).

Does the primary benefit shift where the federal agency is leasing the property from a private owner? GAO said no in 65 Comp. Gen.

847 (1986), but the lease in that case was to continue for at least another six years. The answer would presumably be different if the agency were about to vacate, but the decision does not purport to address precisely where the line should be drawn.

8. Gifts and Awards

a. Gifts

Appropriated funds may not be used for personal gifts, unless, of course, there is specific statutory authority. 68 Comp.Gen. 226 (1989). To state the rule in this manner is to make it appear rather obvious. If, for example, a General Counsel decided it would be a nice gesture and improve employee morale to give each lawyer in the agency a Christmas turkey, few would argue that the expense should be borne by the agency's appropriations. Appropriated funds could not be used because the appropriation was not made for this purpose (assuming, of course, that the agency has not received an appropriation for Christmas turkeys) and because giving turkeys to lawyers is not reasonably necessary to carry out the mission at least of any agency that now exists. Most cases, however, are not quite this obvious or simple.

The cases generally involve the application of the necessary expense doctrine, and the result is that items in the nature of gifts can rarely be justified. In making the analysis, it makes no difference whether the "gift items" are given to federal employees or to others. The connection is either there or, far more commonly, it is not. In each of the cases in which funds have been found unavailable, there was a certain logic to the agency's justification, and the amount of the expenditure in many cases was small. The problem is that, were the justification sufficient, there would be no stopping point. If a free ashtray might generate positive feelings about an agency or program or enhance motivation, so would a new car or an infusion of cash into the bank account. The rule prohibiting the use of appropriated funds for personal gifts reflects the clear potential for abuse and the impossibility of drawing a rational line.

In 53 Comp.Gen. 770 (1974), a certifying officer for the Small Business Administration asked GAO to rule on the propriety of an expenditure for decorative ashtrays which were distributed to federal employee participants of a conference sponsored by that agency.

By passing out ashtrays, the agency intended that they would generate conversation concerning the conference and thereby further the SBA's objectives by serving as a reminder of the purposes of the conference. The decision held that the justification given by the agency was not sufficient because the recipients of the ashtrays were federal officials who were already charged by law to cooperate with the objectives of the SBA. Thus, there was no necessity that ashtrays be given away. The ashtrays were properly designated as personal gifts.

Similarly, in 54 Comp. Gen. 976 (1975), specially made key chains which were distributed to educators who attended seminars sponsored by the Forest Service were determined to be personal gifts despite the Department of Agriculture's claim that their distribution would generate future responses from participants. That decision stated:

"The appropriation . . . proposed to be charged with payment for the items in question is available for . . . expenses necessary for forest protection and utilization. Since the appropriation is not specifically available for giving key chains to individuals, in order to qualify as a legitimate expenditure it must be demonstrated that the acquisition and distribution of such items constituted a necessary expense of the Forest Service. "

The decision concluded that the key chains were not necessary to implement the appropriation and were, therefore, improper expenditures.

This line of reasoning was also used in 57 Comp. Gen. 385 (1978). There it was held that novelty plastic garbage cans containing candy in the shape of solid waste which were distributed by the Environmental Protection Agency to attendees at an exposition were personal gifts. The agency's argument that the candy was used to attract people to its exhibit on the Resource Conservation and Recovery Act and therefore to promote solid waste management was not sufficient to justify the expenditure.

In B-195247, August 29, 1979, the Comptroller General held that an expenditure of appropriated funds for the cost of jackets and sweaters as Christmas gifts to corpsmen at a Job Corps Center with the intent of increasing morale and enhancing program support was unauthorized. It was determined that these were not a necessary



and proper use of appropriated funds and therefore were personal gifts,

The following cases are additional illustrations of expenditures which were found to be in the nature of personal gifts and therefore improper:

- T-shirts stamped with Combined Federal Campaign logo to be given to employees contributing a certain amount. 70 Comp. Gen. (B-240001, February 8, 1991).
- Winter caps purchased by National Oceanographic and Atmospheric Administration to be given to volunteer participants in weather observation program to create “esprit de corps” and enhance motivation. B-201488, February 25, 1981.
- Photographs taken at the dedication of the Klondike Gold Rush Visitor Center to be sent by the National Park Service as “mementos” to persons attending the ceremony. B-195896, October 22, 1979.
- “Sun Day” buttons procured by the General Services Administration and given out to members of the public to show GSA’s support of certain energy policies. B-192423, August 21, 1978.
- Agricultural products developed in Department of Agriculture research programs (gift boxes of convenience foods, leather products, paperweights of flowers imbedded in plastic) to be given to foreign visitors and other official dignitaries. B-151668, June 30, 1970.
- Cuff links and bracelets to be given to foreign visitors by the Commerce Department to promote tourism to the United States. B-151668, December 5, 1963; B-151668, June 12, 1963 (same case).

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

Some expenditures which resemble personal gifts have been approved because they were found necessary to carry out the purposes of the agency’s appropriation. For example, in B-193769, January 24, 1979, it was held that the purchase and distribution of pieces of lava rocks to visitors of the Capulin Mountain National Monument was a necessary and proper use of the Department of the Interior’s appropriated funds. The appropriation in question was for “expenses necessary for the management, operation, and maintenance of areas and facilities administered by the National Park Service” The distribution of the rocks furthered the

objectives of the appropriation because it was effective in preserving the Monument by discouraging visitors from removing lava rock elsewhere in the Monument. Thus, the rocks were not considered to be personal gifts.

Similarly, GAO concluded in B-230062, December 22, 1988, that the Army could use its appropriations to give away framed recruiting posters as “prizes” in drawings at national conventions of student organizations. The students had to fill out cards to enter the drawings, and the cards would provide leads for potential recruits. Also, the Army is authorized to advertise its recruitment program, and posters are a legitimate form of advertising.

Another case in which GAO found adequate justification is 68 Comp. Gen. 583 (1989), concluding that the United States Mint may give complimentary specimens of commemorative coins and medals to customers whose orders have been mishandled. Since customers who do not receive what they paid for may be disinclined to place further orders, the goodwill gesture of giving complimentary copies to these customers would directly contribute to the success of the Mint’s commemorative sales program.

b. Contests

(1) Entry fees

The Comptroller General has held that payment of an entry fee to enter agency publications in a contest sponsored by a private organization is improper and cannot be justified as a necessary expense, at least where the prize is a monetary award to be given to the editors of the winning publications. B-164467, June 14, 1968.

However, payment of a contest entry fee may be permissible where the prize is awarded to the agency and not to the individuals and where there is sufficient justification that the expense will further the objects of the appropriation. B-172556, December 29, 1971. The Comptroller General pointed out in that decision that whether appropriated funds may be used to enter a contest will depend on the nature of the contest, the nature of the prizes and to whom they are awarded, and the sufficiency of the administrative justification.

Thus, the Bureau of Mines could use its appropriations to enter an educational film it produced in an industrial film festival where entry was made in the Bureau’s name, awards would be made to

the Bureau and not to arty individuals, and there was adequate justification that entry would further the Bureau's function of promoting mine safety. B-164467, August 9, 1971.

(2) Government-sponsored contests

In an early case, the Navy wanted to use its appropriation for naval aviation to sponsor a competition for the design of amphibious landing gear for Navy aircraft. Cash prizes would be awarded for the two most successful designs. The Comptroller General ruled, however, that the proposed expenditure was unauthorized because the prizes were not related to the reasonable value of the services of the successful contestants and because the appropriation contemplated that the design and development work would be performed by Navy personnel. 5 Comp.Gen. 640 (1926).

While 5 Comp.Gen. 640 maybe said to express a general rule, later decisions have permitted agencies to, in effect, sponsor contests and competitions where artistic design was involved. Thus, in A-13559, April 5, 1926, the Arlington Memorial Bridge Commission wanted to invite several firms to submit designs for a portion of the Arlington Memorial Bridge. Each design accepted by the Commission would be purchased for \$2,000, estimated to approximate the reasonable cost of preparing a design. Since the \$2,000 was reasonably related to the cost of producing a design, GAO viewed the proposal as amounting to a direct purchase of the satisfactory designs and distinguished 5 Comp.Gen. 640 on that basis. A significant factor was that the bridge was intended not merely as a functional device to cross the river but "as a memorial in which artistic features are a major, if not the primary, consideration."

This decision was followed in 9 Comp.Gen. 63 (1929), holding that the Marine Corps could offer a set sum of \$1,000 for an acceptable original design for a service medal. The Comptroller General stated:

"Competition in the purchase of supplies or articles for Government use in its most common form is for the purpose of securing specified supplies or articles at the lowest possible price. Where, however, the purpose is the selection of the most suitable and artistic design ... , the primary value of the subject being in its design, the ordinary procedure may be reversed and the amount to be expended fixed in advance at a sum considered to be the reasonable value of the services solicited and the bidders requested to submit the best design which they can furnish for that sum." *Id.* at 65.

The concept of A-13559 was followed and applied in several later decisions. See 19 Comp. Gen. 287, 288 (1939) (design of advertising literature for savings bonds); 18 Comp. Gen. 862 (1939) (plaster models for Thomas Jefferson Memorial); 14 Comp. Gen. 852 (1935) (bronze tablets and memorials for Boulder Dam); A-37686, August 1, 1931 (monument at Harrodsburg, Kentucky, as first permanent settlement west of the Allegheny Mountains); A-35929, April 3, 1931 (ornamental sculptured granite columns for the Arlington Memorial Bridge).

Thus, a prize competition *per se* is generally unauthorized in accordance with 5 Comp. Gen. 640. However, the procedure in A-13559 and its progeny is permissible where artistic features are the major consideration and the amount awarded is related to the reasonable cost of producing the design.

Apart from the artistic design line of cases, an agency may be authorized to sponsor a contest under the necessary expense theory, if the expenditure bears a reasonable relationship to carrying out some authorized activity. For example, in B-158831, June 8, 1966, prizes were awarded to enrollees at a Job Corps Conservation Center in a contest to suggest a name for the Center newspaper. GAO held the expenditure permissible because the enabling legislation authorized the providing of "recreational services" for the enrollees and the contest was viewed as a permissible exercise of administrative discretion in implementing the statutory objective.

In another case, the National Park Service sponsored a cross-country ski race in a national park, and awarded trophies to the winners. The cost of the trophies could not be charged to appropriations for management, operation, and maintenance of the national park system. However, the Park Service also received appropriations for recreational programs in national parks, and the trophies could properly have been charged to that account. B-214833, August 22, 1984. See also B-230062, December 22, 1988.

C. Awards

A number of early decisions established the proposition that, absent specific statutory authority, appropriations could not be used to purchase such items as medals, trophies, or insignia for the purpose of making awards. The rationale follows that of the gift cases. The prohibition was applied in 5 Comp. Gen. 344 (1925) (medals for winners of athletic events) and 15 Comp. Gen. 278

(1935) (annual trophies for Naval Reserve bases for efficiency), In 10 Comp. Gen. 453 (1931), the Comptroller General held that a general appropriation could be used to design and procure medals of honor for air mail flyers where the awarding of the medals had been authorized in virtually concurrent legislation. The general appropriation was viewed as available to carry out the specifically expressed intent of Congress and the express authorization obviated any need for a more specific appropriation.

The rule was restated in 45 Comp. Gen. 199 (1965) and viewed as prohibiting the purchase of a plaque to present to a state to recognize 50 years of achievement in forestry. While the voucher in that case was paid because the plaque had already been presented, the decision stated that payment was for that instance only and that congressional authority should be sought if similar awards were considered desirable in the future. A more recent case applying the prohibition is B-223447, October 10, 1986.

As with the gift cases, an occasional exception will be found based on an adequate justification under the necessary expense doctrine. One example, prompted perhaps by wartime considerations, is B-31094, January 11, 1943, approving the purchase of medals or other inexpensive insignia (but not cash payments) to be awarded to civil defense volunteers for heroism or distinguished service.

Similarly, the Comptroller General held in 17 Comp. Gen. 674 (1938) that an appropriation, one of whose purposes was “accident prevention,” was available to purchase medals and insignia (but not to make monetary awards) to recognize mail truck drivers with safe driving records. There was sufficient discretion under the appropriation to determine the forms “accident prevention” should take. However, the discretion in recognizing safe job performance does not extend to distributing “awards” of merchandise selected from a catalogue. B-223608, December 19, 1988.⁷⁰ The same decision disapproved the distribution of ice scrapers imprinted with a safety message, based on the lack of adequate justification.

The prohibition does not apply to a government corporation with the authority to determine the character and necessity of its expenditures, 64 Comp. Gen. 124 (1984). (The expenditure in the case cited was to be made from donated funds.)

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

Several statutes now authorize the making of awards in various contexts. Perhaps the most important is the Government Employees Incentive Awards Act, enacted in 1954⁷¹ and now found at 5 U.S.C. §§ 4501-4507. The Act authorizes an agency to pay a cash award to an employee who “by his suggestion, invention, superior accomplishment, or other personal effort contributes to the efficiency, economy, or other improvement of Government operations or achieves a significant reduction in paperwork” or performs a special act or service in the public interest related to his or her official employment. The agency may also incur “necessary expenses” in connection with an incentive award. Awards and related expenses under the Act are paid from appropriations available to the activity or activities benefited. The Office of Personnel Management is authorized to prescribe implementing regulations. OPM’s regulations are found in 5 C.F.R. Parts 451 and 540, and Chapter 451 of the Federal Personnel Manual. A provision added in 1990, 5 U.S.C. § 4505a, authorizes cash awards for employees with fully successful performance ratings.⁷²

The Incentive Awards Act applies to civilian agencies, civilian employees of the various armed services, the District of Columbia Government, and specified legislative branch agencies. 5 U.S.C. 84501. Within the judicial branch, it applies to the Administrative Office of the United States Courts⁷³ and the United States Sentencing Commission. *Id.*⁷⁴ While it does not apply to members of the armed forces, the Defense Department has very similar authority for military personnel in 10 U.S.C. 51124.

GAO has issued a number of decisions interpreting the Government Employees Incentive Awards Act. Thus, where an award is based

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

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

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

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

on a suggestion resulting in monetary savings, the savings must be to government rather than non-government funds. 36 Comp. Gen. 822 (1957). Applying this principle, GAO found that a suggestion for changes in procedures that would decrease administrative expenses of state employment security offices would effect a savings to an appropriation for unemployment service administration grants to the states. Therefore, the appropriation was available to make an award to the employee who made the suggestion. 38 Comp. Gen. 815 (1959). An agency may make an award to an employee on detail from another agency. 33 Comp. Gen. 577 (1954). An agency may also make an award to one of its employees for service to a Federal Executive Board. B-240316, March 15, 1991. See also 70 Comp. Gen. (B-236040, October 9, 1990).

An interesting situation occurred in B-192334, September 28, 1978. There, an employee made a suggestion that resulted in monetary savings to his own agency, but the savings would be offset by increased costs to other agencies. The decision concluded that, if the agency wanted to make an award on the basis of tangible benefits, it must measure tangible benefits to the government, that is, it must deduct the increased costs to other agencies from its own savings. However, the agency could view the suggestion as a contribution to efficiency or improved operations and make a monetary award based on intangible benefits.

As noted, the Act authorizes an agency to incur "necessary expenses" incident to its awards program. Thus, an agency may pay travel and miscellaneous expenses to bring recipients to Washington to participate in award ceremonies. These expenses are not chargeable against the statutory award ceiling (currently \$10,000). 32 Comp. Gen. 134 (1952). The agency may also pay travel expenses for the recipient's spouse. 69 Comp. Gen. 38 (1989), overruling 54 Comp. Gen. 1054 (1975). In response to 69 Comp. Gen. 38, OPM issued FPM Letter 451-7 (July 25, 1990), extending the concept to "any individual related by blood or affinity." Travel and miscellaneous expenses may also be paid to a surviving spouse to receive an award on behalf of a deceased recipient. B-111642, May 31, 1957. Where a recipient is handicapped and cannot travel unattended, the travel and miscellaneous expenses of an attendant, whether or not a family member, may be paid. 55 Comp. Gen. 800 (1976).

The Act does not authorize “necessary expenses” incident to the receipt of an award from a non-federal organization. 40 Comp.Gen. 706 (1961). However, in limited situations where an award from a non-federal organization is closely related to the recipient’s official duties, it maybe possible to pay certain related expenses on other grounds. See 55 Comp.Gen. 1332 (1976).

In a case previously discussed in our section on entertainment, the Comptroller General held that the “necessary expense” language of the Incentive Awards Act may include refreshments at an agency’s awards ceremony. 65 Comp.Gen. 738 (1986). See also B-167835, November 18, 1969. A 1990 decision applied the rationale of 65 Comp.Gen. 738 and held that an agency could pay a fee, which included a luncheon, for attendance at a Federal Executive Board regional award ceremony by agency employees who had been selected for awards and their supervisors. 70 Comp.Gen. (B-236040, October 9, 1990).

Awards under the Act may take forms other than cash. Thus, in 55 Comp.Gen. 346 (1975), the Comptroller General held that the Army Criminal investigation Command could award marble paperweights and walnut plaques to Command employees, including those who had died in the line of duty, if the awards conformed to the Act and applicable regulations. In situations not covered by the statute (e.g., presentations to non-government persons to recognize cooperation and enhance community relations), however, such awards would be personal gifts and therefore improper. Similarly authorized as “honorary” awards are desk medallions (B-184306, August 27, 1980); telephones of nominal value (67 Comp.Gen. 349 (1988)]; and \$50 jackets bearing agency insignia (B-243025, May 2, 1991). Administrative leave can also be awarded if and to the extent authorized in OPM’s implementing regulations. 5 U.S.C. § 4502(e) (2).⁷⁵ See also B-208766, December 7, 1982. Awards of merchandise to be selected from catalogues, however, are not authorized. B-223608, December 19, 1988 (citing OPM regulations). Whether the award is monetary or non-monetary, the act or service prompting it must be related to official employment. 70 Comp.Gen. (B-240001, February 8, 1991) (Incentive Awards Act does not authorize giving T-shirts to Combined Federal Campaign contributors).

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

The Act does not authorize cash awards based merely on length of service or upon retirement. However, honorary non-cash awards are permissible. For example, the Department of Agriculture wanted to present to retiring members of its Office of Inspector General engraved plastic holders containing their credentials. ^{GAO} found this authorized by the Act. 46 Comp.Gen. 662 (1967). The use of incentive awards for good sick leave records is inappropriate. 67 Comp.Gen. 349 (1988).

The making of an award—and therefore the refusal to make an award—under the Government Employees Incentive Awards Act is discretionary. *Rosano v. United States*, 9 Cl. Ct. 137, 144-45 (1985). As such, it is reviewable only for abuse of discretion. *E.g., Shaller v. United States*, 202 Ct. Cl. 571 (1973), cert. denied, 414 U.S. 1092. A labor relations arbitrator may order an agency to prepare and submit an award recommendation, but cannot order the agency to actually make the award. 56 Comp.Gen. 57 (1976).

In B-202039, April 3, 1981, affirmed upon reconsideration, B-202039, May 7, 1982, two employees filed a claim where their agency had given them a cash award several years after implementing their suggestion. They claimed interest on the award, lost imputed investment earnings, an inflation adjustment, and compensation for higher income taxes paid as a result of the delay. The claim was denied. In the May 1982 decision, ^{GAO} pointed out that an agency's own regulations can have the effect of limiting the discretion it would otherwise have under the statute. See also *Griffin v. United States*, 215 Ct. Cl. 710 (1978). Thus, agency regulations can commit the agency to making an award if it adopts a suggestion. However, this does not create an entitlement to interest.

Finally, the Government Employees Incentive Awards Act is limited to government employees. Since no similar authority exists for persons other than government employees, an award may not be made to a nongovernment employee who submits a suggestion resulting in savings to the government. B-160419, July 28, 1967. The limitation to government employees is also noted in two internal ^{GAO} memoranda. B-224071 -O. M., August 3, 1987 (^{GAO} appropriations not available for cash awards to contract security guards); B-176600 -O. M., August 18, 1978 (appropriations of agencies funding the Joint Financial Management Improvement Program not available to make cash awards to other than federal employees).

In addition to the Government Employees Incentive Awards Act, several other statutes authorize various types of awards. Some examples are:

- 5 U.S.C. § 5384: authorizes lump-sum cash performance awards to members of the Senior Executive Service, Some representative decisions are 68 Comp. Gen. 337 (1989); 64 Comp. Gen. 114 (1984); and 62 Comp. Gen. 675 (1983).
- 10 U.S.C. § 1125 and 14 U.S.C. § 503: authorize the Defense Department and the Coast Guard, respectively, to award trophies and badges for certain accomplishments. The Coast Guard statute includes cash prizes. The statutes have been narrowly construed as limited essentially to proficiency in arms and related skills. 68 Comp. Gen. 343 (1989) (Coast Guard); 27 Comp. Gen. 637 (1948) (discussing predecessor of 10 U.S.C. § 1125).
- 5 U.S.C. §§ 4511-4514: Inspector General of an agency may make cash awards to employees whose disclosure of fraud, waste, or mismanagement results in cost savings for the agency, For an agency without an Inspector General, the agency head is to designate an official to make the awards. The President may make the awards where the cost savings accrue to the government as a whole. GAO reviews under this legislation indicate that the authority has been used sparingly, but that actual or projected cost savings appear reasonable in those cases where awards have been made. ⁷⁶ The legislation was scheduled to expire on September 30, 1990. Even if it is not renewed, as the Office of Personnel Management pointed out in connection with an earlier sunset (FPM Letter 451-5, November 21, 1984), similar awards can be processed under the Incentive Awards Act.

9. Guard Services: Anti-Pinkerton Act

a. Evolution of the Law Prior to 57 Comp. Gen. 524

On July 6, 1892, in Homestead, Pennsylvania, a riot occurred between striking employees of the Carnegie, Phipps & Company steel mill and approximately 200 Pinkerton guards. The company had brought in the Pinkerton force ostensibly to protect company property. As the Pinkertons were being transported down the

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

Monongahela River, the strikers sighted them and began firing on them. The strikers were heavily armed, and even had a cannon on the river bank. The violence escalated to the point where the strikers spread oil on the water and ignited it. Several of the Pinkerton men were killed and several of the strikers were indicted for murder. The riot received national attention.

The then-common practice of employing armed Pinkerton guards as strike-breakers in labor disputes became an emotionally charged issue. The Homestead riot, together with other similar although less dramatic incidents, made it clear that the use of these guards provoked violence. Although Congress was reluctant to legislate against their use in the private sector, some congressional action became inevitable. The result was the law that came to be known as the Anti-Pinkerton Act. Originally enacted as part of the Sundry Civil Appropriation Act of August 5, 1892, 27 Stat. 368, it was made permanent the following year by the Act of March 3, 1893, 27 Stat. 591. Now found at 5 U.S.C. 53108, the Act provides:

“An individual employed by the Pinkerton Detective Agency, or similar organization, may not be employed by the Government. of the United States or the Government of the District of Columbia.”

As we will see, the statute has little impact today. Nevertheless, it remains on the books and could become relevant, albeit only in unusual circumstances. Therefore, it may be useful to briefly record the administrative interpretations of the law.

Although the Anti-Pinkerton Act was never the subject of any judicial decisions until the late 1970's, it was the subject of numerous decisions of the Comptroller General and the Comptroller of the Treasury. Several principles evolved through the decisions.

(1) The Act applies to contracts with “detective agencies” as firms or corporations as well as to contracts with or appointments of individual employees of such agencies. 8 Comp. Gen. 89 (1928); A-12194, February 23, 1926.

(2) The Act prohibits the employment of a detective agency or its employees, regardless of the character of the services to be performed. The fact that such services are not to be of a “detective” nature is immaterial. Thus, detectives or detective agencies within

the scope of the Act may not be employed in any capacity. 51 Comp. Gen. 494 (1971); 26 Comp. Gen. 303 (1946).

(3) The statutory prohibition applies only to direct employment. It does not extend to subcontracts entered into with independent contractors of the United States, 26 Comp. Gen. 303 (1946). The legislative history of the original 1892 statute made it clear that Congress did not intend to reach subcontracts. However, the Act does apply to a contract under the Small Business Administration set-aside program since the contract is a prime contract vis-a-vis SBA even though it may be a subcontract vis-a-vis the actual employing agency. 55 Comp. Gen. 1472 (1976).

(4) Although the Comptroller General never defined “detective agency” for purposes of the Anti-Pinkerton Act, the decisions drew a distinction between detective agencies and protective agencies and held that the Act did not forbid contracts with the latter. 38 Comp. Gen. 881 (1959); 26 Comp. Gen. 303 (1946); B-32894, March 29, 1943. Thus, the government could employ a protective agency, but could not employ a detective agency to do protective work. An important test became whether the organization was empowered to do general investigative work.

(5) In determining whether a given firm is within the statutory prohibition, GAO considers the nature of the functions it may perform as well as the functions it in fact performs. Two factors are relevant here—the firm’s authority under its corporate charter and its powers under licensing arrangements in the states in which it does business. If a firm is chartered as a detective agency and licensed as a detective agency, then the fact that it does not actually engage in detective work will not permit it to escape the statutory prohibition. Since virtually every corporation inserts in its charter an “omnibus” clause (“engage in any lawful act or activity for which corporations may be organized in this state” or similar language), an omnibus clause alone will not make a company a detective agency. Rather, specific charter authorization is needed. 41 Comp. Gen. 819 (1962); B-146293, July 14, 1961.

(6) The government may employ a wholly-owned subsidiary of a detective agency if the subsidiary itself is not a detective agency, even if the subsidiary was organized primarily or solely to avoid the Anti-Pinkerton Act. As long as there is prima facie separation of corporate affairs, the Act does not compel the government to

“pierce the corporate veil.” 44 Comp. Gen. 564 (1965); 41 Comp. Gen. 819 (1962); B-167723, September 12, 1969.

(7) A telephone listing alone is not sufficient evidence that a given firm is a “detective agency” for purposes of 5 U.S.C. § 3108, although the fact of such a listing should prompt further inquiry by the procuring agency. 55 Comp. Gen. 1472 (1976); B-181684, March 17, 1975; B-176307, March 21, 1973; B-177137, February 12, 1973.

(8) Corrections to charters and licenses maybe made prior to contract award to avoid Anti-Pinkerton Act violations. Post-award corrections, while perhaps relevant to future procurements, do not, absent compelling circumstances, retroactively expunge ineligibility existing at the time of the award. 56 Comp. Gen. 225 (1977); B-172587, June 21, 1971; B-161770, November 21, 1967; B-160538, November 15, 1967; B-156424, July 22, 1965.

These principles were discussed and applied in many decisions over the years. For example, a contract for guard services was found to violate the Act where the contractor was expressly chartered and licensed as a detective agency. 55 Comp. Gen. 1472 (1976), affirmed on reconsideration, 56 Comp. Gen. 225 (1977). Similarly, a contract with a sole proprietorship was invalid where the owner was also the president of a corporation chartered and licensed as a detective agency. B-186347/B-185495, October 14, 1976, affirmed on reconsideration, B-186347/B-185495, March 7, 1977.

By the 1970’s, the Anti-Pinkerton Act had become a hindrance to the government’s guard service contracting activities. The federal government is a major consumer of guard services, and it was the rare solicitation that did not generate a squabble over who was or was not subject to the Act. Many companies, including Pinkerton itself, were forced to form subsidiaries in order to compete for government business,

b. 57 Comp. Gen. 524 and the Present State of the Law

The first reported judicial decision dealing with the Anti-Pinkerton Act was United States ex rel. Weinberger v. Equifax, 557 F.2d 456 (5th Cir. 1977), cert. denied, 434 U.S. 1035. The issue in that case was whether the Act applied to a credit reporting company. The Comptroller General, in B-139965, January 10, 1975, had already held that it did not. The court reached the same result, although on different reasoning. Relying heavily on the Act’s legislative history, the court held:

“In light of the purpose of the Act and its legislative history, we conclude that an organization is not ‘similar’ to the (quondam) Pinkerton Detective Agency unless it offers quasi-military armed forces for hire.” 557 F.2d at 463.

In a June 1978 circular letter to department and agency heads, published at 57 Comp.Gen. 524 (1978), the Comptroller General announced that GAO would follow the Equifax interpretation in the future. Therefore, the statutory prohibition will now be applied only if an organization can be said to offer quasi-military armed forces for hire. The Comptroller General declined, as did the Fifth Circuit, to attempt a definition of a quasi-military armed force but noted that, whatever it might mean, “it seems clear that a company which provides guard or protective services does not thereby become a ‘quasi-military armed force,’ even if the individual guards are armed.” 57 Comp.Gen. at 525. It follows that whether that company also provides investigative or detective services is no longer relevant. The first decision applying this new standard was 57 Comp.Gen. 480 (1978).

Prior to the Equifax decision, GAO had gone on record as favoring repeal of the Anti-Pinkerton Act. See, e.g., 56 Comp.Gen. 225, 230 (1977). In light of the Equifax case and 57 Comp.Gen. 524, the case for repeal is considerably lessened. The statute is no longer a major impediment to legitimate guard service contracting, and certainly most would agree that the government should not deal with an organization that offers quasi-military armed forces for hire.

With the issuance of 57 Comp.Gen. 524 and 57 Comp.Gen. 480, GAO reviewed the prior decisions under the Anti-Pinkerton Act and designated them as either overruled or modified. If the result in the earlier case would have remained the same under the new standard, the decision was only “modified.” If the new standard would have produced a different result, the earlier decision was “overruled.” This is important because 57 Comp.Gen. 524 did not simply throw out all of the old rules. What it did is eliminate the “protective vs. investigative” distinction and adopt the Equifax standard as the definition of a proscribed entity. Thus, an organization will no longer violate the Act by providing general investigative services; it will violate the Act only if it “offers quasi-military armed forces for hire.” If a given organization were found to offer quasi-military armed forces for hire—an event which is viewed as unlikely although not impossible—the rules in the earlier decisions would still be applicable even though the decisions themselves have

been technically overruled or modified. Thus, the pre-1978 principles set forth previously in this discussion remain applicable, but the focal point is now whether the organization in question offers quasi-military armed forces for hire, not merely whether it provides general detective or investigative services. For purposes of guard service contracting, the burden of proof rests with the party alleging the violation. E.g., B-216534, January 22, 1985.

10. Insurance

a. The Self-Insurance Rule

One frequently hears that the government is a self-insurer. This is not completely true. There are many situations in which the government buys or pays for insurance. Among the more well-known examples are the Federal Employees' Health Benefits Program and Federal Employees' Group Life Insurance. Also, the government frequently pays for insurance indirectly through contracts, grants, and leases. E.g., B-72120, January 14, 1948 (lease). A comprehensive treatment may be found in a report of the Comptroller General entitled Survey of the Application of the Government's Policy on Self-Insurance, B-168106, June 14, 1972. Another useful report, although more limited in scope, is Extending the Government's Policy of Self-Insurance in Certain Instances Could Result in Great Savings, PSAD-75-105 (August 26, 1975).

However, the government is essentially a self-insurer in certain important areas, primarily loss or damage to government property and the liability of government employees insofar as the government is legally responsible or would ultimately bear the loss. The rule to be discussed in this section may be stated thus: In the absence of express statutory authority to the contrary, appropriated funds are not available for the purchase of insurance to cover loss or damage to government property or the liability of government employees. The rule and its evolution are summarized in B-158766, February 3, 1977.

The rationale for the rule is aptly summarized in the following two passages from early decisions:

"The basic principle of fire, tornado, or other similar insurance is the lessening of the burden of individual losses by wider distribution thereof, and it is difficult to conceive of a person, corporation, or legal entity better prepared to

carry insurance or sustain a loss than the United States Government. ” 19 Comp.Gen. 798,800 (1940).

“The magnitude of [the government’s] resources obviously makes it more advantageous for the Government to carry its own risks than to shift them to private insurers at rates sufficient to cover all losses, to pay their operating expenses, including agency or broker’s commissions, and to leave such insurers a profit. ” 19Comp.Gen. 211, 214 (1939).

