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PRINCIPLES OF FEDERAL APPROPRIATIONS LAW

Second Edition

Volume IV

G A O

Accountability * Integrity * Reliability

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Foreword

Volume IV completes, in substance, the second edition of the Principles of Federal Appropriations Law. It covers goods and services, real property, boards and commissions, nonappropriated fund instrumentalities, corporations, and trust funds. Later this year, we will publish our final volume in this second edition, Volume V. Volume V will contain a comprehensive index and tables of authorities.

Later in this volume, a memoriam notes the contributions made to this project by Robert Centola. We also wish to recognize Valerie Barnes, Bridget Beverly, Edda Emmanuelli-Perez, Joyce Harper, Karen Holliday, Gary Kepplinger, Lydia Koeller, Neill Martin-Rolsky, Nancy Mufti, Wanda Okoro, and Barbara Timmerman, who also made major contributions to the production of volumes IV and V.

Finally, we thank our readers for their support of the preceding volumes and trust that Principles of Federal Appropriations Law continues to serve as a useful reference.

Anthony Gamboa
General Counsel

March 2001

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In Memoriam: Robert J. Centola (1942—1999)

The Principles of Federal Appropriations Law—its comprehensiveness and accuracy, its structure and tone—reflects the influence, perseverance, and devotion of Bob Centola. For more than a dozen years, Bob worked on this second edition of "the Red Book," producing the first three volumes. Bob was working on this volume when he passed away in April 1999. We dedicate Volume IV to his memory.

Bob brought innumerable talents to this effort, including dogged and precise legal research, clarity of thinking, and especially clarity of writing—simple, concise, insightful, enjoyable writing. Bob's sure hand wrote to an audience broader than the government world of fiscal lawyers, and guided us through the mine fields of legalese and jargon and around dangerously obscure rationalizations. His breadth of vision helped make the Red Book's second edition the standard reference on appropriations law for government finance and accounting officers, fiscal lawyers, congressional staff and the public at large. Citations to it turn up everywhere, including decisions of the highest court in the land, the United States Supreme Court.

Bob received many awards recognizing his exceptional skills as a lawyer, and was routinely assigned challenging tasks, including this one, that would test the mettle of many an attorney. He carried out each of those tasks in good humor, and with a thoroughness of analysis, insight, and precision that we, his friends and colleagues, admired and envied. The Principles of Federal Appropriations Law stands as a lasting tribute to Bob Centola.

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"[I]n most matters it is more important that the applicable rule of law be settled than that it be settled right." Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 406 (1932) (Justice Louis Brandeis, dissenting).

Abbreviations

APA	Administrative Procedure Act
BLM	Bureau of Land Management
CDA	Contract Disputes Act of 1978
CCC	Commodities Credit Corporation
C.F.R.	Code of Federal Regulations
EAJA	Equal Access to Justice Act
EEOC	Equal Employment Opportunity Commission
FAR	Federal Acquisition Regulation
FY	Fiscal Year
GAO	General Accounting Office
GSA	General Services Administration
HUD	Department of Housing and Urban Development
IRS	Internal Revenue Service
NRC	Nuclear Regulatory Commission
OMB	Office of Management and Budget
SBA	Small Business Administration
TFM	Treasury Financial Manual
U.S.C.	United States Code
UTRA	Uniform Relocation Assistance and Real Property Acquisition Policies Act

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Acquisition and Provision of Goods and Services

In the course of performing its duties, a government agency routinely needs to acquire various goods and services from outside sources. These outside sources may include federal entities as well as private parties. The agency may also have to dispose of property or equipment which it no longer needs, or may be authorized to provide certain goods or services to others as part of its mission. Fiscal aspects of government contracting are dealt with in virtually every chapter of this publication. This chapter addresses several topics not covered elsewhere whose only common thread is that they relate loosely to the general theme of how the government "does business."

A. Acquisition and Disposal of Personal Property for Government Use

1. GSA Supply Programs

The General Services Administration has broad authority over the acquisition of personal property for other government agencies. Section 201(a) of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 481(a), authorizes GSA, if it determines it to be advantageous to the government in terms of economy, efficiency, or service, to do the following with respect to executive agencies:

"(1) subject to regulations prescribed by the Administrator for Federal Procurement Policy prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions . . . ;

"(2) operate . . . consolidate, take over, or arrange for the operation by any executive agency of warehouses, supply centers, repair shops, fuel yards, and other similar facilities; and

"(3) procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities . . . . "

Section 201(b)(1), 40 U.S.C. § 481(b)(1), authorizes GSA to provide the same services, upon request, to "any other Federal agency," mixed ownership corporation, or the District of Columbia. The term "federal agency" brings in the legislative and judicial branches except for the Senate, House of Representatives, and Architect of the Capitol. 40 U.S.C. § 472(b). GSA published a detailed explanation and listing of who is eligible to use its supply services in 57 Fed. Reg. 41503 (September 10, 1992).[1]

One way GSA implements its authority under the Federal Property Act is through its stock system described in 41 C.F.R. Subpt. 101-26.3. Basically, GSA maintains a stock of commonly used items which may be requisitioned by using agencies. Operations are financed through the revolving General Supply Fund (40 U.S.C. § 756). At one time, the regulations provided for mandatory use, which GSA could waive upon request. See 63 Comp. Gen. 579, 581-82 (1984). Now, the regulations provide a three-tiered system an agency can follow if it thinks that "alternative sources are more favorable." If the total requirement is below a specified "de minimis" amount, the agency can simply procure elsewhere. If it is between that amount and a specified ceiling, the agency can procure elsewhere but must include a written justification in its purchase file. If the total requirement exceeds the ceiling, the agency must procure from GSA unless GSA grants a waiver. 41 C.F.R. § 101-26.301(b). The determination that alternate sources are more favorable should not be based on price alone, and agencies should not divide requisitions to avoid the higher threshold requirements. Id. and § 101-26.301(c).

An agency which tries to procure a mandatory item on the open market without seeking a GSA waiver is acting beyond its authority and does not validly obligate its appropriation. See 63 Comp. Gen. at 582. The agency should not initiate the procurement action until GSA acts on the waiver request. 41 C.F.R. § 101-26.100-2(d); 63 Comp. Gen. at 582; B-221536, June 12, 1986. If the agency does procure elsewhere in violation of the regulations, the vendor can be

[1]Our limited coverage here of the more common systems should not be taken to indicate that other authorities do not exist. See, for example, 62 Comp. Gen. 245 (1983), discussing GSA's barter authority under the Strategic and Critical Materials Stock Piling Act, 50 U.S.C. § 98e(c).

paid if the standards for quantum valebant recovery are met, but the amount paid cannot exceed what the item would have cost had it been procured as a GSA stock item. 63 Comp. Gen. at 585. See also 34 Comp. Gen. 280 (1954); 30 Comp. Gen. 23 (1950).

Another of GSA's basic supply systems is the Federal Supply Schedule system. GSA enters into requirements contracts with suppliers on either a single-award or multiple-award basis. As the term implies, a single-award contract is a contract with a single supplier for items or services on a schedule. Under a multiple-award schedule—known as GSA's "MAS" program—GSA contracts with more than one supplier for comparable items on a schedule. The objective is to obtain, through consolidation and volume buying, lower prices than could be realized through individual-order purchasing. Federal Acquisition Regulation, codified in 48 C.F.R. § 8.401(a) (hereafter cited as FAR; B-213966, January 25, 1984. Schedules are mandatory for some users, optional for others. Each schedule identifies its mandatory users. FAR, § 8.404(c)(3). GSA for many years included ordering instructions in the Federal Property Management Regulations, but dropped them in 1995. 60 Fed. Reg. 19674 (April 20, 1995).

At one time, multiple award schedule contracts were entered into for 1 year only. In the early 1980s, GSA developed a system, which GAO approved in 63 Comp. Gen. 129 (1983), for entering into MAS contracts on a multi-year basis. Under that system, the government does not obligate itself to spend any money when it signs the MAS agreement. It merely promises that "if an agency determines that it has a requirement for a scheduled item, the agency will place an order for the item from a contractor if he has offered the lowest price." Id. at 131. No obligation of appropriations takes place until a using agency determines that it has a requirement and issues a purchase order. Of course, the agency must have available appropriations when it does that.

While it has been suggested that this is illusory and unenforceable, it is GAO's position that there is adequate consideration for a valid requirements contract even though there is no obligation in the appropriations accounting sense and even though the contract includes a "no guarantee that any quantities will be purchased" clause. 52 Comp. Gen. 732 (1973). See also B-259274, May 22, 1996

("a naked contractual obligation that carries no financial exposure to the government does not violate the Antideficency Act").

A mandatory user is required to purchase from the schedule unless one of the regulatory exemptions applies or GSA grants a waiver. B-237150, January 17, 1990; B-228302, January 13, 1988. One of the exemptions is for urgent delivery requirements. FAR, § 8.404(c)(3)(i). Another is where a lower price for an identical item is available from a non-schedule source. Id. 48 C.F.R. § 8.404(c)(3)(iv); B-224022 et al., January 5, 1987. "Identical" in this context means more than just functionally equivalent. B-219909.2, January 15, 1986. It means an "exact duplicate" (id.), or "same make and model" (FAR § 8.404(c)(3)(iv)). A mandatory MAS user is not required to select the vendor with the lowest price provided it can adequately justify its selection. B-231344, August 10, 1988; B-224219, January 23, 1987. The precise regulation cited in these two cases has been dropped, but the "best value" standard of FAR § 8.404(b) takes you to essentially the same place.

Quotations from Federal Supply Schedule vendors are not "offers" that the government "accepts." Rather, they are regarded as informational responses. Therefore, there is no requirement that the quotation conform precisely to the agency's request, nor for the agency's delivery order to conform precisely to the quotation. B-232007, October 19, 1988; B-225575, May 1, 1987. Of course, any maximum order limitation must be followed. 69 Comp. Gen. 438 (1990); B-230876, July 8, 1988.