The “self-insurance rule” dates back to the 19th Century and has been stated and applied in numerous decisions of the Comptroller General and the Comptroller of the Treasury. In one early decision, 13 Comp. Dec. 779 (1907), the question was whether an appropriation for the education of natives in Alaska could be used to buy insurance to cover desks en route to Alaska which had been purchased from that appropriation. The Comptroller of the Treasury held that the insurance could not be considered a necessary expense incident to accomplishing the purpose of the appropriation unless it somehow operated either to preserve and maintain the property for use or to preserve the appropriation which was used to buy it. It did not do the first because insurance does not provide any added means to actually protect the property (life insurance does not keep you alive) but merely transfers the risk of loss. Neither could it “preserve the appropriation” because any recoveries would have to be deposited into the general fund (miscellaneous receipts) of the Treasury. Therefore the appropriation was not available to purchase the insurance.

The following year, the Comptroller held that appropriations for the construction and maintenance of target ranges for the National Guard (then called “organized militias”) could not be used to insure buildings acquired for use in target practice. 14 Comp. Dec. 836 (1908). The decision closely followed the reasoning of 13 Comp. Dec. 779—the insurance would not actually protect the property from loss nor would it preserve the appropriation because any proceeds could not be retained by the agency but would have to be paid into the Treasury. Thus, the object of the appropriation “can be as readily accomplished without insurance as with it.” *Id.* at 840.

Citing these and several other decisions, the Comptroller held similarly in 23 Comp. Dec. 269 (1916) that an appropriation for the construction and operation of a railroad in Alaska was not available to

pay premiums for insurance on buildings constructed as part of the project.

A slightly different situation was presented in 24 Comp. Dec. 569 (1918). The Lincoln Farm Association had donated to the United States a memorial hall enclosing the log cabin in which Abraham Lincoln was born, together with a \$50,000 endowment fund to preserve and maintain the property. The question was whether the fund could be used to buy fire insurance on the property. The Comptroller noted that the funds were not appropriated funds in the strict sense, but were nevertheless “government funds” in that legal title was in the United States. Therefore, the self-insurance rule applied. Recalling the reasoning of the earlier decisions, the Comptroller apparently could not resist commenting “[i]t should be remembered that fire insurance does not tend to protect or preserve a building from fire.” *Id.* at 570.

The Comptroller General continued to apply the rule. In a 1927 case, a contracting officer attempted to agree to indemnify a contractor against loss or damage by casualty on buildings under construction. Since the appropriation would not have been available to insure the buildings directly, the stipulation to indemnify was held to exceed the contracting officer’s authority and therefore imposed no legal liability against the appropriation. 7 Comp. Gen. 105 (1927). Boiler inspection insurance was found improper in 11 Comp. Gen. 59 (1931).

A more recent decision applying the self-insurance rule is 55 Comp. Gen. 1196 (1976). There, the National Aeronautics and Space Administration (NASA) loaned certain property associated with the Apollo Moon Mission to the Air Force for exhibition. As a condition of the loan, NASA required the Air Force to purchase commercial insurance against loss or damage to its property. The Comptroller General found that the self-insurance rule applied to the loan of property from one federal agency to another, and that commercial coverage should not have been procured. Since the insurance had already been purchased and had apparently been procured and issued in good faith, the voucher could be paid. However, the decision cautioned against similar purchases in the future. See also B-237654, February 21, 1991.

As noted at the outset, the self-insurance rule applies to tort liability as well as property damage. This was established in a 1940

decision to the Federal Housing Administration, 19 Comp. Gen. 798 (1940). In holding that insurance could not be procured against possible tort liability, the Comptroller General noted that the self-insurance rule “relates to the risk and not to the nature of the risk,” Id. at 800. Since the 1946 enactment of the Federal Tort Claims—Act, the issue has become largely moot. However, questions still arise concerning the operation of motor vehicles, and these are discussed later in this section. Conceptually related is 65 Comp. Gen. 790 (1986), holding that an agency may not use its appropriations to insure against loss or damage to employee-owned hand tools. If the agency wishes to afford a measure of protection to employees who use their own tools, it may consider loss or damage claims under the Military Personnel and Civilian Employees Claims Act of 1964, 31 U.S.C. § 3721.

Another type of insurance which may not be paid for from appropriated funds is flight insurance. If a federal employee traveling by air on official business wishes to buy flight insurance, it is considered a personal expense and not reimbursable. 47 Comp. Gen. 319 (1967); 40 Comp. Gen. 11 (1960). Similarly non-reimbursable is trip cancellation insurance. 58 Comp. Gen. 710 (1979).

Insurance on household goods placed in storage incident to a permanent change of duty station may not be reimbursed to the employee unless the insurance is required by the storage company as a condition of accepting the goods for storage or is otherwise required by law. 28 Comp. Gen. 679 (1949).

Many of the decisions in this area include a statement to the effect that the government’s practice of self-insurance “is one of policy and not of positive law.” E.g., 21 Comp. Gen. 928, 931 (1942). While the statement is true, as it has been carried from decision to decision the word “positive” has occasionally been omitted and this has caused some confusion. All the statement means is that the rule is not mandated by statute, but, has evolved administratively from the policy considerations summarized above.

b. Exceptions to the Rule

(1) Departments and agencies generally

Exceptions to the self-insurance rule may of course be authorized by statute. The absence of an express prohibition on insurance is not enough to authorize it; rather, specific statutory authority is required. 19 Comp. Gen. 798, 800 (1940); 14 Comp. Dec. 836, 839

(1908). Although legislation in this area has been minimal, Congress has occasionally authorized the procurement of insurance in some instances and prohibited it in others. By this pattern, congressional recognition of the rule may be inferred.

Also, the existence of statutory authority to buy insurance does not necessarily mean it has to be exercised. In one case, the Comptroller General recommended against the purchase of insurance although recognizing that it was statutorily authorized in that instance. 19 Comp. Gen. 211 (1939).

There are also non-statutory exceptions where the underlying policy considerations do not apply. The standards for exception were summarized in B-151876, April 24, 1964, as follows:

1. Where the economy sought by self-insurance would be defeated;
2. Where sound business practice indicates that a savings can be effected; or
3. Where services or benefits not otherwise available can be obtained by purchasing insurance.

Two World War II cases provide early illustrations of this approach. In B-35379, July 17, 1943, the procurement of airplane hull insurance by the Civil Aeronautics Administration was approved. It was determined that the Administration did not have in its employ, and was unable at the time to recruit, the number of qualified personnel that would be required to appraise damage and arrange for and supervise immediate repairs in connection with the War Training Service and that commercial insurance coverage could provide such services. Also, in B-59941, October 8, 1946, the purchase of pressure vessel insurance including essential inspection services from commercial sources was permissible because of the necessity and economy brought on by wartime conditions.

In 37 Comp. Gen. 511 (1958), GAO considered a provision in a shipbuilding contract which required the contractor to procure builder's risk insurance, including war risk insurance that was obtainable mainly from the government. Under the contract, title vested in the United States to the extent work was completed, but the risk of loss remained in the shipbuilder until the completed vessel was delivered to and accepted by the government. The government would

end up paying part of the premiums because their cost was included in the bid price, GAO approved the arrangement, finding that it did not improperly transfer the contractor's risk to the government.

Exceptions may be based on the funding arrangement of a particular agency or program. For example, the rule prohibiting the purchase of insurance does not apply to the Panama Canal Commission because the Commission operates on a self-sustaining basis, deriving its operating funds from outside sources. The vast resources available to the government, upon which the self-insurance rule is founded, are not intended to be available to the Commission. B-217769, July 6, 1987 (holding that the Commission could purchase "full scope" catastrophic insurance coverage if administratively determined to be necessary). In contrast, the fact that an agency's initial appropriation was placed in an interest-earning trust fund was found not sufficient to warrant an exception where the government's resources were nevertheless available to it. B-236022, January 29, 1991 (John C. Stennis Center for Public Service Training and Development).

The Comptroller General has held that the self-insurance rule does not apply to privately-owned property temporarily entrusted to the government. 17 Comp. Gen. 55 (1937) (historical items loaned to the government for exhibition purposes); 8 Comp. Gen. 19 (1928) (corporate books and records produced by subpoena for a federal grand jury); B-126535 -O. M., February 1, 1956 (airplane models loaned by manufacturer). Compare 25 Comp. Dec. 358 (1918), disallowing a claim for insurance premiums by West Publishing Company for law books loaned to a federal employee, where correspondence from the claimant made it clear that it was loaning the books to the employee personally and not to the government.

However, insurance may be purchased on loaned private property only where the owner requires insurance coverage as part of the transaction. If the owner does not require insurance, private insurance is not a necessary expense and the government should self-insure. 63 Comp. Gen. 110 (1983) (works of art temporarily loaned by the Corcoran Gallery to the President's Commission on Executive Exchange); 42 Comp. Gen. 392(1963) (school classrooms used for civil service examinations).

Foreign art treasures are frequently loaned to the United States for exhibition purposes. While insurance may be purchased by virtue of 17 Comp. Gen. 55, its extremely high cost has been a disincentive. To remedy this situation, Congress in 1975 passed the Arts and Artifacts Indemnity Act, 20 U.S.C. §§ 971-977. This statute authorizes the Federal Council on the Arts and Humanities to enter into agreements to indemnify against loss or damage to works of art and other materials while on exhibition under specified circumstances and within specified limits. Claims under the Act require specific appropriations for payment, but the agreements are backed by the full faith and credit of the United States. The Act constitutes authority to incur obligations in advance of appropriations and the agreements would therefore not violate the Antideficiency Act. See B-115398.01, April 19, 1977 (non-decision letter).

Since nonappropriated fund activities are by definition not financed from public funds, they are not governed by the self-insurance rule. Whether the rule should or should not be followed would generally be within the discretion of the activity or its parent agency. Thus, it is within the discretion of the Department of Defense to establish the rule by regulation for its nonappropriated fund activities. B-137896, December 4, 1958.

Finally, it is important to keep in mind that the self-insurance rule is aimed at insurance whose purpose is to protect the United States from risk of financial loss. Applying the rule from this perspective, GAO found that it would not preclude the Federal Bureau of Investigation from purchasing insurance in connection with certain of its undercover operations. The objective in these instances was not to protect the government against risk of loss, but to maintain the security of the operation itself, for example, by creating the appearance of normality for FBI-run undercover proprietary corporations. Thus, the FBI could treat the expenditure purely as a "necessary expense" question. B-204486, January 19, 1982. For additional exceptions, see 59 Comp. Gen. 369 (1980) and B-197583, January 19, 1981.

(2) Government corporations

In an early case, the Comptroller of the Treasury indicated that the self-insurance rule would not apply to a wholly-owned government corporation and suggested that it would generally take an act of

Congress to apply the prohibition to a corporation's funds. 23 Comp. Dec. 297 (1916).

The Comptroller General followed this approach in 21 Comp. Gen. 928 (1942), noting that the rule "has not been observed strictly in cases involving insurance of property of government corporations." *Id.* at 931. The decision held that, while the funds of the Virgin Islands Company were subject to various statutory restrictions on the use of public funds, they could be used to insure the Company's property.

The Federal Housing Administration is treated as a corporation for many purposes although it is not chartered as one. See 53 Comp. Gen. 337 (1973). In 16 Comp. Gen. 453 (1936), the Comptroller General held that the Administration could purchase hazard insurance on acquired property based on a determination of necessity, but in 19 Comp. Gen. 798 (1940), declined to extend that ruling to cover insurance against possible tort liability. See also 55 Comp. Gen. 1321 (1976) (former Federal Home Loan Bank Board, although technically not a corporation, could nevertheless insure its new office building since Board's authority to cover losses by assessments against member banks made rationale of self-insurance rule inapplicable).

c. Specific Areas of Concern

(1) Property owned by government contractors

The cases previously discussed in which insurance was prohibited involved property to which the government held legal title. Questions also arise concerning property to which the government holds less than legal title, and property owned by government contractors,

A contractor will normally procure a variety of insurance as a matter of sound business practice. This may include hazard insurance on its property, liability insurance, and workers' compensation insurance. The premiums are part of the contractor's overhead and will be reflected in its bid price. When this is done, the government is paying at least a part of the insurance cost indirectly. Since the risks covered are not the risks of the government, there is no objection to this "indirect payment" nor, if administratively determined to be necessary, to the inclusion of an insurance stipulation in the contract. 39 Comp. Gen. 793 (1960); 18 Comp. Gen. 285, 298 (1938).

Similarly differentiating between the government's risk and the contractor's risk, the Comptroller General has applied the self-insurance rule where the government holds "equitable title" under a lease-purchase agreement. 35 Comp. Gen. 393 (1956); 35 Comp. Gen. 391 (1956). In both decisions, the Comptroller General held that, although the government could reimburse the lessor for the cost of insuring against its own (the lessor's) risk, it could not require the lessor to carry insurance for the benefit of the government.

(2) Use of motor vehicles

As noted previously, the self-insurance rule applies to tort liability as well as property damage. 19 Comp. Gen. 798 (1940). At present, the Federal Tort Claims Act provides the exclusive remedy for claims against the United States resulting from the negligent operation of motor vehicles by government employees within the scope of their employment. Thus, insurance questions have become largely moot. Nevertheless, the self-insurance rule has been involved in several situations involving the operation of motor vehicles.

A 1966 decision, 45 Comp. Gen. 542, involved Internal Revenue Service employees classified as "high mileage drivers." They were assigned government-owned cars for official use and, when warranted, could drive the cars home at the close of the workday so that they could proceed directly to an assignment from home the next morning. The Treasury Department asked whether IRS appropriations were available to reimburse the employees for having their commercial liability insurance extended to cover the government vehicles. Applying the self-insurance rule, and noting further that the travel would most likely be considered within the scope of employment for purposes of the Federal Tort Claims Act., the Comptroller General concluded that the funds could not be so used.

In B-127343, December 15, 1976, the Comptroller General concluded that the Federal Tort Claims Act applied to Senate employees operating Senate-owned vehicles within the scope of their employment. Therefore, the purchase of commercial insurance would be neither necessary nor desirable.

In 1972, the Veterans Administration asked whether it could use its appropriations to provide liability insurance coverage for disabled

veteran patients being given VA-conducted driver training. Since the trainees were not government employees, they would not be covered by the Federal Tort Claims Act. Since the risk was not that of the government, the self-insurance rule was not applicable. Therefore, VA could procure the liability insurance upon administrative determinations that the driver training was a necessary part of a given patient's medical rehabilitation, and that the insurance coverage was necessary to its success. B-175086, May 16, 1972.

The Federal Tort Claims Act does not apply to claims arising in foreign countries and the rules are a bit different for driving overseas. Originally, notwithstanding the nonavailability of the Federal Tort Claims Act, the Comptroller General had prohibited the purchase of insurance for government-owned vehicles operated in foreign countries. 39 Comp. Gen. 145 (1959). Instances of specific statutory authority for the State Department and the Foreign Agricultural Service were viewed as precluding insurance in other situations without similar legislative sanction.

However, GAO reviewed and revised its position in 1976. In 55 Comp. Gen. 1343 (1976), the Comptroller General held that the General Services Administration could provide by regulation for the purchase of liability insurance on government-owned vehicles operated regularly or intermittently in foreign countries, where required by local law or necessitated by legal procedures which could pose extreme difficulties in case of an accident (such as arrest of the driver and/or impoundment of the vehicle). The decision also concluded that GSA could amend its regulations to permit reimbursement of federal employees for the cost of "trip insurance" on both government-owned and privately-owned vehicles in foreign countries where liability insurance is a legal or practical necessity. The decision was extended in 55 Comp. Gen. 1397 (1976) to cover the cost of required insurance on vehicles leased commercially in foreign countries on a long-term basis.

"Some confusion may result from the statement in 55 Comp. Gen. 1343, 1347, that "39 Comp. Gen. 145 (1959), 19 Comp. Gen. 798 (1940), and similar decisions" are overruled "to the extent that they are inconsistent with this decision." Since 39 Comp. Gen. 145 prohibited insurance on government-owned vehicles in foreign countries, it is properly viewed as overruled by 55 Comp. Gen. 1343. However, 19 Comp. Gen. 798 and "similar decisions" remain valid insofar as they assert the general applicability of the self-

insurance rule to tort liability and to motor vehicle usage in the United States. They should be viewed as modified to the extent that they no longer preclude purchase of insurance in the foreign country situations dealt with in 55 Comp.Gen. 1343 and 55 Comp.Gen. 1397.

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

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

(3) Losses in shipment

Early decisions had applied the self-insurance rule to the risk of damage or loss of valuable government property while in shipment. Thus, marine insurance could not be purchased for shipment of a box of silverware. 4 Comp.Gen. 690 (1925). Nor could it be purchased to cover shipment of \$5,000 in silver dollars from San Francisco to Samoa. 22 Comp. Dec. 674 (1916), affirmed upon reconsideration, 23 Comp. Dec. 297 (1916).

In 1937, Congress enacted the Government Losses in Shipment Act, 40 U.S.C. §§ 721-729. The Act provides a fund for the payment of claims resulting from the loss or damage in shipment of government-owned "valuables" as defined in the Act. The Act also prohibits the purchase of insurance except as specifically authorized by the Secretary of the Treasury. If a given risk is beyond the scope of the Act, for example, if the items in question are not within the definition of "valuables" or if the particular movement does not qualify as "shipment," then the self-insurance rule and its exceptions would still apply. See, e.g., 17 Comp.Gen. 419 (1937).

(4) Bonding of government personnel

Prior to 1972, the federal government frequently required the surety bonding of officers and employees who handled money or other valuables. In 1972, Congress enacted legislation, now found at 31 U.S.C. 59302, to expressly prohibit the government from requiring or obtaining surety bonds for its civilian employees or

military personnel in connection with the performance of their official duties. The reasons for this legislation parallel the policy considerations behind the self-insurance rule. Indeed, the objective of the legislation was to substitute the principle of self-insurance for the practice of obtaining surety bonds on federal employees where the risk insured against is a loss of government funds or property in which the United States is the insured.⁷⁷ 56 Comp. Gen. 788, 790 (1977). Although 31 U.S.C. § 9302 does not define “officer” or “employee,” the definitions in title 5 of the U.S. Code are available for guidance. B-236022, January 29, 1991.

Under the former system, the surety bonds were for the protection of the government, not the bonded employee. If a loss occurred and the government collected on the bond, the surety could attempt to recover against the individual employee. Thus, the elimination of bonding in no way affects the personal liability of federal employees, and 31 U.S.C. § 9302 specifies this. This principle has been noted several times in connection with the liability of accountable officers and the cases are cited in Chapter 9.

In 56 Comp. Gen. 788 (1977), the Comptroller General held that, by virtue of 31 U.S.C. § 9302, the United States became a self-insurer of restitution, reparation, and support moneys collected by probation officers under court order. The decision noted that the same result applied to litigation funds paid into the registry of the court (funds paid into the registry by a litigant pending distribution by the court to the successful party).

However, if an agency requires an employee to serve as a notary public and state law requires bonding of notaries, the employee’s expense in obtaining the surety bond may be reimbursed notwithstanding 31 U.S.C. § 9302. The bond in such a situation is neither required by nor obtained by the federal government. It is required by the state and obtained by the employee. Also, the risk involved is not one in which the United States is the insured. B-185909, June 16, 1976.

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

Similarly, if a federal court designates a state court employee to perform certain functions in connection with the arrest and detention of federal offenders, 31 U.S.C. § 9302 does not preclude the Administrative Office of the United States Courts from requiring that the state employee be bonded since the statute applies only to federal employees. 52 Comp. Gen. 549 (1973).

11. Lobbying and Related Matters

a. Introduction

Lobbying—attempting to influence legislators—is nothing new. The term itself derives from the practice of advocates of a particular measure lying in wait in the corridors or “lobby” of the Capitol Building, there to collar passing members of Congress.⁷⁸

Generally speaking, there are two types of lobbying. “Direct lobbying,” as the term implies, means direct contact with the legislators, either in person or by various means of written or oral communication. “Indirect” or “grass roots” lobbying is different. There, the lobbyist contacts third parties, either members of special interest groups or the general public, and urges them to contact their legislators to support or oppose something. Of course, the term “lobbying” can also refer to attempts to influence decision-makers other than legislators.

There is nothing inherently evil about lobbying. A House select committee investigating lobbying in 1950 put it this way:

“Every democratic society worthy of the name must have some lawful means by which individuals and groups can lay their needs before government.. One of the central purposes of government is that, people should be able to reach it; the central purpose of what we call ‘lobbying’ is that they should be able to reach it with maximum impact and possibility of success. This is, fundamentally, what lobbying is about..”⁷⁹

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

⁷⁸ *A. V.*, the term can be traced back at least to 17th century England. 17 *Encyclopedia Americana* 633 (1978).

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

them. Because the focus of this publication is on the use of appropriated funds, coverage is limited for the most part to lobbying by government officials and does not include lobbying by private organizations. Restrictions on lobbying by government officials derive from two sources: criminal statutes and provisions in appropriation acts.

b. Criminal statutes

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

“**h-o** part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any **personal** service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, to favor or oppose, by vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business. ”

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

The context in which section 1913 was enacted is reflected in the following passage from the floor debate on the original 1919 legislation:

“The bill also contains a provision which . . . will prohibit a practice that has been indulged in so often, without regard to what administration is in **power**—the practice of a bureau chief or the head of a department writing letters throughout the country, sending telegrams throughout the country, for this organization, for this man, for that company to write his Congressman, to **wire** his Congressman, in behalf of this or that legislation. [Applause.] The gentleman from Kentucky . . . during the closing days of the last Congress was . . . greatly worried because he had on his desk thousands upon thousands of telegrams that had been started right here in Washington by some official wiring out for people to wire Congressman Sherley . . . Now, it was never the intention of Congress to appropriate money for this purpose, and [§ 1913] will absolutely put a stop to that sort of thing. [Applause.]” 80

⁸⁰58 Cong. Rec. 403 (1919) (remarks of Representative Good), quoted in National Treasury Employees’ Union v. Campbell, 654 F.2d 784,791 (D.C.Cir.1981).

Since 18 U.S.C. § 1913 is a criminal statute, its enforcement is the responsibility of the Department of Justice and the courts. Therefore, GAO will not “decide” whether a given action constitutes a violation. GAO will, however, determine whether appropriated funds were used in a given instance, and refer matters to the Justice Department in appropriate cases, E.g., B-192658, September 1, 1978; B-164497(5), March 10, 1977. Generally, GAO will refer matters to the Justice Department if asked to do so by a Member of Congress or where available information provides reasonable cause to suspect that a violation may have occurred, B-145883, April 27, 1962.

In addition, since a violation of section 1913 is by definition an improper use of appropriated funds, such a violation could form the basis of a GAO exception or disallowance. However, GAO can take no action unless the Justice Department or the courts first determine that there has been a violation. B-164497(5), March 10, 1977.

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

In evaluating particular fact situations to determine possible violations of section 1913, GAO applies the Justice Department’s interpretation of that statute. Thus, GAO found that referral to Justice was not warranted in the following situations:

- Various judicial branch activities including direct contacts with legislators by federal judges, legislative liaison activities by the Judicial Conference of the United States, and some grass roots lobbying which did not involve the use of federal funds. 63 Comp.Gen. 624 (1984).
- Providing to a private lobbying group a copy of congressional testimony by the Secretary of State supporting the administration’s Central American policies. 66 Comp.Gen. 707 (1987). The answer

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

would have been different if the State Department had used appropriated funds to develop material for the lobbying group rather than simply providing existing and readily available material. *Id.* at 712, See also “Assistance to private lobbying groups” later in this section, and B-229069.2, August 1, 1988.

- Contacts with congressional staff members and a briefing for the House Foreign Affairs Committee by State Department officials designed to generate opposition for a legislative measure perceived as inconsistent with administration nuclear non-proliferation policy. B-217896, July 25, 1985.
- Speeches and written materials by the Chairman of the Federal Trade Commission expressing opposition to the Postal Service’s “monopoly” status for letter class mail. None of the materials exhorted members of the public to contact their legislators. B-229257, June 10, 1988.
- Written materials prepared and disseminated by the Small Business Administration, none of which included grass roots lobbying, designed to support an administration proposal to transfer the SBA to the Commerce Department. B-223098/B-223098.2, October 10, 1986.
- Transmission of information by the Consumer Product Safety Commission to a private company advising of scheduled congressional hearings on legislation relevant to a problem the company was facing. B-229275-O. M., November 17, 1987. The memorandum stated:

“We believe it is within the statutory authority of a regulatory agency to advise a regulated company that a remedy it seeks can only be obtained through legislation and that such legislative remedy may be initiated by a particular Congressional Committee. ”

- Congressional briefings by Department of Energy officials designed to influence views on nuclear weapons testing legislation. A planned media campaign to further that objective would have been more questionable, but it was not carried out. Nuclear Test Lobbying: DOE Regulations for Contractors Need Reevaluation, GAO/RCED-88-25BR (October 1987).

Numerous additional examples maybe found in our discussion of “pending legislation” appropriation restrictions later in this section,

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

- An article written by a Commerce Department official and published in Business America, a Commerce Department publication, explicitly urging readers to contact their elected representatives in Congress to support certain amendments to the Export Administration Act. B-212235, November 17, 1983.
- Campaign by Air Force and Defense Department to use contractors' lobbyists and subcontractor network to lobby Congress in support of C-5B aircraft procurement. Improper Lobbying Activities by the Department of Defense on the Proposed Procurement of the C-5B Aircraft, GAO/AFMD-82-123 (September 29, 1982).

Of course, GAO's opinion that section 1913 has been violated—or, for that matter, an independent conclusion by the Justice Department that a violation has occurred—does not necessarily mean that a prosecution will follow. The Attorney General has what is known as “prosecutorial discretion.” A great many factors, including the amount of public funds involved, may legitimately influence the prosecutorial decision. Justice states that there were no prosecutions under section 1913 as of early 1978.2 Op. Off. Legal Counsel 30,31 (1978). To our knowledge, this has not changed.

Judicial activity under 18 U.S.C. § 1913 has thus far been limited to the issue of whether the statute creates a private right of action. The answer is no. National Treasury Employees' Union v. Campbell, 482 F.Supp. 1122 (D.D.C. 1980), *aff'd*, 654 F.2d 784 (D.C. Cir. 1981), overruling National Association for Community Development v. Hodgson, 356 F. Supp. 1399 (D.D.C. 1973); Grassley v. Legal Services Corporation, 535 F. Supp. 818 (S.D. Iowa 1982);⁸³ American Trucking Associations, Inc. v. Department of Transportation, 492 F. Supp. 566 (D.D.C. 1980). The availability of injunctive relief to a private litigant may be inferred from American Public Gas Association v. Federal Energy Administration, 408 F.Supp.

⁸²A few earlier cases will be found in which GAO held expenditures illegal under 18 U.S.C. § 1913. E.g., B-139134-0. M., June 17, 1959 (Air Force paid registration fee for members to enter state rifle association shooting match; portion of fee set aside for fund to fight adverse gun legislation held improper payment); B-76695, June 8, 1948. GAO today would merely refer the cases to the Justice Department.

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

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

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

c. Appropriation Act
Restrictions: Publicity and
Propaganda

(1) Origin and general considerations

In 1949, a House Resolution created a Select Committee on Lobbying Activities to review the operation of the Federal Regulation of Lobbying Act and to investigate all lobbying activities both by the private sector and by federal agencies. The Committee held extensive hearings and issued several reports. In its final report, the Committee had this to say about lobbying by government agencies:

“The existing law in this field, unlike the law governing lobbying by private interests, is not directed toward obtaining information of such activities, but is prohibitory in concept and character. It forbids the use of appropriated funds for certain types of lobbying activities and is specifically a part of the Criminal Code. Enacted in 1919, it is not a recent or in any sense a novel piece of legislation. Its validity has never been challenged and we consider it sound law. . .

“It is our conclusion that the long-established criminal statute referred to above should be retained intact and that Congress, through the proper exercise of its powers to appropriate funds and to investigate conditions and practices of the executive branch, as well as through its financial watch dog, the General Accounting Office, can and should remain vigilant against any improper use of appropriated funds and any invasion of the legislative prerogatives and responsibilities of the Congress.”⁸⁴

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

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

the use of that power to restrict the use of funds for activities considered undesirable. While the use of appropriation act restrictions to control lobbying had some earlier precedent, the practice began in earnest shortly after the issuance of the Select Committee's final report with some fiscal year 1952 appropriations, and has continued ever since.

The most common form of appropriation act restriction prohibits the use of funds for "publicity or propaganda." There are several variations of the provision, with varying degrees of specificity. Approximately half of the regular annual appropriation acts include some version. As of 1990, there is no governmentwide "publicity or propaganda" statute. Thus, some agencies will be subject to one version, other agencies to a different version, and still others to none at all. Nevertheless, it is possible to draw some generalizations.

The simplest version of the statute, and the most general, is this:

"No part of any appropriation contained in this Act shall be used for publicity or propaganda purposes not authorized by the Congress."⁸⁵

It prohibits expenditures for all unauthorized "publicity" or "propaganda." Unfortunately, as with most of the publicity and propaganda statutes over the years, there is no definition of either term. Thus, the statutes have been applied through administrative interpretation.

In construing and applying a "publicity or propaganda" provision, it is necessary to achieve a delicate balance between competing interests. On the one hand, every agency has a legitimate interest in communicating with the public and with the Congress regarding its functions, policies, and activities. The Select Committee recognized this, quoting in its Interim Report from the report of the Hoover Commission:

"Apart from his responsibility as spokesman, the department head has another obligation in a democracy: to keep **the** public informed about the activities of his agency. How far to go and what media to use in this effort

⁸⁵E.g., Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriation Act, 1990, Pub. L. No. 101-162, 9601, 103 Stat. 988, 1031 (1989).

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

In addition, the courts have indicated that it is not illegal for government agencies to spend money to advocate their positions, even on controversial issues. See Joyner v. Whiting, 477 F.2d 456, 461 (4th Cir. 1973); Arrington v. Taylor, 380 F. Supp. 1348, 1364 (M. D.N.C.1974).⁸⁷

Yet on the other hand, the statute has to mean something. As the court said in National Association for Community Development v. Hodgson in reference to 18 U.S.C. 51913, “Obviously, Congress intended to remedy some problem or further some cause, otherwise they would not have bothered enacting the statute.” 356 F. Supp. at 1403. As long as the law exists, there has to be a point beyond which government action violates it. Testifying before the Select Committee on March 30, 1950, former Assistant Comptroller General Frank Weitzel made the following remarks:

“[I]f you setup an organization in the executive branch for the benefit of the three blind mice they would come up here with a budget program and prospectus which would convince any Member of Congress that that was one of the most important organizations in the executive branch. . .

“And no doubt by that time there would also be some private organizations with branches which would parallel your Federal agency, which would be devoted to the propagation and dissemination of information about the three blind mice . . .”⁸⁸

In evaluating whether a given action violates a “publicity or propaganda” provision, GAO will rely heavily on the agency’s administrative justification. In other words, the agency gets the benefit of any legitimate doubt. GAO will override the agency’s determination only where it is clear that the action falls into one of a very few specific categories. Before discussing what those categories are, two threshold issues must be noted.

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

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

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

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

Second, a violation must be predicated on the use of public funds (either direct appropriations or funds which, although not direct appropriations, are treated as appropriated funds). If appropriated funds are not involved, there is no violation no matter how blatant the conduct may be. 56 Comp. Gen. 889 (1977) (involving a newsletter concerning the Clinch River Breeder Reactor Project containing material which would have been illegal had it been financed in any way with appropriated funds).

(2) Self-aggrandizement

As noted above, the broadest form of the publicity and propaganda restriction prohibits the use of appropriated funds “for publicity or propaganda purposes not authorized by the Congress.” A variation limits the restriction to activities “within the United States.”⁸⁹

The Comptroller General first had occasion to construe this provision in 31 Comp. Gen. 311 (1952). The National Labor Relations Board asked whether the activities of its Division of Information amounted to a violation. Reviewing the statute’s scant legislative history, the Comptroller General concluded that it was intended “to prevent publicity of a nature tending to emphasize the importance of the agency or activity in question.” *Id.* at 313. Therefore, the prohibition would not apply to the “dissemination to the general public, or to particular inquirers, of information reasonably necessary to the proper administration of the laws” for which an agency is responsible. *Id.* at 314. Based on this interpretation, GAO concluded that the activities of the Board’s Division of Information were not improper. The only thing GAO found that might be questionable, the decision noted, were certain press releases reporting speeches of members of the Board.

⁸⁹E.g., Treasury, Postal Service and General Government Appropriations Act, 1990, Pub. L. h-o. 101-136, §512, 103 Stat. 783,813 (1989).

Thus, 31 Comp. Gen. 311 established the important proposition that the statute does not prohibit an agency's legitimate informational activities. See also B-223098/B-223098.2, October 10, 1986; B-177704, February 7, 1973. It is geared at activities whose obvious purpose is "self-aggrandizement" or "puffery."

GAO's approach to this statute is basically the same as its approach to the "pending legislation" version to be discussed in detail later. The statute does not provide adequate guidelines to distinguish the legitimate from the proscribed. Thus, without further clarification from Congress or the courts, GAO is reluctant to find a violation where the agency can provide a reasonable justification for its activities.

In a 1973 case, B-178528, July 27, 1973, the Republican National Committee financed a mass mailing of copies of editorials from British newspapers in praise of the President. The editorials were transmitted with a letter prepared by a member of the White House staff, on State Department letterhead stationery, and signed by the Ambassador to Great Britain. GAO again noted the extreme difficulty in distinguishing between disseminating information to explain or defend administration policies, which is permissible, and similar activities designed for purely political or partisan purposes. (See also B-194776, June 4, 1979.) In addition, a legitimate function of a foreign legation is to communicate information on press reaction in the host country to policies of the United States. Thus, GAO was unable to conclude that there was any violation of the publicity and propaganda law. In any event, the use of appropriated funds was limited to the cost of one piece of paper and the time it took the Ambassador to think about it and sign his name.

Other cases in which GAO found no violation are B-212069, October 6, 1983 (press release by Director of Office of Personnel Management excoriating certain Members of Congress who wanted to delay a civil service measure the administration supported), and B-161686, June 30, 1967 (State Department publications on Vietnam War). In neither case were the documents designed to glorify the issuing agency or official.

GAO did find a violation in B-136762, August 18, 1958. The Deputy Assistant Secretary of Defense for Military Assistance Programs attended a meeting of the Aircraft Industries Association and made

a speech “clearly designed to enlist the aid of the Aircraft Industries Association in publicizing and selling the Mutual Security program to the American public through the various media available to the Association. ” Reviewing the text of the speech, GAO found that it went far beyond any legitimate purpose of informing the public and that it therefore violated the publicity and propaganda restriction. However, the officer had been authorized to attend the meeting as related to the performance of official duty and would have been entitled to per diem for the full day even if he had not made the speech. Therefore, since the government incurred no additional expense by virtue of the speech, GAO declined to seek recovery either from the officer himself or from the accountable officers who had made the payment.

Some agencies have authority to disseminate material that is promotional rather than purely informational. For example, the Commerce Department is charged with promoting commerce. In so doing, it entered into a contract with the Advertising Council to undertake a national multi-media campaign to enhance public understanding of the American economic system. Finding that this was a reasonable means of implementing its function and that the campaign did not “aggrandize” the Commerce Department, GAO found nothing illegal. B-184648, December 3, 1975.

If an agency does not have promotional authority, the scope of its permissible activities is correspondingly more restricted. For example, GAO found the publicity and propaganda law violated when a Presidential advisory committee, whose sole function was to advise the President and which had no promotional role, setup and implemented a public affairs program which included the hiring of a “publicity expert.” B-222758, June 25, 1986.

(3) Covert propaganda

Another type of activity which GAO has construed as prohibited by the “publicity or propaganda not authorized by Congress” statute is “covert propaganda,” defined as “materials such as editorials or other articles prepared by an agency or its contractors at the behest of the agency and circulated as the ostensible position of parties outside the agency. ” B-229257, June 10, 1988. A critical element of the violation is concealment of the agency’s role in sponsoring the material. Id.

In a 1986 case, the Small Business Administration prepared “suggested editorials” and distributed them to newspapers. The editorials urged support of an administration proposal to merge the SBA with the Department of Commerce. The editorials were clearly “propaganda.” This, however, was not enough to violate the law. The problem was that they were misleading as to their origin. The plan presumably was for a newspaper to print the editorial as its own without identifying it as an SBA document. This, the Comptroller General concluded, went beyond the range of acceptable public information activities and therefore violated the publicity and propaganda law. B-223098/B-223098.2, October 10, 1986.

A similar holding is 66 Comp.Gen. 707 (1987), involving newspaper articles and editorials in support of Central American policy. The materials were prepared by paid consultants at government request, and published as the work of nongovernment parties. The decision also found that media visits by Nicaraguan opposition leaders, arranged by government officials but with that fact concealed, constituted another form of “covert propaganda.” See also B-129874, September 11, 1978 (“canned editorials” and sample letters to the editor in support of Consumer Protection Agency legislation, had they been prepared, would have violated the law).

In B-229257, June 10, 1988, the Federal Trade Commission prepared a variety of materials critical of the Postal Service’s “monopoly” on letter class mail, for distribution at a National Press Club breakfast which the Postmaster General was to attend. While the material was unquestionably “propaganda,” it did not violate the law because it identified the FTC as the source.

(4) Providing assistance to private lobbying groups

Another type of “lobbying” activity GAO has found improper is the use of appropriated funds to provide assistance to private lobbying groups. This is largely an outgrowth of the concept that an agency should not be able to do indirectly that which it cannot do directly. The few cases in which violations have been found have involved a version of the publicity and propaganda statute tied in specifically to attempting to influence pending legislation. However, the activity in question would presumably also constitute a violation of the broader “publicity or propaganda not authorized by Congress” version.

In 1977, the Office of the Special Assistant to the President for Consumer Affairs and the Office of Consumer Affairs within the (then) Department of Health, Education and Welfare mounted an active campaign to obtain passage of legislation to establish a Consumer Protection Agency. As part of the campaign, the Special Assistant had instructed the Office of Consumer Affairs to informally clear its efforts with certain "public interest lobby members." In addition, two of the consumer lobby groups asked HEW to provide material illustrating situations where a Consumer Protection Agency could have had an impact had it been in existence. Before implementing the campaign, however, the Office of Consumer Affairs sought advice from the HEW General Counsel, who advised against certain elements of the plan, including the two items mentioned.

Since, pursuant to the General Counsel's advice, the more egregious elements of the plan were not carried out, the Comptroller General concluded that no laws were violated. However, the Comptroller pointed out that the "publicity and propaganda" statute would prohibit the use of appropriated funds to develop propaganda material to be given to private lobbying organizations to be used in their efforts to lobby Congress. An important distinction must be made. There would be nothing wrong with servicing requests for information from outside groups, lobbyists included, by providing such items as stock education materials or position papers from agency files, since this material would presumably be available in any event under the Freedom of Information Act. The improper use of appropriated funds arises when an agency assigns personnel or otherwise provides administrative support to prepare material not otherwise in existence to be given to a private lobbying organization. B-129874, September 11, 1978. See also 66 Comp. Gen. 707, 712 (1987), drawing the same distinction in the context of 18 U.S.C. § 1913.

In another example, the Maritime Administration ("MarAd") had become intimately involved with the National Maritime Council, a trade association of ship operators and builders. MarAd staff performed the administrative functions of the Council at MarAd headquarters and regional offices. In 1977, at a time when cargo preference legislation was pending in Congress, the Council, with MarAd's active assistance, undertook an extensive advertising campaign in national magazines and on television advocating a strong U.S. merchant marine. Some of the advertisements encouraged

members of the public to contact their elected representatives to urge them to support a strong merchant fleet. Reviewing the situation, GAO concluded that MarAd had violated the publicity and propaganda statute by expending appropriated funds to provide administrative support to the Council in the form of staff time, supplies, and facilities, when it knew the Council was attempting to influence legislation pending before Congress. See B-192746 -O. M., March 7, 1979, and GAO report entitled The Maritime Administration and the National Maritime Council—Was Their Relationship Appropriate, CED-79-91, May 18, 1979.

In B-133332, March 28, 1977, the Smithsonian Institution had prepared an exhibit entitled “The Tallgrass Prairie: An American Landscape” and displayed it at a premiere showing for the benefit of the Tallgrass Prairie Foundation, a nonprofit organization. While appropriated funds were used to prepare the exhibit, none were used for the benefit itself since, under the Smithsonian’s traveling exhibit program, administrative costs are paid by the host organization. The problem arose because the Tallgrass Prairie Foundation shared a large part of its membership with a lobbying organization known as “Save the Tallgrass Prairie, Inc. ” (There is no cause that does not have its lobbyists.) In addition, a leading member of both organizations had actually created the exhibit under contract with the Smithsonian. However, the exhibit itself was non-controversial and the Foundation had an independent legal existence. Thus, since no lobbying took place at the benefit, and since any lobbying by “Save the Tallgrass” or by the exhibit’s creator could not be imputed to the Foundation nor to the Smithsonian, GAO concluded that the Smithsonian had not used its appropriations for any improper indirect lobbying.

(5) Pending legislation: overview

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

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

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

As long as this version was in effect, it applied, by virtue of the “this or any other act” language, to all government agencies regardless of which appropriation act provided their funds. It also applied expressly to government corporations, even those which did not receive direct appropriations. See, e.g., B-164497(5), March 10, 1977 (United States Railway Association); B-114823, December 23, 1974 (Export-Import Bank).

For fiscal year 1984, the “this or any other act” provision fell victim to a point of order and was dropped. See 64 Comp. Gen. 281 (1985). As of 1990, there is no governmentwide “pending legislation” provision. However, it continues to appear in individual appropriation acts in various forms. For example, a sampling of 1990 appropriation acts reveals the following versions:

“None of the funds made available by this Act shall be used in any way, directly or indirectly, to influence congressional action on any legislation or appropriation matters pending before the Congress.”⁹¹

“No part of this appropriation shall be used for publicity or propaganda purposes OR implementation of any policy including boycott designed to support or defeat legislation pending before Congress or any State legislature.”⁹²

“No part of any appropriation contained in this Act shall be available for any activity or the publication OR distribution of literature that in any way tends to promote public support or opposition to any legislative proposal on which congressional action is not complete.”⁹³

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

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

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

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

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

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

If a given policy or activity is affected by pending or proposed legislation, any discussion of that policy or activity by officials will necessarily refer to such legislation, either explicitly or by implication, and will presumably be either in support of or in opposition to it. Thus, an interpretation of a "pending legislation" statute which strictly prohibited expenditures of public funds for dissemination of views on pending legislation would preclude virtually any comment by officials on agency or administration policy or activities. Absent a compelling indication of congressional intent, GAO has been unwilling to adopt this approach.

The Comptroller General has construed the "pending legislation" provisions as applying primarily to indirect or "grass roots" lobbying and not to direct contact with Members of Congress. In other words, the statute prohibits appeals to members of the public suggesting that they in turn contact their elected representatives to indicate support of or opposition to pending legislation, thereby expressly or implicitly urging the legislators to vote in a particular manner. This is essentially the same interpretation the Justice Department has given to the previously-discussed criminal statute, 18 U.S.C. § 1913.

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

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

⁹⁴Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1990, Pub.L.No. 101-166, 5509, 103 Stat. 1159, 1190 (1989).

GAO concluded in a 1984 study that further statutory restraints on executive branch lobbying did not appear necessary. GAO did recommend, however, that the restriction on “grass roots” lobbying be enacted into permanent law. No Strong Indication That Restrictions on Executive Branch Lobbying Should Be Expanded, GAO/GGD-84-46 (March 20, 1984), See also B-206391/B-217896, October 30, 1985; B-206391, July 2, 1982, (Both of these are comments on proposed legislation which was not enacted.)

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

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

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

(6) Cases involving “grass roots” lobbying violations

A bill was introduced in the 86th Congress to prohibit the Post Office Department from transporting first class mail by aircraft on a space available basis. The Post Office Department opposed the

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

bill and embarked on a campaign to defeat it. Among the tactics used were letters to postal patrons and “canned” editorials asking the public to contact Members of Congress to urge opposition to the bill. GAO found that this activity violated the anti-lobbying statute. B-116331, May 29, 1961.

Another violation resulted from the use of a kit entitled “Battle of the Budget 1973.” The White House at the time was opposed to 15 bills then pending in Congress which it felt would exceed the administration’s 1974 budget. White House staff writers assembled a package of materials that were distributed to executive branch officials in an effort to defeat the bills. The kit included statements that people should be urged to write their representatives in Congress to support the administration’s opposition to the 15 bills. This, the Comptroller General held, violated the publicity and propaganda statute. B-178448, April 30, 1973.

Administration budget battles with Congress produced another violation in B-178648, September 21, 1973. This case involved pre-recorded news releases provided to radio stations by executive branch agencies. GAO reviewed over 1,000 of these releases and while most were proper, nevertheless found several that violated the law. Examples of the violations are as follows:

(1)“If the President’s position of resisting higher taxes resulting from big spending is to be upheld, the people need to be heard. The voice of America can reach Capitol Hill and can be a positive persuader. ”

(2)“If we are going to have economic stability and fiscal responsibility, we must all support the President’s budget program—and let Congress know we support it.”

The next two examples illustrate important points:

(3)“If we don’t slow down Federal spending. . . we face a 15-percent increase in income taxes and more inflation I don’t think any American wants this. But, in the final analysis the responsibility rests with the voters and the taxpayers. They must let the Congress know how they feel on this critical issue.”

Here, the listener is urged merely to make his or her “views” known to Congress. This is nevertheless a violation if the context

makes it clear, as in the example, what those “views” are supposed to be.

(4)“All those unneeded new bills headed for the President’s desk from Congress—all the unworthy Federal programs and projects—are guns pointed at the heads of American taxpayers. . . . Right now, Congress is getting all kinds of letters from special interest groups. Those groups are pleading their own selfish causes, I think Congress should hear from all Americans on what the President is trying to do whatever their views may be. And I say that regardless of whether those who contact their Congressmen happen to be in agreement with me.”

The purported disclaimer in the last sentence does not cure the obvious violation.

A clear violation occurred in B-128938, July 12, 1976. The Environmental Protection Agency, as part of an authorized public information program, contracted with a nonprofit organization to publish a newsletter in California entitled “Water Quality Awareness.” One of the articles discussed a pending bill which environmentalists opposed. The article went on to name the California representatives on the House committee that was considering the bill and exhorted readers to “[c]ontact your representatives and make sure they are aware of your feelings concerning this important legislation.” As with some of the violations in B-178648, the context of the article left no doubt what those “feelings” were supposed to be. The fact that EPA did not publish the article directly did not matter since an agency has a duty to insure that its appropriations are not used to violate a statutory prohibition. See also B-202975, November 3, 1981.

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

It is not necessary for a statement to explicitly refer to the particular piece of pending legislation. Thus, a lobbying campaign using appropriated funds urging the public to write to Members of Congress to support a strong merchant marine at a time when cargo

preference legislation is pending violates the law. B-192746 -O. M., March 7, 1979.

There is one case in which GAO found conduct short of the traditional form of "grass roots" lobbying to constitute a violation, but its precedent value is unclear. The 1979 Interior Department appropriation act (Pub. L. No. 95-465, § 304) included a provision very similar to the 1990 anti-lobbying provision quoted earlier.⁹⁶ In 59 Comp. Gen. 115 (1979), GAO reasoned that section 304 must be read as covering certain activities which would have been permissible under the standard "this or any other act" provision then in effect, otherwise there would have been no purpose in enacting section 304. Accordingly, GAO found section 304 violated by a mass mailing by the National Endowment for the Arts of an information package supporting the Livable Cities Program. Although the literature did not directly exhort readers to lobby Congress, its tenor was clearly designed to promote public support for the program, and the mailing was timed to reach the public just before House reconsideration of a prior refusal to fund the program. Since the result in 59 Comp. Gen. 115 was based on the parallel existence of the "this or any other act" statute, it is unclear whether the same result would be reached in the absence of that statute. In any event, the Interior Department provision, as with similar provisions, applies to appeals to the public rather than direct communication with legislators. *Id.* See also report entitled Alleged Unauthorized Use of Appropriated Moneys by Interior Employees, CED-80-128 (August 13, 1980).

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

As indicated above, GAO has consistently taken the position that the anti-lobbying statute does not prohibit direct communication, solicited or unsolicited, between agency officials and Members of Congress. This is true even where the contact is an obvious attempt to influence legislation. Thus, GAO concluded that the publicity and propaganda statute was not violated in the following cases:

- Contacts with Members of Congress by federal judges and legislative liaison activities by the Judicial Conference of the United States. 63 Comp. Gen. 624 (1984).

⁹⁶Supra note 93.

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

See also B-200250, November 18, 1980 (agency sent position paper to Members of Congress opposing particular piece of pending legislation); B-164497(5), March 10, 1977 (entertainment in form of dinners for Members of Congress); B-114823, December 23, 1974 (personal visits to Capitol Hill by agency officials during floor debate on authorizing legislation, at request of congressional proponents of the legislation); B-164786, November 4, 1969 (cruises with Members of Congress on Presidential yacht, paid for from entertainment appropriation); B-145883, October 10, 1967 (unsolicited letter to Members of Congress from agency head urging support for continuation of agency programs); B-93353, September 28, 1962 (telegram sent by agency head to all Members of Congress).

A government contractor lobbying with its own corporate (i.e., non-federal) funds would generally not violate the appropriation act restriction. However, applicable contract cost principles may restrict or prohibit reimbursement. See, e.g., Federal Acquisition Regulation, 48 C.F.R. § 31.205-22; B-218952, August 21, 1985; Nuclear Test Lobbying: DOE Regulations for Contractors Need Reevaluation, GAO/RCED-88-25BR (October 9, 1987). In addition, there may be legislation applicable to contractor lobbying.⁹⁷

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

⁹⁷One of the previously-cited "pending legislation" statutes—the Labor-HHS provision—has an additional sentence, not included in our quotation, barring the use of appropriated funds to pay the salary or expenses of any grantor contract recipient, or agent of such recipient, related to any activity designed to influence pending legislation. In addition, 31 U.S.C. § 1352, enacted in October 1989 and summarized later in our discussion of lobbying with grant funds, includes governmentwide restrictions on certain lobbying activities by contractors.

For example, the Department of Transportation setup displays on U.S. Capitol grounds of passenger cars equipped with passive restraint systems (airbags). DOT employees at the displays distributed brochures, explained the devices, and answered questions from Members of Congress and the public. All this was done while legislation was pending to prohibit mandatory enforcement of the airbag standard. While, considering the timing and location of the displays, one would have to be pretty stupid not to see this as an obvious lobbying ploy, that did not make it illegal since there was no evidence that DOT urged members of the public to contact their elected representatives. Thus, since it was not illegal for DOT to advocate the use of airbags or to communicate with Congress directly, there was no violation. B-139052, April 29, 1980. The apparent intent alone is not enough; it must be translated into action.

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

- Speech by Secretary of the Air Force urging defense contractors to direct their advertising towards convincing the public of the need for a strong defense rather than promoting particular weapon systems manufactured by their companies. Speech did not refer to legislation nor urge anyone to contact Congress. B-216239, January 22, 1985.
- Bumper stickers purchased by Department of Transportation and affixed to government vehicles urging compliance with 55 mph speed limit. B-212252, July 15, 1983.
- Various trips by the District of Columbia Police Chief during which he made speeches supporting the administration's law enforcement policy. B-118638, August 2, 1974.
- Statements by cabinet members, distributed to news media, which discussed pending legislation but were limited to an exposition of the administration's views. B-178648, December 27, 1973.
- Mailings by the National Credit Union Administration to federally chartered credit unions consisting of reprints from the Congressional Record giving only one side of a controversial legislative issue, B-139458, January 26, 1972.

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

Generally speaking, funds appropriated to carry out a particular program would not be available for political purposes, i.e., for a propaganda effort designed to aid a political party or candidate. See B-147578, November 8, 1962. If for no other reason, such an expenditure would be improper as a use of funds for other than their intended purpose in violation of 31 U.S.C. §1301(a). However, the publicity and propaganda statute does not provide adequate guidelines to distinguish between legitimate and purely political activities and is therefore applicable to “political” activities only to the extent that the activities would otherwise constitute a violation. See B-130961, October 26, 1972.

In more general terms, it is always difficult to find that conduct is so purely political as to constitute a purpose violation. As stated in B-144323, November 4, 1960:

“[The question is] whether in any particular case a speech or a release by a cabinet officer can be said to be so completely devoid of any connection with official functions or so political in nature that it is not in furtherance of the purposes for which Government funds were appropriated, thereby making the use of such funds . unauthorized. This is extremely difficult to determine in most cases as the lines separating the nonpolitical from the political cannot be precisely drawn.

“ . . . As a practical matter, even if we were to conclude that the use of appropriated funds for any given speech or its release was unauthorized, the amount involved would be small, and difficult to ascertain; and the results of any corrective action might well be more technical than real. ”

Apart from considerations of whether any particular law has been violated, GAO has taken the position that the government should not disseminate misleading information. On occasion, the Comptroller General has characterized publications as “propaganda” and attacked them from an audit perspective.

In 1976, the former Energy Research and Development Administration published a pamphlet entitled “Shedding Light on Facts About Nuclear Energy.” Ostensibly created as part of an employee motivational program, ERDA printed copies of the pamphlet far in excess of any legitimate program needs, and inundated the State of California with them in the months preceding a nuclear safeguards initiative vote in that state. The pamphlet had a strong pro-nuclear bias and urged the reader to “Let your voice be heard. ” On the legal side, the pamphlet did not violate any anti-lobbying statute because

applicable restrictions did not extend to lobbying at the state level. B-130961 -O. M., September 10, 1976. However, GAO's review of the pamphlet found it to be oversimplified and misleading. GAO characterized it as "propaganda" not suitable for distribution to anyone, employees or otherwise, and recommended that ERDA cease further distribution and recover and destroy any undistributed copies. See GAO report entitled Evaluation of the Publication and Distribution of "Shedding Light on Facts About Nuclear Energy," EMD-76-12 (September 30, 1976).

In a later report, GAO reviewed a number of publications related to the Clinch River Breeder Reactor Project and found several of them to be oversimplified and distorted propaganda and as such questionable for distribution to the public. However, the publications were produced by the private sector components of the Project and paid for with utility industry contributions and not with federal funds. While GAO was thus powerless to recommend termination of the offending publications, it nevertheless recommended that the Department of Energy work with the private sector components in an effort to eliminate this kind of material, or at the very least insure that such publications include a prominently displayed disclaimer statement making it clear that the material was not government-approved, GAO report entitled Problems with Publications Related to the Clinch River Breeder Reactor Project, EMD-77-74 (January 6, 1978).

d. Lobbying With Grant Funds

The use of grant funds by a federal grantee for lobbying presents somewhat more complicated issues. On the one hand, there is the principle, noted in various contexts throughout this publication, that an agency should not be able to do indirectly what it cannot do directly. Thus, if an agency cannot make a direct expenditure of appropriated funds for certain types of lobbying, it should not be able to circumvent this restriction by the simple device of passing the funds through to a grantee. Yet on the other hand, there is the seemingly countervailing rule that where a grant is made for an authorized grant purpose, grant funds in the hands of the grantee largely lose their identity as federal funds and are no longer subject to many of the restrictions on the direct expenditure of appropriations.

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

Section 319 of the 1990 Interior Department appropriation act, Pub. L. No. 101-121, 103 Stat. 701, 750 (1989), is a piece of permanent legislation to be codified at 31 U.S.C. 91352. Subsection (a)(1) provides:

“None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any Federal action described in paragraph (2) of this subsection.”

The actions identified in paragraph (2) are the awarding of any federal contract, the making of any federal grantor loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement. The law includes detailed disclosure requirements and civil penalties. Subsection (e)(1)(C) stresses that the new section 1352 should not be construed as permitting any expenditure prohibited by any other provision of law. Thus, the new law supplements other anti-lobbying statutes; it does not supersede them.

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

Another example is the legislation governing the Legal Services Corporation. Under the Legal Services Corporation Act, recipients of funds, both contractors and grantees, may not use the funds directly or indirectly to attempt to influence the passage or defeat of legislation. The prohibition covers legislation at the state and local level as well as federal legislation. The statute permits three exceptions: (1) recipients may testify before and otherwise communicate with legislative bodies upon request; (2) they may initiate contact with legislative bodies to express the views of the Corporation on legislation directly affecting the Corporation; and (3) they

may engage in certain otherwise prohibited lobbying activities when necessary to the proper representation of an eligible client. 42 U.S.C. § 2996 f(a)(5).⁹⁸ For a general discussion of these provisions, see B-129874 -O. M., October 30, 1978. See also B-202569, April 27, 1981.

Three 1981 cases illustrate the application of the Legal Services Corporation statute. In one case, the Board of Aldermen for the City of Nashua, New Hampshire, was considering a resolution to authorize a “food stamp workfare” demonstration project. An attorney employed by the New Hampshire Legal Assistance group, a Legal Services Corporation grantee, wrote to members of the Board urging them to reject the resolution. Since the letter was not related to the representation of any specific client or group of clients but rather had been self-initiated by the attorney, the use of federal funds to prepare and distribute the letter was illegal. B-201928, March 5, 1981.

In the second case, 60 Comp. Gen. 423 (1981), the Corporation and its grantees conducted a lobbying campaign to drum up support for the Corporation’s reauthorization and appropriation legislation. The Corporation argued that the actions were permissible under the exception authorizing contact with legislative bodies on legislation directly affecting the Corporation. While recognizing that the statute permitted direct self-initiated contact in these circumstances, GAO reviewed the legislative history and concluded that the exception did not permit “grass roots” lobbying either by the Corporation itself or by its grantees.

In the third case, the Managing Attorney of a Legal Services Corporation grantee made a mass mailing of a form letter to local attorneys. The letter solicited their support for continuation of the LSC program and urged them to contact a local Congressman opposed to reauthorization of the LSC to try to persuade him to change his vote. This too constituted impermissible “grass roots” lobbying. B-202787, December 29, 1981.⁹⁹

⁹⁸Similar provisions, found in 42 U.S.C. § 2996e(c), apply to the Corporation itself. An illustrative case is B-231210, June 7, 1988, *aff’d upon reconsideration*, B-231210, June 4, 1990, holding that the Corporation is not authorized to retain a private law firm to lobby Congress on its behalf.

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

More recently, GAO found the statute violated when a grantee used LSC grant funds to oppose the confirmation of Judge Robert Bork to the United States Supreme Court. The finding was based largely on LSC regulations which broadly define “legislation” to include action on appointments. B-230743, June 29, 1990.

Another provision in the LSC enabling legislation prohibits both the Corporation and its grantees from contributing or making available “corporate funds or program personnel or equipment for use in advocating or opposing any ballot measures, initiatives, or referendums.” 42 U.S.C. § 2996e(d)(4). The Corporation and one of its grantees violated this one by providing funds and personnel for a campaign to defeat a ballot measure in California. 62 Comp. Gen. 654 (1983).

In addition to the Corporation’s enabling legislation, appropriation acts providing funds for the Corporation have included a version of the “publicity and propaganda” restriction, known as the “Moorhead Amendment,” which prohibits the use of Corporation funds for publicity or propaganda designed to support or defeat legislation pending before Congress or any state legislature. While serving largely to reemphasize the prohibitions contained in the Corporation’s enabling legislation, the Moorhead Amendment makes it clear that the exception for the proper representation of eligible clients does not extend to grass roots lobbying. See 60 Comp. Gen. 423 (1981); B-163762, November 24, 1980.¹⁰⁰

Still another example of legislation expressly applicable to grantees is discussed in B-202787(1), May 1, 1981. The appropriation act providing funds for the Community Services Administration contained a variety of the “publicity and propaganda” provision which prohibited the use of funds “to pay the salary or expenses of any grant or contract recipient. . . to engage in any activity designed to influence legislation or appropriations pending before the Congress.” GAO found this provision violated when a local community action agency used grant funds for a mass mailing of a letter to members of the public urging them to write to their Congressmen to

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

oppose abolition of the agency. In addition, CSA had issued a regulation purporting to exempt CSA grantees from the appropriation act restriction. Finding that GSA had exceeded its authority, the Comptroller General recommended that CSA rescind its ruling. The Justice Department also found the CSA regulations invalid, construing the statute as constituting “an unqualified prohibition against lobbying by federal grantees” and not merely a restriction on grass roots lobbying. 5 Op. Off. Legal Counsel 180 (1981).

The provision discussed in the preceding paragraph was also violated when a university, using grant funds received from the Department of Education, encouraged students to write to Members of Congress to urge their opposition to proposed cuts in student financial aid programs. GAO report entitled Improper Use of Federal Student Aid Funds for Lobbying Activities, GAO/HRD-82-108 (August 13, 1982).

The question of lobbying with grant funds becomes more difficult when the situation is not covered by the new 31 U.S.C. § 1352 and applicable appropriation act restrictions do not expressly cover grantees. Until late in 1981, whether “publicity and propaganda” provisions silent as to grantees applied to grantee expenditures had not been definitively addressed in a decision of the Comptroller General. An early case held that telegrams to Members of Congress by state agencies funded by Labor Department grants constituted an improper use of federal funds where they were clearly designed to influence pending legislation. B-76695, June 8, 1948. This case pre-dated the “publicity and propaganda” provisions and was decided under 18 U.S.C. § 1913. While, as noted earlier, GAO would today be more circumspect in drawing conclusions under the criminal statute,¹⁰¹ the concept of applying the prohibition to grantee expenditures would arguably be the same under the appropriation act restrictions. In a 1977 letter, GAO noted the principle that funds in the hands of a grantee largely lose their identity as federal funds and said that the applicability of the publicity and propaganda statute was therefore “questionable.” B-158371, November 11, 1977 (non-decision letter). A 1978 letter to a Member of the Senate said that the issue should be addressed on a case-by-case basis. B-129874, August 15, 1978.

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

In B-128938, July 12, 1976, GAO said that an agency has a responsibility to insure that its appropriations are not used to violate the anti-lobbying statute. While the case involved expenditures by a contractor, the principle would seemingly apply as well to a grantee.

Finally, in B-202975, November 3, 1981, the Comptroller General resolved the uncertainty, applied the concept of B-128938, and concluded that:

“Federal agencies and departments are responsible for insuring that Federal funds made available to grantees are not used contrary to [the publicity and propaganda] restriction. ”

The case involved the Los Angeles Downtown People Mover Authority, a grantee of the Urban Mass Transportation Administration, Department of Transportation. Fearing that its funding was in jeopardy, the Authority prepared and distributed a newsletter urging readers to write to their elected representatives in Congress to support continued funding for the People Mover project. The Comptroller General found that this newsletter, to the extent it involved UMTA grant funds, violated the anti-lobbying statute.

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

e. Government Employees Training Act

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

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

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

f. Informational Activities

As we have noted previously, a government agency has a legitimate interest in informing the public about its programs and activities. Just how far it can go depends on the nature of its statutory authority. Certainly there is no need for statutory authority for an agency to issue a press release describing a recent speech by the agency head, or for the agency head or some other official to participate in a radio, television, or magazine interview. Activities of this type are limited only by applicable restrictions on the use of public funds such as the anti-lobbying statutes previously discussed,

A 1983 decision illustrates another form of information dissemination which is permissible without the need for specific statutory support. Military chaplains are required to hold religious services for the commands to which they are assigned. 10 U.S.C. § 3547. Publicizing such information as the schedule of services and the names and telephone numbers of installation chaplains is an appropriate extension of this duty. Thus, GAO advised the Army that it could procure and distribute calendars on which this information was printed. 62 Comp.Gen. 566 (1983). Applying a similar rationale, the decision also held that information on the Community Services program, which provides various social services for military personnel and their families, could be included.