The Supply Schedule system applies to nonpersonal services as well as personal property. For example, GSA is within its authority under the Federal Property Act to establish a mandatory supply schedule for debt collection services. The using agency's authority in 31 U.S.C. § 3718 to contract for debt collection services does not override GSA's authority to determine how the procurement is to be accomplished. B-259975, September 18, 1995.

If a mandatory user determines that schedule items will not meet its specific needs but similar non-schedule items will, it can request a waiver from GSA. FAR § 8.404-3(a). See, e.g., B-252754.3, January 30, 1995. As with stock items, the agency is expected to defer initiating the procurement until GSA approves the request. FAR § 8.404-3(b). A non-schedule procurement in violation of the

regulations is an unauthorized act, but again as with stock items, the vendor can be paid if the quantum meruit/quantum valebant standards are met. However, payment may not exceed the amount payable under an applicable mandatory Supply Schedule. B-213489, March 13, 1984; B-195123, July 11, 1979. In 69 Comp. Gen. 13 (1989), this rationale was extended to a non-mandatory schedule. In a few cases where the property was delivered and the vendor paid, GAO has had to grudgingly concede that corrective action was no longer feasible. 54 Comp. Gen. 488, 490 (1974); B-217302, March 19, 1985.

For a non-mandatory user, the decision whether to purchase from a Supply Schedule vendor or elsewhere is regarded as a business judgment within the contracting agency's discretion. B-270483, March 12, 1996; B-232660, January 10, 1989.

As with any other agency program, there are certain expenses GSA must bear incident to administering the Federal Supply Schedule program. One example is discussed in 42 Comp. Gen. 563 (1963), in which GSA directed a supply schedule gasoline contractor to litigate the constitutionality of a state gasoline tax. The cost was simply a cost of carrying out GSA's normal duties and there was no basis for passing it on to user agencies.

2. Stationery and Supplies

Originally enacted in 1868 (15 Stat. 246), 41 U.S.C. § 13 provides:

> "Except as otherwise provided, it shall not be lawful for any of the executive departments to make contracts for stationery or other supplies for a longer term than one year from the time the contract is made."

Our research failed to disclose a definition of "supplies" for purposes of this statute, although the request for decision in one case assumed it meant "supplies which are consumed in the use thereof, such as food, gasoline," etc., and nothing in the decision contradicted that assumption. 19 Comp. Gen. 980, 981 (1940). The statute was often cited along with other fiscal control laws such as the Antideficiency Act, Adequacy of Appropriations Act, bona fide needs statute, etc., and its independent significance received little attention. E.g., 36 Comp. Gen. 683 (1957). Apart from certain indefinite-quantity or requirements contracts (e.g., A-60589, July 12, 1935), it added little to what was already prohibited by the other statutes.

In any event, while the law is still on the books, statutory exemptions have whittled it down to virtually nothing. The Federal Property and Administrative Services Act of 1949 included an exemption for the General Services Administration and agencies acting under a GSA delegation, later expanded to what is now the first sentence of 41 U.S.C. § 260:

"Sections 5, 8, and 13 of this title shall not apply to the procurement of property or services made by an executive agency pursuant to this subchapter."

Since this provision originated in the Federal Property Act, that act's definition of "executive agency," 40 U.S.C. § 472(a), would presumably apply to "any executive department or independent establishment in the executive branch of the government, including any wholly owned Government corporation." "This is almost identical to the definition in 5 U.S.C. § 105, which in turn would implicate 5 U.S.C. § 104 for the definition of "independent establishment." See W.B. Fishburn Cleaners, Inc. v. Army & Air Force Exchange Service, 374 F. Supp. 162, 165-166 (N.D. Tex. 1974).

In addition, 10 U.S.C. § 2314 provides:

"Sections 3709 and 3735 of the Revised Statutes (41 U.S.C. [§§] 5 and 13) do not apply to the procurement or sale of property or services by the agencies named in section 2303 of this title."

Section 2303 lists the Departments of Defense, Army, Navy, Air Force, the Coast Guard, and the National Aeronautics and Space Administration.

GAO has pointed out that these exemptions are just that—exemptions from 41 U.S.C. § 13—and do not by themselves authorize anyone to obligate funds in advance of appropriations. 63 Comp. Gen. 129, 135 (1983); 48 Comp. Gen. 497, 500 (1969).

3. Exchange/Sale Authority

Section 201(c) of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 481(c), provides:

"In acquiring personal property, any executive agency [subject to regulations of the General Services Administration, which in turn are subject to regulations of the Office of Federal Procurement Policy] may exchange or sell similar items and may apply the exchange allowance or proceeds of sale in such cases in whole or in part

payment for the property acquired: Provided, That any transaction carried out under the authority of this subsection shall be evidenced in writing."

The reason for this legislation is that, without it, the acquiring agency would have to charge the full purchase price to its appropriation while depositing the proceeds from the disposition of old material in the Treasury as miscellaneous receipts, even though it may have budgeted on the basis of net cost. For an example of this problem, see 21 Comp. Gen. 294 (1941). This was true regardless of whether the old material was sold for cash (15 Op. Att'y Gen. 322 (1877)) or traded in for an allowance against the purchase price (5 Comp. Dec. 716 (1899)). GAO had come to the conclusion that there was "no complete and satisfactory solution of the problem except by obtaining necessary legislation." 21 Comp. Gen. at 297. Section 201(c) was the culmination of legislative attempts that began decades earlier. The first statutes tended to be limited either to a particular agency or to particular types of personal property such as automobiles. See, e.g., 19 Comp. Gen. 906 (1940). The origins and history of section 201(c) are outlined in B-169903-O.M., January 8, 1973. Although the statute uses the term "executive agency," GAO regards it as applicable to itself by virtue of 31 U.S.C. § 704(a) which makes laws "generally related to administering an agency" applicable to GAO. B-201082-O.M., December 2, 1980.

Implementation of the exchange/sale authority is the primary responsibility of the General Services Administration, whose regulations are found in 41 C.F.R. Part 101-46, part of the Federal Property Management Regulations. GAO has considered various aspects of the exchange/sale authority on many occasions, but relies heavily on the GSA regulations and will not interfere with any reasonable application by GSA. See B-189300, May 5, 1978.

The regulations authorize use of the exchange/sale authority only when the following conditions apply:

- The item sold or exchanged must be "similar to the item acquired."
- The items sold or exchanged must not be excess, and the items acquired must be necessary to the conduct of approved programs.
- Subject to certain exceptions, "[o]ne item is to be acquired to replace one similar item."

- There must be an appropriate written administrative determination at the time of the exchange or sale.
- The transaction must foster the "economical and efficient accomplishment of an approved program." 41 C.F.R. § 101-46.202(b).

If the exchange/sale authority applies, the agency is under no requirement to give precedence to other disposal options under the Federal Property Act, such as donation programs. B-153771, June 12, 1964.

The first listed condition is simply a restatement of the requirement of the statute that the items be "similar." GAO has observed that "'similar items' is not a precise term" and that the law "affords [GSA] a flexible standard in the promulgation of regulations." 41 Comp. Gen. 227, 228-29 (1961). GSA regards items as similar for purposes of the exchange/sale statute when:

"(i) The replaced item and the acquired item are identical;

"(ii) The acquired item is designed and constructed for the same specific purpose as the replaced item, or both constitute parts or containers for identical or similar end items; or

"(iii) The acquired item and the replaced item both fall within a single Federal Supply Group [except for certain items listed elsewhere in the regulation as ineligible]." 41 C.F.R. § 101-46.202(b)(1).

Under the second standard, items need not be identical if they are "designed and constructed for the same specific purpose." Thus, ambulances and station wagons adapted for use as ambulances are similar for purposes of the statute. 41 Comp. Gen. 227 (1961). Different types of trucks qualify because they are designed and intended to be used for the transportation of property. B-47592, February 14, 1945. So do vessels designed for hydrographic surveying, notwithstanding differences in size and capacity which would preclude their operation under the same conditions. B-127659, June 5, 1956.

The statute and regulations are designed to facilitate the legitimate replacement of property and should not be used for what amounts to a new acquisition in the guise of an exchange. In 55 Comp. Gen. 1268 (1976), GSA had disapproved an exchange of gold for

silver proposed by the Defense Department and the National Aeronautics and Space Administration. Notwithstanding the assertion that the two were "virtually interchangeable," an examination of the proposal showed that they would not serve the same specific purpose, and that GSA was therefore correct. See also B-149858-O.M., February 25, 1963 (diamonds not similar to rubies). The purpose to be served must be specific. Intermingling dissimilar items for use on a common project—unless they are within the same Federal Supply Group—is not enough. Thus, trucks and shovels, for example, are not "similar" simply because they will be used as "road building equipment." 27 Comp. Gen. 540 (1948). In general, "in the purchase of a truck only a truck may be sold or exchanged, a tractor for a tractor, a boat for a boat, etc." 23 Comp. Gen. 931, 934 (1944).

The regulations also treat items as similar if they are parts for similar end items. See, e.g., 34 Comp. Gen. 452 (1955) (United States Mint at Philadelphia could sell high-frequency motor-generator set and use proceeds for parts for high-frequency melting units); B-126544, February 17, 1956 (another case involving U.S. Mint equipment we don't understand either). The 1955 decision cautioned that while the proceeds could be applied to the purchase of the new equipment, they could not be used for such things as removal, modification, installation, or assembly. 34 Comp. Gen. at 454.

Sales proceeds can be applied to a different program or activity in the same agency as long as they are applied to the purchase of similar items. This follows logically from the agency's authority under 40 U.S.C. § 483(c) to reassign property within the agency before reporting it to GSA as excess. B-153771, June 12, 1964.

There are a number of important exclusions from the exchange/sale authority. One is mandated by the very premise of the statute—it applies only to personal property, not to real property. E.g., B-128706, August 14, 1956 (41 miles of telephone line not "personal property"). Others are contained in the regulations. Items are not eligible for exchange/sale treatment if they are found in any of more than two dozen federal supply classification groups listed in 41 C.F.R. § 101-46.202(a). The groups listed range from hand tools and office supplies to weapons and nuclear ordnance. Another provision specifies that the exchange/sale authority may not be used

if the acquisition is not otherwise authorized by law or is in contravention of an applicable restriction. 41 C.F.R. §§ 101-46.202(c)(1) and (2). For example, it could not be used to acquire a passenger motor vehicle by an agency which lacks the specific authority required by 31 U.S.C. § 1343(b). 27 Comp. Gen. 105 (1947). The exchange/sale authority may not be used to dispose of excess or surplus property. 41 C.F.R. § 101-46.202(c)(4). See B-163084, February 5, 1979; B-169903, July 27, 1970. Nor may it be used to dispose of scrap materials except scrap gold for fine gold (see B-163084, cited above), or property in new or unused condition. 41 C.F.R. §§ 101-46.202(c)(8) and (9).

Long before the enactment of 40 U.S.C. § 481(c), GAO had taken the position that an agency disposing of personal property through competitive bids should solicit cash bids as well as trade-in offers, and should accept whichever was more favorable to the government. E.g., 5 Comp. Gen. 798 (1926). This position continued after enactment of the Federal Property Act. 45 Comp. Gen. 671 (1966); B-150296, March 14, 1963. The point was reflected in GSA's regulations but was dropped in a 1988 revision. In 64 Comp. Gen. 132 (1984), GAO sustained a bid protest where the solicitation failed to include the cash option. The decision stated:

> "[W]here an agency contemplates considering offers for the government's old equipment in conjunction with an acquisition of new equipment, we question whether it is fair or even in the government's best interest to limit offers for the old equipment to firms also offering to supply the new equipment, if there exists a third-party market for the old equipment that might be willing to offer more on a cash basis than the government could have obtained from any exchange allowance." Id. at 134.

While the requirement was still in the regulations at the time of that decision, the quoted passage suggests a significance independent of the regulations.

GAO has approved issuing a request for quotations for the sole purpose of comparing trade-in offers where the agency contemplated making the actual acquisition by purchase request from the Federal Supply Schedule. B-181146, November 21, 1974. GAO has also concurred with a proposal by GSA to sell used cars, many of which are exchange/sale cars, on consignment through private auction houses. 64 Comp. Gen. 149 (1984).

Of course, the main reason for the enactment of 40 U.S.C. § 481(c) was to permit the proceeds of the exchange or sale to be applied towards acquisition of the new item. Applicable requirements are set forth in GAO's Policy and Procedures Manual for Guidance of Federal Agencies, title 7, section 5.5.D (1993), most of which has been incorporated into GSA's regulations at 41 C.F.R. § 101-46.304. If the proceeds are received after the obligation for the replacement property has been incurred, they may be credited directly to the appropriation account charged. If the proceeds are received before the obligation for the replacement property has been incurred, they remain available for the purchase during the fiscal year in which the property was sold and for one fiscal year thereafter. If an administrative determination to use the proceeds has been made and documented, the money should be credited to the appropriate budget clearing account. When the obligation is incurred, the clearing account is charged and the appropriation account credited. This prevents expiration of the appropriation from thwarting the legitimate exercise of the exchange/sale authority. If the obligation does not occur within the prescribed time period, the money goes to the Treasury asmiscellaneous receipts, the theory being that it would no longer be a bona fide replacement.

4. Disposal of Personal Property

The principles which govern the disposal of government property are, for the most part, the same for real and personal property although they differ in detail. Those principles, discussed further in Chapter 16, are:

- Under the Property Clause of the Constitution (Art. IV, sec. 3, cl. 2), disposal of government property requires statutory authority.
- Congress has implemented the Property Clause primarily through the Federal Property and Administrative Services Act of 1949. The General Services Administration has primary responsibility for administering the Federal Property Act, and does so in turn through the Federal Property Management Regulations, 41 C.F.R. Ch. 101.
- Disposal is a three-stage process: reassignment within the agency; transfer to other federal agencies (excess property); sale or other authorized disposal outside of the government (surplus property). The definitions of excess and surplus property are the same for real and personal property.

Upon determining that an item of personal property is no longer needed "for the purposes of the appropriation from, which it was purchased," the agency's first task is to see if it can be reassigned for use elsewhere in the agency. 40 U.S.C. § 483(c); 41 C.F.R. § 101-43.102(a). The statutory language makes clear that this includes activities within the agency financed by different appropriations. B-139655-O.M., July 20, 1959. If the property is not needed elsewhere in the agency, it is declared excess and reported to GSA. GSA can then direct transfer to another agency, government corporation, or the District of Columbia, or can redistribute the property through its own supply centers. 40 U.S.C. § 483(a)(1).

As with real property, the statute requires reimbursement by the receiving agency of the property's "fair value" if either the transferor or the transferee is the District of Columbia or a government corporation subject to the Government Corporation Control Act, or if the property was acquired by using a revolving or reimbursable fund and the transferor agency requests reimbursement of the net proceeds. In all other cases, the extent of reimbursement is left to the determination of GSA and the Office of Management and Budget. 40 U.S.C. § 483(a)(1). The regulations provide that, except for the situations mandated by the statute and a few others, transfers of excess personal property are without reimbursement. 41 C.F.R. § 101-43.309-3(a). This "no reimbursement" policy is within GSA's discretion under the law. B-101646, February 11, 1977 (internal memorandum).

A little-known (and probably even less observed) statute is 40 U.S.C. § 483b, which prohibits the use of appropriated funds "for the purchase of furniture by any department or agency in any branch of the Government if such requirements can reasonably be met . . . by transfer of excess furniture including rehabilitated furniture from other departments and agencies" in accordance with the Federal Property Act.

Excess property in a foreign country is subject to different provisions of the law. Each agency is responsible for disposing of its own foreign excess property. 40 U.S.C. § 511. Methods of disposal include sale, exchange, lease, or transfer, or the property can be returned to the United States for handling as domestic excess property. 40 U.S.C. § 512. This broad authority includes transfer to

another federal agency without reimbursement. 42 Comp. Gen. 21 (1962).

If the property is found to be excess to all federal agencies, GSA declares it to be surplus. GSA has "supervision and direction over the disposition of surplus property." 40 U.S.C. § 484(a). Another agency can sell surplus property only if it has specific authority which overrides the Federal Property Act or upon delegation from GSA. 56 Comp. Gen. 754 (1977). GSA's regulations amount to a blanket delegation to authorized agencies to either sell their own surplus property or have GSA sell it for them for a fee. 41 C.F.R. § 101-45.103-1.

Subsection (c) of 40 U.S.C. § 484, provides that agencies authorized by GSA to dispose of surplus property—

"may do so by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, with or without warranty, and upon such other terms and conditions as the Administrator deems proper, and it may execute such documents for the transfer of title or other interest in property and take such other action as it deems necessary or proper to dispose of such property under the [Federal Property Act]."

With appropriate safeguards, GSA may, for example, sell surplus vehicles on consignment through private auction houses. 64 Comp. Gen. 149 (1984). Subsection (c) authorizes credit sales. The regulations require prior GSA approval. 41 C.F.R. § 101-45.304-9. Subject to GSA's authority under the Federal Property Act, there is no statutory prohibition against accepting payment by credit card although certain conditions some issuers might like to impose may be unacceptable to the government. 52 Comp. Gen. 764 (1973).

Disposal by sale is governed by 40 U.S.C. § 484(e). Advertising for bids is the preferred method. 40 U.S.C. § 484(e)(1). The statute further provides that:

"award shall be made with reasonable promptness by notice to the responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: Provided, That all bids may be rejected when it is in the public interest to do so." 40 U.S.C. § 484(e)(2)(C).

Generally speaking, this requires award to the highest bidder. 36 Comp. Gen. 94 (1956); B-192592, November 16, 1978. The winning bidder must be responsive and responsible. These terms have the same meaning as in the procurement arena. Responsive means that

the bid must conform to the advertised terms and conditions (49 Comp. Gen. 244, 246 (1969)); responsible refers to ability to perform (B-160179(1), December 12, 1966).

Subsection (e)(3) sets forth nine exceptions—situations in which the sale may be negotiated rather than advertised. They include such things as national emergency; estimated fair market value does not exceed $15,000; and advertisement fails to produce reasonable bids. Another of the exceptions, 40 U.S.C. § 484(e)(3)(D), is where sale by competitive bidding "would cause such an impact on an industry or industries as adversely to affect the national economy," provided that negotiation will produce the estimated fair market value. This does not authorize an agency to address economic impact by advertising a sale with the condition that the property must be scrapped by the purchaser. 43 Comp. Gen. 15 (1963). Another portion of the statute, 40 U.S.C. § 484(e)(5), authorizes GSA to sell surplus personal property by negotiation at fixed prices which reflect estimated fair market value, without regard to subsections (e)(2) or (e)(3).

A provision that has generated some controversy is 40 U.S.C. § 484(d):

"A deed, bill of sale, lease, or other instrument executed by or on behalf of any executive agency purporting to transfer title or any other interest in surplus property under [the Federal Property Act] shall be conclusive evidence of compliance with the provisions of [the Federal Property Act] insofar as concerns title or other interest of any bona fide grantee or transferee for value and without notice of lack of such compliance."

This was derived from a very similar provision in the Federal Property Act's predecessor, the War Surplus Property Act of 1944, designed to protect the good-faith purchaser, in the absence of fraud, against attack based on mistake or lack of authority. United States v. Jones, 176 F.d 278, 288 (9th Cir. 1949). See also East Tennessee Iron and Metal Co. v. United States, 218 F. Supp. 377 (E.D. Tenn. 1963) (mutual mistake). It will protect an otherwise innocent party who acquires title from a fraudulent vendee. United States v. Mailet, 294 F. Supp. 761 (D. Mass. 1968). The provision has also been viewed as a protection for the title of a good-faith purchaser where the property had never been declared surplus and was therefore disposed of in violation of the Federal Property Act and regulations and without authority. Pacific Harbor Capital, Inc. v. United States

Department of Agriculture, 845 F. Supp. 1 (D.D.C. 1993). GAO has held that where the notice of award specifies that title does not pass until the property is removed, section 484(d) does not apply until the property is removed. 58 Comp. Gen. 240 (1979). GAO has also suggested that the statute should not be read as, in effect, permitting disregard of any statutory violation. B-150468, December 23, 1963.