Some agencies have specific authority to disseminate information. Such authority will permit a broader range of activities and gives

the agency discretion to choose the appropriate means, the selection being governed by the necessary expense doctrine.

The agency may use common devices such as newsletters (e.g., B-128938, July 12, 1976) or conferences or seminars (e.g., B-166506, July 15, 1975). In one case, the Comptroller General approved a much less conventional means. Shortly after World War II, the Labor Department wanted to publicize its employment services for veterans. It did this by discharging balloons from a float in a parade. Attached to the balloons were mimeographed messages asking employers to list their available jobs. Since the Department was charged by statute with publishing information on the program, the cost of the balloons was permissible. B-62501, January 7, 1947. Other pertinent cases are 32 Comp.Gen. 487 (1953) (publication of Public Health Service research reports in scientific journals); 32 Comp.Gen. 360 (1953) (the recording of Office of Price Stabilization forum discussions to be used at similar meetings in other regions); B-89294, August 6, 1963 (use of motion picture by United States Information Agency); B-15278, May 15, 1942 (photographs); A-82749, January 7, 1937 (radio broadcasts).

However, in 18 Comp.Gen. 978 (1939), radio broadcasts by the Veterans Administration were held to violate 31 U.S.C. §1301(a) because the agency did not have statutory authority to disseminate information about its activities. Similarly, the Bureau of Printing and Engraving needed statutory authority to publish a 100-year history to commemorate its centennial because the Bureau is essentially an "industrial and service" establishment and lacked authority to disseminate information. 43 Comp.Gen. 564 (1964).

g. Advertising and the
Employment of Publicity
Experts

(1) Commercial advertising

Suppose you opened this publication and found on the inside front cover a full-page advertisement for somebody's soap or underwear or aluminum siding or the local pool parlor. We assume most readers would find this offensive. There is in fact a long-standing policy" against involving the government in commercial advertising. In the case of government publications, the policy is codified in section 13 of the Government Printing and Binding Regulations issued by the Joint Committee on Printing (1986 reprint):

"No Government publication or other Government printed matter, prepared or produced with either appropriated or nonappropriated funds or identified

with an activity of the Government, shall contain any advertisement inserted by or for any private individual, firm, or corporation; or contain material which implies in any manner that the Government endorses or favors any specific commercial product, commodity, or service. ”

An explanatory paragraph included in the regulations summarizes many of the reasons for this prohibition. Advertising would be unfair to competitors in that it would, regardless of intent, unavoidably create the impression of government endorsement. It would also be unfair to non-government publications which compete for advertising dollars and need those dollars to stay in business. Acceptance of advertising could also pose ethical, if not legal, problems. (Imagine, for example, lobbyists scrambling to purchase advertising space in the Congressional Record.)

A different situation was presented in 67 Comp. Gen. 90 (1987). The United States Information Agency is authorized to accept donations of radio programs from private syndicators for broadcast over the Voice of America. Some donations were conditioned on the inclusion of commercial advertising. GAO noted that, in the case of public broadcast stations (which are supported by the Corporation for Public Broadcasting), commercial advertising is expressly prohibited by 47 U.S.C. § 399b(b). However, there is no comparable statute applicable to USIA. Therefore, the conditional donations were not subject to any legal prohibition. In view of the traditional policy against commercial advertising, GAO suggested that USIA first consult the appropriate congressional committees.

(2) Advertising of government programs, products, or services

Even the casual viewer of commercial television will note that the government is heavily “into” advertising. Turn on one channel and “Smokey Bear” is pleading with you not to ignite the national forests. Flip to another channel and a feathered character named “Woodsy Owl” admonishes against pollution.¹⁰² Try still another and someone may be telling you to observe the speed limit or join a carpool or collect postage stamps or write for a catalogue of available government publications. A brief description of some of the methods the government uses to advertise may be found in a GAO report entitled Federal Energy Administration’s Contract with the

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

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

Whether an agency's appropriations are available for advertising, like any other expenditure, depends on the agency's statutory authority. Whether to advertise and, if so, how far to go with it are determined by the precise terms of the agency's program authority in conjunction with the necessary expense doctrine and general restrictions on the use of public funds such as the various anti-lobbying statutes. E.g., B-229732, December 22, 1988 (Department of Housing and Urban Development had no authority to incur promotional expenses at a trade show in the Soviet Union the purpose of which was to enhance the potential for sale of American products and services in the Soviet Union, a purpose unrelated to HUD's mission).

As noted previously, some agencies have express promotional authority. For example, the Department of Energy may promote energy conservation. See B-139965, April 16, 1979 (non-decision letter). Similarly, the United States Postal Service has statutory authority to advertise its philatelic services to encourage stamp collecting. B-114874.30, March 3, 1976 (non-decision letter).

As with the dissemination of information, where promotional authority exists, agencies have reasonable discretion, subject to "necessary expense" considerations, in selecting appropriate means. Thus, the Navy could exercise its statutory authorization to promote safety and accident prevention by procuring book matches with safety slogans printed on the covers and distributing them without charge at naval installations. B-104443, August 31, 1951. Another example is B-184648, December 3, 1975.

Activities of the United States Mint furnish additional illustrations. While the Postal Service has long been in the business of promoting the sale of its products to collectors (see, e.g., B-119784, May 18, 1954); the Mint is a relative newcomer. Several statutes in recent years have authorized the Mint to produce and market various commemorative coins. Sales proceeds are applied first to recover production costs, with the balance going to the Treasury or other specified source. In B-206273, September 2, 1983, GAO considered the Mint's promotional authority under legislation authorizing coins to commemorate the 1984 Los Angeles Summer Olympics. GAO concluded that the Mint could stage media events and receptions, and

could give away occasional sample coins at these events, if (1) the expenditures were deemed necessary to further the statutory objectives, (2) a reasonable relationship were found to exist between a given expenditure and a marketing benefit for the program, and (3) promotional expenses were recouped from sales proceeds. In 68 Comp. Gen. 583 (1989), GAO applied the same standards to the commemorative coin program generally, but declined to expand the scope of legitimate promotional activities to include the printing of business cards for sales representatives.

The line between promotion and information dissemination is occasionally thin, but the concepts are nevertheless different. Thus, an agency may be authorized to disseminate information but not to promote. If so, its “advertising” must be tailored accordingly. For example, the Federal Housing Administration could disseminate authentic information on available benefits or related procedures under a loan insurance program, but could not use its funds for an advertising campaign to create demand. 14 Comp. Gen. 638 (1935). Similarly, when the United States Metric Board was first created, it could provide information, assistance, and coordination for voluntary conversion to metrics but could not advocate metric conversion. See GAO report entitled Getting A Better Understanding of the Metric System—Implications If Adopted by the United States, CED-78-128, October 20, 1978, and letters B-140399, June 19, 1979, and B-140399, May 29, 1979.

(3) Publicity experts

A statute originally enacted in 1913, now found at 5 U.S.C. § 3107, provides:

“Appropriated funds may not be used to pay a publicity expert unless specifically appropriated for that purpose. ”

. GAO has had little occasion to interpret or apply 5 U.S.C. § 3107 and, from the earliest cases, has consistently noted certain difficulties in enforcing the statute. In GAO’s first substantive discussion of 5 U.S.C. 83107, the Comptroller General stated “[i]n its present form, the statute is ineffective. ” A-61553, May 10, 1935. The early cases¹⁰³

¹⁰³There is no mention of the 1913 statute before the 1930’s. A Small group of cases then arose. In addition to A-61553, cited in the text, see B-26689, May 4, 1943; A-93988, April 19, 1938; A-82332, December 15, 1936; A-57297, September 11, 1934. Another stretch of silence followed and the statute did not arise again until 5181254, February 28, 1975.

identified three problem areas, summarized in B-181254, February 28, 1975.

First, the prohibition is against compensating any “publicity expert,” but the statute does not define the term “publicity expert” nor does it provide criteria for determining who is one. Traditionally, persons employed for or engaged in so-called publicity work have not been appointed as “publicity experts” but under some other designation, and often have other duties as well. Everyone who prepares a press release is not a “publicity expert.” Testifying before the House Select Committee on Lobbying Activities in 1950, Assistant Comptroller General Weitzel said:

“I might mention one of the great difficulties in enforcing that language is it is very, very rare, if ever, the case that a man is on the pay roll as publicity experts [sic]. He can be called almost anything else, and usually and frequently will have other duties, so that that in itself, is a very difficult statute to enforce.”¹⁰⁴

Second, employees engaged in so-called publicity work are normally assigned to their duties by their supervisors. It would be harsh, in the absence of much more definitive legislative or judicial guidance, to withhold the compensation of an employee who is merely doing his or her assigned job. Some thought was given in the 1930’s and early 1940’s to amending the statute to cure this problem, but the legislation was not enacted. See B-181254, February 28, 1975; B-26689, May 4, 1943; A-82332, December 15, 1936.

Third, the effective implementation of the duties of some agencies requires the acquisition and dissemination of information, although agencies normally do not receive specific appropriations for the required personnel.

Based on these considerations, GAO does not view 5 U.S.C. § 3107 as prohibiting an agency’s legitimate informational functions or legitimate promotional functions where authorized by law. The apparent intent of the statute is to prohibit publicity activity “for the purpose of reflecting credit upon an activity, or upon the officials charged with its administration, rather than for the purpose of furthering the work which the law has imposed upon it.” A-82332, December 15, 1936. See also B-181254, February 28, 1975. In this

¹⁰⁴Hearings, *supra* note 88, at 156

sense, 5 U.S.C. § 3107 is closely related to the prohibition on self-aggrandizement previously discussed, although the focus is different in that, to violate 5 U.S.C. § 3107, the activity must be performed by a “publicity expert.”

In the only two cases in the 1970’s with any substantial discussion of 5 U.S.C. 83107, GAO considered a mass media campaign by the Federal Energy Administration, now part of the Department of Energy, to educate the American public on the need for and means of energy conservation. Based on the considerations discussed above and on the FEA’s statutory authority to disseminate information and to promote energy conservation, GAO found no basis on which to assess a violation of 5 U.S.C. 83107. B-181254, February 28, 1975; B-139965, April 16, 1979 (non-decision letter). In both cases GAO stressed its view that the statute is not intended to interfere with the dissemination of information which an agency is required or authorized by statute to disseminate, or with promotional activities authorized by law.

The only case in the 1980’s to apply 5 U.S.C. § 3107 is B-222758, June 25, 1986. The Chemical Warfare Review Commission, a Presidential advisory committee, hired a public affairs consultant. The Commission’s functions were solely advisory; it had no authority to engage in promotional activities or to maintain a public affairs program. In view of the consultant’s duties, job title, and reputation, GAO found that he was a “publicity expert.” As such, and given the nature of the Commission’s functions and its lack of statutory authority, the hiring was held to violate 5 U.S.C. § 3107.

12. Membership Fees

a. 5 U.S.C. § 5946

Appropriated funds may not be used to pay membership fees of an employee of the United States or the District of Columbia in a society or association. 5 U.S.C. § 5946. The prohibition does not apply if an appropriation is expressly available for that purpose, or if the fee is authorized under the Government Employees Training Act. Under the Training Act, membership fees may be paid if the fee is a necessary cost directly related to the training or a condition precedent to undergoing the training. 5 U.S.C. § 4109(b).

The rule that has evolved under 5 U.S.C. § 5946 is that membership fees for individuals may not be paid, regardless of the resulting benefit to the agency. An agency may, however, purchase a membership in its own name, upon an administrative determination that the expenditure would further the authorized activities of the agency, and this is not affected by any incidental benefits that may accrue to individual employees.¹⁰⁵

In 24 Comp. Gen. 814 (1945), the Veterans Administration asked whether it could pay membership fees for VA facilities in the American Hospital Association. Facility membership would enable individual employees to apply for personal membership at reduced rates. The Comptroller General responded that the facility memberships were permissible if administratively determined necessary to accomplish the objectives of the appropriation to be charged. The indirect benefit to individual officials would not operate to invalidate the agency membership. However, the expenditure would be improper if its purpose was merely to enable the officials to obtain the reduced rates for personal memberships. VA could not, of course, pay for the individual memberships.

Similarly, GAO advised the Environmental Protection Agency that it could not pay the membership fees for its employees in professional organizations (such as the National Environment Research Center and the National Solid Waste Management Association), notwithstanding the allegation that the benefits of membership would accrue more to the agency than to the individuals. EPA could, however, purchase a membership in its own name if it justified the expenditure as being of direct benefit to the agency and sufficiently related to carrying out the purposes of its appropriation. 53 Comp. Gen. 429 (1973).¹⁰⁶

In another 1973 decision, the Comptroller General held that the Department of Justice could not reimburse an electronics engineer employed by the Bureau of Narcotics and Dangerous Drugs for membership in the Institute of Electrical and Electronic Engineers.

¹⁰⁵A few very early decisions will be found to the effect that 5 U.S.C. § 5946 prohibits agency memberships as well as individual memberships. E.g., 19 Comp. Gen. 838 (1940); 24 Comp. Dec. 473 (1918). While these decisions do not appear to have been explicitly overruled or modified, they must be regarded as implicitly repudiated by the subsequent body of case law to the extent they purport to prohibit adequately justified agency memberships.

¹⁰⁶The last sentence of the decision uses the term "essential." This word is too strong. The necessary expense doctrine does not require that an expenditure be "essential."

The Department had argued that the government benefited from the membership by virtue of reduced subscription rates to Institute publications and because the membership contributed to employee development. These factors were not sufficient to overcome the prohibition of 5 U.S.C. § 5946. Once again, GAO pointed out that the Bureau could become a member of the Institute in its own name if administratively determined to be necessary. 52 Comp. Gen. 495 (1973). To the same effect is B-205768, March 2, 1982 (Federal Mediation and Conciliation Service can purchase agency membership in Association of Labor Related Agencies upon making appropriate administrative determinations).

In another case, the Comptroller General held that the National Oceanic and Atmospheric Administration could not pay the membership fee of one of its employees in Federally Employed Women, Inc., notwithstanding the employee's designation as the agency's regional representative. The mere fact that membership may be job-related does not overcome the statutory prohibition. B-198720, June 23, 1980. See also 19 Comp. Dec. 650 (1913) (Army could not pay for Adjutant General's membership in International Association of Chiefs of Police). Similarly, the fact that membership may result in savings to the government, such as reduced travel rates for members, does not overcome the prohibition against individual memberships. 3 Comp. Gen. 963 (1924).

As noted, an agency may purchase membership in its own name in a society or association since 5 U.S.C. § 5946 prohibits only memberships for individual employees. The distinction, however, is not a distinction in name only. An expenditure for an agency membership must be justified on a "necessary expense" theory. To do this, the membership must provide benefits to the agency itself. For example, in 31 Comp. Gen. 398 (1952), the Economic Stabilization Agency was permitted to become a member of a credit association because members could purchase credit reports at reduced cost and the procurement of credit reports was determined to be necessary to the enforcement of the Defense Production Act. In 33 Comp. Gen. 126 (1953), the Office of Technical Services, Commerce Department, was permitted to purchase membership in the American Management Association. The appropriation involved was an appropriation under the Mutual Security Act to conduct programs including technical assistance to Europe, and the membership benefit to the agency was the procurement of Association publications for foreign trainees and foreign productivity centers.

Citing 31 Comp. Gen. 398 and 33 Comp. Gen. 126, the Comptroller General held in 57 Comp. Gen. 526 (1978), that the Department of Housing and Urban Development could purchase, in the name of the Department, air travel club memberships to obtain discount air fares to Hawaii. Similarly, the General Services Administration could join a shippers association to obtain the benefit of volume transportation rates. B-159783, May 4, 1972.

GAO has also approved membership by the Federal Law Enforcement Center in the local Chamber of Commerce, B-213535, July 26, 1984, and by a naval installation in the local Rotary Club, 61 Comp. Gen. 542 (1982). In the latter decision, however, GAO cautioned that the result was based on the specific justification presented, and that the decision should not be taken to mean that “every military installation or regional Government office can use appropriated funds to join the Rotary, Kiwanis, Lions, and similar organizations.” *Id.* at 544.

The acquisition of needed publications for the agency is sufficient benefit to justify purchase of an agency membership. 20 Comp. Gen. 497 (1941) (membership of Naval Academy in American Council on Education); A-30185, February 5, 1930 (membership of Phoenix Indian School in National Education Association). See also 33 Comp. Gen. 126 (1953). Compare 52 Comp. Gen. 495 (1973), holding that acquisition of publications is not sufficient to justify an individual, as opposed to agency, membership.

A variation occurred in 19 Comp. Gen. 937 (1940). The Cleveland office of the Securities and Exchange Commission desired access to a law library maintained by the Cleveland Law Library Association. Access was available only to persons who were stockholders in the Association. The alternative to the SEC would have been the purchase of its own library at a much greater cost. Under the circumstances, GAO advised that 5 U.S.C. § 5946 did not prohibit the stock purchases or the payment of stockholders assessments. GAO further noted, however, that a preferable alternative would be a contract with the Association for a flat-rate service charge.

Where there is no demonstrable benefit to the agency, the membership expense is improper. Thus, in 32 Comp. Gen. 15 (1952), the cost of membership fees for the New York Ordnance District of the

Army in the Society for Advancement of Management was disallowed. The membership was in actuality four separate memberships for four individuals and the primary purpose was to enhance the knowledge of those individuals.

Since the benefit to the agency must be in terms of furthering the purposes for which its appropriation was made, a benefit to the United States as a whole rather than the individual agency may not be sufficient. In 5 Comp. Gen. 645 (1926), the former Veterans Bureau owned herds of livestock and wanted to have them registered. Reduced registration costs could be obtained by joining certain livestock associations. The benefit of registration would be a higher price if the agency sold the livestock. However, sales proceeds would have to be deposited in the Treasury as miscellaneous receipts and would thus not benefit the agency's appropriations. Membership was therefore improper. (The agency's appropriation language was subsequently changed and the membership was approved in A-38236, March 30, 1932.)

Several of the decisions have pointed out that an agency may accept a gratuitous membership without violating the Antideficiency Act. 31 Comp. Gen. 398,399 (1952); A-38236, March 30, 1932, quoted in 24 Comp. Gen. 814,815 (1945).

In addition, payment of a membership fee at the beginning of the period of membership does not violate the prohibition on advance payments found in 31 U.S.C. 53324. B-221569, June 2, 1986. What is being purchased is a "membership," and the "membership" is received upon payment.

The evolution of the statutory law on membership fees produced a somewhat anomalous result in some of the early cases. 5 U.S.C. § 5946 originally prohibited—and still prohibits—not only membership fees but also the expenses of attending meetings. In the early decades of the statute, some agencies received specific authority to pay the expenses of attendance at meetings, but many did not. Thus, as the individual vs. agency membership distinction developed, some of the decisions were forced to conclude that an agency could purchase a membership in an association but that nobody could attend the meetings since attending meetings could not be done by "the agency" but only through an individual. See, e.g., 24 Comp. Gen. 814, 815 (1945); A-30185, February 5, 1930. Two provisions of the Government Employees Training Act, 5 U.S.C.

§§ 41.09 and 4110, now permit attendance at meetings in certain situations. Thus, as a general proposition, if an organization is closely enough related to an agency's official functions to justify agency membership, it is presumably closely enough related to justify sending a representative to its meetings.

As noted above, the prohibition in 5 U.S.C. § 5946 against individual memberships does not apply if the fee is authorized by the Government Employees Training Act. An illustration is 61 Comp. Gen. 162 (1981), holding that the Defense Department could pay the licensing fees of Methods Time Measurement instructors for the Army Management Engineering Training Agency. The instructors had to be trained and certified—hence the fee—before they could train others. Further, the fee was not a matter of “personal qualification” since the certifications would be restricted to the training of Defense Department personnel and would be of no personal use to the instructors apart from their Defense Department jobs.

Another example is B-223447, October 10, 1986, approving certain individual memberships for U.S. Army Corps of Engineers employees in the Toastmasters International organization as a source of public speaking training. The organization required membership in order to obtain the training. Because the Government Employees Training Act does not apply to active duty members of the uniformed services (68 Comp. Gen. 127 (1988)), the Act's exception to 5 U.S.C. 55946, and cases applying the Actor the exception, apply to civilian employees of the military departments but not to uniformed personnel.

b. Attorneys

A number of cases have dealt with the expenses of admission to the bar and related items for attorneys employed by the government.

The question first came up in 22 Comp. Gen. 460 (1942), when the Federal Trade Commission asked if it could reimburse one if its attorneys the fee he paid to be admitted to the bar of the Tenth Circuit Court of Appeals. The attorney had paid the fee in order to make an appearance to represent the agency in a suit filed against it. The Comptroller General said no, stating the rule as follows:

“It has been the consistent holding of the accounting officers of the United States that an officer or employee of the Government has upon his own shoulders the duty of qualifying himself for the performance of his official duties

and that if a personal license is necessary to render him competent therefor, he must procure it at his own expense." *Id.* at 461.

In 1967, the National Labor Relations Board asked GAO to reconsider the rule in a fact situation similar to that in 22 Comp. Gen. 460. GAO reviewed the basis for the prior decision in light of the Government Employees Training Act, but found no reason to change it. Pointing out that "the privilege to practice before a particular court is personal to the individual and is his for life unless disbarred regardless of whether he remains in the Government service," the Comptroller General again held that the bar admission fee was personal to the attorney and could not be paid from appropriated funds. 47 Comp. Gen. 116 (1967).

The same result was reached in B-161952, June 12, 1978, again to the National Labor Relations Board. The fact that an attorney might require admission to several courts rather than just one in the performance of official duties was found immaterial and GAO rejected the suggestion that the court admission would be of very limited value to the attorney after leaving the government.

Questions have also arisen over the requirement for a government attorney to remain a member in good standing of the bar of some state or the District of Columbia. In a jurisdiction with a "unified" or "integrated" bar, the attorney must pay an annual fee to remain a member in good standing, and membership in the state's bar association goes along with the fee. (Some states require annual fees to remain on the active rolls but do not include bar association membership.) In B-171667, March 2, 1971, the annual fee for an Internal Revenue Service attorney to remain in good standing in the California bar, an integrated bar jurisdiction, was held not reimbursable from appropriated funds. The fee remains a matter of personal qualification and the principle is the same whether applied to a one-time fee or to dues or fees charged on a recurring basis. The decision cited 5 U.S.C. § 5946 as an additional reason. GAO reached the same result in 51 Comp. Gen. 701 (1972), concerning a Patent Office attorney's membership in the unified bar of the District of Columbia; again in B-204213, September 9, 1981, concerning mandatory dues for continued membership in the North Carolina bar; and still again in B-204215, December 28, 1981, concerning the membership of an Internal Revenue Service estate tax attorney in the New Jersey bar.

Another case applying the prohibition is B-187525, October 15, 1976. The decision further pointed out that an agency may not pay the costs incurred by one of its attorneys in taking a bar examination since the examination is part of the employee's personal qualification process. See also 55 Comp. Gen. 759 (1976) concerning examinations in general.

In 61 Comp. Gen. 357 (1982), GAO held that the Merit Systems Protection Board could not pay the bar membership fees of its appeals officers. It made no difference that the requirement for appeals officers to be bar-admitted attorneys was a new one the Board had imposed on incumbent employees. In addition, the Board could not pay bar review course fees. (The decision distinguished B-187525, cited above, which had permitted bar review course fees in a very limited situation.)

13. Personal Expenses and Furnishings

Items which are classified as personal expenses or personal furnishings may not be purchased with appropriated funds without specific statutory authority. Most of the cases tend to involve government employees, the theory being simply that there are certain things an employee is expected to provide for him(her)self. A prime example is food, covered in detail previously in this chapter.

The rule on personal expenses and furnishings was stated as follows in 3 Comp. Gen. 433 (1924):

“[Personal furnishings are not authorized to be purchased under appropriations in the absence of specific provision therefor contained in such appropriations or other acts, if such furnishings are for the personal convenience, comfort, or protection of such employees, or are such as to be reasonably required as a part of the usual and necessary equipment for the work on which they are engaged or for which they are employed. ”

This decision is still cited frequently and the rule is applied in many contexts. Of course, over the years, exceptions have evolved, both statutory and non-statutory. The remainder of this section explores several categories of personal expenses.

a. Business or Calling Cards

Business cards or calling cards are commonly used in the commercial world. (We use the terms synonymously here even though there may be technical distinctions.) As far as the government is concerned, they are inherently personal in nature. Therefore, they are

considered a personal expense and not payable from appropriated funds without specific statutory authority.

The rule is long-standing and has been applied in a number of decisions. In 20 Comp. Dec. 248 (1913), the Comptroller of the Treasury considered the argument that has been presented in every case—that the cards are used for official business purposes. Be that as it may, business or calling cards are more a matter of personal convenience than necessity. Therefore, the Comptroller advised the State Department that their cost is a personal expense and not chargeable to public funds.¹⁰⁷ The decision also pointed out a practical basis for the rule: If the cards were permitted for certain officials, it would be impossible to draw a fair and enforceable line.

The rule was reiterated in 41 Comp. Gen 529 (1962), in which the purchase of business cards from appropriated funds was held improper for Department of Agriculture officials at overseas posts.

In a more recent case, the Comptroller General applied the prohibition to deny reimbursement to an employee of the National Highway Traffic Safety Administration who had purchased business cards at his own expense. B-195036, July 11, 1979. More recently still, GAO advised the Forest Service that appropriated funds were not available to buy “identification cards” for use by a public affairs officer. The cards were the same as traditional business cards and were to be used for the same purposes. 68 Comp. Gen. 467 (1989). See also B-149151, July 20, 1962, in which the cards were called “cards of introduction.” Devising a new name for the same thing does not make a difference. For other cases holding business cards to be personal expenses and therefore unauthorized, see 68 Comp. Gen. 583 (1989); 12 Comp. Gen. 565 (1933); 12 Comp. Dec. 661 (1906); 10 Comp. Dec. 506 (1904); B-131611, February 15, 1968; B-131611, May 24, 1957. The fact that the cost is to be charged to a revolving fund rather than a “direct” appropriation is immaterial. B-234603, August 11, 1989.

The rule is also reflected in the Government Printing & Binding Regulations, section 20 (1986 reprint):

¹⁰⁷“[I]n official life it has been the practice for the official himself to furnish his own cards, the salaries in most instances being adequate for such expenditures,” the Comptroller chided. 20 Comp. Dec. at 250.

“Printing or engraving of calling or greeting cards is considered to be personal rather than official and shall not be done at Government expense. ”

A variation occurred in B-173239, June 15, 1978. The Board for International Broadcasting wanted to use what it termed “transmittal slips” to accompany the distribution of its annual report. The “transmittal slip” resembled a business card and contained the words “With the compliments of (name and title), Board for International Broadcasting.” It was not necessary to decide whether the “slips” were business cards or not, because 44 U.S.C. § 1106 expressly provides that documents distributed by an executive department or independent establishment may not contain or include a notice that they are being sent with “the compliments” of a government official. Use of the transmittal slips was therefore unauthorized

For the application of these rules to Members of Congress, see B-198419, November 25, 1980, and B-198419, July 8, 1980.

There is one significant exception. Reception and representation (or comparable forms of “entertainment”) appropriations may be used to purchase business cards for employees whose jobs include representation. B-223678, June 5, 1989 (noting that business cards are a “legitimate and accepted” representation device); 68 Comp. Gen. 467,468 n.1 (1989).

Finally, “name tags” to be worn on the person are not the same as business cards and may be provided from appropriated funds. 69 Comp. Gen. 82 (1989). A name tag is more closely analogous to a government identification card, which is clearly not a personal expense. 2 Comp. Gen. 429 (1923). See also 11 Comp. Gen. 247 (1931) (identification insignia to be worn on caps).

b. Health, Medical Care and Treatment

(1) Medical care

The rule for medical care is that, except for illness directly resulting from the nature of the employment, medical care and treatment are personal to the employee and payment may not be made from appropriated funds unless provided for in a contract of employment or by statute or valid regulation. 57 Comp. Gen. 62 (1977); 53 Comp. Gen. 230 (1973). The case most frequently cited

for this rule is 22 Comp. Gen. 32 (1942), which contains citations to many of the earlier decisions.¹⁰⁸

Exceptions have been recognized where a particular item could be justified as being primarily for the benefit of the government rather than the employees. The exceptions involve primarily physical examinations and inoculation. For example, appropriated funds were held available in the following cases:

- 41 Comp. Gen. 387 (1961) (desensitization treatment for a Department of Agriculture horticulturist with a known history of severe reaction to bee and wasp stings).
- 23 Comp. Gen. 888 (1944) (purchase of drugs and their administration by private doctor to employees exposed to spinal meningitis in line of duty; otherwise, agency would have risked having to quarantine the employees and close the facility).
- B-108693, April 8, 1952 (X-rays for Weather Bureau personnel being assigned to Alaska, presumably necessitated by a high incidence of tuberculosis among Eskimos).

By virtue of legislation enacted in 1946 and now found at 5 U.S.C. § 7901, each agency is authorized to establish a health service program to promote and maintain the physical and mental fitness of employees under its jurisdiction. The statute expressly limits authorized health service programs to (1) treatment of on-the-job illness and dental conditions requiring emergency attention; (2) pre-employment and other examinations; (3) referral of employees to private physicians and dentists; and (4) preventive programs relating to health.

Under this legislative authority, the Comptroller General advised, for example, that an agency could, upon determining that it will be in the government's interest to do so, provide immunization against specific diseases without charge to employees. 47 Comp. Gen. 54 (1967).

¹⁰⁸ Although not directly related to medical care, there is a very early group of cases, on which the earlier medical care cases partly relied, standing for the proposition that appropriate funds are not available for the burial of a deceased civilian employee unless necessary for the health and/or safety of other employees, in which event the "reasonable expenses of a decent burial" are permissible, 3 Comp. Gen. 111 (1923); 11 Comp. Dec. 789 (1905); 6 Comp. Dec. 447 (1899); 2 Comp. Dec. 347 (1896).

In 57 Comp. Gen. 62 (1977), the Comptroller General held that the Environmental Protection Agency was authorized by 5 U.S.C. § 7901 to procure diagnostic and preventive psychological counseling services for its employees. The service could encompass problem identification, referral for treatment or rehabilitation to an appropriate service or resource, and follow-up to help an employee readjust to the job during and after treatment, but could not include the actual treatment and rehabilitation. Actual treatment and rehabilitation remain the employee's responsibility.

In B-198804, December 31, 1980, GAO refused to expand the holding in 57 Comp. Gen. 62 to permit an agency to pay the expenses of alcoholism treatment and rehabilitation for one of its employees. Treatment and rehabilitation, as stressed in 57 Comp. Gen. 62, are the employee's responsibility. It made no difference that the employee had been erroneously advised that the expenses would be covered by her health insurance and had already incurred the expenses, since the government cannot be bound by the unauthorized acts or representations of its agents.

Federal agencies are authorized under 5 U.S.C. § 7901 to establish smoking cessation programs for their employees, and may use their operating appropriations to pay the costs. 68 Comp. Gen. 222 (1989). In light of the body of evidence of the health hazards of smoking, the decision reasoned, programs to help employees quit smoking are clearly "preventive programs relating to health" for purposes of the statute.¹⁰⁹

Physical fitness programs may qualify as preventive health programs under 5 U.S.C. § 7901 to the extent permissible under applicable regulations such as OMB Circulars, the Federal Personnel Manual, and regulations of the General Services Administration. In addition, it may be possible to justify some programs under the necessary expense concept without the need to invoke the statute. For example, in 63 Comp. Gen. 296 (1984), GAO applied the necessary expense doctrine to conclude that Bureau of Reclamation funds were available for physical exercise equipment to be used in a mandatory physical fitness program for firefighters.