One situation in which 40 U.S.C. § 484(d) will not prevail is illustrated in Dubin v. United States, 289 F.2d 651 (Ct. Cl. 1961). The government had erroneously sold certain defense articles as surplus. A provision of the Espionage Act, 18 U.S.C. § 793(d), gives the government the right to recover the articles, a right which prevails over the purchaser's claim to title under 40 U.S.C. § 484(d). The person surrendering the property is entitled to recover only his out-of-pocket expenses. 40 U.S.C. § 655; B-247981, July 24, 1992.

Another major method of disposal of surplus personal property is donation to the states, set out in 40 U.S.C. § 484(j). Early amendments to the Federal Property Act authorized the donation of surplus personal property to states for educational, public health, or civil defense purposes. Congress significantly revised the law in 1976 to expand the range of authorized purposes. In brief, GSA transfers surplus property, without cost, to state agencies designated under state law to receive surplus federal property. GSA is supposed to try to allocate property among the states on a fair and equitable basis. The state agency may then distribute the property—

"(A) to any public agency for use in carrying out or promoting for the residents of a given political area one or more public purposes, such as conservation, economic development, education, parks and recreation, public health, and public safety; or

"(B) to nonprofit educational or public health institutions or organizations . . . for purposes of education or public health (including research for any such purpose)." 40 U.S.C. §§ 484(j)(3)(A), (B).

GAO has reviewed the donation program on several occasions and found that it was generally meeting its goals. The most comprehensive report is Transfers of Excess and Surplus Federal

Personal Property—Impact of Public Law 94-519, GAO/LCD-80-101 (September 30, 1980).[2]

Title to property in the custody of the state receiving agency remains with the United States. 41 C.F.R. § 101-44.205(a). Upon taking possession from the state agency, the donee receives "conditional title." 41 C.F.R. § 101-44.208(c). The donee must return the property if it is not used for the donated purpose within one year of donation, or if it ceases being used within one year after being placed in use. 40 U.S.C. § 484(j)(4)(C)(ii); 41 C.F.R. § 101-44.208(a)(2). In addition, there are recapture provisions for noncompliance. 41 C.F.R. §§ 101-44.208(e) and (f). Absent "conditional title," if full legal title passed to the donee free of federal "strings," and the donee sold the property, the federal government would have no claim to the proceeds. 41 Comp. Gen. 20 (1961).

The statute provides no standards as to when property should be sold or when it should be donated. It does not require GSA to consider various policy factors in making the determination. Northrop University v. Harper, 580 F. Supp. 959, 963 (C.D. Cal. 1983). It confers "unfettered discretion" on GSA. Id. at 964.

The statute and regulations, in addition to the more general features noted above, address many highly specialized situations. For example, 40 U.S.C. § 484(i) authorizes the Maritime Administration to dispose of surplus vessels determined to be "merchant vessels or capable of conversion to merchant use," in accordance with the Merchant Marine Act. The procedures of the Merchant Marine Act take precedence over those in the Federal Property Act. 42 Comp. Gen. 69 (1962). Dredges are apparently not regarded as within the scope of subsection 484(i) (B-158429, April 20, 1966), so there is separate authority in 40 U.S.C. § 483d to dispose of dredges.

A situation the statute does not address is the disposal of property held by a commission composed equally of federal and state members. Confronted with one such situation, GAO said there is a

[2]The last of GAO's statutorily mandated biennial reports was Property Management: Excess and Surplus Personal Property Transfers to Nonfederal Organizations, GAO/GGD-88-68 (May 1988). Under the law as changed in 1988, GAO now reviews GSA's reports.

choice: divide the property in half with the federal portion of the commission disposing of its half in accordance with the Federal Property Act, or sell it with the United States receiving half the proceeds. Absent statutory guidance, the choice is up to the commission. B-185203, April 8, 1976.

Unless one of several statutory exceptions applies, the proceeds from the sale of surplus personal property must be deposited in the Treasury as miscellaneous receipts. 40 U.S.C. § 485(a); 41 C.F.R. § 101-45.307; B-200962, May 26, 1981. One exception (40 U.S.C. § 485(b)) is personal property "related" to real property sold by GSA. Another (§ 485(c)) is property originally acquired by a revolving or reimbursable fund. E.g., B-162337-O.M., October 2, 1967. Another (§ 485(d)) permits a portion of the proceeds to be deposited in a special account from which to pay refunds that may become necessary. When property is repossessed under the Espionage Act noted earlier, for example, the refund may be paid from one of these accounts. B-163028, January 8, 1968. Still another (§ 485(e)) permits proceeds from the sale of "contractor inventory," including government-furnished property, to be applied against the contract price when so provided in the contract. E.g., B-140689-O.M., October 29, 1959; B-139655-O.M., July 20, 1959. When GSA sells surplus personal property, it may deduct from the proceeds its costs of conducting the sale, and may deposit those amounts in the General Supply Fund. 40 U.S.C. § 485(i).

Finally, while the Federal Property Act governs the vast majority of disposals, other authorities exist in specific contexts. For example:

- The Secretary of the Treasury is authorized to sell gold and silver. 31 U.S.C. § 5116. GSA can conduct the sale as Treasury's agent. See B-87620, January 27, 1976.
- The Comprehensive Crime Control Act of 1984 provides several options for the use and disposition of forfeited property, summarized in B-225008, February 24, 1987.

- Excess and surplus government personal property can be donated to Indian tribes and tribal organizations under the Indian Self-Determination Act, 25 U.S.C. § 450j(f). If someone obtains property under this authority to sell to third parties, the government may bring criminal charges. E.g., United States v. Hacker, 883 F. Supp. 444 (D.S.D. 1994).

B. Interagency Transactions

1. The Economy Act

a. Origin, Legislative History, General Requirements

In 1932, as part of a package of measures designed to reduce government spending and help the nation fight its way out of the Great Depression, Congress enacted the first governmentwide statutory authorization for federal agencies to provide work, services, or materials to other federal agencies on a reimbursable basis. The advantages of interagency dealings had long been apparent, but widespread use had been discouraged by the "well established rule that one Government activity may not be reimbursed for services performed for another except to the extent that it is shown that increased costs have been incurred." A-31040, May 6, 1930.[3] In addition, the early decisions held that statutory authority was necessary if doing work for another agency would require an increase in the plant or personnel of the performing agency. 10 Comp. Gen. 131, 134 (1930); 7 Comp. Gen. 709, 710 (1928).[4] Furthermore, there was discomfort with the concept of the government contracting with itself. See, e.g., 26 Comp. Dec. 1022, 1023 (1920); 22 Comp. Dec. 684, 685 (1916).

[3]See also, e.g., 10 Comp. Gen. 193 (1930); 10 Comp. Gen. 131 (1930); 8 Comp. Gen. 600 (1929); 6 Comp. Gen. 81 (1926). Under this rule, the performing agency could not recover costs it would have incurred in any event, a prime example being the salaries of personnel used in providing the service.

[4]This rule was based on 31 U.S.C. § 1301(a), which limits the use of appropriations to their intended purposes. 7 Comp. Gen. at 710; 3 Comp. Gen. 974, 976 (1924).

The 1932 legislation did not hatch fully grown. A general, albeit limited, provision had been enacted in 1920 authorizing ordering agencies to transfer appropriations to performing agencies "for direct expenditure." Act of May 21, 1920, ch. 194, § 7, 41 Stat. 607, 613.[5] In addition, a number of agency-specific statutes were on the books. For example, a permanent provision in the Navy Department's 1927 appropriation act, Act of May 21, 1926, ch. 355, 44 Stat. 591, 605, directed agencies ordering services or materials' from the Navy to pay the actual cost to the Navy's working fund, either in advance or by reimbursement. This law, quoted in 10 Comp. Gen. 275, 277 (1930), was the source of some of the language used a few years later in the Economy Act.

Against this backdrop, Representative Burton French sponsored legislation in 1930 to provide general authority for reimbursable interagency transactions. The purpose of the legislation, Representative French testified, was

"to permit the utilization of facilities and personnel belonging to one department by another department or establishment and to enact a simple and uniform procedure for effecting the appropriation adjustments involved." Interdepartmental Work: Hearings on H.R. 10199 Before the Committee on Expenditures in the Executive Departments, 71st Cong., 2d Sess. 3 (1930), quoted in 57 Comp. Gen. 674, 678 (1978).

Representative French explained how the bill conformed with certain fundamental tenets of appropriations law:

"It is also a requirement of law, in using appropriations for the support of any activity that the appropriation be expended only for the objects specified therein.

"This requires that when one department obtains work, materials or services from another department it should pay the full cost of such work, materials or services.

[5]A few of the numerous decisions discussing and applying this provision are 4 Comp. Gen. 674 (1925); 27 Comp. Dec. 684 (1921); 27 Comp. Dec. 106 (1920); A-31068, March 25, 1930.

"If full cost is not paid, then such part of the cost as is not reimbursed must fall upon the department doing the work, which is contrary to [31 U.S.C. § 1301(a)] and the appropriation of the department for which the work was done will be illegally augmented because it does not bear all of the cost of the work done for it." Id. at 4, 57 Comp. Gen. at 678.[6]

The report of the House Committee on Expenditures in the Executive Departments mirrored the sponsor's testimony:

"The purpose of this bill is to permit the utilization of the materials, supplies, facilities, and personnel belonging to one department by another department or independent establishment which is not equipped to furnish the materials, work, or services for itself, and to provide a uniform procedure so far as practicable for all departments.

"Your committee also believes that very substantial economies can be realized by one department availing itself of the equipment and services of another department in proper cases. A free interchange of work as contemplated by this bill will enable all bureaus and activities of the Government to be utilized to their fullest and in many cases make it unnecessary for departments to set up duplicating and overlapping activities of [their] own.

. . . .

"Heretofore the cost of such services as have been performed by one department for another has frequently been paid for out of the appropriations for the department furnishing the materials and services. This is unfair to the department doing the work. All materials furnished and work done should be paid for by the department requiring such materials and services. [The bill's funding provisions] will hold each department to strict accountability for its own expenditures and result in more satisfactory budgeting and accounting." H.R. Rep. No. 71-2201, at 2-3 (1931).