¹⁰⁹The 1989 decision modified 64 @rep, Gen. 789 (1985), which had found smoking cessation programs unauthorized. The 1985 case had correctly held that such programs were not a form of "medical care," but had failed to properly evaluate them as preventive programs.

In 64 Comp. Gen. 835 (1985), GAO considered the scope of a permissible fitness program under section 7901, concluding that a program could include comprehensive physical fitness evaluations and laboratory blood tests. Based on the statute alone, it could also include physical exercise. However, regulations then in effect precluded use of appropriated funds for physical exercise as part of a health service program. The decision further noted, as 63 Comp. Gen. 296 had held, that physical exercise costs incident to a mandatory program necessitated by the demands of designated positions could be paid as a necessary expense without the need to rely on 5 U.S.C. § 7901. See also B-216852-O. M., March 6, 1985 (discussing GAO's own authority to establish a fitness program); B-216852, December 17, 1984 (non-decision letter).

Subsequent to 64 Comp. Gen. 835, the Office of Personnel Management revised its regulations to include physical fitness programs and facilities as permissible preventive health services. Based on the revised regulations, an agency may now use appropriated funds to provide access to a private fitness center's exercise facilities, although both GAO and OPM caution that expenditures of this type should be carefully monitored and should be undertaken only where all other resources have been considered and rejected. 70 Comp. Gen. (B-240371, January 18, 1991).

Medical treatment not within the scope of 5 U.S.C. § 7901 remains subject to the general rule expressed in cases such as 22 Comp. Gen. 32. Thus, the cost of an ambulance called by an agency medical officer to take an employee to a hospital could not be paid from appropriated funds. B-160272, November 14, 1966. (This is the kind of expense that can be covered by employee health insurance plans.) In another case, GAO rejected the contention that medical expenses are automatically "necessary expenses," and concluded that Internal Revenue Service appropriations were not available to reimburse the State Department for medical services provided to IRS overseas employees and their dependents under the Foreign Service Act of 1946. 53 Comp. Gen. 230 (1973). The decision noted that several other agencies had received specific statutory authority to participate in the program.

A review of the decisions involving medical examinations will further illustrate the relationship of 5 U.S.C. § 7901 to the decisional rules. Prior to the enactment of section 7901, a pre-employment physical examination, the purpose of which was to determine an

applicant's eligibility for a federal job, was the applicant's responsibility and was not chargeable to appropriated funds. 22 Comp.Gen. 243 (1942).

Applying the "primary benefit of the government" standard, however, the Comptroller General found post-employment examinations permissible in certain situations. Thus, in 22 Comp.Gen. 32 (1942), GAO told the Army that it could use its appropriations to provide periodic physical examinations to detect arsenic poisoning in civilian workers in a chemical warfare laboratory. The decision noted that instances of arsenic poisoning "might have a depressing effect on the morale of fellow workers"¹¹⁰ and might make it more difficult to find qualified people to do the work.¹¹¹ In another case, a civilian employee joined the Army during World War II. He received a medical discharge, and thereafter applied for reinstatement to his former civilian job. GAO advised that the agency could pay for a physical examination which it required prior to reinstatement. 23 Comp.Gen. 746 (1944).

In 1946, 5 U.S.C. § 7901 was enacted. Now, agencies have specific authority to include medical examinations, including pre-employment examinations, without charge to applicants, in the health programs they are authorized to establish. 30 Comp.Gen. 493 (1951). While the statute authorizes establishment of government programs, it does not authorize the reimbursement of privately-incurred expenses. Thus, an applicant who declines to use an available government doctor for a pre-employment examination and instead chooses to have it performed by a private doctor may not be reimbursed. 31 Comp.Gen. 465 (1952).

In situations not covered by the statute, the "primary benefit of the government" test continues to apply. Thus, based on the earlier precedents, the cost of medical examinations by private physicians was approved in the following cases:

¹¹⁰The morale of the poisoned workers wouldn't be particularly enhanced either.

¹¹¹While this may sound heartless, the expenditure could be justified only if it was determined to be necessary to carry out the objects of the appropriation, and the appropriation in this instance was for chemical warfare service, not for employee health.

- 30 Comp. Gen. 387 (1951) (physical examinations of Department of Agriculture employees engaged in testing repellents and insecticides for use by the armed forces; no government medical facilities available).
- 41 Comp. Gen. 531 (1962) (annual physical examinations for Saint Lawrence Seaway Development Corporation employees engaged in strenuous physical work, often under severe weather conditions; no public health facilities in area).

The examinations in both of the above cases could have been included in an authorized health service program. As noted, however, facilities were not available in either case. Thus, since the examinations were for the primary benefit of the government, appropriated funds were available to have them performed by private physicians.

In 65 Comp. Gen. 677 (1986), the Navy could pay for a medical examination required for a private individual joining a government research exercise under invitational travel orders. Although government medical facilities were presumably available, there was no need to note this fact in the decision. Since the individual was neither a government employee nor an applicant for a government job, she could not be required to use the government facility and, since the Navy wanted her participation, it could not very well expect her to bear the expense.

(2) Purchase of health-related items ¹¹²

The purchase of health-related items, while conceptually related to the medical care cases, is also an application of the “personal expense” rule set forth in 3 Comp. Gen. 433, cited at the beginning of this section, that personal equipment needed to qualify an employee to perform the regular duties of his or her position may not be paid from appropriated funds. The rule is illustrated in B-187246, June 15, 1977. There, a Community Services Administration employee’s doctor had placed him under certain restrictions because of a back injury. Specifically, he was to use a “sacro-ease positioner” for his office chair and could drive cars only with a minimum 116-inch wheel base, bucket seats, and full power. While the equipment may have been necessary for that particular individual to perform his duties, it was not essential to the transaction

¹¹²See also “Wearing Apparel,” section C.13.h, for related cases.

of official business from the government's standpoint. Therefore, the items could not be provided from appropriated funds.

In B-166411, September 3, 1975, an employee who, as a result of a back injury, needed a bedboard while traveling could not be reimbursed beyond the normal per diem. The bedboard was a personal expense. Similarly, gratuities for wheelchair services while traveling were held non-reimbursable in B-151701, July 3, 1963.

A different type of situation arose in B-215640, January 14, 1985. An agency asked whether it could purchase a heavy-duty office chair for an employee who needed extra physical support because he weighed over 300 pounds and had broken 15 regular chairs. While the particular type of chair in question was necessitated by the employee's physical condition, it is nevertheless the case that an office chair is not "personal equipment" but is an item the government is normally expected to provide for its employees. The purchase was therefore authorized.

Another exception occurred in 23 Comp. Gen. 831 (1944). There, GAO approved the rental of an amplifying device to be attached to an official telephone for use by an employee with a hearing handicap. The device was seen as a means of obtaining the best results from available personnel. The precedent value of this decision is somewhat speculative. On the one hand, the device would not become the property of the individual. Yet on the other hand, the decision seems to have been based largely on the difficulty of hiring "qualified" employees in view of the wartime draft situation. (Whether consideration was given to hiring women is not mentioned.)

Generally, however, exceptions stem from some statutory basis. Thus, in 56 Comp. Gen. 398 (1977), the Comptroller General approved the purchase of a motorized wheelchair for use by a Social Security Administration employee. The decision emphasized that a wheelchair is normally the employee's personal expense. In this case, however, the employee had his own non-powered wheelchair and needed a motorized wheelchair only because the agency had not complied with the Architectural Barriers Act of 1968. The wheelchair would, of course, become the property of the government and was approved only as a temporary expedient pending compliance with the statute. More recently, GAO advised that the purchase of a motorized wheelchair for a quadriplegic employee

who spent half of his time on official travel could be regarded as a “reasonable accommodation” in accordance with regulations implementing the Rehabilitation Act of 1973, again on condition that the wheelchair remain the property of the government. B-240271, October 15, 1990.

In B-188710, September 23, 1977, training funds were held available to procure the taping and braining of training materials and to provide related services such as interpreters for the deaf and readers for the blind. The decision pointed out that these items would be personal expenses if used in connection with regular duties in that each employee is presumptively qualified to perform the official duties of his or her position. However, in view of the policy in the Rehabilitation Act of providing equal opportunity for handicapped employees, the expenditures were held proper in the limited context of training under the Government Employees Training Act. In contrast, expenses for personal attendants to provide handicapped employees attending training with required personal care (such as help in dressing, bathing, getting in and out of bed) were held not to be proper expenditures from training funds because they are not directly related to training. B-188710, March 23, 1978. (For non-training situations, the employment of reading assistants for blind employees and interpreting assistants for deaf employees is now covered by 5 U.S.C. § 3102.)

Health-related items may also be authorized as “special protective equipment” under 5 U.S.C. § 7903, discussed later under “Wearing Apparel.” Thus, prescription ground safety glasses may be purchased for employees engaged in hazardous duties. The glasses become and remain the property of the government. The government can also pay the cost of related eye refraction examinations in limited circumstances. 51 Comp. Gen. 775 (1972); 42 Comp. Gen. 626 (1963).

‘ Relying on 3 Comp. Gen. 433 rather than 5 U.S.C. § 7903, GAO, in 45 Comp. Gen. 215 (1965), approved the purchase of special prescription filter spectacles and clinical eye examinations necessary to obtain the proper prescription for employees operating stereoscopic map plotting instruments. Employees who did not use special glasses frequently lost the required visual skills before reaching the normal retirement age. Also, the special glasses would be of no personal use to the employees except during working hours and would remain the property of the government. However, the purchase of

eyeglasses for employees who work at video display terminals is not authorized. There is no applicable safety standard in the Occupational Safety and Health Act, the work is not (or at least has not yet been found to be) hazardous to the eyes if proper care is used, and not all employees who work at terminals need eyeglasses. 63 Comp. Gen. 278 (1984).

The 1980's saw a veritable flood of cases involving the purchase of air purifiers ("smokeeaters") as the campaign against smoking became a fashionable "cause celebre." The rules, distilled from several decisions,¹¹³ are as follows:

- Appropriated funds are not available to purchase air purifiers for the private office of an employee who objects to tobacco smoke unless the employee's hypersensitivity to smoke qualifies him or her as handicapped under the Rehabilitation Act of 1973.
- Air purifiers may be purchased for "common areas" such as reading rooms.
- Air purifiers may be placed on the desks of employees who smoke if they will provide a general benefit to all employees working in the area.

C. Office Furnishings (Decorative Items)

An agency's appropriations are available without question to furnish the space it occupies with such necessary items as desks, filing cabinets, and other ordinary office equipment. Questions occasionally arise when the item to be procured is decorative rather than utilitarian.

The availability of appropriations for certain decorative items has long been recognized. In 7 Comp. Dec. 1 (1900), the Comptroller of the Treasury advised the Secretary of the Treasury that "paintings suitable for the decoration of rooms" were within the meaning of the term "furniture." Therefore, an appropriation for the furnishing of public buildings was available to purchase cases and glass coverings for paintings of deceased judges. The paintings had been donated to the government for display in a courtroom.

¹¹³64 Comp. Gen. 789 (1985), modified on other grounds, 68 Comp. Gen. 222 (1989); 63 Comp. Gen. 115 (1983); 62 Comp. Gen. 653 (1983); 61 Comp. Gen. 634 (1982); B-213666, July 26, 1984; B-215108, July 23, 1984.

The Comptroller followed this decision in 9 Comp. Dec. 807 (1903), holding that Treasury appropriations were available to buy portraits as furniture for the Ellis Island immigration station if administratively determined “necessary for the public service.”

Citing both of these decisions, the Comptroller General held in B-178225, April 11, 1973, that the appropriation for salaries and expenses of the Tax Court was available for portraits of the Chief Judges of the Tax Court, to be hung (the portraits, not the judges) in the main courtroom. Similarly, the Tax Court could purchase artwork and other decorative items for judges’ individual offices. 64 Comp. Gen. 796 (1985).

Other decisions approving the use of appropriated funds for decorative items are B-143886, September 14, 1960 (oil painting of agency head for “historical purposes” and public display); B-121909, December 9, 1954 (“solid walnut desk mount attached to a name plate”); B-114692, May 13, 1953 (framing of Presidential Certificates of Appointment for display in the appointee’s office).

Purchase of decorative items for federal buildings is now covered in the Federal Property Management Regulations. The regulations authorize expenditures for pictures, objects of art, plants, flowers (both artificial and real), and other similar items. However, such items may not be purchased solely for the personal convenience or to satisfy the personal desire of an official or employee.

The regulation was discussed and the rule restated in 60 Comp. Gen. 580 (1981). Decorative items maybe purchased if the purchase is consistent with work-related objectives and the items to be purchased are not “personal convenience” items.¹ The determination of “necessity” is within the agency’s discretion, subject to the regulations. The regulations apply equally to space leased by an agency in a privately-owned building. See also 64 Comp. Gen. 796 (1985); 63 Comp. Gen. 110, 113 (1983).

As noted, one type of permissible decorative item is plants. A restriction in a 1980 appropriation act prohibited the use of funds

¹¹⁴The decision also noted that the items must be for permanent rather than “seasonal” use. 60 Comp. Gen. at 582. The rule prohibiting use of appropriated funds for seasonal (e.g., Christmas) decorations has since been modified. See 67 Comp. Gen. 87 (1987), discussed in Section C.13.f.

for plant maintenance contracts. The Comptroller General construed this provision to apply to office space to which particular federal employees were actually assigned. The provision's legislative history suggested that it was not intended to apply to outdoor plants or to plants in common areas which were not the assigned work space of any particular employee or group of employees. 59 Comp. Gen. 428 (1980).

d. Personal Qualification Expenses

Expenses necessary to qualify a government employee to do his or her job are personal expenses and not chargeable to appropriated funds. As stated in an early decision:

“That which is required of a person to become invested with an office must be done at his own expense unless specific provision is made by law for pay-merit by the Government.”

2 Comp. Dec. 262, 263 (1895). Somewhat coldly, the Comptroller added, “if he does not desire the office, he need not accept it.” *Id.* See also United States v. Van Duzee, 140 U.S. 169, 171 (1890) (“[I]t is the duty of persons receiving appointments from the government . . . to qualify themselves for the office”). One example of this rule, bar membership expenses for attorneys, has already been covered in the section on membership fees.

Another commonly encountered example is a license to operate a motor vehicle. A driver's license is considered a personal expense incident to qualifying for the position for which employed. 21 Comp. Gen. 769,772 (1942); 6 Comp. Gen. 432 (1926); 23 Comp. Dec. 386 (1917). An exception was recognized in B-115463, September 18, 1953, for Army civilian employees on temporary duty of at least six months' duration in foreign countries, where the employees did not already possess driver's licenses, operating a motor vehicle was not part of the job for which the employees were hired but the Army wanted to include driving as part of their TDY duties as a less expensive alternative to hiring additional personnel, and the license was required by the host country. See also B-87138-O. M., July 19, 1949 (Virgin Islands).

The rule has also been applied in the following situations:

- License to practice medicine. 49 Comp. Gen. 450 (1970); 46 Comp. Gen. 695 (1967).

- License for pesticide applicators. B-235727, February 28, 1990; B-186512, January 17, 1977.
- License to operate motion picture projection equipment. 31 Comp. Gen. 81 (1951).
- License to operate a gasoline pump. 3 Comp. Gen. 663 (1924).

Several of the decisions note that licenses of this nature amount to taxes and should not be imposed on federal employees performing federal functions. Whether a particular item does or does not amount to a tax, the result is the same: An employee who pays cannot be reimbursed.

It is not uncommon for agencies to have some of their employees commissioned as notaries public. By statute, an employee whose job includes serving as a notary public may be reimbursed the expense required to obtain the commission. 5 U.S.C. 55945. The expense is reimbursable even though the employee uses the notarial power for private as well as government business. 36 Comp. Gen. 465 (1956).

e. Photographs

General rule: The cost of photographs of individual government employees is a personal expense not chargeable to appropriated funds in the absence of specific statutory authority. 31 Comp. Gen. 452 (1952). Thus, the dissemination to the press of photographs of a new agency official upon his appointment was held to be an improper expenditure in B-111336, September 16, 1952.

The rule is intended to prevent the use of public funds for the personal publicity of a particular individual. Exceptions have accordingly been recognized where there is adequate justification that the expenditure is necessary to accomplish some purpose for which the appropriation was made. For example, the distribution of photographs of an area director of the Equal Employment Opportunity Commission was held permissible in 47 Comp. Gen. 321 (1967) where the purpose was to increase cooperation with the EEOC by publicizing its activities and functions. The decision further pointed out that the expense was chargeable to the fiscal year in which the photographs were taken rather than the year in which they were actually used.

Another acceptable justification is illustrated in B-123613, June 1, 1955, involving photographs of the Under Secretary of the Interior. One of the Under Secretary's functions is to represent the Secretary in various parts of the country. The photographs were obtained in

order to respond to requests by organizations in preparing programs or by the press, in connection with this official travel. Similar justifications were found sufficient in B-1 14344, May 19, 1953, and B-47547, February 15, 1945.

Photographs for use on identification cards or badges are permissible when administratively determined necessary to protect government property or for security reasons. 23 Comp. Gen. 494 (1944); 20 Comp. Gen. 566 (1941); 20 Comp. Gen. 447 (1941); 2 Comp. Gen. 429 (1923).

At one time, travel regulations did not provide for the reimbursement of passport photographs, and they were held to be non-reimbursable personal expenses unless and until the regulations should be amended. 9 Comp. Gen. 311 (1930). The regulations were subsequently amended and passport photographs are now reimbursable. See 52 Comp. Gen. 177 (1972),

While earlier decisions state the rule in terms of photographs of individual employees, it applies to other photographs as well. The expense will be permitted where it clearly constitutes a means of effecting a proper agency function and disallowed where adequate justification does not exist,

For example, distribution of photographs of a department store display was viewed as a proper means of carrying out a statutory function of encouraging public cooperation toward economic stabilization. B-1 13464, January 29, 1953. Similar types of justification were found sufficient in B-175434, April 11, 1972; B-1 13026, January 19, 1953; and B-15278, May 15, 1942. However, inadequate justification was found in B-149493, December 28, 1977, in which a group photograph of interagency participants in a training symposium, sent free to participants, was held a personal, rather than a necessary, expense. Similarly, photographs taken at the dedication of the Klondike Gold Rush Visitor Center to be sent by the National Park Service as "mementos" to persons attending the ceremony were disallowed as a personal gift in B-195896, October 22, 1979.

f. Seasonal Greeting Cards and (1) Greeting cards
Decorations

The cost of seasonal greeting cards is a personal expense to be borne by the officer who ordered and sent them, and may not be charged to public funds.

In a 1957 case, an agency with overseas posts wanted to send Christmas cards to “important individuals” in the countries where the posts were located. The agency tried to justify the expense as a means of disseminating information and thereby to promote mutual understanding. The Comptroller General ruled, however, that the expense was a personal one and could not be paid from the agency’s appropriations. 37 Comp. Gen. 360 (1957). As to the purported justification, the Comptroller said “it seems to us that very little, if any, information in that regard is contained on the ordinary Christmas greeting card.” *Id.* at 361. See also 7 Comp. Gen. 481 (1928) and B-1 15132, June 17, 1953.

It is immaterial that the card is “nonpersonal,” that is, sent by the agency and not containing the names of any individuals. The expenditure is still improper. 47 Comp. Gen. 314 (1967); B-156724, July 7, 1965.

In 47 Comp. Gen. 314, it was also held immaterial that the expenditure had been charged to a trust fund in which donations, which the agency was statutorily authorized to accept, had been deposited.

Transmitting the greetings in the form of a letter rather than a card does not legitimize the expenditure. In 64 Comp. Gen. 382 (1985), an agency head sent out a letter stating that the entire staff of the agency “joins me in wishing you a joyous holiday. We look forward to working with you and your staff throughout the coming year.” A Member of Congress questioned the propriety of sending these letters in penalty mail envelopes. GAO noted that the letter “transacts no official business” and “is the essence of a Christmas card.” *Id.* at 384. Therefore, the costs should not have been charged to appropriated funds.

While all of the above cases deal with Christmas greetings, the rule would presumably apply equally to other holiday or seasonal cards. It would also apply to “greetings” not tied in to any particular holiday, B-149151, July 20, 1962 (“thank you for hospitality” cards). The point is that while sending greetings maybe a nice gesture, it is not the sort of thing that should be charged to the taxpayers.

(2) Seasonal decorations

Prior to 1987, based in part on the reasoning that seasonal decorations are significantly different from ordinary office furnishings designed for permanent use, it had been GAO's position that Christmas decorations (trees, lights, ornaments, etc.) were not a proper charge to appropriated funds. 52 Comp.Gen. 504 (1973); B-163764, February 25, 1977 (non-decision letter).

In 1987, GAO overruled 52 Comp.Gen. 504, concluding that the rules for office decorations should be the same whether the decorations are seasonal or permanent. 67 Comp.Gen. 87 (1987). Thus, seasonal decorations are now permissible "where the purchase is consistent with work-related objectives [such as enhancement of morale], agency or other applicable regulations, and the agency mission, and is not primarily for the personal convenience or satisfaction of a government employee." *Id.* at 88. See also B-226781, January 11, 1988. In implementing this decision, agencies should be appropriately sensitive (whatever that means) with respect to the display of religious symbols. 67 Comp.Gen. at 89.

The rationale of 67 Comp.Gen. 87 does not apply to Christmas cards, which remain "basically individual good will gestures and are not part of a general effort to improve the work environment." *Id.*

g. Traditional Ceremonies

Expenditures which might otherwise be prohibited as personal may be permissible when they are incurred incident to certain traditional ceremonies. Groundbreaking ceremonies and dedication ceremonies for the laying of cornerstones in public buildings are the most common examples of such traditional ceremonies.

For example, in B-158831, June 8, 1966, the cost of flowers used as centerpieces at a dedication ceremony was held to be a proper expenditure. Similarly, the cost of engraving and chrome-plating a ceremonial shovel used in a groundbreaking ceremony was viewed as a necessary expense of the ceremony. 53 Comp.Gen. 119 (1973). In the cited decision, however, the voucher could not be paid because there was no evidence as to who authorized the work, where the shovel originated, the subsequent use to be made of the shovel, and why there was a year's delay between the ceremony and the engraving.

Expenses necessarily incident to a groundbreaking or cornerstone ceremony are chargeable to the appropriation for the construction of the building, B-158831, June 8, 1966; B-11884, August 26, 1940 (cost of printing programs and invitations to cornerstone ceremony); A-88307, August 21, 1937 (recording of presidential speech and group photograph at cornerstone ceremony); B-107165-0. M., April 3, 1952 (cost of dedication ceremony).

In 56 Comp. Gen. 81 (1976), the rationale of the above cases was extended to Armed Forces change of command ceremonies. The decision held that the cost of printing invitations to a change of command ceremony for a Coast Guard vessel could be paid from the Coast Guard's appropriations for operating expenses. In view of the traditional role of change of command ceremonies in the military, the Comptroller General concluded that the invitations were not inherently personal. The case was therefore distinguishable from the decisions previously discussed prohibiting the use of public funds for business cards and greeting cards.

The "traditional ceremony" concept has also been applied to a vessel "christening" ceremony at a Navy Yard (A-74436, May 19, 1936), and a Uniformed Services University of the Health Sciences annual graduation ceremony (B-211700, March 16, 1984).

The precise scope of the "traditional ceremony" concept still needs some clarification. One early Comptroller of the Treasury decision, 7 Comp. Dec. 31 (1900), not overruled or modified as of 1990, disallowed expenses for printing, decorations, music, and refreshments at opening exercises for new buildings at the Ellis Island immigrant station. If a building opening is to be distinguished from a cornerstone ceremony, then the decision may still be valid. If not, then the holding as it relates to printing, and probably decorations, has been implicitly superseded by the later cases. Whether music and refreshments are permissible has yet to be discussed.

h. Wearing Apparel

The starting point is the principle that "every employee of the Government is required to present himself for duty properly attired according to the requirements of his position." 63 Comp. Gen. 245, 246 (1984), quoting from B-123223, June 22, 1955. In other words, the government will not clothe the naked, at least where the naked are receiving government salaries.

Nevertheless, there are certain out-of-the-ordinary items, required by the nature of the job, that the government should furnish. The test was described in 3 Comp.Gen. 433 (1924), and that discussion is still relevant today:

“In the absence of specific statutory authority for the purchase of personal equipment, particularly wearing apparel or parts thereof, the first question for consideration in connection with a proposed purchase of such equipment is whether the object for which the appropriation involved was made can be accomplished as expeditiously and satisfactorily from the Government’s standpoint, without such equipment. If it be determined that use of the equipment is necessary in the accomplishment of the purposes of the appropriation, the next question to be considered is whether the equipment is such as the employee reasonably could be required to furnish as part of the personal equipment necessary to enable him to perform the regular duties of the position to which he was appointed or for which his services were engaged, Unless the answer to both of these questions is in the negative, public funds can not be used for the purchase. In determining the first of these questions there is for consideration whether the Government or the employee receives the principal benefit resulting from use of the equipment and whether an employee reasonably could be required to perform the service without the equipment. In connection with the second question the points ordinarily involved are whether the equipment is to be used by the employee in connection with his regular duties or only in emergencies or at infrequent intervals and whether such equipment is assigned to an employee for individual use or is intended for and actual] y to be used by different employ ees.”

Id. at 433-34. Under the rule set forth in 3 Comp.Gen. 433, most items of apparel were held to be the personal responsibility of the employee. E.g., 5 Comp.Gen. 318 (1925) (rubber boots and coats for custodial employees in a flood-prone area); 2 Comp.Gen. 258 (1922) (coats and gloves for government drivers). But there were limited exceptions. Thus, caps and gowns for staff workers at Saint Elizabeth Hospital in Washington were viewed as for the protection of the patients rather than the employees and could therefore be provided from appropriated funds as part of the hospital equipment. 2 Comp.Gen. 652 (1923). See also 5 Comp.Gen. 517 (1926), Similarly, aprons for general laboratory use were held permissible in 2 Comp.Gen. 382 (1922). Another exception was wading trousers for Geological Survey engineers as long as the trousers remained the property of the government and were not for the regular use of any particular employee. 4 Comp.Gen. 103 (1924), One category of apparel not permissible under the early decision was uniforms, Uniforms were viewed as personal furnishings to be procured at the expense of the wearer, 24 Comp. Dec. 44 (1917),

There are now three statutory provisions which permit the purchase of items of apparel from appropriated funds in certain circumstances.

The first is 5 U.S.C. 97903, enacted as part of the Administrative Expenses Act of 1946. It provides:

“Appropriations available for the procurement of supplies and material or equipment are available for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks. For the purpose of this section, ‘appropriations’ includes funds made available by statute [to wholly-owned government corporations].”

In order for an item to be authorized by 5 U.S.C. 57903, three tests must be met: (1) the item must be “special” and not part of the ordinary and usual furnishings an employee may reasonably be expected to provide for himself; (2) the item must be for the benefit of the government, that is, essential to the safe and successful accomplishment of the work, and not solely for the protection of the employee, and (3) the employee must be engaged in hazardous duty. See 32 Comp. Gen. 229 (1952); B-193104, January 9, 1979. Thus, this provision is but a slight liberalization of the rule in 3 Comp. Gen. 433.

Applying 5 U.S.C. § 7903, the Comptroller General has held that raincoats and umbrellas for employees who must frequently go out in the rain are not special equipment but are personal items which the employee must furnish. B-193104, January 9, 1979; B-122484, February 15, 1955. Similarly unauthorized are coveralls for mechanics (B-123223, June 22, 1955) and running shoes for Department of Energy nuclear materials couriers (B-234091, July 7, 1989). Nor does 5 U.S.C. § 7903 authorize reimbursement for ordinary clothing and toiletry items purchased by narcotics agents on a “moving surveillance.” B-179057, May 14, 1974.

An illustration of the type of apparel authorized by 5 U.S.C. § 7903 is found in 51 Comp. Gen. 446 (1972). There, the Comptroller General advised the Department of Agriculture that snowmobile suits, mittens, boots, and crash helmets for personnel required to operate snowmobiles over rough and remote forest terrain were clearly authorized by the statute. Similarly authorized are down-filled parkas for Office of Surface Mining employees temporarily

assigned to Alaska or the high country of the Western states. 63 Comp. Gen. 245 (1984), ¹¹⁵

Items other than wearing apparel may be furnished under 5 U.S.C. § 7903 if the tests set forth above have been met. See, e.g., 28 Comp. Gen. 236 (1948) (mosquito repellent for certain Forest Service employees).

Continuing the old rule, however, the Comptroller General held that 5 U.S.C. § 7903 does not constitute general authority for the purchase of uniforms. 32 Comp. Gen. 229 (1952).

Congress addressed the uniform problem with the second statutory provision under consideration, 5 U.S.C. § 5901, the so-called Federal Employees Uniform Act, most recently amended by section 202 of the Federal Employees Pay Comparability Act of 1990, section 529 of the FY 1991 Treasury-Postal Service-General Government appropriation act, Pub. L. No. 101-509 (November 5, 1990), 104 Stat. 1389, 1456. This provision authorizes annual appropriations to each agency, on a showing of necessity or desirability, to provide a uniform allowance of up to \$400 a year (or more if authorized under Office of Personnel Management regulations) to each employee who wears a uniform in the performance of official duties. The agency may pay a cash allowance or may furnish the uniform.

Note that 5 U.S.C. § 5901 is merely an authorization of appropriations. An appropriation is still required in order for payments to be made or obligations incurred. 35 Comp. Gen. 306 (1955). While the decision stated that specific appropriation language is preferable, it recognized that the inclusion of an item for uniforms in an agency's budget request which is then incorporated into a lump-sum appropriation is legally sufficient.

An example of an item that could properly be required under 5 U.S.C. § 5901 is frocks for Department of Agriculture meat grader employees. 57 Comp. Gen. 379, 383 (1978). Another example is robes for administrative law judges of the Occupational Safety and

¹¹⁵The distinction between this case and the "foul weather" cases cited in the preceding Paragraph is that an employee is expected to provide his or her own clothing suitable for the climate in which the employee normally works or resides. See B-230820, April 25, 1988 (non-decision letter). For example, it is not reasonable to expect an employee who normally lives and works in Florida to own clothing suitable for Alaska in January,

Health Review Commission. B-199492, September 18, 1980. (The decision concluded merely that the expenditure would be legal, not that it was an especially good idea, pointing out that federal judges pay for their own robes.)

In 48 Comp. Gen. 678 (1969), a National Park Service employee was given a uniform allowance but, in less than a year, was promoted to a higher position which required substantially different uniforms. The Comptroller General held that the employee could receive the uniform allowance of his new position even though the sum of the two allowances would exceed the statutory annual ceiling. To hold otherwise would have been inconsistent with the statutory purpose.

While the uniform allowance under 5 U.S.C. § 5901 maybe in cash or in kind, there is no similar option for “special clothing or equipment” under 5 U.S.C. § 7903. The latter statute authorizes the furnishing of covered items in kind only. 46 Comp. Gen. 170 (1966).

The third piece of legislation which may permit the purchase of items of apparel from appropriated funds is the Occupational Safety and Health Act of 1970 (OSHA). Section 19 of OSHA, 29 U.S.C. § 668, requires each federal agency to establish an occupational safety and health program and to acquire necessary safety and protective equipment. Thus, protective clothing may be furnished by the government if the agency head determines that it is necessary under OSHA and its implementing regulations.

Under the OSHA authority, the following items have been held permissible:

- Snowmobile suits, mittens, boots, and crash helmets for Department of Agriculture employees required to operate snowmobiles over rough and remote terrain. 51 Comp. Gen. 446 (1972). (This decision has already been noted in the discussion of 5 U.S.C. § 7903 above. The decision held that the items were justifiable on either basis.)
- Down-filled parkas for Interior Department employees temporarily assigned to Alaska or the high country of the Western states during the winter months. 63 Comp. Gen. 245 (1984). (This decision is also noted under 5 U.S.C. 87903. As with 51 Comp. Gen. 446, the items could be justified under either statute.)

- . Protective footwear for Drug Enforcement Administration agents assigned to temporary duty in jungle environments, The footwear remains the property of the United States and must be disposed of in accordance with the Federal Property Management Regulations. B-187507, December 23, 1976.
- Cooler coats and gloves for Department of Agriculture meat grader employees. 57 Comp.Gen. 379 (1978).
- . Ski boots for Forest Service snow rangers, where determined to be necessary protective equipment in a job-hazard analysis. B-191594, December 20, 1978.
- Steel-toe safety shoes for an Internal Revenue Service supply clerk whose work includes moving heavy objects. 67 Comp.Gen. 104 (1987). This item also could have been justified under 5 U.S.C. 57903. Id.

If an item is authorized under OSHA, it is unnecessary to determine whether it meets the tests under 5 U.S.C. 57903, E.g., B-187507, cited above. As noted in the above listing, however, several of the decisions have discussed both statutes. If an item does not qualify under OSHA, it is still necessary to examine the other possibilities. E.g., B-234091, July 7, 1989 (running shoes unauthorized under either statute).

Thus, there are three statutes under which purchase of wearing apparel may be authorized—5 U.S.C. § 7903 (special clothing for hazardous occupations), 5 U.S.C. § 5901 (uniform allowances), and OSHA (protective clothing). A decision summarizing all three is 63 Comp.Gen. 245 (1984). If none of these applies, then the rule of 3 Comp.Gen. 433 continues to govern.

An illustration of the continued applicability of the decisional rules is the rental of formal evening wear, a situation which, thus far at least, no one has suggested fits under any of the three statutes.

In a 1955 case, an employee on travel status in England rented a dinner jacket to attend a dinner related to the purposes of the trip. Based on the rule of 3 Comp.Gen. 433, the Comptroller General denied reimbursement for the cost of renting the jacket. 35 Comp. Gen. 361 (1955). “The claimant’s failure to take with him necessary clothing to meet reasonably anticipated personal necessities is not considered sufficient to shift the burden of the cost of procuring such clothing from personal to official business.” Id., at 362. This decision was followed in a similar situation involving the rental of a

tuxedo in 45 Comp. Gen. 272 (1965), and again in 64 Comp. Gen. 6 (1984).

A different situation was presented in 48 Comp. Gen. 48 (1968), in which it was held that the Secret Service could pay the rental charges on formal dress attire required to be used by special agents when attending formal functions incident to their furnishing protective services to persons whom they are assigned to protect. In this situation, the purpose of the formal attire is not merely to be “socially acceptable,” but is necessary for security purposes, to make the agents less readily identifiable as such.

Similarly, in the not-too-distant past, attorneys arguing before the Supreme Court were required to wear formal cutaway coats and striped pants. In B-164811, July 28, 1969, GAO approved reimbursement for the rental of these items by Justice Department attorneys who were only occasionally required to appear before the Supreme Court. A more recent case restating the rules is 67 Comp. Gen. 592 (1988) (advising agency to resolve certain conflicting information and pay or deny the claim accordingly).

Finally, the rules we have been discussing for wearing apparel apply to government employees. Questions may arise with respect to nongovernment employees, in which event the answer is a pure application of the necessary expense doctrine, in light of whatever statutory authority may exist. For example, in B-62281, December 27, 1946, the State Department was administering a training program for citizens of the Philippines to assist in post-war rehabilitation. The decision held that the government could provide “special purpose” clothing required for the training, such as uniforms, overalls, or work aprons. However, this could not include the furnishing of complete wardrobes adaptable to the cooler climate of the United States; this was a personal expense. See also 29 Comp. Gen. 507 (1950) (clothing for indigent narcotic patients upon release from Public Health Service Hospitals, as therapeutic measure to aid rehabilitation).

i. Miscellaneous Personal Expenses

Several “personal expense” matters are dealt with elsewhere in this chapter, for example, the sections on entertainment and membership fees. Apart from those topics specifically covered elsewhere, the preceding portions of this section cover the situations which have generated the largest number of cases. There are, however, other frequently encountered situations.

(1) Commuting and parking

One personal expense everyone is familiar with is commuting to and from work (more precisely, between permanent residence and permanent duty location). The employee is expected to be at work; how the employee chooses to get there is entirely his or her own business, 27 Comp. Gen. 1 (1947); 16 Comp. Gen. 64 (1936).

Along with commuting goes parking. It is equally clear that parking incident to ordinary commuting is also a personal expense. 63 Comp. Gen. 270 (1984); 43 Comp. Gen. 131 (1963); B-162021, July 6, 1977. These cases stand for the proposition that the government may not be required to provide parking facilities for its employees. However, an agency may provide employee parking facilities if it determines that the lack of parking facilities will significantly impair the operating efficiency of the agency and will be detrimental to the hiring and retention of personnel. 49 Comp. Gen. 476 (1979); B-168946, February 26, 1970; B-155372-O. M., November 6, 1964. If severely disabled employees are forced to pay parking costs higher than those paid by non-disabled employees working at the same facility,¹⁶ the agency can subsidize the difference. 63 Comp. Gen. 270 (1984).

As several of the cases cited in the preceding paragraph discuss, agencies must generally obtain parking accommodations through the General Services Administration under the Federal Property and Administrative Services Act unless they have independent statutory authority or a delegation from GSA. GSA regards a delegation of authority to lease parking facilities as a delegation of authority to enter into a service contract, which can be approved at the regional level, rather than a delegation of leasing authority. GSA Temp. Reg. No. D-73, § 101-17,201-2 (1989). If an agency has independent statutory or delegated authority to procure space and facilities and has made the requisite morale and efficiency determinations, it may provide for employee parking in a collective bargaining agreement. See 55 Comp. Gen. 1197 (1976).

A governmentwide provision in the 1991 Treasury-Postal Service-General Government Appropriation Act authorizes federal agencies to participate in state or local government programs designed to encourage employees to use public transportation. Pub. L. No,

¹⁶For example, the disabled employee may have to park closer to the facility at higher rates.

101-509, § 629, 104 Stat. 1478 (1990). Thus, an agency may use its general operating appropriations to subsidize the use of discounted transit passes by its employees. The “subsidy” is not additional pay for purposes of the prohibition in 5 U.S.C. 55536. *Id.*; B-243677/B-243674, May 13, 1991. The legislation has a sunset date of December 31, 1993.

(2) Miscellaneous employee expenses

Personal expense questions may occur in contexts which arise infrequently and for which there is little precedent. The rationale of the decisions cited and discussed throughout this section should provide the approach necessary to analyze the problem.

For example, the Forest Service requested a lodge owner to furnish lodging and meals to a group of summer employees on temporary duty on a forest project in Maine. While the Forest Service made the request on behalf of the employees, it did not contract directly with the lodge owner. The individual employees received a per diem allowance and were expected to settle their own accounts with the lodge. One of the employees left at the end of the summer without paying his bill and the lodge owner filed a claim against the government. Under these circumstances, the unpaid bill was nothing more than a personal debt of the individual and there was therefore no basis for government liability. B-191 110, September 25, 1978. (Had the government contracted directly with the lodge, the result might have been different. See section entitled “Cancelled Hotel Reservations” in Chapter 12.)

In another case, the Navy asked whether it could use appropriated funds to buy luggage for use by members of the Navy’s Recruit Mobile Training Team. Normally, luggage is a personal expense. The employee who travels on government business is generally expected to provide his or her own luggage. In this case, however, the members of the team travelled an average of 26 weeks a year. The Comptroller General applied the test set forth in 3 Comp. Gen. 433, discussed at various points throughout this section, and accepted the Navy’s judgment that it would be unreasonable to require the team members to furnish their own luggage in view of this excessive amount of travel. Therefore, Navy could buy the luggage, but only on the conditions that it would become Navy property and be stored in Navy facilities. In other words, the members

could not use the luggage for any personal business. B-200154, February 12, 1981. The Comptroller General declined to state a precise rule as to how much travel is enough to justify government purchase of luggage, and emphasized that the purchase would be permitted only in highly unusual circumstances.

The payment of a federal employee's union dues is the employee's personal obligation even though payment by payroll withholding is authorized. If an agency wrongfully fails to withhold the dues, it may use appropriated funds to reimburse the labor union, but must then recover the payment from the employee unless the debt can be waived. 60 Comp. Gen. 93 (1980); B-235386, November 16, 1989.

A new situation for the federal government is "flexiplace"—permitting an employee to work at home. An agency may compensate an employee for work done at home in limited circumstances. However, increased utility expenses (heating, air conditioning, lighting, etc.) incurred by the employee by virtue of working at home are personal expenses and may not be reimbursed in the absence of statutory authority. 68 Comp. Gen. 502 (1989). As the decision points out., along with the increased utility costs, the employee also incurs savings from reduced commuting, child care, meal, and/or clothing expenses. "How the balance should be struck, if at all, . . . is a legislative judgment." *Id.* at 506.

14. Rewards

This section discusses when appropriated funds may be used to offer and pay rewards. As a general proposition, statutory authority is needed. Exactly how explicit this statutory authority has to be depends somewhat on the nature of the information or services for which the reward is contemplated and its relationship to the authority of the paying agency,

a. Rewards to Informers

(1) Reward as "necessary expense"

One group of decisions deals with rewards for the furnishing of information regarding violations of civil and criminal laws. The rule is that, if the information is "essential or necessary" to the effective administration and enforcement of the laws, a reward may be offered if it can be tied in to a particular appropriation under the "necessary expense" theory. In that situation, the statutory authority does not have to expressly provide for the payment of

rewards. If, however, the information is merely “helpful or desirable,” then more explicit statutory authority is needed. Since the distinction is difficult to administer as a practical matter, statutory authority has been granted in many situations.¹¹⁷

The Comptroller General addressed the issue in 8 Comp. Gen. 613, 614 (1929), stating:

“An appropriation general in terms is available to do the things essential to the accomplishment of the work authorized by the appropriation to be done. As to whether such an appropriation may properly be held available to pay a reward for the furnishing of information, not essential but probably helpful to the accomplishment of the authorized work, the decisions of the accounting officers have not been uniform. The doubt arises generally because such rewards are not necessarily in keeping with the value of the information furnished and possess elements of a gratuity or gift made in appreciation of helpful assistance rendered.”

While the reward in that particular case was permitted, the decision announced that specific legislative authority would be required in the future. See also 9 Comp. Gen. 309 (1930); A-26777, May 22, 1929.

Whether a reward to an informer is necessary or merely helpful depends largely on the nature of the agency’s organic authority and its appropriations language. For example, the Forest Service is responsible for protecting the national forests “against destruction by fire and depredations.” 16 U.S.C. § 551. It receives appropriations for expenses necessary for “forest protection and utilization.” Under this authority, the Comptroller General held that information relating to violations (such as deliberately set forest fires, theft of timber, unauthorized occupancy, and vandalism) could be considered necessary rather than just helpful, and the Forest Service could therefore offer rewards to informers without more specific statutory authority. B-172259, April 29, 1971. See also 5 Comp. Gen. 118 (1898). The ruling was extended in B-172259, August 2,

¹¹⁷In addition to the statutes discussed in the text, other examples are: 16 U.S.C. § 668 (information on capturing, buying or selling of bald eagles); 16 U.S.C. § 1540(d) (violations of Endangered Species Act); 16 U.S.C. § 2409 (Antarctic Conservation Act of 1978); 18 U.S.C. § 1751(g) (information concerning Presidential assassinations or attempted assassinations); 18 U.S.C. § 53056 (rewards by the Secret Service); 18 U.S.C. § 3059 (information leading to arrest of person charged with violation of criminal laws of United States or District of Columbia); 21 U.S.C. § 886 (Drug Abuse Act); 39 U.S.C. § 404(a)(8) (violations of postal laws); 50 U.S.C. § 47a (illegal introduction, manufacture, acquisition, or export of special nuclear material or atomic weapons)

1972, to cover “endorsements” (the “endorsement” by an informant of an undercover agent to help him gain acceptance with the suspects),

Similarly, the Commerce Department could pay rewards to informers as a necessary expense under a provision of the Export Control Act of 1949 which authorized the obtaining of confidential information incident to enforcement of the act, B-117628, January 21, 1954.

The rule was also applied in B-106230, November 30, 1951, in which GAO advised the Treasury Department that rewards to informers for information or evidence on violations of the revenue, customs, or narcotics laws could be offered under an appropriation for the necessary expenses of law enforcement. As long as the information was necessary and not just helpful, more specific appropriations language was not needed. The result would be different if the agency did not have specific law enforcement authority. A.D. 6669, May 15, 1922.

(2) Payments to informers: Internal Revenue Service

One reward to informers most people are familiar with is the reward offered by the Internal Revenue Service for the detection of tax cheats. While the pertinent Internal Revenue Code provision does not use the term “reward,” it authorizes the payment of sums deemed necessary “for detecting and bringing to trial and punishment persons guilty of violating the internal revenue laws,” 26 U.S.C. 57623. Where information leads to an actual recovery of back taxes or penalties, IRS may pay the informer a reward based on a percentage of the amount recovered, up to a 10 percent maximum set by regulation. GAO approved this scheme as within the statutory authority in 3 Comp. Gen. 499 (1924). The determinations of whether to pay a reward and, if so, its amount are discretionary and, short of a showing of no rational basis, are not reviewable by the courts or by GAO. *Saracena v. United States*, 508 F.2d 1333 (Ct. Cl. 1975); *Thomas v. United States*, 22 Cl. Ct. 749 (1991); B-131689, June 7, 1957; B-10761, June 29, 1940; B-5768, September 16, 1939; A-96942, August 23, 1938. The same statute has been held to authorize rewards for information on violations where no tax or fine is collected. 24 Comp. Dec. 430 (1918).

The IRS statute has been held to constitute an “indefinite reward offer.” The informant responds by his conduct, and an “enforceable contract” arises when the parties fix the amount of the reward. Merrick v. United States, 846 F.2d 725 (Fed. Cir. 1988). The plaintiff in that case provided information on an illegal tax shelter in which 1,585 persons had invested, resulting in the recovery of over \$10 million. The court upheld the position of the IRS that the taxpayers were “related taxpayers” in a single tax avoidance scheme, thereby limiting the reward to \$50,000 for the aggregate recovery rather than \$50,000 per person as the plaintiff had sought. Merrick v. United States, 18 Cl. Ct. 718 (1989).

The issue in B-137762.32, July 11, 1977 was whether IRS could contract with an attorney representing an unnamed informant (i.e., a “partially disclosed principal”), The decision discussed the general prohibition against contracting with a partially disclosed principal, but approved the proposed agreement, noting that the reasons for the rule in the ordinary procurement context did not apply to the IRS reward situation. See also B-1 17628, January 21, 1954. However, Treasury regulations required that the informant’s identity be disclosed before any claim could actually be paid. Therefore, disclosure would be necessary if and when a reward became payable but not before then.

An additional issue in B-137762.32 was when an obligation has to be recorded under 31 U.S.C. §1501(a). No contractual liability to make payment exists until IRS has evaluated the worth of the information and has assessed and collected any underpaid taxes and penalties. This is when the appropriate IRS official determines that a reward should be paid and its amount, and it is at this point that a recordable obligation arises. This is consistent with the Federal Circuit’s holding in Merrick.

The Internal Revenue Service may also make “support and maintenance” payments to informers under its general investigation and enforcement authority. In B-183922, August 5, 1975, the Comptroller General held that IRS could not make payments to an informer who was simultaneously being paid by the Justice Department under its Witness protection Program. However, IRS could make the payments if administratively determined to be necessary after the informer had been disenrolled from the Justice Department’s program.

(3) Payments to informers: Customs Service

The Customs Service also has statutory authority to pay rewards. Under 19 U.S.C. 51619, a person (other than a government employee) who detects and seizes any vessel, vehicle, aircraft, merchandise, or baggage subject to seizure and forfeiture under the customs or navigation laws, or who furnishes original information, leading to a monetary recovery, maybe paid a reward of 25 percent of the amount recovered, not to exceed \$250,000 in any case. Rewards are payable from “appropriations available for the collection of the customs revenue.” Id. §1619(d).

This reward is in the nature of compensation for services rendered rather than a personal gratuity. 5 Comp. Gen. 665 (1926). The statute has been deemed mandatory in the sense that an informant who complies with its terms has a legal and judicially-enforceable claim for the reward. Wilson v. United States, 135 F.2d 1005 (3d Cir. 1943); Tyson v. United States, 32 F. Supp. 135 (Ct. Cl. 1940); Rickard v. United States, 11 Cl. Ct. 874 (1987); B-217636, March 4, 1985 (non-decision letter).

The information furnished must be “original” information, that is, the first information the Customs Service has concerning the particular fraud or violation. Lacy v. United States, 607 F.2d 951,953 (Ct. Cl. 1979); Cornman v. United States, 409 F.2d 230,234 (Ct. Cl. 1969); Tyson, 32 F. Supp. at 136.

In cases where the furnishing of information leads to recoveries from multiple parties, the monetary ceiling on the reward “for any case” applies to the information furnished, not to the number of recoveries it produces. Cornman v. United States, citing and following 24 Comp. Dec. 17 (1917).

Liquidated damages assessed under customs bonds are “recoveries” for purposes of 19 U.S.C. 51619.34 Comp. Gen. 70 (1954). So are recoveries under bail bonds. 19 U.S.C. §1619(e). Moneys received by customs officers as bribes, however, are not “recoveries” for purposes of the reward. 11 Comp. Gen. 486 (1932).

The statute applies to recoveries under the “customs laws or the navigation laws.” See 16 Comp. Gen. 1051 (1937). Recoveries under other laws do not qualify. Thus, in 32 Comp. Gen. 405 (1953), a reward could not be paid where recovery was made under several

laws and the amount attributable to the customs laws or navigation laws could not be ascertained. Similarly, a violation of the Anti-Dumping Act is not a violation of the customs laws for purposes of 19 U.S.C. 51619. Fraters Valve & Fitting Co. v. United States, 347 F.2d 990 (Ct. Cl. 1965). Nor is a violation of the internal revenue laws, Wilson v. United States, 135 F.2d 1005 (3d Cir. 1943).

The reward is authorized, based on appraised value, if the item forfeited is destroyed or “delivered to any governmental agency for official use” rather than sold. Under this provision, seized merchandise donated to state governmental agencies under General Services Administration regulations qualifies for the reward since the statutory language is not limited to federal agencies. B-146223, November 27, 1961. Similarly, where forfeited distilled spirits, wines, or beer, which are required by statute to be delivered to GSA for disposal, are subsequently given to “eleemosynary institutions” for medicinal purposes, the reward is payable because the initial delivery to GSA counts as delivery to a “governmental agency for official use” under 19 U.S.C. 51619. B-146223, February 2, 1962.

b. Missing Government Employees

The only decisions that exist on rewards for locating missing government employees concern military deserters. No decision has been found discussing whether a reward could be offered for the apprehension of a military deserter in the absence of statutory authority, although one early case stated that “[t]here is no reward for the apprehension or delivery of a deserter by operation of law.” 20 Comp. Dec. 767 (1914). The reason the issue has not been discussed is probably that the authority has existed by statute for a long time. For many years, a provision in the annual Defense Department appropriation acts authorized payment of expenses of the apprehension and delivery of deserters, including a small reward. In 1984, the provision was made permanent and is now found at 10 U.S.C. § 956(1). The Coast Guard also has permanent authority to offer rewards for the apprehension of deserters. 14 U.S.C. § 644.

Thus, the decisions that do exist concern mainly questions of interpretation under the statutory language and implementing regulations. For example, the term “apprehension” was construed to permit payment of the reward where an Army deserter voluntarily surrendered to a civil officer. 6 Comp. Gem 479 (1927).

The statute and implementing regulations limit the amount payable as expenses, but this limitation applies only to the period before the deserter is returned to military control. Expenses incurred after return to military control, for example, continued civil detention at the request of military authorities, are not subject to the limitation and may be paid. B-179920, July 18, 1974; B-147496-0. M., January 4, 1962. Three early decisions permitted payment of expenses incurred in apprehending a deserter in excess of the statutory limit where the deserter was also wanted for other criminal offenses (such as forgery or embezzlement). 16 Comp. Dec. 132 (1909); 11 Comp. Dec. 124 (1904); B-3591, May 27, 1939.¹¹⁸

c. Lost or Missing Government Property

It has long been established that no payment may be made to one who finds lost government property unless a reward has been offered prior to the return of the property. 11 Comp. Dec. 741 (1905); 5 Comp. Dec. 37 (1898); A-23019, May 24, 1928; B-117297-O. M., February 12, 1954. To offer a reward for the recovery of lost or missing property, an agency needs some statutory basis. Examples are 10 U.S.C. § 2252 (Defense, military departments) and 14 U.S.C. § 643 (Coast Guard). While the degree of explicitness required has not been definitively addressed, the rules appear to be the same as in the case of rewards for information discussed above.

Two early decisions permitted the use of military “contingent expense” appropriations. In 6 Comp. Gen. 774 (1927), GAO told the Army that it could offer a reward from its contingent expense appropriation for the recovery of stolen platinum. In B-33518, April 23, 1943, prior to the enactment of 10 U.S.C. § 2252, the Navy wanted to use a general appropriation to offer rewards for locating lost aircraft. The Comptroller General advised that the general appropriation could not be used since the reward was not essential to carrying out its purposes, but, relying on 6 Comp. Gen. 774, the Navy could use its contingent expense appropriation.

In 41 Comp. Gen. 410 (1961), the Treasury Department asked if the Coast Guard had any general authority beyond 14 U.S.C. § 643 to make reasonable payments to persons who found lost property. The Comptroller General replied that he knew of none. Based on these decisions, it appears that a general operating appropriation is

¹¹⁸The excess payment in each of these cases was authorized from the Army’s appropriation for “contingent expenses.” While the “contingent expense” language is no longer used, the military departments receive similar appropriations for “emergencies and extraordinary expenses.” See 53 Comp. Gen. 707 (1974)

not available to offer or pay rewards for the recovery of lost property.

In B-79173, October 18, 1948, the Civil Aeronautics Administration had an appropriation for the temporary relief of distressed persons. The question presented was whether the appropriation was available to pay a reward to someone who had found a lost airplane four months after it disappeared. The Comptroller General said no, because the passengers could all be presumed dead after four months, but expressly declined to decide whether the appropriation would have been available if the airplane had been found “with such promptness as to afford reasonable hope that survivors might be found and given relief.” The reasoning is similar to that in the information cases—the reward might have been considered necessary to carrying out the relief appropriation if there was a reasonable chance of survivors, but after the passage of several months it would be at best helpful. As with the necessary expense theory in general, “necessary” relates not to the importance of the object itself but to carrying out the purposes of the particular appropriation.

Stolen property was involved in 53 Comp. Gen. 707 (1974). The Air Force asked if it could pay a reward, pursuant to local custom, to two Thai police officers whose services had been instrumental in recovering a stolen road grader. Based on 6 Comp. Gen. 774, the Comptroller General held that the Air Force could pay the reward from its appropriation for emergencies and extraordinary expenses, successor to the old “contingent expense” appropriation. However, apart from that particular appropriation, the decision held that there was no authority for the reward. This part of the decision was based on 8 Comp. Gen. 613, once again implying that the rules in the information cases would apply to missing property as well. (This case would now be covered by 10 U.S.C. § 2252.)

d. Contractual Basis

- The basis of the right to a reward is contractual; that is, there must be an offer and an acceptance. The rationale is that “no person by his voluntary act can constitute himself a creditor of the Government.” 20 Comp. Dec. 767, 769 (1914).

Where a reward is based on the “necessary expense” theory rather than on explicit statutory authority, the decisions hold that there must be an offer of reward before a reward can be claimed. Performance of the service constitutes the acceptance. See, e.g., 26

Comp. Gen. 605 (1947); 3 Comp. Gen. 734 (1924), The offer maybe in the form of a “standing offer” promulgated by regulation. See, e.g., B-131689, June 7, 1957, in which a Treasury Decision constituted the offer for an IRS reward. Another example is 28 C.F.R. Part 7, a “standing offer” by the Attorney General for rewards for the capture, or information leading to the capture, of escaped federal prisoners.

Consistent with contract theory in general, it is also possible for an offer to be implied from practice or course of conduct. For example, a reward was held payable to an informer under the prohibition laws without a specific offer in 4 Comp. Gen. 255 (1924). The informer was a member of a “gang of whiskey thieves” and the Comptroller General noted that “[u]nder such conditions no specific agreement for compensation is generally made, but with a man of such character there is, and practically must be, to obtain the information, an understanding that there will be compensation.” *Id.* at 256. The course of conduct and standing offer concepts were combined in A-23019, May 24, 1928, involving a reward for finding a lost Navy torpedo. In view of the prevailing understanding in the area and past practice, the Navy’s regulations were viewed as “implicitly” making a standing offer.

Similarly, where a reward is based on express statutory authority and the statute either is discretionary or authorizes the agency to “offer and pay” a reward, there must be an offer before payment can be made. 41 Comp. Gen. 410 (1961) (14 U.S.C. § 643); 20 Comp. Dec. 767 (1914) (apprehension of a deserter), On the other hand, if a statute provides for a reward as a matter of entitlement, the reasons for requiring an offer are less compelling; the terms of the statute and any implementing regulations will determine precisely how and when the “contract” comes into existence. *E.g., Merrick v. United States*, discussed above in connection with the Internal Revenue Service statute.

As to whether the claimant must have knowledge of the offer, the decisions are not entirely consistent. Cases involving the apprehension of deserters have held that performance of the service gives rise to an obligation on the part of the government to pay the offered reward notwithstanding the claimant’s lack of knowledge of the offer when he performed the service. 27 Comp. Dec. 47 (1920); 20 Comp. Dec. 767 (1914); B-41659, May 26, 1944. On the other hand, cases involving the finding of lost property have held

that knowledge is required. Thus, in 26 Comp. Gen. 605 (1947), a reward the Navy had offered for the discovery of a lost airplane was denied where the person discovering the airplane had no knowledge of the offer at the time he performed the service. This ruling was followed in 41 Comp. Gen. 410 (1961), holding that the Coast Guard could not pay a reward under 14 U.S.C. § 643 to one who had no knowledge of the published offer. See also A-35247, April 1, 1931 (escaped prisoner). The latter group of decisions purports to be based on the "great weight of authority." 26 Comp. Gen. at 606.

Since reward payments for information furnished to the government are in the nature of compensation for services rendered rather than personal gratuities, the right to file a claim for the reward vests at the time the compensation is earned (i.e., the services performed). Consequently, that right is not defeated where the informant dies prior to filing a claim or receiving the reward. The issue was discussed in 5 Comp. Gen. 665 (1926), in which GAO approved the payment of a reward to the legal representative of an informant's estate for information furnished under the predecessor of 19 U.S.C. 51619, even though the informant had not filed a claim prior to his death. See also 2 Comp. Dec. 514 (1896) (customs); B-131689, June 7, 1957 (internal revenue); B-129886-0, M., December 28, 1956 (internal revenue).

e. Rewards to Government Employees

A reward may not be paid to a government employee for services rendered within the scope of his or her official duties. For example, in 4 Comp. Gen. 687 (1925), a Deputy United States Marshal claimed a reward for apprehending a military deserter. The Comptroller General held that the reward could not be paid since the Marshal had been acting in his official capacity (i.e., doing his job) rather than his personal capacity. See also 7 Comp. Gen. 307 (1927); A-35247, April 1, 1931; A-17808, March 30, 1927. Under the Defense Department's statutory authority to pay expenses plus a small reward, a federal employee may be reimbursed actual expenses incurred, but may not be paid the reward. 32 Comp. Gen. 219 (1952). In addition, some statutes, 19 U.S.C. § 1619 for one example, expressly exclude government employees from eligibility.

However, if an employee performs services beyond the scope of his official duties for which a reward has been offered, the reward may be paid since the employee was acting in his capacity as a private citizen. Thus, a reward was held payable to a patrol inspector for

the Immigration Service who had apprehended a military deserter since the action was outside the scope of his official duties. 5 Comp. Gen. 447 (1925), See also A-17066, March 2, 1927.

The prohibition against an employee's receiving a reward for services performed in the course of his official duties applies as well to rewards offered by non-government sources. The principle is illustrated in 49 Comp. Gen. 819 (1970). An Air Force Major, flying a low-level training mission in the Republic of Colombia, spotted a cargo plane unloading in a suspicious location. He notified the Colombian authorities who seized what turned out to be a load of contraband. Under Colombian law, the informant was entitled to a reward of 25 percent of the total value of the contraband. However, any earnings of an employee in excess of his regular compensation, earned in the course of performing his official duties, belong to the government. Therefore, the Major could not keep the reward but had to turn it in for deposit in the Treasury. Another reason the Major could not keep the reward is the prohibition in the Constitution (Art. I, § 9, cl. 8) against the acceptance by a government officer or employee of gifts or emoluments from a foreign government without the consent of Congress.

15. State and Local Taxes

a. Introduction

It has long been held that the doctrine of sovereign immunity and the Supremacy Clause of the Constitution (Art. VI, cl. 2) combine to prohibit the states from taxing the federal government or its activities. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). This early interpretation was aimed essentially at the preservation of the federal system. Chief Justice Marshall penned his famous dictum in McCulloch that "the power to tax is the power to destroy." 17 U.S. at 431.

Since Justice Marshall's time, federal activities and state taxing schemes have grown in complexity and sophistication. Today, while the basic rule of federal immunity from state and local taxation is easy to state, it is far less easy to apply. In the words of the Supreme Court, federal immunity from state and local taxation is a "much litigated and often confused field." United States v. City of Detroit, 355 U.S. 466, 473 (1958). It "has been marked from the

beginning by inconsistent decisions and excessively delicate distinctions” (United States v. New Mexico, 455 U.S. 720, 730 (1982)), with the line between taxability and immunity “drawn by an unsteady hand” (United States v. County of Allegheny, 322 U.S. 174, 176 (1944)).

In the simplest situation, federal tax immunity applies to attempts to directly tax the property or activities of a federal department or agency. More difficult problems arise when the entity being taxed is not a “traditional” federal agency. The test enunciated by the Supreme Court is whether the entity is “so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.” United States v. New Mexico, 455 U.S. 720, 735 (1982). The most common situation calling for the application of this test, the taxation of government contractors, will be discussed later.

Funds paid over to a grantee under a federal grant program maybe used to pay a nondiscriminatory state sales tax on purchases made with grant funds. 37 Comp.Gen. 85 (1957). The same result would apply to purchases by a contractor under a contract with a grantee financed from federal grant funds (B-177215, November 30, 1972), and to state or local taxation of the income of a grantee’s employees (14 Comp.Gen. 869 (1935)). The reason is that the funds, once paid over to the grantee, lose their identity as federal funds and are no longer subject to many of the restrictions on the direct expenditure of appropriations. Appropriations for National Guard operations, however, are not grants to the states and the government’s immunity from taxation therefore applies. 42 Comp.Gen. 631 (1963).

The government’s constitutional immunity from state taxation has been held to extend to federal credit unions, United States v. Michigan, 851 F.2d 803 (6th Cir. 1988). However, a municipal sales tax imposed on a “village corporation” established under the Alaska Native Claims Settlement Act and funded in part by federal funds is not a tax on the United States since the village corporation is not a federal agency and the funds, once distributed to the corporation, are essentially private funds. B-205150, January 27, 1982 (non-decision letter).