The bill was not enacted immediately, however. The following year, it was again reported favorably, in the same language as quoted above, by the House Committee on Economy. H.R. Rep. No. 72-1126, at 15-16 (1932). This time it became law as section 601 of the

[6]As we will note in our discussion of interagency details of personnel, the reason the accounting officers had not previously espoused this eminently logical application of the purpose statute and augmentation concept was rooted more in history than in law. Certainly in non-Economy Act situations, the proposition that using agency A's appropriations to do agency B's work violates the purpose statute is stated largely as dogmatic. E.g., 59 Comp. Gen. 403, 404 (1980).

Legislative Branch Appropriation Act for 1933, ch. 314, 47 Stat. 382, 417 (1932), which almost immediately upon enactment became popularly known as the "Economy Act."[7]

Section 601 of the Economy Act has been amended several times, receiving its current structure and designation in the 1982 recodification of Title 31, and is now found at 31 U.S.C. §§ 1535 and 1536. The basic authority is set out in 31 U.S.C. § 1535(a):

"(a) The head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency for goods or services if—

"(1) amounts are available;

"(2) the head of the ordering agency or unit decides the order is in the best interest of the United States Government;

"(3) the agency or unit to fill the order is able to provide or get by contract the ordered goods or services; and

"(4) the head of the agency decides ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise."

The introductory portion of 31 U.S.C. § 1535(a) tells you who can use the authority and what they can use it for. Both points will be explored later in more detail. The numbered subsections establish four basic conditions on use of the authority.

(1) Funds available

The first condition is that "amounts are available" or, in the original language, "if funds are available therefor" (47 Stat. 417-418). Since nothing in the Economy Act in any way abrogates or diminishes 31 U.S.C. § 1301(a), the ordering agency must have funds which are available for the contemplated purpose, or, in other words, the

[7]Excerpts from House Report 1126 are quoted in 52 Comp. Gen. 128, 131-132 (1972), and the history of section 601 is discussed in more detail in 57 Comp. Gen. 674 (1978). Technically, section 601 was cast as an amendment to the 1920 statute noted earlier in the text. Certain documents in the legislative history, one of which is quoted in 57 Comp. Gen. at 679, cite GAO decision A-2272, June 16, 1924. For the benefit of future researchers, there is no such decision. The correct reference is A-2272, June 18, 1924, published at 3 Comp. Gen. 974.

purpose of the transaction must be something the ordering agency is authorized to do. 26 Comp. Gen. 545, 548 (1947); 16 Comp. Gen. 3, 4 (1936); 15 Comp. Gen. 704 (1936); 15 Comp. Gen. 5 (1935); B-259499, August 22, 1995. The ordering agency does not need specific authority in its appropriation language to use the Economy Act, but of course must adhere to any monetary limits Congress may choose to impose. 19 Comp. Gen. 585 (1939).

In brief, the Economy Act does not authorize an agency to use another agency to do anything it could not lawfully do itself. This is merely a continuation of the rule in effect under the Economy Act's 1920 predecessor. E.g., 5 Comp. Gen. 757 (1926). This point—that transfer of funds to another agency cannot be used to circumvent 31 U.S.C. § 1301(a)—is not limited to Economy Act transactions but applies to all transfers, whether in advance or by reimbursement, to working funds or otherwise, unless authorized under a statute which expressly provides differently. See, e.g., 7 Comp. Gen. 524, 526 (1928), emphasizing that since the appropriation in question "is not available for direct expenditure for such purpose . . . it can not be made available for such purpose by transfer" to another agency. See also 30 Comp. Gen. 453 (1951); 28 Comp. Gen. 365 (1948); 22 Comp. Gen. 462 (1942); 19 Comp. Gen. 774 (1940).

(2) Interest of the government

The second condition is that the head of the ordering agency must determine that the order is in the best interests of the government. This appears to offer little impediment, and our research has disclosed no instance where a proposed transaction was rejected for this reason.[8]

(3) Performing agency's "position"

The third condition—agency is "able to provide" the goods or services—is best understood by again referring to the original language: the performing agency must be "in a position to supply or equipped to render" the materials or' services in question (47 Stat. 418). (The "get by contract" part was added by amendments starting

[8]This of course does not mean that it has never happened. The issue would involve an internal debate and would not likely surface outside of the agency.

in 1942, and will be addressed later in our discussion.) This requirement goes to the essence of the Economy Act. The objective of the statute is to permit an agency to take advantage of another agency's experience or expertise, not merely to "dump" either work or funds or to avoid legislative restrictions. A good example is 13 Comp. Gen. 138 (1933), in which a government corporation issuing its own securities sought Economy Act assistance from the forerunner of the Bureau of the Public Debt.

The "in a position" requirement does not mean that the performing agency must have all required equipment and personnel already on hand before it may validly accept an Economy Act order. If necessary, the agency may, as long as the work or service is within the scope of activities it normally performs, procure additional supplies or equipment or add additional temporary personnel. B-197686, December 18, 1980. For example, the agreement in 13 Comp. Gen. 138 was not objectionable merely because the Public Debt Service had to take on some additional personnel in order to handle the increased workload. Similarly, GAO found a proposed transfer of funds to enable the performing agency to hire additional personnel authorized in 14 Comp. Gen. 526 (1935). GAO noted in B-119846, September 8, 1955, that this authority is not unlimited, otherwise the statutory condition would be negated. However, nothing thus far has purported to define precisely where those limits might be.

Property purchased incident to an Economy Act transaction is, upon completion of the work, "an asset of the agency bearing the cost of its acquisition." 33 Comp. Gen. 565, 567 (1954). If the ordering agency has paid through an advance of funds to the performing agency, then whatever remains when performance is done should be returned to the ordering agency for use or disposal as appropriate. Id. If several agencies have contributed to the cost, the property is regarded as "owned" by all of the agencies on a pro rata basis. 38 Comp. Gen. 36 (1958).

It is one thing to acquire property incident to performing an Economy Act order. It is entirely different, and far more questionable, to acquire substantial equipment—or to solicit funds from potential customer agencies to do so—solely to put yourself "in a position" to perform Economy Act services. B-119846, July 23, 1954. And, of course, in order to be "in a position" to do anything

under the Economy Act, the performing activity must be in existence. B-37273, October 16, 1943.

Whether an agency is "in a position" to do Economy Act work is primarily the agency's own determination, one which merits substantial weight. 23 Comp. Gen. 935, 937 (1944). However, the agency's status includes legal as well as factual considerations. The legal part of the formula is the absence of any statutory prohibitions or restrictions which would obstruct performance. Id. at 937-938. The Economy Act does not give a performing agency any authority which it would not otherwise have. 18 Comp. Gen. 262, 266 (1938).

(4) Lower cost

The Economy Act was never intended to foster an incestuous relationship in lieu of normal contracting with private business concerns. Hence the fourth condition of 31 U.S.C. § 1535(a)—the ordering agency must determine that it cannot obtain the goods or services "as conveniently or cheaply" from a private contractor.[9] It should be apparent that this refers to services which are "lawfully procurable" from private sources in the first place and not to "regular governmental functions." 19 Comp. Gen. 941 (1940).

In making the "lower cost" determination, it is permissible to solicit bids and then reject all bids if they exceed the cost of dealing with another agency. 37 Comp. Gen. 16 (1957).[10] Even if the determination is made, however, the authority to use the Economy Act is permissive rather than mandatory. Id. If the agency cannot make the determination, although the recodified language is less explicit in this regard (compare the original language, 47 Stat. at 418), use of the Economy Act is improper.

[9]As originally enacted, this requirement explicitly referred to "work or services performed" but not to "materials, supplies, or equipment furnished." See, e.g., 12 Comp. Gen. 597, 598 (1933). The substitution of the word "goods" came about as part of the 1982 recodification of Title 31. See 31 U.S.C. §1535 (Rev. Notes). While a recodification is not supposed to make substantive changes, this is nevertheless what the statute now says. Perhaps it simply reflects the deduction that "work" implies a product.

[10]This decision implies that an agency can enter into an Economy Act agreement with a nonappropriated fund activity, and to that extent was modified by 64 Comp. Gen. 110 (1984). It remains valid for the points cited in the text.

The cost comparison of 31 U.S.C. § 1535(a)(4) is required only where the agency is contemplating an Economy Act transaction. It does not apply where the agency chooses to perform a function in-house in lieu of renewing an existing commercial contract. Techniarts Engineering v. United States, 51 F.3d 301 (D.C. Cir. 1995).

The Economy Act itself does not require that agencies document the two determinations called for by 31 U.S.C. § 1535(a) (interest of the government and lower cost). Interagency Agreements: Fiscal Year 1988 Agreements at Selected Agencies Were Proper, GAO/AFMD-88-72 (September 1988). However, GAO regards documenting the determinations as "sound practice" and a desirable internal control. Id. at 8. The Federal Acquisition Regulation was amended in 1995 to require that the two determinations be documented in a Determination and Finding. 48 C.F.R. § 17.503(a) (60 Fed. Reg. 49721, September 26, 1995).

(5) Written agreement

Another important requirement which should be emphasized at the outset is not specified in the statute but finds its authority in common sense. An Economy Act transaction should be evidenced by a "written order or agreement in advance, signed by the responsible administrative officer of each of the departments or offices concerned." 13 Comp. Gen. 234, 237 (1934).[11] A written agreement is important because, as in any contract situation, the terms to which the parties agree, as reflected in the writing, establish the scope of the undertaking and the rights and obligations of the parties. Also, the written agreement can establish a ceiling on the ordering agency's financial obligation. 22 Comp. Gen. 74 (1942).

While an advance agreement normally "should be regarded as essential . . . the lack of a specific agreement does not necessarily preclude reimbursement" in appropriate cases. B-39297, January 20, 1944. An "appropriate case," although the decisions do not use this language, generally means one in which the facts are sufficient to establish an implied contract, or an express contract which was not finalized. In A-85201, April 15, 1937, for example, an agreement had been in effect for several prior years and the facts showed an intent

[11] 64 Comp. Gen. 370 (1985) overruled other aspects of 13 Comp. Gen. 234.

to continue the agreement for the year in question. Another appropriate case is where there is a written agreement and the parties subsequently agree to an "adjustment" for some additional amount or item which is otherwise proper but was not included in the original agreement. 22 Comp. Gen. 74 (1942); B-31862, February 27, 1943.