In 46 Comp.Gen. 363 (1966), the Comptroller General considered a program under which the United States was to share the cost of

materials and services procured by farmers to carry out a conservation program. The Department of Agriculture had proposed a procedure whereby the United States would make its cost-sharing payments directly to the vendors. Since the materials purchased would not become the property of the United States, the procedure was viewed as essentially a “credit device” provided to the farmers, and the Comptroller General concluded that the payments could include state sales taxes.

Evidence of tax-exempt status may take various forms, depending on the circumstances. For example, use of a government credit card or purchase order identifies the purchaser as an agency or instrumentality of the United States. Other forms are listed in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 29.305. When other evidence is not available or is inapplicable, immunity is normally established by use of a “tax exemption certificate.” This is a printed form (Standard Form 1094) and is usually processed individually. It is prescribed by and illustrated in the FAR, 48 C.F.R. §§ 29.302(b), 53.229, 53.301-1094.

Consistent with the guidance in 48 C.F.R. § 29.302(b), the GAO Policy and Procedures Manual for Guidance of Federal Agencies (title 7, Appendix 4, Section E (1990)), advocates cost-effectiveness in the use of the certificates. This does not mean that small taxes should automatically be paid without attempting to assert the government’s immunity. What it means is that taxes in small amounts should be paid regardless of the government’s entitlement to immunity where no other evidence is at hand and where a tax exemption certificate would otherwise be required to take advantage of the immunity. The use of blanket exemption certificates and multiple exemption certificates is discussed in 41 Comp. Gen. 560 (1962).

In some jurisdictions, tax exemption can be established by reciting a “tax exempt number” obtained from the taxing authority. Where this procedure exists, it is governed by state regulation. Where available, this can be a simple and cost-effective way of invoking the government’s tax immunity in situations where the amounts involved do not justify obtaining a tax exemption certificate. See B-206804-O. M., February 7, 1983,

State taxation problems center on two distinct types of taxing schemes: taxes linked to business transactions involving the federal government, typically sales and use taxes, and property-oriented

taxes linked to ownership or use of various types of real and personal property located within the geographical boundaries of a state. In addition, government employees frequently incur various types of state and local taxes while performing government business. These three broad categories form the framework of our discussion.

b. Tax on Business Transactions to Which the Federal Government Is a Party

(1) General principles ¹¹⁹

The key question in determining whether the federal government may pay a sales or other tax imposed on its purchase of goods or services within a state depends on where the legal incidence of the tax falls. This concept was enunciated by the Supreme Court in Alabama v. King and Boozer, 314 U.S. 1 (1941). There, a construction contractor building a federal project objected to the state's imposition of sales tax on its purchase of building materials used in construction. It argued that such purchases should be exempt from state taxation as the costs would ultimately be borne by the federal government and thereby violate federal immunity from state taxation. The Supreme Court disagreed, drawing a distinction between the economic burden imposed on the United States when it must pay more for goods and services because of sales taxes levied against the seller of goods to the government, and the constitutionally impermissible burden which occurs when the government, as a purchaser of goods, is directly liable to the state for taxes imposed on a transaction. In other words, if the "legal incidence" of a tax falls on the seller and the seller alone is obligated to pay, the government may reimburse the seller for his total cost including tax. But if the buyer is in any way legally responsible for the payment of the tax, the federal government as a buyer cannot be required to pay.

A few years earlier, the Court had applied the same distinction in sustaining a state gross receipts tax imposed on a government contractor. James v. Dravo Contracting Co., 302 U.S. 134 (1937).

¹¹⁹Two points must be emphasized at the outset. First, there are dozens of cases in this area and it is impossible to treat them all here. The cases included have been selected to illustrate the more important principles and the kinds of problems that arise. Second, mention of a particular state in the following discussion is designed primarily to illustrate a type of tax and is not presented as a definitive statement of the law of that state. State laws and their judicial interpretations may change from time to time. Thus, while a cited decision may still reflect the law of that state, there is no guarantee of this and other decisions involving that state may exist which are not cited.

The rule that the government may pay a valid “vendor tax” even if it ends up bearing the ultimate economic burden, but is constitutionally immune from a “vendee tax,” has been recognized and applied in numerous decisions of the Comptroller General. E.g., 46 Comp. Gen. 363 (1966); 24 Comp. Gen. 150 (1944); 23 Comp. Gen. 957 (1944); 21 Comp. Gen. 1119 (1942); 21 Comp. Gen. 733 (1942). Where a state tax applies to rentals as well as purchases, the rule will apply to rentals also. See 49 Comp. Gen. 204 (1969); B-168593, January 13, 1971; B-170899, November 16, 1970. In the context of sales taxes, the hallmark of a vendor tax is that the law establishing the tax requires the seller to pay it notwithstanding any inability or unwillingness on the part of the seller to collect it from the purchaser. E.g., B-225123, May 1, 1987 (non-decision letter).

In determining whether the legal incidence of a particular tax is on the vendor or the vendee, GAO will follow judicial precedent where available. If there are no federal judicial decisions on point, the determination of the highest court of the state in question will be controlling. 21 Comp. Gen. 843 (1942); B-211093, May 10, 1983; B-172025, March 30, 1971.

Nowhere is the vendor/vendee concept more clearly illustrated than in the many cases considered by GAO on the payment of state gasoline taxes. In 57 Comp. Gen. 59 (1977), the Comptroller General held that, under the Vermont tax on gasoline distributors which was required by law to be passed along to dealers and which dealers in turn were required to collect from consumers, the consumer was legally obligated to pay the tax. This tax collection mechanism constituted a vendee tax, and where the government was the vendee, it was constitutionally immune. Subsequently, the Comptroller General advised a certifying officer that, based on 57 Comp. Gen. 59, he could not properly certify vouchers covering the Vermont fuel tax. B-190293, September 22, 1978. In 1979, Vermont amended its tax law to delete the requirement for pass-through to dealers and consumers. With this amendment, the tax became a vendor tax and the government’s immunity no longer applied. 63 Comp. Gen. 49 (1983). It is immaterial that, as a practical matter, the tax will be reflected in the retail price of the fuel. While the economic incidence might still fall on the purchaser, the legal incidence no longer did.

Another example of a vendee tax was the California state gasoline tax, which the dealer was required to collect from a consumer

“insofar as possible.” 55 Comp. Gen. 1358 (1976). That finding was predicated in part on the Supreme Court’s determination in *Diamond National Corp. v. State Board of Equalization*, 425 U.S. 268 (1976), that the California sales tax, which had an identically worded requirement, was imposed on the vendee.

In 55 Comp. Gen. 1358, GAO also considered gasoline taxes in Pennsylvania, New Mexico, and Hawaii. Pennsylvania’s tax was an excise tax on dealer-users (meaning retail service station operators). The statute did not provide any mechanism for the dealer-user to seek reimbursement from the consumer and therefore it was assumed that the tax levied against the dealer-user would become a part of that retailer’s operating expenses. Accordingly, the government could pay, as a part of the purchase price, the amount of tax on the retailer who was required by statute to assume that tax as a cost of doing business.

The New Mexico gasoline tax was a tax on the users of state highways, collected by the retail dealer of gasoline. The tax was added at the pump to the per-gallon cost of gasoline. Since the incidence of this tax was on the vendee, when the United States purchased fuel in New Mexico, it was exempt from the tax. In Hawaii the tax was in the form of a license fee paid by retail distributors of gasoline. This license fee was imposed directly on the distributors with no direct recourse against the consumers of gasoline, although the amount of the license fee was undoubtedly considered in setting the basic cost of fuel sold by those retailers. For this reason the government was authorized to pay the full retail price including whatever amount was attributable to the tax.¹²⁰

In a 1963 case, California law provided for a refund of the tax paid on gasoline for vehicles operated entirely off state highways. The state courts had found that the term “highway” did not encompass roads running in and through national parks. Therefore, relying on the state’s interpretation of its own statute, GAO concluded that no tax was payable on gasoline used in vehicles driven only on the grounds of a national monument. 42 Comp. Gen. 593 (1963).

¹²⁰In 28 Comp. Gen. 706 (1949), a Washington State tax on gasoline distributors was similarly found to be a vendor tax and the United States was therefore required to pay the amount added to the purchase price of gasoline to represent the tax. See also 5154266, June 25, 1964, considering the same tax as applied to government-rented commercial vehicles.

Even if a tax is a valid vendor tax, a state may not apply it **discriminatorily** to the United States and not to other buyers, See, e.g., B-156561, June 22, 1965.

Thus the immunity of the United States from taxation depends on whether the government **is itself** being taxed, in which case the **seller** of goods is merely a collection agent for the state. Similarly, an agency relationship between the United States and a contractor whereby the contractor **is** acting solely as the government's purchasing agent and title to goods purchased never **vests in the contractor, has been held** to create a situation where constitutional immunity from tax can be invoked. See Kern-Limerick, Inc. v. Scurlock, 347 U.S. 110 (1954); B 177215, November 30, 1972. However, the "contractor as agent" concept is a very limited one. See United States v. New Mexico, 455 U.S. 720,742 (1982),

A type of "vendor tax" which the federal government must nearly always pay is a business privilege or gross receipts tax, a personal tax on domestic and foreign concerns for the privilege of doing business in the state commonly measured as a percentage of gross receipts. An example of this kind of tax is the Illinois Retailers Occupational Tax discussed in 43 Comp. Gen. 721 (1964), 42 Comp. Gen. 517 (1963), and B-162452, October 6, 1967. Similar taxes have been held to be payable in the states of Arizona (27 Comp. Gen. 767 (1948) and 13-167150, February 17, 1970), Hawaii (49 Comp. Gen. 204 (1969) and 37 Comp. Gen. 772 (1958)), New Mexico (B-147615, December 14, 1961), and South Dakota (B-21 1093, May 10, 1983). A "business privilege" tax on motor fuel sellers imposed by Kansas City, Missouri, was held payable in 32 Comp. Gen. 423 (1953).

The imposition of state taxes—sales, use, gross receipts, etc.—on government contractors has produced more than its share of litigation. Questions arise, for example, because the tax may be based on the value of property in the contractor's possession but owned by the government, or purchased for use in performing the contract. For the most part, the taxes will be upheld. The most comprehensive recent discussion by the Supreme Court is United States v. New Mexico, 455 U.S. 720 (1982). The Court reviewed prior cases and concluded:

“[T]ax immunity is appropriate in only one circumstance: when the levy falls on the United States itself, *or* on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned.” *Id.* at 735.

Government contractors will generally be unable to meet this test except in very limited circumstances such as the Kern-Limerick case noted above. 455 U.S. at 742. In New Mexico, the Court sustained use and gross receipts taxes imposed on government contractors which, in that case, operated under an “advance funding” system whereby the contractors met their obligations by using Treasury funds which had been placed in a special bank account. *Id.* at 725–26.¹²¹

In imposing taxes on government contractors, a state may not discriminate against the federal government or substantially interfere with its activities, New Mexico, 455 U.S. at 735 n.11; Phillips Chemical Co. v. Dumas Independent School District, 361 U.S. 376 (1960); City of Detroit v. Murray Corp., 355 U.S. 489, 495 (1958); United States v. City of Manassas, 830 F.2d 530 (4th Cir. 1987), *aff’d mem.*, 485 U.S. 1017 (1988).

The Federal Acquisition Regulation provisions on state and local taxes are found in 48 C.F.R. Subpart 29.3, and the prescribed contract clauses at 48 C.F.R. 552.229. The typical language in government contracts for the purchase of goods or services recites that the offered price includes all applicable state and local taxes. The purpose of this language is to shift to the contractor the burden of determining which taxes apply, the theory being that the contractor is in a better position than the contracting agency to know this. B-220977, January 15, 1986; B-209430, January 25, 1983. Under this clause, the government cannot be required to pay any additional amount for tax. B-162667, December 19, 1967; B-134347, March 1, 1966. Unless otherwise specified in the contract, this “applies even to taxes which are first imposed while the contract is in existence. B-160129, December 7, 1966. In such circumstances it is not relevant that the tax involved has been found to be a valid

¹²¹Some additional Supreme Court cases sustaining the imposition of state taxes on government contractors in various contexts are Washington v. United States, 460 U.S. 536 (1983); United States v. Boyd, 378 U.S. 39 (1964); City of Detroit v. Murray Corp., 355 U.S. 489 (1958); Alabama v. King and Boozer, 314 U.S. 1 (1941); James v. Dravo Contracting Co., 302 U.S. 134 (1937). There are others Dravo is regarded as starting the current trend. New Mexico, 455 U.S. at 731–32.

vendor tax **from** which the United States is not immune; there can be no liability unless the contract agrees to reimburse taxes. 45 Comp. Gen. 192 (1965); 23 Comp. Gen. 957 (1944); B-148311 -O. M., April 20, 1962.

A contract can include a contingency clause for after-imposed state and local taxes. Failure to include **such a clause is regarded as the contractor's business decision**, in which event the government will not be liable for any additional taxes. Midcon of New Mexico, Inc., ASBCA No. 37249,90-1 BCA 122,621 (1990).

Other contract language, of course, may dictate different results. A contract for the "actual costs" would justify reimbursement to a contractor of back taxes and interest assessed against him when a court found that the contractor was not exempt on a constitutional basis. B-147316-O. M., January 9, 1962. The same result would apply in the case of a contract for a cost plus fixed fee, such as the contract in Alabama v. King and Boozer, cited above. 35 Comp. Gen. 378 (1955). Likewise, a contract to pay 50 percent of any new tax imposed by a state would include a business privilege tax assessed against a corporate contractor. B-152325, December 12, 1963.

A contractor maybe entitled to equitable relief in certain limited circumstances where both the contractor and the government are mistaken as to the applicability of a state tax to a particular contract and where the contractor reasonably relies on an innocent representation of a government agent that no tax applies. In such cases, the contract may be reformed and the price increased to include the applicable state tax. Cases reaching this result in various fact situations include 64 Comp. Gen. 718 (1985); B-186949, October 20, 1976; B-180071, February 25, 1974; B-169959, August 3, 1970; B-159064, May 11, 1966; and B-153472, December 2, 1965. The underlying legal concept is unjust enrichment resulting from mutual mistake, the theory being that a party, in this case the government, making a misrepresentation, however innocently, should not benefit at the expense of a party who reasonably relies on that misrepresentation. Mutual mistake is an essential element of recovery in these cases. If the contractor cannot establish mutual mistake, the contract is payable as written and the contractor must absorb the additional expense. E.g., Hugh S. Ferguson Co., PSBCA No. 2178, 89-1 BCA ¶ 21,294 (1988) (distinguishing 64 Comp. Gen. 718).

If a contractor **entitled** under the contract to be reimbursed for state taxes pays a state tax which is later judicially determined to be invalid, the contractor is nevertheless entitled to reimbursement (43 **Comp. Gen.** 721 (1964)), unless the contractor paid the tax without being required to do so (38 **Comp. Gen.** 624 (1959)).

Throughout the preceding discussion, the government has been the buyer. Tax problems may also arise where the government is the seller, although there have been few decisions in this area. In one case, the Texas use tax statute required sellers to obtain a permit, collect the tax, and remit collections to the State Comptroller. The Comptroller General held that the state could not impose these requirements on the disposal of surplus federal property by the General Services Administration under the Federal Property and Administrative Services Act of 1949. 41 **Comp. Gen.** 668 (1962). The theory is that a state may not infringe on the right of the federal government to conduct its official activities free from state control or regulation.

(2) Public utilities

As with any other occupant of a building, the federal government is a consumer of services from public utilities. A utility bill may include various elements in addition to the basic charge for services used. Some of these elements may be taxes which the government may properly pay; others may be taxes from which the government is immune; still others may not be taxes at all.

In determining whether appropriated funds maybe used to pay taxes appearing on or included in utility bills, the principles described above apply—such as the distinction between vendor and vendee taxes—with one additional feature based on the nature of the rate-fixing process. Utility rates are usually set by the state legislature or by a public service commission to which the power , has been delegated. Rates established through this process apply to federal and nonfederal users alike. Unless they are unreasonable or discriminatory, federal agencies are expected to pay them. E.g., 27 **Comp. Gen.** 580 (1948).

For example, state sales taxes which qualify as vendor taxes and which have been factored into the utility rates through the applicable rate-setting process are payable by the government. 45 **Comp. Gen.** 192 (1965); B-134602, December 26, 1957; B-123206, June 30,

1955. The same result applies with respect to a vendor sales tax on the utility which is billed separately to the agency. B-211093, May 10, 1983.

Business privilege or gross receipts taxes are frequently imposed on public utilities. When this is done by law and the utility company is permitted to treat the tax as an operating expense and incorporate the amount of tax into its basic billing rate, a constitutionally permissible vendor tax is created. B-144504, June 9, 1967; B-148667, May 15, 1962. This is true even where the pass-through is required by a state utility regulatory body, as long as the tax itself, based on the statute that established it, qualifies as a “vendor tax.” The Comptroller General applied this principle in 61 Comp. Gen. 257 (1982), concluding that Veterans Administration Medical Centers were liable for that portion of their electric bills attributable to a rate increase reflecting the Alabama public utility license tax. The Justice Department considered the same situation and reached the same result, 6 Op. Off. Legal Counsel 273 (1982).

Where the business privilege tax is a valid vendor tax, it can be paid even if it is attributed as a tax and stated on the utility bill as a separate item. 32 Comp. Gen. 577 (1953); B-171756, February 22, 1971; B-144504, June 30, 1970; B-225123, May 1, 1987 (non-decision letter).¹²² The theory is that the “tax,” even though separately stated, is, in effect, an authorized rate increase designed to recover the revenue necessary to permit the utility to maintain the allowed rate of return on its investment, See B-167999, December 31, 1969. However, payment may not be approved where the taxes collected only from the federal government or where the collection of the tax would have a discriminatory effect on federal activities. B-159685, April 7, 1967.

Another charge occasionally encountered is a “lifeline” surcharge. This is a surcharge designed to subsidize the providing of reduced-cost utility service to low-income or elderly customers. GAO regards a lifeline surcharge as not a tax at all, but merely part of the

¹²² Another type of “tax” appearing on utility bills is a charge for 9-1-1 emergency service, discussed in Section C.7.c of this chapter.

authorized rate, and therefore properly payable by federal users. 67 Comp. Gen. 220 (1988); B-189149, September 7, 1977.

c. Property-Related Taxes

Federal land located within state borders is also exempt from state property taxes on the same constitutional theory discussed above. E.g., Clallam County v. United States, 263 U.S. 341 (1923); Van Brocklin v. Tennessee, 117 U.S. 151 (1886). However, as with the contractor cases previously discussed, the immunity is generally limited to attempts to levy the tax directly against the federal government. Thus, the Supreme Court has sustained a state property tax on federally-owned land leased to a private party for the conduct of for-profit activities (United States v. City of Detroit, 355 U.S. 466 (1958)), and on the “possessor interest” of Forest Service employees living in government-owned housing (United States v. County of Fresno, 429 U.S. 452 (1977)).¹²³

For loss of income due to the presence of large federal holdings of real property within a particular district or state, Congress may compensate local taxing authorities by means of payments in lieu of taxes. See B-149803, May 15, 1972. The rationale is that Congress chooses specifically to compensate a local taxing authority for the hardship which the exemption of federal lands from property tax works on the local government’s activities.¹²⁴ Payments may also be made pursuant to specific legislation setting up a new federal enclave. See B-145801, September 20, 1961.

Just as states and their political subdivisions are barred from levying general property taxes against federal property, they are likewise prevented from making assessments against federal land for local improvements. Such assessments are typically made for

¹²³A tax lien which attaches to property before title passes to the government not a tax on government property. The lien is a valid encumbrance against the property, although it is unenforceable as long as the government holds the property. United States v. Alabama, 313 U.S. 274 (1941). In a series of early decisions, however, GAO advised that the acquiring agency could use its appropriations to extinguish the lien if administratively determined to be in the best interests of the government, for example, to clear title prior to disposition of the property. B-46548, January 26, 1945; 541677, May 8, 1944; B-28443, December 9, 1943; B-21817, February 12, 1942.

¹²⁴The most important statute in this area is the Payments in Lieu of Taxes Act, 31 U.S.C. §§ 6901-6907, which authorizes the Secretary of the Interior to make payments, pursuant to statutory criteria, to units of local government in which “entitlement land” is located. GAO has issued a number of decisions and opinions construing the PILT statute. See, e.g., 65 Comp. Gen. 849 (1986); 58 Comp. Gen. 19 (1978); B-212145, October 2, 1984; B-214267, August 28, 1984.

paving or repairing streets or sidewalks, installing sewers, and similar local governmental services. An assessment for local improvements is an involuntary exaction in the nature of a tax, Hagar v. Reclamation District No. 108, 111 U.S. 701,707 (1884). As such, the decisions have uniformly held that the United States may not be required to pay. E.g., National Railroad Passenger Corp. v. Pennsylvania Public Utility Commission, 665 F. Supp.402 (E.D. Pa. 1987);¹²⁵ United States v. Harford County, 572 F. Supp. 239 (D. Md. 1983); 27 Comp. Gen. 20 (1947); 18 Comp. Gen. 562 (1938); B-226503, September 24, 1987; B-184146, August 20, 1975; B-160936, March 13, 1967; B-155274, October 7, 1964; B-150207, November 8, 1962. Arty assessment which is related to a fixed dollar amount multiplied by the number of front feet of the government's property, or computed on a square footage basis, is not payable on the grounds that it is a tax. E.g., Harford County; B-168287, February 12, 1970; B-159084, May 11, 1966; B-178517-0. M., April 22, 1974.

It makes no difference whether the land on which the improvements are to be made is federally-owned or state-owned. B-157435, October 6, 1965. See also 32 Comp. Gen. 296 (1952). Also, the determination of whether a particular assessment can be paid does not depend on the taxing authority's characterization of the payment. Thus, payment has been denied where the assessment was termed a "benefit assessment" (B-168287, November 9, 1970), a "systems development charge" (B-183094, May 27, 1975), or an "invoice for services" (49 Comp. Gen. 72 (1969)). Regardless of the designation, if the charge is computed on a footage basis or in the same manner as the taxes levied against other property owners, it cannot be paid.

However, even though an assessment may not be paid as such, a state or municipality may be compensated on a quantum meruit basis for the fair and reasonable value of the services actually received by the United States. United States v. Harford County; 49 Comp. Gen. 72 (1969); 18 Comp. Gen. 562 (1938); B-226503, September 24, 1987; B-168287, November 9, 1970.

¹²⁵The cited case deals with Amtrak. Whether Amtrak should be regarded as an instrumentality of the United States for purposes of tax immunity was not necessary to decide, however, as Amtrak's enabling legislation specifically provides for tax immunity. 665 F. Supp. at 411;45 U.S.C. § 546b.

The method of computation is the primary means of determining whether the charge represents the fair value of services received. Thus, in order to be paid on a quantum meruit basis, the claimant must show how it arrived at the amount claimed. An unsupported statement that the sum represents the fair and reasonable value of the services rendered is not sufficient. Although the claim need not be presented on a strict “quantity of use” basis, only when it is clearly shown that the specified method of computation is based purely upon the value of the particular services rendered to the government may any payment be made. B-177325, November 27, 1972; B-168287-O. M., July 28, 1972; B-168287-O. M., March 29, 1971. However, where a precise determination of the benefit received by the government cannot reasonably be made, payment has been allowed where the method of computation used did not appear unreasonable under the circumstances. B-168287-O. M., July 28, 1972. In any event, the quantum meruit payment cannot exceed the amount of the statutory assessment. B-168287-O. M., May 15, 1973.

Applying the above principles, the Comptroller General concluded in one case that a special assessment based on the federal property’s ratable share of the cost of necessary repairs and improvements to a septic sewage system could be paid on a quantum meruit basis. B-177325, November 27, 1972. However, in B-179618, November 13, 1973, an assessment against an Air Force base for maintenance of a drainage ditch based on the “benefit” to the land could not be paid since there was no indication of how the amount of the “benefit” had been computed and no showing that the assessment represented the fair and reasonable value of the services rendered to the government. Similarly, a municipal assessment based on such factors as land area, structure value, and size was found to be a tax and therefore not payable in B-183094, May 27, 1975.

Using the same analysis, GAO advised the Air Force in B-207695, “June 13, 1983, that it was not required to pay fees for well registration and withdrawal of groundwater which a state had attempted to impose on the Air Force’s right to draw water from wells on federal property. There was no showing that the fees bore any relationship to any services provided to the government. However, fees for permits or certificates for the right to use state-owned water represent charges for services rendered rather than taxes and may therefore be paid. 5 Comp. Gen. 413 (1925); 1 Comp. Gen. 560

(1922), Similarly, one-time connection fees for hooking up federal facilities, whether new construction or improvements, to local sewer systems are payable as authorized service charges. 39 Comp. Gen. 363 (1959); 9 Comp. Gen. 41 (1929). Where the hook-up is incident to new construction, the fee is chargeable to the construction appropriation. 19 Comp. Gen. 778 (1940).

The principle that a state or municipality maybe paid on a quantum meruit basis for services actually rendered is another way of saying that a "service charge" for services rendered is not a tax. E.g., 49 Comp. Gen. 72 (1969). However, this has no relevance to services which the governmental unit is required by law to provide, such as police or firefighting services. (Section C.7, this chapter.)

Where a local government finances major improvements, such as sewers, by means of issuing revenue bonds, and levies a surcharge on its service charge to liquidate the bonded indebtedness, a federal user of the sewer service under a contractual obligation to pay the service charge may also pay the surcharge. 42 Comp. Gen. 653 (1963). However, GAO has questioned the payment of bond interest where that interest was attributable to the municipality y's share of initial construction costs. B-180221 -O. M., March 19, 1974.

The assessments we have been discussing thus far are assessments levied by governmental entities, Tax immunity would not apply to assessments levied by private entities, in which case the government's liability is determined by application of traditional concepts of contract and property law, subject of course to any applicable federal statutory provisions. For example, in B-210361, August 30, 1983, GAO advised that the Forest Service was liable for assessments levied by a private homeowners' association on a parcel the Forest Service had acquired by donation. The obligation to pay the assessments amounted to a covenant running with the land, and the United States became contractually bound by accepting the deed with notice of the covenant

The principles we have discussed in the context of real property apply equally to personal property. E.g., 27 Comp. Gen. 273 (1947) (no legal basis to pay state registration fee on government-owned outboard motors). Several earlier decisions applied the government's immunity in the context of state motor vehicle license plate and title registration fees. 21 Comp. Gen. 769 (1942); 4 Comp. Gen. 412 (1924); 1 Comp. Gen. 150 (1921); 15 Comp. Dec. 231 (1908).

(Most government-owned vehicles today would have government plates.)

A final type of property-related state tax we may briefly mention is the so-called “death tax.” Death taxes are of two types, estate taxes and inheritance taxes. An estate tax is based on the value of the taxable estate in its entirety; an inheritance tax is based on the value of taxable property passing to a particular beneficiary. Property given to the United States by testamentary disposition may be subject to a state inheritance tax. The Supreme Court has held that a state may impose an inheritance tax on property bequeathed to the United States, and indeed may completely prohibit testamentary gifts to the United States by its domiciliaries. Death taxes on gifts to the United States do not involve federal immunity because the taxes are imposed before the property reaches the hands of the beneficiary. (See also Chapter 6, section on donations to the government, which includes citations to the leading cases.)

There may be situations, although they should be uncommon, in which it may be desirable to pay a state death tax from appropriated funds. In an early case, the Comptroller of the Treasury advised the Smithsonian Institution that it could use its appropriation for “preservation of collections” to pay a state inheritance tax on a legacy bequeathed to the Smithsonian. 26 Comp. Dec. 480 (1919). This type of situation could arise, for example, if a decedent bequeathed specific real or personal property to the United States and the estate contained insufficient assets to pay an applicable death tax without liquidating the property.

d. Taxes Paid by Federal Employees

Another way in which the federal government sometimes pays a state or local tax is by way of reimbursement to a federal employee who incurred the tax during the performance of official business or other activities which qualify for reimbursement. For example, a member of the Armed Services was entitled to reimbursement under a government-supported health insurance plan for the full amount of a doctor’s bill, including the amount which was attributable to New Mexico gross receipts tax, a valid vendor tax. B-130520, November 30, 1970. See also 36 Comp. Gen. 681 (1957) (state gasoline tax); B-203151, September 8, 1981 (local sales tax on rental vehicle); B-160040, July 13, 1976 (certain intangible property taxes reimbursable as relocation expenses incident to transfer). Some other commonly encountered situations are described below.

(1) Parking taxes

Questions here arise in two contexts—parking meter fees and municipal taxes on parking in parking lots or garages.

The rule for parking meters on public streets is: Unless and until there is a contrary judicial determination, appropriated funds may be used to reimburse a federal employee for street parking meter fees incurred while driving a government-owned vehicle on official business, except (1) where the fee would impose an impermissible burden on the performance of a federal function, or (2) where the particular fee has been held by a court to be a tax or a revenue raising measure (as opposed to a traffic regulation device), 46 Comp. Gen. 624 (1967).¹²⁶

To the extent a parking meter fee maybe held to be a tax under the above rule, it can be imposed neither against the government nor against the employee-driver as the government's agent. 41 Comp. Gen. 328 (1961). However, even where the fee is a tax, if the car is unmarked and being used in investigative work, the fee can be reimbursed as a necessary cost of the investigation. 38 Comp. Gen. 258 (1958).

The two preceding paragraphs apply to government-owned vehicles. If the employee is using a privately-owned vehicle on official business, 5 U.S.C.s 5704 expressly authorizes reimbursement of parking fees. 41 Comp. Gen. 328 (1961).

Parking meter fees in a municipally owned off-street parking lot are not viewed as taxes for purposes of the rule stated in 46 Comp. Gen. 624. These fees may therefore be reimbursed whether the employee is driving a government-owned or privately-owned vehicle. 44 Comp. Gen. 578 (1965).

A local tax on parking in a parking lot or garage cannot be imposed on a government-owned vehicle on official business. 51 Comp. Gen. 367 (1971). However, if the amount of the taxis so small as not to justify issuance of a tax exemption certificate, the employee may be reimbursed notwithstanding the government's immunity. 52 Comp. Gen. 83 (1972). The rationale is that the administrative cost

¹²⁶46 Comp. Gen. 624 overruled several earlier decisions and modified several others. The text attempts to reflect those elements of the modified decisions which remain valid.

of asserting the immunity by using the certificate would be prohibitive for very small amounts. As with the parking meter fees, an employee using a privately-owned vehicle on official business may be reimbursed under 5 U.S.C. § 5704 for local taxes levied on parking in lots or garages. 51 Comp. Gen. 367 (1971).

To sum up the rules on parking taxes and fees:

1. Privately-owned vehicles on official business: Employee may be reimbursed for meter fees either on a street or in a municipal lot, and for taxes on parking in a lot or garage.
2. Government-owned vehicle, metered parking: Employee may be reimbursed for meter fees on a public street unless one of the exceptions in 46 Comp. Gen. 624 applies, and for meter fees in a municipal lot.
3. Government-owned vehicle, unmetered parking: Employee may be reimbursed for local taxes on parking in a lot or garage if the amount is too small for the issuance of a tax exemption certificate, at least where the taxing entity requires the certificate as evidence of tax-exempt status.

(2) Hotel and meal taxes

A frequent occurrence is the addition of a tax to the price of lodging secured by government employees traveling on official business. When a federal employee rents a room directly from the proprietor, the employee becomes personally liable for the amount of the rental, including tax. The government is not a party to the transaction and the tax is therefore not viewed as a tax on the government. Accordingly, the employee must pay the tax and cannot assert the government's immunity from local taxes. The fact that the government may reimburse the full rental price as part of the employee's travel expenses does not transform the tax into a tax on the government. 55 Comp. Gen. 1278 (1976); B-172621 -O. M., August 10, 1976. If local law exempts federal employees from the tax, the employees should use tax exemption certificates to claim the exemption. See B-172621, April 4, 1973 (non-decision letter).

However, if the government rents the rooms directly, that is, if there is a direct contractual relationship between the United States and a hotel or motel for the rental of rooms to federal employees or

others, the government is entitled to assert its immunity from local taxes. 55 Comp.Gen. 1278 (1976). The Justice Department reached the same result in 5 Op. Off. Legal Counsel 348 (1981), holding that the Office of the Vice President was not required to pay local hotel taxes when reserving a block of rooms for an official trip.¹²⁷

Similar results would occur where a tax was imposed on commercial rental of a vehicle or any other travel-related activity such as meals or other transportation. B-167150, April 3, 1972. On the theory that the contract defines the limits of liability, however, a meal ticket good for the purchase of food up to a maximum dollar amount may include amounts attributable to a valid vendor tax up to the specified dollar limit. In the event the dollar limit were exceeded, however, the remainder of the expense would be personal, including the extra amounts for tax. 41 Comp.Gen. 719 (1962).

(3) Tolls

As anyone who drives in certain areas of the United States well knows, state authorities frequently charge tolls for the use of state-owned highways, bridges, or tunnels. It has long been established that a toll is not a tax, but is a charge for the use of the road, bridge, or tunnel. *Sands v. Manistee River Improvement Co.*, 123 U.S. 288, 294 (1887). Thus, tolls do not raise questions of federal tax immunity and are properly payable where necessarily incurred in the performance of official business. 9 Comp.Gen. 41, 42 (1929); 4 Comp.Gen. 366 (1924); 24 Comp. Dec. 45 (1917). Statutory authority now exists for the reimbursement of tolls incurred by government employees on official travel. 5 U.S.C. § 5704(b); 35 Comp.Gen. 92 (1955).

GAO has also held that appropriated funds may be used to purchase annual toll road permits where justified by anticipated usage. Such purchase does not violate the statutory prohibition on advance payments. 36 Comp.Gen. 829 (1957). Similarly, if an employee who frequently uses a toll road on official business purchases an annual permit for his or her own automobile, the agency may reimburse the toll charges that would otherwise have been incurred, on a per-

¹²⁷The Justice Department opinion notes that even where an individual employee is procuring the accommodation, the government could, if it wanted to change existing practice, compel recognition of federal immunity. 5 Op. Off. Legal Counsel at 349n.2.

trip basis, not to exceed the cost of the annual permit. 34 Comp. Gen. 556 (1955).

Some of the early decisions state that a toll may not be paid if the particular highway, bridge, or tunnel was constructed with the aid of federal funds. 9 Comp. Gen. at 42; 24 Comp. Dec. at 48. The statement in 24 Comp. Dec. was based on legislation which authorized federal financial assistance but also prohibited the charging of "tolls of all kinds." *Id.* at 47. The Federal-Aid Highway Act includes an almost identical prohibition (23 U.S.C. § 301), but also authorizes tolls in certain circumstances (23 U.S.C. § 129). The editors have found no discussion of this issue under the modern legislation, nor have we found any guidance as to how, apart from the interstate highway system, an employee is supposed to know which items have received federal aid. Be that as it may, it would seem prudent to apply the concept of 52 Comp. Gen. 83, discussed above under parking taxes, in conjunction with the reimbursement authority of 5 U.S.C. § 5704.

(4) State and local income taxes

Payment of state and local income taxes is basically the responsibility of the individual employee. In the absence of statutory authority, state or local withholding requirements would not apply to the federal government because a state may not "regulate" the governmental activities of the United States. 27 Comp. Gen. 372 (1948). The requisite statutory authority now exists. For the District of Columbia and any other state, city, or county which provides for the collection of income tax by withholding, the Secretary of the Treasury must enter into an agreement with the applicable jurisdiction to withhold the tax from federal employees, 5 U.S.C. §§ 5516, 5517, 5520.

(5) Possessor interest taxes

This is essentially a type of property tax. An example is the California tax on "possessor interests" in improvements on tax-exempt land. The Supreme Court upheld the validity of the tax in a suit brought by federal employees required to live in housing owned by the Forest Service. The Court found that the tax was nondiscriminatory and that its legal incidence falls upon the employees and not the United States. United States v. County of Fresno, 429 U.S. 452 (1977). See also B-191232, June 20, 1978.

Where the government provides quarters for employees and collects rent under 5 U.S.C. § 5911, the rental rate maybe adjusted to discount an applicable possessory interest tax, but the adjustment must be approved by the Office of Management and Budget and may not be retroactive. B-194420, October 15, 1981.

(6) Occupational license fees

Occupational license fees or employment taxes are fees imposed by a state or local jurisdiction, usually on members of a particular occupation or profession, such as doctors, as a prerequisite to being able to work or practice in that jurisdiction. Federal employees may or may not be exempted. Apart from the question of a state's authority to impose such fees on federal employees performing federal functions, even if the fee is valid, it is considered a personal expense and not reimbursable from appropriated funds. For further discussion and case citations, see Sections C.13.d (Personal Qualification Expenses) and C.12.b (Membership Fees—Attorneys) of this chapter. As in the case of state and local income taxes, state or local withholding requirements for employment taxes do not apply to the federal government absent statutory authority. 28 Comp. Gen. 101 (1948). Statutory authority now exists in 5 U.S.C. §5520 where withholding is provided by city or county ordinance.

e. Refund and Recovery of Tax Improperly Paid

GAO has held that improperly paid taxes may be recovered by setoff against other moneys payable to a state. B-150228, August 5, 1973; B-100300, March 12, 1965. Setoff maybe asserted against any money payable to any other agency of the state, whether or not related to the source of the erroneous payments. B-154778, August 6, 1964; B-154113, June 24, 1964; B-150228, August 5, 1963. With the enactment of the Debt Collection Act of 1982, the question of using offset against state or local governments has become much more controversial and is explored more fully in Chapter 13. Also, as discussed in Chapter 10, setoff against advances under a federal grant program may be improper in some instances.

Some states provide for refunds of certain taxes paid by the United States. In evaluating these refund provisions, it is important to determine whether the tax subject to refund is a vendor tax or a vendee tax. If the tax is a vendor tax, the United States is not constitutionally immune from payment. Thus, any right to a refund is purely a creature of state law and the United States must comply with any conditions and limitations imposed by state law.

B-100300, June 28, 1965. The fact that state law may permit refunds to the United States as the ultimate bearer of the tax in certain situations does not transfer the legal incidence of the tax to the vendee. B-152995, January 30, 1964. See also 27 Comp.Gen. 179 (1947).

If, however, the tax is a vendee tax, the government's right to a refund is based on the Constitution and is wholly independent of state law. Therefore, in claiming a refund in this situation, the United States is not bound by restrictions in state law, such as state statutes of limitations. United States v. Michigan, 851 F.2d 803, 809-10 (6th Cir.1988); B-100300, June 28, 1965; B-154778, August 6, 1964.

If a refund mechanism is available, this would be the preferred method of recovering improperly paid taxes. 42 Comp.Gen. 593 (1963). Thus, upon the request of a state, and as long as the interests of the government will be adequately protected, setoff may be deferred pending the filing of a formal claim with the appropriate state agency. B-151095, January 2, 1964. However, if the state refuses a refund to which the United States is entitled, setoff is again, to the extent legally available, the proper remedy. 39 Comp.Gen. 816 (1960); B-162005, April 8, 1968.

Where a sales tax has been improperly paid, the vendor is little more than a collection agent for the state and the state is the ultimate beneficiary of the improper payment. Therefore, collection action should proceed against the state rather than by setoff against the vendor. 42 Comp.Gen. 179 (1962).

In the course of resolving problems over the liability of the United States to pay a particular tax, the government has entered into various arrangements with states pending the outcome of litigation. In one case, the government agreed with a state taxing authority to file tax forms without remitting any money, and to make the actual payments upon a final judicial determination in a pending test case that the tax was valid. B-160920, May 10, 1967. (The decision, after the Supreme Court upheld the validity of the tax, held that the back taxes should be paid notwithstanding expiration of the state statute of limitations.) In another case, the government negotiated an agreement with contractors whose contracts were being subjected to a questionable state sales tax, under which the General Services Administration agreed to pay the tax and the contractors

promised to refund the amounts paid if it was ultimately determined that the government's immunity applied. B-170899, November 16, 1970. See also 50 Comp. Gen. 343 (1970).

16. Telephone Services

a. Telephone Service to Private (1) The statutory prohibition Residences

A problem which existed during the early years of the 20th century was an apparent tendency on the part of government officials to have telephones installed in their homes at government expense. See 53 Comp. Gen. 195, 197 (1973); 19 Comp. Dec. 350,352 (1912). It must be remembered that telephones were much more of a novelty in those days; we were still decades from the point where almost every American home has a private telephone. In any event, Congress enacted legislation in 1912 to prevent the use of public funds for private telephone service for government officials. The portion of the statute we are concerned with here, 31 U.S.C. § 1348(a)(1), provides:

“Except as provided in this section, appropriations are not available to install telephones in private residences or for tolls or other charges for telephone service from private residences.”

The decisions are fond of saying that the statute has, for the most part, been strictly applied. Indeed, the earlier decisions are packed with the “reflex” observations that the language of the statute is “plain and comprehensive,” the “prohibition is mandatory,” and the statute “leaves no room for the exercise of discretion on the part of the accounting officers of the Government.” E.g., 21 Comp. Gen. 997, 999 (1942). Thus, except for long-distance calls properly certified as necessary (discussed later), the rule is that charges for residential telephones (installation, connection, monthly equipment rental, and basic service charges) may not be paid from appropriated funds. As we will see, however, there are some exceptions.

(2) Funds to which the statute applies

The statute is a direct restriction on the use of appropriated funds. As such, it applies not only to direct appropriations from the Treasury but also to funds which constitute appropriated funds by operation of law. Thus, the statute applies to expenditures from the

revolving fund established by the Federal Credit Union Act since the authority to maintain a revolving fund constitutes a continuing appropriation. 35 Comp. Gen. 615, 618 (1956). Similarly, the authority to retain rentals from certain defense housing projects and to use the funds for maintenance of the housing units makes them appropriated funds and therefore subject to 31 U.S.C. § 1348(a)(1). 21 Comp. Gen. 239 (1941).

Along these same lines, the Comptroller General held in 4 Comp. Gen. 19 (1924) that the Alaska Railroad could not designate residential telephones as “operating expenses” and pay for them from revenues derived from operating the railroad. The Comptroller pointed out in that case that the authority to do “all necessary things” to accomplish a statutory purpose confers legal discretion, not unlimited discretion, and the authority is therefore subject to statutory limitations such as 31 U.S.C. 51348. *Id.* at 20. The same point was made in 35 Comp. Gen. at 618, and in B-130288, February 27, 1957.

(3) What is a private residence?

Simply stated, a private residence is where you live as opposed to where you work, assuming the two can be distinguished. Cases where the two cannot be distinguished are discussed later. For purposes of 31 U.S.C. § 1348, it makes no difference that the residence is government-owned or on public land. 35 Comp. Gen. 28 (1955); 7 Comp. Gen. 651 (1928); 19 Comp. Dec. 198 (1912). The statute therefore fully applies to permanent residential quarters on a military installation. 21 Comp. Gen. 997 (1942); B-61938, September 8, 1950; A-99355, January 11, 1939. It does not apply, however, to tents or other temporary structures on a military post which are not available for family occupancy, notwithstanding that military personnel may use them as temporary sleeping quarters. 21 Comp. Gen. 905 (1942).

In 41 Comp. Gen. 190 (1961), the statutory prohibition was held not applicable to the installation of telephones in hotel rooms occupied by officials on temporary duty where necessitated by the demands of the mission. (One would have thought that all hotel rooms were already equipped with telephones by 1961.)

An early decision stated that “private” means set apart for the exclusive personal use of any one person or family. 19 Comp. Dec.

198, 199 (1912). Following this approach, the Comptroller General held that appropriated funds could be used to install and operate local-service telephones in Army barracks occupied by large numbers of enlisted personnel. 53 Comp.Gen. 195 (1973). An earlier decision, 35 Comp.Gen. 28 (1955), applied the prohibition to several government-owned residences, one of which was used to house a number of employees. While these two cases may appear inconsistent at first glance in that the telephones in both instances would be available for the personal use of the residents, the apparent distinction is that Army appropriations are available for the welfare and recreation of military personnel so that the “personal use” aspect in the Army barracks case was not necessarily dispositive.

Since the statute uses only the term “residence,” it has been held not to prohibit service charges for a dedicated telephone line, on which a Navy-supplied fax machine was installed for official use, in the private business office of a Naval Reserve officer. B-236232, October 25, 1990.

(4) Application of the general rule

A large number of decisions has established that the prohibition applies even though the telephones are to be extensively used in the transaction of public business and even though they maybe desirable or necessary from an official standpoint. 59 Comp.Gen. 723, 724 (1980) and cases cited therein. In this respect, there is no discretion involved.

Relevant factors are whether the telephone will be freely available for the employee’s personal use and whether facilities other than the employee’s residence exist for the transaction of official business. The employee’s personal desires are irrelevant. Thus, it makes no difference that the employee doesn’t want the telephone and has asked to have it removed. 33 Comp.Gen. 530 (1954); A-99355, January 11, 1939. The fact that a telephone is unlisted is also immaterial. 15 Comp.Gen. 885 (1936).

The rule is well illustrated in a 1980 decision in which the District Commander of the Seventh Coast Guard District sought to be reimbursed for a telephone installed in his residence. The Commander was in charge of the Cuban Refugee Freedom Flotilla in the Florida Straits. He was in daily contact with the various federal, state, and local agencies involved and was required to be available 24 hours a

day. Since this situation placed a burden on the Commander's immediate family by restricting their personal use of the home telephone, he had another telephone installed for official business. In view of the statutory prohibition, and since the Commander was already provided with an office by the Coast Guard, reimbursement could not be allowed. 59 Comp.Gen. 723 (1980). For an earlier decision applying the prohibition notwithstanding the need for employees to be available on a 24-hour basis, see 11 Comp.Gen. 87 (1931).

A somewhat similar situation was presented in B-130288, February 27, 1957. There, the Federal Mediation and Conciliation Service sought authority to pay for telephones in the homes of mediators stationed in cities where office accommodations were not provided. The mediators had to work out of their homes and were required to be available 24 hours a day. Applying the statutory prohibition, the Comptroller General concluded that the agency could not pay for the telephones, nor could it pay for an answering service. However, there was no reason a mediator couldn't list his private telephone number under the agency's name, and the government could pay for this listing. By doing this, the government would not be paying for personal use of the telephone.

In B-175732, May 19, 1976, it was proposed to install a telephone in the "galley" (kitchen) of the Coast Guard Commandant's home, for use by a "subsistence specialist" who worked there and presumably had no access to other telephones. The argument was that while the galley may have been part of the Commandant's private residence, it was the subsistence specialist's duty station and since he had no other office, he had to conduct government business from the galley. GAO found the proposal prohibited by 31 U.S.C. §1348(a)(1). Although the duties of the subsistence specialist—the procurement of food, supplies, and services—were official to him, they nevertheless accrued largely if not exclusively to the personal benefit of the Commandant and were not sufficient to justify an exception,

(5) Exceptions

To say that the statute is strictly applied is not to suggest that there are no exceptions.

First, there are statutory exceptions. One example is 31 U.S.C. §1348(a)(2), for residences owned or leased by the United States in foreign countries for use of the Foreign Service. Another statutory exception is 31 U.S.C. §1348(c), enacted in 1922, covering telephones deemed necessary in connection with the construction and operation of locks and dams for navigation, flood control, and related water uses, under regulations of the Secretary of the Army. Still another is 16 U.S.C. §580f, for telephones necessary for the protection of national forests.

Next, there are some nonstatutory exceptions. They fall generally into two categories. The first, dictated by common sense, involves situations where private residence and official duty station are one and the same. If the government has made available office facilities elsewhere, it is clear that a residential telephone cannot be charged to appropriated funds no matter how badly it is needed for official business purposes. E.g., 59 Comp. Gen. 723 (1980); 22 Comp. Dec. 602 (1916). However, exceptions have been recognized where a government-owned private residence was the only location available under the circumstances for the conduct of official business. E.g., 4 Comp. Gen. 891 (1925) (isolated lighthouse keeper); 19 Comp. Dec. 350 (1912) (lock tender); 19 Comp. Dec. 212 (1912) (national park superintendent).

Note that in all of these cases the combined residence/duty station was government-owned. The exception has not been extended to privately-owned residences which are also used for the conduct of official business. 26 Comp. Gen. 668 (1947); B-130288, February 27, 1957; B-219084-O. M., June 10, 1985. The theory seems to be that, in a privately-owned residence, the degree of personal use as opposed to likely official need is considered so great as to warrant a stricter prohibition since there would be no other practical way to control abuse, whereas some flexibility is afforded for government-owned residences where sufficient official use for telephones exists. 53 Comp. Gen. 195, 197-98 (1973). Cf. 68 Comp. Gen. 502 (1989).

It should also be noted that isolation alone is not sufficient to justify an exception. In 35 Comp. Gen. 28 (1955), 31 U.S.C. §1348(a)(1) was held to prohibit payment for telephones in government-owned residences of Department of Agriculture employees at a sheep experiment station. The employees claimed need for the telephones because they frequently received calls outside of normal office

hours from Washington or to notify them of unexpected visitors and shipments of perishable goods, and because they were sometimes stranded in their residences by severe blizzards. 4 Comp. Gen. 891 was distinguished because the telephone in that case was installed in a room equipped and used only as an office and was not readily available for personal use.

The second category of nonstatutory exceptions stems from the recognition that the “evil” 31 U.S.C. §1348(a)(1) is intended to address is not the physical existence of a telephone, but the potential for charging the government for personal use. Thus, a series of cases has approved exceptions where (1) there is an adequate justification of necessity for a telephone in a private residence, and (2) there are adequate safeguards to prevent abuse.

This category seems to have first developed in the context of “military necessity” and national security justifications. For example, an exception was made to permit the installation in the residence of the Pearl Harbor Fire Marshal (a civilian employee) of a telephone extension which was mechanically limited to emergency fire calls. 32 Comp. Gen. 431 (1953), modifying 32 Comp. Gen. 271 (1952). See also 21 Comp. Gen. 905 (1942). In B-128144, June 29, 1956, GAO approved a proposal to install direct telephone lines from an Air Force Command Post switchboard to the private residences of certain high level civilian and military officials to ensure communications in the event of a national emergency. Air Force regulations prohibited the use of these lines for anything but urgent official business in the event of a national emergency and authorized the recording of conversations as a safeguard against abuse.

However, a “necessity” which is little more than a matter of convenience is not enough to overcome the prohibition. For example, in A-99355, January 11, 1939, a telephone could not be maintained at government expense in the private quarters of the Officer-in-Charge on a Navy installation because several telephones were available in established offices on the station. This decision was followed in 21 Comp. Gen. 997 (1942) and 33 Comp. Gen. 530 (1954).

The prohibition applies equally to an intra-base system not connected to outside commercial trunk lines. B-61938, September 8, 1950.¹²⁸

Relying largely on B-128144,^{GAO} approved a General Services Administration proposal to install Federal Secure Telephone Service telephones in the residences of certain high level civilian and military officials certified by their agency heads as having national security responsibilities. 61 Comp. Gen. 214 (1982). The system was designed to provide a secure communications capability to permit the discussion of classified material that could not be discussed over private telephones. As in B-128144, the proposal included a number of safeguards against abuse, which ^{GAO} deemed adequate.

The concept established in the military necessity/national security cases would subsequently be applied in other contexts as well. Thus, ^{GAO} approved exceptions in the following cases:

- . Installation of telephone equipment by the Internal Revenue Service in the homes of customer “assistors” who were intermittent, part-time employees. The phones to be installed had no outcall capability and could receive calls only from IRS switching equipment. Separate lines were essential because the employees’ personal phones could not be used with the IRS equipment. B-220148, June 6, 1986.
- Installation of telephones in the homes of Internal Revenue Service criminal investigators who were authorized to work from their homes, to be used for portable computer data transmission. ^{GAO} found the agency’s justification adequate and approved the expenditure, contingent upon the establishment of adequate safeguards, such as those in 61 Comp. Gen. 214, to prevent personal use. 65 Comp. Gen. 835 (1986).
- Installation of separate telephone lines in the homes of IRS data transcribers authorized to work at home under a “flexiplace” program, again subject to the establishment of adequate safeguards. 68 Comp. Gen. 502 (1989).

¹²⁸The Navy now has statutory authority to use i@ appropriations to pay for the installation and use (except for personal long-distance calls) of extension telephones connecting public quarters occupied by naval personnel (but not civilian employees) with station switchboards. 10 U.S.C. § 7576.

- Installation of telephones in the homes of certain high level Nuclear Regulatory Commission officials to assure immediate communication capability in the event of a nuclear accident. The phones would be capable of dialing only internal NRC numbers, with any other calls to be placed through the NRC operator. B-223837, January 23, 1987.

Some of the cases noted earlier in which the prohibition was applied, such as 59 Comp. Gen. 723, also presented strong justifications. The primary feature distinguishing these cases from the exceptions described above is the existence in the latter group of adequate safeguards against abuse.

Finally, a couple of cases have dealt with payment for telephone services during periods of non-occupancy. In order to ensure continuous service, the government secures telephone service for the residence of the Air Deputy for the Allied Forces Northern Europe in Norway by long-term lease with the Norwegian Telephone Company. Normally, the Air Deputy pays the charges. The question presented in 60 Comp. Gen. 490 (1981) was who should pay the charges accruing during a vacancy in the position. The Comptroller General held that since the quarters were not the private residence of either the outgoing or the incoming Air Deputy during the period of vacancy, no public official received the benefit of the service during that period. Therefore, payment from appropriated funds would not thwart the statutory purpose.

The decision distinguished an earlier case, 11 Comp. Gen. 365 (1932), denying payment for telephone service to the residence of the US. Ambassador to Mexico during a period when the position was vacant. In the 1932 case, the service had been retained during the interim period mainly through inadvertence. In 60 Comp. Gen. 490, on the other hand, retention of the service was necessary to avoid delays in reinstallation when the new Air Deputy moved in. The decision did note, however, that except in limited situations of public necessity such as the one involved, telephone service should ordinarily be cancelled during periods of non-occupancy.

b. Long-Distance Calls

(1) Residential telephones

“Appropriations of an agency are available to pay charges for a long-distance call if required for official business and the voucher to pay for the call is sworn to by the head of the agency. Appropriations of an executive agency are

available only if the head of the agency also certifies that the call is necessary in the interest of the Government.” 31 U. SC. §1348(b).

Note that the statute requires two different things. As a practical matter, the requirement that the voucher be “sworn to” by the agency head is met by the normal certification of the payment voucher by an authorized certifying officer. However, the official business certification prescribed in the second sentence, further described under “Government telephones” below, is a separate requirement.

In any event, the import of section 1348(b) is that, if properly certified as necessary, a long-distance call made from an employee’s personal telephone can be paid by the employing agency. Presumably, although we have found no cases, the same principle would apply to a call made from a public pay phone and billed to the employee, or to a call made from any other residential phone.

Calls billed on a message unit basis are regarded as local calls. B-75124, May 10, 1948; A-13067, April 30, 1940; A-13067, June 17, 1939. Thus, multi-message unit charges are not reimbursable even if incurred on official business. This is true regardless of whether the calls are dialed directly or placed through an operator. 35 Comp. Gen. 615 (1956); B-126760, August 21, 1972.

Normally, the original itemized bill from the telephone company is required in order to obtain reimbursement. However, in one case where the agency lost the original invoice and the telephone company was unable to furnish a copy of the original itemized bill, a letter from the telephone company indicating the exact amount representing long-distance toll charges was held acceptable as the best evidence obtainable. 32 Comp. Gen. 432 (1953).

In B-149048, July 18, 1962, GAO evaluated a proposed Department of Justice regulation which would have required Federal Marshals to pay the cost of long-distance telephone calls from their homes to their offices on evenings and weekends. The Department felt that a marshal’s choice not to live in the city of his headquarters was a matter of personal convenience and therefore the cost of communication should be a personal expense. Since there was no requirement for marshals to live near their work site, and since statutory authority existed to reimburse long-distance calls necessary for

official business, GAO recommended against the proposed regulation.

(2) Government telephones

The provisions of 31 U.S.C. § 1348(b), quoted above, apply to government as well as residential telephones. The official business certification requirement is particularly significant in the context of government telephones. An employee who wants reimbursement for a long-distance call placed from his or her home must present the bill to the agency and establish that the call was necessary for official business. Certification should thus be a simple matter, at least in most cases. Long-distance calls are routine occurrences on government telephones, however, and for the most part the agency cannot determine from the bill itself which calls are business and which are personal.

The cost of a call is a factor to be considered in determining whether the call was necessary. B-149048, July 18, 1962. The administrative approval of a travel voucher, including long-distance telephone calls, will satisfy 31 U.S.C. § 1348(b) and separate certification is not required. 56 Comp. Gen. 28 (1976). A certifying officer will not be liable for improperly certified long-distance calls as long as the "official business certification" was made by the agency head or an agency official to whom the authority has been specifically delegated. *Id.*

The certification can be a simple statement such as:

"Pursuant to 31 U.S.C. § 1348(b), I certify that the use of the telephone for the official long-distance calls listed herein was necessary in the interest of the government." (Adapted from 18 Comp. Gen. 1017 (1939).)

Agencies should maintain documentation of the officials authorized to make the certification, GAO, Policy and Procedures Manual for "Guidance of Federal Agencies, title 7, Appendix IV (1990). Statements, such as that in 18 Comp. Gen. 1017, that copies of the documentation should be submitted to GAO are obsolete and should be disregarded.

As noted above, calls billed on a message unit basis are regarded as local calls, Therefore, message unit calls do not have to be certified

under 31 U.S.C. §1348(b). See cases cited under “Residential telephones” above. In addition, calls made using the Federal Telecommunications System (FTS) do not have to be certified since the flat rate charge to agencies under FTS is a rental payment for the lease of the lines rather than a payment for long-distance tolls within the meaning of 31 U.S.C. §1348(b). 43 Comp. Gen. 163 (1963).¹²⁹

In 57 Comp. Gen. 321 (1978), the Internal Revenue Service asked how to apply the certification requirement to its Hartford, Connecticut office, where the telephone company did not use a message unit system but rather listed and billed all calls separately as toll calls. The Comptroller General pointed out that all calls billed as long-distance calls must be certified under 31 U.S.C. §1348(b). However, certification for “short haul” toll calls may be based on statistical sampling. The sampling procedure must include a large enough number of calls to assure probable accuracy. The decision contains further guidelines on establishing an adequate statistical sampling system.

A few years later, GAO took the logical next step, determined that there was no reason to distinguish between “short haul” and other toll calls for statistical sampling purposes, and advised that the official business certification requirement of 31 U.S.C. §1348(b) could generally be satisfied through an appropriate statistical sampling system. 63 Comp. Gen. 241 (1984).

What do you do if the volume of calls is not large enough to make statistical sampling feasible? GAO addressed this question in 65 Comp. Gen. 19 (1985). In that case, the Nuclear Regulatory Commission proposed to base certification on an annually-adjusted percentage estimate reflecting past experience. The NRC would pay this percentage immediately to minimize Prompt Payment Act penalties, pending completion of internal verification. GAO approved the proposal, but cautioned that the person making the certification must have reasonable assurance that the verification process provides a high degree of accuracy.

¹²⁹If an agency withdraws from the FTS system, the General services Administration is authorized to charge that agency with direct costs associated with the termination, and is not required to assess those costs among remaining users. 69 Comp. Gen. 65 (1989). This authority was not affected by the 1987 amendment to 40 U.S.C. § 757 which merged the former Federal Telecommunications Fund into the newly established Information Technology Fund, 70 Comp. Gen. (B-231044.3, February 6, 1991) (Army and Air Force Exchange Service); 70 Comp. Gen. (B-231044.2, February 6, 1991) (Tennessee Valley Authority); B-238181, January 9, 1991 (National Trust for Historic Preservation).

The 1985 decision emphasized the distinction between a certifying officer's certification of a payment voucher and the "administrative certification" required by 31 U.S.C. §1348(b), which is not a certification for payment even if it appears on the payment voucher, and reiterated the point made in 56 Comp. Gen. 29 that a certifying officer may rely on the "official business certification" without risking personal liability for improper payments. 65 Comp. Gen. at 20-21.

Several cases have dealt with the government's liability to a telephone company for calls placed in violation of 31 U.S.C. §1348(b). A contract for telephone services must be viewed as having been made subject to 31 U.S.C. §1348(b), and no authority exists to waive the statutory requirements. Thus, where the agency cannot make the required certification, it cannot pay that portion of the bill unless it first collects from the individual(s) responsible for the unauthorized calls. B-172155, August 13, 1971; B-165102, September 10, 1968; B-164699, July 8, 1968; B-90487, November 29, 1949; B-36190, August 12, 1943.

To illustrate, in B-172155, August 13, 1971, an airman had applied for telephone service in a barracks and was assigned a special billing identification number. Another airman used the telephone and special billing number without permission and made several unauthorized long-distance calls. Since the statute amounts to a legislative limitation on an agency's contracting authority, the Air Force could not use appropriated funds to pay the telephone company for the unauthorized calls.

Questions also arise under 31 U.S.C. § 1348 concerning telephone installation and use charges incident to travel, temporary duty, or relocation. See, e.g., 68 Comp. Gen. 307 (1989) (government may pay installation and reinstallation charges where employee is required to temporarily vacate government-furnished residence through government action over which employee has no control); 56 Comp. Gen. 767 (1977) (same result with respect to relocation of mobile home required by government); 44 Comp. Gen. 595 (1965); B-196549, January 31, 1980. Further coverage of these areas may be found in GAO's Personnel Law Manuals.

c. Telephones in Automobiles

If having your own personal telephone in your home was the status symbol of the early 1900's, car phones appear well on their way to becoming the status symbol of the 1990's. There is at the present

time very little case law in this area, and no government-wide statutory guidance.

In a 1988 case, B-229406, December 9, 1988, an agency official used his own funds to purchase a cellular telephone and have it installed in his personal automobile. GAO considered the relevance of both 31 U.S.C. § 1348(a) and § 1348(b). With respect to § 1348(a), the simple fact is that the statute addresses residences, not automobiles. Concluding that “section 1348 does not apply to cellular phones located in private automobiles,” GAO advised that the agency could reimburse local business calls as long as there were adequate safeguards to prevent abuse. The safeguards existed in this case because all local calls were individually itemized on a monthly basis. The agency could also reimburse necessary long-distance calls provided it makes the certification required by section 1348(b). The decision cautioned, however, that “agency heads should strictly scrutinize automobile telephone calls before certifying them for reimbursement,” to ensure that the most economical means of communication are being used.

With respect to the purchase price of the phone itself, the decision found the agency’s appropriations unavailable. However, it was clear in that case that the official intended the phone to be his own property. What about purchase and installation of a car phone that is to remain the property of the government? An early decision held that appropriated funds were not available to install radio equipment in a private automobile even though the equipment was to remain government-owned. 15 Comp. Gen. 260 (1935). Whether this decision can withstand B-229406 is open to question. It is certainly possible to argue that the rationale of the cases recognizing exceptions in the case of residences, where there is a statutory prohibition, should apply as well to automobiles, where there is no comparable statutory prohibition. Under this approach, the answer would depend on the administrative justification and the existence of adequate safeguards. In any event, these issues must await future resolution.

GAO has also considered the purchase of cellular telephones for use by Members of the Senate and concluded that the expenditure is authorized from the Senate’s contingent fund. B-227763, September 17, 1987; B-186877, August 12, 1976. The 1976 opinion took a negative view of the question from the policy perspective, however, and suggested that more specific legislative authority would be

appropriate. This was done and there is now express statutory authority to use the contingent fund of the Senate to provide telecommunications services and equipment. 2 U.S.C. §§ 58(a)(1) and 58a.