Apart from common sense, another reason for an advance agreement is that written documentation is necessary in order to record an obligation under 31 U.S.C. § 1501(a). See 34 Comp. Gen. 418, 421 (1955).

GAO recommends that the agreement specify at least the following:

- Legal authority for the agreement;
- Terms and conditions of performance;
- The cost of performance, including appropriate ceilings when cost is based on estimates;
- Mode of payment (advance or reimbursement);
- Any applicable special requirements or procedures for assuring compliance; and
- Approvals by authorized officials.

GAO, Policy and Procedures Manual for Guidance of Federal Agencies, tit. 7, § 2.4.C.2e. The documentation requirements of the Federal Acquisition Regulation are found in 48 C.F.R. § 17.504(b). In addition, it is extremely useful for the agreement to set forth a requirement and procedures for the performing agency to notify the ordering agency if it appears that performance will exceed estimated costs and to cease or curtail performance as may be necessary. This is an important safeguard to protect the performing agency against Antideficiency Act violations. See 7 GAO-PPM § 2.4.C.2g; B-234427, August 10, 1989 (non-decision letter).

b. Who Is Covered

The coverage of the Economy Act is broad, and there is no distinction between who can place an order and who can perform one. The statute says that "[t]he head of an agency or major organizational unit within an agency may place an order with a major organizational unit within the same agency or another agency." 31 U.S.C. § 1535(a). This embraces all three branches of the federal government. Within the legislative branch, for example, one of the earliest Economy Act decisions applied the statute to the

Architect of the Capitol. 12 Comp. Gen. 442 (1932). Financial audits of legislative branch agencies include the Economy Act as one of the laws tested for compliance. E.g., Financial Audit: First Audit of the Library of Congress Discloses Significant Problems, GAO/AFMD-91-13 at 29 (August 1991). And GAO has always viewed the law as applicable to itself. B-156022-O.M., January 6, 1972; B-130496-O.M., March 13, 1957; B-13988, January 7, 1941. See also A-31068, March 25, 1930 (Economy Act's 1920 predecessor applicable to Botanic Garden). The court in United States v. Mitchell, 425 F. Supp. 917, 918 (D.D.C. 1976), regarded the law as applicable to the judicial branch.[12]

The Economy Act applies to government corporations. 13 Comp. Gen. 138 (1933); B-116194, October 5, 1953; B-39199, January 19, 1944; B-27842, August 13, 1942; A-46332, January 9, 1933. The cited decisions involve a variety of government corporations in the capacity of both ordering agency and performing agency. Although the specific corporations in those cases are now defunct, the point remains valid.

The Act also applies to temporary boards and commissions. See B-157312, August 2, 1965 (Public Land Law Review Commission). However, GAO found it inapplicable to the land and timber appraisal committee established by 43 U.S.C. § 181f-1 even though it was to be federally funded and permanent, because two of its three members could not be employees of the United States. 33 Comp. Gen. 115, 116-17 (1953).

The common thread of applicability is that the entity in question must be an agency or instrumentality of the United States government. Accordingly, the Economy Act does not apply to the District of Columbia government. 50 Comp. Gen. 553, 556 (1971); B-107612, February 8, 1952. (As we will see later, there is separate legislation applicable to the District of Columbia.) It also does not apply to the National Guard, except possibly when the Guard is

[12]The Economy Act originally said "executive department or independent establishment of the Government" (47 Stat. 417). The indefatigable researcher will find one GAO opinion, B-25199, May 15, 1942, holding the Act inapplicable to the legislative branch. While B-25199 has never been overruled, it has never been followed either, and the Revision Note to 31 U.S.C. § 1535 explicitly adopts the broader views of 12 Comp. Gen. 442 and the Mitchell case.

called into federal service. B-152420, October 3, 1963, aff'd on recons., B-152420, February 25, 1964. Nor does it apply to Indian tribes (B-44174, September 6, 1944), agencies of the United Nations (23 Comp. Gen. 564 (1944)), American Samoa (B-194321, August 7, 1979), or a presidential inaugural committee (62 Comp. Gen. 323, 330 (1983)).

There are also a few instances in which entities which clearly are agencies or instrumentalities of the United States, or which are treated as such for other purposes, are not covered. For example, the Postal Service although clearly an instrumentality of the United States is subject only to those statutes specifically designated in the Postal Reorganization Act; however, the Economy Act is not one of the statutes designated. 58 Comp. Gen. 451, 459 (1979). It also does not apply to nonappropriated fund instrumentalities. 64 Comp. Gen. 110 (1984).

Finally, it is important to note that the Economy Act authorizes intra-agency, as well as inter-agency, transactions. E.g., 57 Comp. Gen. 674 (1978); 25 Comp. Gen. 322 (1945); B-77791, July 23, 1948. While the decisions had consistently taken this position, this is one instance in which the recodified language of 31 U.S.C. § 1535(a) ("major organizational unit within the same agency") is more precise than the original language. While the two bureaus or offices may be part of the same department or agency, they must be funded under separate appropriations. 38 Comp. Gen. 734, 738 (1959); B-60609, September 26, 1946.[13] However, the Economy Act does not apply with respect to separate appropriations of a single bureau or office. 38 Comp. Gen. at 737-738.

c. Fiscal Matters

(1) Payment: types and accounting

The payment provision of the Economy Act is 31 U.S.C. § 1535(b):

"Payment shall be made promptly by check on the written request of the agency or unit filling the order. Payment may be in advance or on providing the goods or services ordered and shall be for any part of the estimated or actual cost as

[13]The concept of the Economy Act simply does not "fit" where the two units are funded under the same appropriation. Presumably, although we have found no cases, an agency could administratively apply similar principles since it needs no statutory authority to shift funds within a lump-sum appropriation.

determined by the agency or unit filling the order. A bill submitted or a request for payment is not subject to audit or certification in advance of payment. Proper adjustment of amounts paid in advance shall be made as agreed to by the heads of the agencies or units on the basis of the actual cost of goods or services provided."

This provision authorizes two types of payment, advance and reimbursement. The decision is up to the performing agency.[14] Payment may be in a lump sum or in installments. Pre-audit is not required.

Payments made in advance will often necessarily be based on estimates, in which event the amounts should be adjusted, up or down as the case may be, when the actual cost is known. Any excess (the amount by which the advance exceeds actual cost) should be returned to the ordering agency. Retention of the excess amount by the performing agency is an improper augmentation of its funds. 72 Comp. Gen. 120 (1993). If the account to which the excess would otherwise be returned has been closed, the money should be deposited in the Treasury as miscellaneous receipts. 31 U.S.C. § 1552(b).

If the excess is determined while the appropriation charged with the advance is still available for obligation, the performing agency should pay special attention to returning the funds in time for the ordering agency to be able to use them. GAO, Policy and Procedures Manual for Guidance of Federal Agencies, tit. 7, § 2.4.C.2d (May 1993).

The authority to pay by reimbursement amounts to an exception to 31 U.S.C. § 1301(a) by implicitly authorizing the performing agency to temporarily use its own funds to do the ordering agency's work. See B-234427, August 10, 1989 (nondecision letter); B-6124-O.M., October 11, 1939. The statute requires that payment be made "promptly."

Accounting for payments is addressed in 31 U.S.C. § 1536. Subsection (a) sets forth general requirements; subsection (b) deals with goods provided from stock. Subsection (a) provides:

[14]As a practical matter, if the performing agency is not in a position to use its own funds initially, or simply does not wish to do so, it doesn't have to accept the order.

"An advance payment made on an order under section 1535 of this title is credited to a special working fund that the Secretary of the Treasury considers necessary to be established. Except as provided in this section, any other payment is credited to the appropriation or fund against which charges were made to fill the order."

This provision amounts to an exception—albeit a necessary one if the Economy Act is to succeed—to the "miscellaneous receipts" statute, 31 U.S.C. § 3302(b). 56 Comp. Gen. 275, 278 (1977).

Advance payments are to be credited to special working funds created for that purpose. 31 U.S.C. § 1536(a), supra. (A working fund is simply a type of intragovernmental revolving fund.)[15] The intent of the original Economy Act was that Treasury would establish a working fund when requested by the performing agency. H.R. Rep. No. 1126, 72d Cong., 1st Sess. 16 (1932). The language of the 1982 recodification would appear to give Treasury the final decision on the need to create such a fund. When the work is completed, the amount of the advance is adjusted as noted above.

Payments made as reimbursements are credited to the appropriation(s) of the performing agency "against which charges were made" in effecting performance. This means that the reimbursement must be credited to the fiscal year in which it was "earned," that is, the fiscal year actually charged by the performing agency, without regard to when the reimbursement is made. If the appropriation which earned the reimbursement is still available for obligation at the time of reimbursement, the money may be used for any authorized purposes of that appropriation. 31 U.S.C. § 1536(b). (This would be true as a matter of general appropriations law even if the statute were silent.) If the appropriation is no longer available for new obligations, the reimbursement must be credited to the appropriate expired account or, if the account has been closed, to miscellaneous receipts. B-260993, June 26, 1996; 31 U.S.C. § 1552(b). See also B-211953, n.8, December 7, 1984; B-194711-O.M., January 15, 1980.

[15]Compare the definition of "Working Capital Funds" contained in A Glossary of Terms Used in the Federal Budget Process: Exposure Draft at 86 (GAO/AFMD-2.1.1, Rev. January 1993) (here after cited as Budget Glossary Exposure Draft).

If this causes problems for the performing agency, its choices are to (1) seek advance payment, (2) bill the ordering agency promptly as soon as the work is completed, or (3) bill periodically as portions of the work are done. Program to Improve Federal Records Management Practices Should Be Funded by Direct Appropriations, GAO/LCD-80-68, 12 (June 23, 1980).

Although not expressly provided in the Economy Act, an agency may, if it chooses, deposit reimbursements in the Treasury as miscellaneous receipts. 56 Comp. Gen. 275, 278-279 (1977) (indirect costs); 57 Comp. Gen. 674, 685 (1978) (applying same conclusion to direct costs). The latter decision pointed out that crediting a reimbursement to an appropriation against which no charges had been made would amount to an improper augmentation. Thus, there could be situations—the closed account being one example—where the performing agency has no choice but to deposit the reimbursement as miscellaneous receipts. 57 Comp. Gen. at 685-86.

A significant exception to 31 U.S.C. § 1536(b) exists for the Department of Defense. By virtue of 10 U.S.C. §§ 2205(a) and 2210(a), Defense may, at its option, credit Economy Act reimbursements to the appropriations which earned them or, if those appropriations have expired, to appropriations current at the time of collection. Reimbursements to Appropriations: Legislative Suggestions for Improved Congressional Control, GAO/FGMSD-75-52 (November 1, 1976); B-179708-O.M., December 1, 1975 at 16.

With respect to items provided from stock, 31 U.S.C. § 1536(b) provides in part:

"Where goods are provided from stocks on hand, the amount received in payment is credited so as to be available to replace the goods unless—

"(1) another law authorizes the amount to be credited to some other appropriation or fund; or

"(2) the head of the executive agency filling the order decides that replacement is not necessary, in which case, the amount received is deposited in the Treasury as miscellaneous receipts."[16]

This provision, which limits the performing agency's authority to retain payment to cases where replacement is necessary, illustrates the Economy Act's approach of structuring the transaction so that the performing agency neither profits nor is penalized. It does not say merely that payments are available for replacement, but limits their availability to cases where replacement is necessary. B-36541, September 9, 1943. The apparent theory is that retaining payment when replacement is not necessary would amount to a form of profit. 41 Comp. Gen. 671, 674 (1962) (purpose of provision is "to preclude augmentation of the appropriations involved").

The law does not require "concurrent replacement," that is, replacement in the same fiscal year as delivery, but does require, in general terms, that "agency accounting systems . . . be able to relate credits from the use of stocks on hand in Economy Act transactions to replacement needs." B-179708-O.M., July 10, 1975. In this connection, B-179708-O.M. states beginning on page 15:

"The crucial factor with respect to implementation of the statute is the determination that replacement is necessary—or, more precisely, not unnecessary—rather than the actual replacement transaction. Thus we believe that the statutory requirement is satisfied by some mechanism for screening out payments for stocks not in need of replacement and insuring that such payments are treated as miscellaneous receipts rather than credits. Once this is accomplished, we think the timing of replacements, including fiscal year differences, is essentially immaterial, except perhaps to the extent that time lapses are so great as to be relevant from an audit standpoint in terms of the validity of the determination that replacement was necessary. Finally, we perceive no objection to the fact that replacement items might not be identical to the materials furnished from stocks so long as there is sufficient similarity to justify a bona fide replacement relationship."

It follows that if the appropriation which earned the reimbursement has expired and the performing agency has made the replacement decision but has not implemented it prior to expiration, the payment may be credited to the corresponding appropriation current at the time of collection, since this is the only way it can be "credited so as

[16]Retention of the word "executive" in this subsection in the 1982 recodification was inadvertent. Resort to the source provision makes clear that "agency" as used in 31 U.S.C. § 1536(b) is the same as "agency" in 31 U.S.C. § 1535(a).

to be available to replace the goods." Receipt of payment too late in the fiscal year to permit conducting a procurement for the replacement items poses a problem, but there is no authority to put the payment in some sort of holding account to be credited to next year's appropriation when it shows up. A-92491, April 5, 1938. If the payment then arrives in that fiscal year, it effectively becomes the budgetary resource for purposes of the obligation; if it arrives in the following year, it is credited to the expired account.

While the replacement items need not be identical, the Economy Act does not authorize exchange of dissimilar items. 41 Comp. Gen. 671 (1962). That case involved a proposal by the Public Health Service and the Defense Supply Agency to exchange lists of medical goods and equipment in long supply or available for rotation and to, in effect, swap supplies and equipment not presently needed, making necessary appropriation adjustments periodically. GAO recognized that the proposal had merit and suggested that the agencies seek legislative authority, but was forced to conclude that 31 U.S.C. § 1536(b) does not authorize what amounts to "program replacements," i.e., replacements of excess materials with other materials within the general area covered by the appropriation.

(2) "Actual cost": meaning and application

Payment under the Economy Act, whether by advance with subsequent adjustment or by reimbursement, must be based on "the actual cost of goods or services provided." 31 U.S.C. § 1535(b). This applies to both intra-agency and inter-agency transactions under the Act. 57 Comp. Gen. 674, 684 (1978). Unfortunately, as the decisions have pointed out, neither the statute nor its legislative history address the meaning of the term "actual cost." Id. at 681.

In setting out an analytical framework, it is useful to start by recalling that agencies using the Economy Act must avoid the unauthorized augmentation of anyone's appropriations. B-250377, January 28, 1993. Charging too much augments the appropriations of the performing agency. B-45108/B-48124, February 3, 1955; B-101911-O.M., April 4, 1951. Charging too little augments the appropriations of the ordering agency. 57 Comp. Gen. at 682. In connection with this latter proposition, GAO quickly recognized that the Economy Act legislatively abolished the prior decisional rule that limited the performing agency's recovery to additional costs.

12 Comp. Gen. 442 (1932).[17] Once this is accepted, the approach then becomes a matter of seeking to apply the concept of "actual cost" consistent with the statutory objectives and such guidance as the legislative history does provide.

The following passage from 57 Comp. Gen. 674, at 681 describes this approach:

"While the law and its legislative history are silent as to what was meant by the term 'actual cost' . . . the legislative history does indicate that . . . Congress intended to effect savings for the Government as a whole by: (1) generally authorizing the performance of work or services or the furnishing of materials pursuant to inter- and intra-agency orders by an agency of Government in a position to perform the work or service; (2) diminishing the reluctance of other Government agencies to accept such orders by removing the limitation upon reimbursements imposed by prior [GAO] decisions [footnote omitted]; and (3) authorizing inter- and intra-departmental orders only when the work could be as cheaply or more conveniently performed within the Government as by a private source. Thus in determining the elements of actual cost under the Economy Act, it would seem that the only elements of cost that the Act requires to be included in computing reimbursements are those which accomplish these identified congressional goals. Whether any additional elements of cost should be included would depend upon the circumstances surrounding the transaction."

Thus, the universe of costs may be divided into (1) required costs and (2) what we may term "situational" costs.

Required costs consist in large measure of direct costs—expenditures incurred by the performing agency which are specifically identifiable and attributable to performing the transaction in question. Quoting from 57 Comp. Gen. at 682:

"The Economy Act clearly requires the inclusion as actual cost of all direct costs attributable to the performance of a service or the furnishing of materials, regardless of whether expenditures by the performing agency were thereby increased."

One element of direct cost is the salary of employees engaged in doing the work. 12 Comp. Gen. 442 (1932). This means gross

[17]Loathe to summarily throw out the old rule, some early Economy Act decisions treated the "actual cost" prescription as discretionary, holding that agencies could agree to operate under the old rule. E.g., 13 Comp. Gen. 150, 153 (1933). This "option approach" has long since been discarded.

compensation. 14 Comp. Gen. 452 (1934). It includes, for example, the accrual of annual leave. 32 Comp. Gen. 521 (1953); 17 Comp. Gen. 571 (1938).

Another common element is the cost of materials or equipment furnished to the ordering agency or consumed in the course of performance. "Actual cost" in this context means historical cost and not current replacement or production cost. B-130007, December 7, 1956. See also 58 Comp. Gen. 9, 14 (1978). This does not necessarily have to be the original acquisition cost, however, but may be the most recent acquisition cost of the specific kind of item provided to the requesting agency. B-250377, January 28, 1993. Related transportation costs are another reimbursable direct cost item. Id.

Not every identifiable direct cost is reimbursable under the "actual cost" formulation. An illustration is 39 Comp. Gen. 650 (1960). The Maritime Administration was activating several tankers for use by the Navy. In the course of performing this activity, an employee of the Maritime Administration's contractor was injured, sued the United States under the Suits in Admiralty Act, and recovered a judgment which the Maritime Administration paid from an available revolving fund. While certainly a very real cost actually incurred in the course of performance, the judgment was not "necessary or required in order to condition the tanker for use by the Navy" (id. at 653), and therefore was properly payable as a judgment and not as a reimbursable cost which could be billed to Navy.[18]

In addition to direct costs, it has long been recognized that "actual cost" for Economy Act purposes includes as well certain indirect costs (overhead) proportionately allocable to the transaction. E.g., 22 Comp. Gen. 74 (1942). Indirect costs are those "incurred for common objectives and therefore cannot be directly charged to any single cost objective."[19] Indirect costs which (1) are funded out of currently available appropriations, and (2) bear a significant

[18]"Properly payable as a judgment" means payable from the permanent judgment appropriation (31 U.S.C. § 1304) unless, as was the case here, the agency has an available appropriation or fund.

[19]A Glossary of Terms Used in the Federal Budget Process, GAO/PAD-81-27, 87 (3d ed. March 1981). The term does not appear in the 1993 draft revision (Budget Glossary Exposure Draft, supra note 15).

relationship to the service or work performed or the materials furnished, are recoverable in an Economy Act transaction the same as direct costs. 56 Comp. Gen. 275 (1977), as modified by 57 Comp. Gen. 674 (1978), as modified in turn by B-211953, December 7, 1984. Examples of indirect costs include administrative overhead applicable to supervision (56 Comp. Gen. 275), and rent paid to the General Services Administration attributable to space used in the course of performing Economy Act work (B-211953).

The costs discussed thus far are those which the Economy Act can fairly be said to require. In addition, there may be others, so-called "situational costs." The discussion in 57 Comp. Gen. 674 goes on to say:

> "[The Economy Act] is not so rigid and inflexible as to require a blanket rule for costing throughout the Government . . . . Certainly neither the language of the Economy Act nor its legislative history requires uniform costing beyond what is practicable under the circumstances. This is not to say that costing is expected to be different in a substantial number of circumstances. We are merely recognizing that in some circumstances, other competing congressional goals, policies or interests might require recoveries beyond that necessary to effectuate the purposes of the Economy Act
>
> . . . .
>
> "[T]he term ['actual costs'] has a flexible meaning and recognizes distinctions or differences in the nature of the performing agency, and the purposes or goals intended to be accomplished." Id. at 683, 685.

For example, under the rules stated above, depreciation is not normally recoverable because it is not funded out of currently available appropriations. 57 Comp. Gen. 674; 72 Comp. Gen. 159, 162 (1993).[20] However, in 57 Comp. Gen. 674, in view of the congressionally established goal that the performing agency (the government entity which operated Washington National and Dulles International Airports) be self-sustaining and recover its operating costs and a fair return on the government's investment, it was appropriate to include depreciation and interest as indirect costs.

[20]Under prior decisions, actual cost could include depreciation. E.g., 38 Comp. Gen. 734 (1959). This is one of the aspects of the earlier cases superseded by the 57 Comp. Gen. 674 "family."

The amounts so recovered were deposited in the general fund of the Treasury as miscellaneous receipts. Id. at 685-86.

Another example of permissible "situational costs" is where the performing activity is funded by a statutorily authorized stock, industrial, or similar fund which provides for "full cost" recovery, i.e., beyond what the Economy Act would otherwise require, and the fund's Economy Act work is an insignificant portion of its overall work. In such a situation, there might be sound reasons for charging all customers alike. B-250377, January 28, 1993.

While particular circumstances might authorize some indirect costs beyond what the Economy Act requires, their inclusion in the performing agency's charges is not required but is discretionary. Failure to recover them is not legally objectionable, except in the unlikely event it could be shown to be an abuse of discretion. B-198531, September 25, 1980.

The Economy Act was intended to promote interagency cooperation, not interagency bickering over billings. Hence, the statutory scheme emphasizes the role of agreement. It contemplates that application of the "actual cost" standard in a given case should be "primarily for administrative consideration, to be determined by agreement between the agencies concerned." 22 Comp. Gen. 74, 78 (1942). In the interest of intragovernmental harmony, it has been held that the Economy Act does not require a detailed cost audit by the ordering agency. 32 Comp. Gen. 479 (1953); 39 Comp. Gen. 548, 549-50 (1960). Nor does it require the performing agency to provide a detailed breakdown unless the agreement provides otherwise. B-116194, October 5, 1953. Payment is authorized "at rates established by the servicing agency so long as they are reported to be based upon the cost of rendition of the service and do not appear to be excessive." 32 Comp. Gen. at 481.

While at times actual cost can be computed with precision, the Economy Act does not require that the determination be an exact science. Cases on reimbursable work even before the Economy Act recognized the acceptability of a reasonable and appropriate methodology over "absolutely accurate ascertainment" which might entail considerable burden and expense. 3 Comp. Gen. 974 (1924). As stated in B-133913, January 21, 1958, "[a]s long as the amount agreed upon results from a bona fide attempt to determine the

actual cost and, in fact, reasonably approximates the actual cost," the Economy Act is satisfied. One methodology GAO has found to be reasonable and "consistent with the minimum legal requirements of the Economy Act" is billing on the basis of "standard costs" derived from documented costs of the last acquisition or production. B-250377, January 28, 1993 (containing a detailed discussion); Iran Arms Sales: DOD's Transfer of Arms to the Central Intelligence Agency, GAO/NSIAD-87-114, 8 (March 1987) .

There are limits, however, and the "methodology" cannot be totally divorced from the determination or reasonable approximation of actual costs. Thus, a cost allocation in which some customers are paying excessive amounts and effectively subsidizing others is improper. 70 Comp. Gen. 592 (1991). So is an allocation based on the availability of appropriations (B-114821-O.M., November 12, 1958), or a per capita funding arrangement not related to the goods or services actually received (67 Comp. Gen. 254, 258 (1988)).

Agencies may waive the recovery of small amounts where processing would be uneconomical. An agency wishing to do this should set a minimum billing figure based on a cost study. B-156022, April 28, 1966. The case for waiver is even stronger when the account to be credited with the payment is no longer available for obligation. See B-120978-O.M., October 19, 1954.

Finally, while the statute talks about the "actual cost of goods or services provided," there is one situation in which payment of actual costs will have no relationship to anything "provided." For various reasons, an agency may find it necessary to terminate an Economy Act contract before it is completed. It can terminate the contract "for convenience," the same as it could with a commercial contract, in which event the performing agency should not have to bear the loss for any expenses it has already incurred. The Comptroller General addressed the situation as follows in B-61814, January 3, 1947:

"[W]here an order issued pursuant to [the Economy Act] is terminated after the establishment receiving said order has incurred expenses incident thereto the amount of such expenses or costs is for determination and adjustment by agreement between such agencies . . . . [T]here would appear to be ample authority for an agreement between the agencies . . . to effect an adjustment of the appropriations and/or funds of said agencies on the basis of the actual amount of the costs or expenses incurred."

(3) Obligation and deobligation

The obligational treatment of Economy Act transactions is addressed in 31 U.S.C. § 1535(d):

"An order placed or agreement made under this section obligates an appropriation of the ordering agency or unit. The amount obligated is deobligated to the extent that the agency or unit filling the order has not incurred obligations, before the end of the period of availability of the appropriation, in—

"(1) providing goods or services; or

"(2) making an authorized contract with another person to provide the requested goods or services." (Emphasis added.)

The first sentence of section 1535(d) establishes that an Economy Act agreement is sufficient to obligate the ordering agency's appropriations even though the agency's liability is not subject to enforcement the same as a contract with a private party. This sentence must be read in conjunction with 31 U.S.C. § 1501(a)(1), which recognizes interagency agreements and prescribes the requirements for a valid obligation. Under section 1501(a)(1), an obligation is recordable when supported by documentary evidence of:

"(1) a binding agreement between an agency and another person (including an agency) that is—

"(A) in writing, in a way and form, and for a purpose authorized by law; and

"(B) executed before the end of the period of availability for obligation of the appropriation or fund used for specific goods to be delivered, real property to be bought or leased, or work or service to be provided[.]"

Thus, an Economy Act agreement is recordable as an obligation under 31 U.S.C. § 1501(a)(1) if it meets the requirements specified in that section. 34 Comp. Gen. 418, 421 (1955); 39 Comp. Gen. 317, 318-19 (1959). It must, for example, involve a definite commitment for specific equipment, work, or services. See, e.g., 15 Comp. Gen. 863 (1936). Also, the recording statute reinforces a point in the Economy Act itself, namely, that the order or agreement must be for a purpose the ordering agency is authorized to accomplish.

In addition, a valid Economy Act obligation must satisfy the basic fiscal requirements applicable to obligations in general. Specifically, it must comply with the bona fide needs rule. E.g., 58 Comp. Gen. 471 (1979); B-195432, July 19, 1979. And, of course, the ordering agency must have sufficient obligational authority to satisfy the Antideficiency Act.

While the order must be placed or the agreement entered into before the ordering agency's appropriation expires for obligational purposes, actual payment to the performing agency may occur in a later fiscal year. If payment does not take place until after the obligated account has closed pursuant to 31 U.S.C. § 1552, the payment must be charged to a current appropriation of the ordering agency available for the same purpose. 31 U.S.C. § 1553(b); B-260993, June 26, 1996.

The second sentence of section 1535(d) lays out the requirement that the performing agency must incur obligations to fill the order within the period of availability of the appropriation being used. Otherwise the funds deobligate. In the case of a contract with a private party, as discussed in Chapter 5, obligated funds remain available to fund work performed in a subsequent fiscal year as long as the obligation met bona fide need concerns when it was incurred. Some statutes authorizing interagency transactions specifically provide for obligations to be treated the same as obligations with private contractors. E.g., 41 U.S.C. § 23. Subsection (c) of the original Economy Act contained similar language (47 Stat. 418). However, a concern soon arose that the Economy Act was being used to effectively extend the obligational life of appropriations beyond that which Congress had provided. Legislative resolution came about in stages. First, a 1936 statute restricted the period of availability of advance payments under the Economy Act to that provided in the source appropriation.[21] See 16 Comp. Gen. 752, 754 (1937); 16 Comp. Gen. 575, 577 (1936); 15 Comp. Gen. 1125 (1936).

A more comprehensive provision was enacted as part of the General Appropriation Act for 1951, September 6, 1950, ch. 896, § 1210,

[21]Act making deficiency appropriations for 1936, June 22, 1936, ch. 689, § 8, 49 Stat. 1597, 1648. The Act of June 26, 1943, ch. 150, 57 Stat. 219, amended the Economy Act itself to reflect the 1936 legislation.

64 Stat. 595, 765. This provision, the origin of what is now the second sentence of 31 U.S.C. § 1535(d), restricted the availability of any funds "withdrawn and credited" under the Economy Act to the period provided in the act which appropriated them. The obvious purpose, as reflected in pertinent committee reports, was to prevent use of the Economy Act as a subterfuge to continue the availability of appropriations beyond the period provided in the appropriating act. See 31 Comp. Gen. 83, 85 (1951); B-95760, June 27, 1950. Thus, funds obligated under the Economy Act must be deobligated at the end of their period of availability (fiscal–year or multiple-year period) to the extent the performing agency has not performed or itself incurred valid obligations as part of its performance (34 Comp. Gen. 418, 421-422 (1955)). The 1982 recodification of Title 31, United States Code, restated the provision as a positive requirement to deobligate.

The deobligation requirement is not limited to advance payments but applies as well to payment by way of reimbursement. 31 Comp. Gen. 83 (1951). Accordingly, as stated in 31 Comp. Gen. at 86,

> "where work is performed or services rendered on a reimbursable basis by one agency for another over a period covering more than one fiscal year, the respective annual appropriations of the serviced agency must be charged pro tanto with the work performed or services rendered in the particular fiscal year."

The deobligation requirement of 31 U.S.C. § 1535(d) does not apply where the appropriation originally obligated is a no-year appropriation. 39 Comp. Gen. 317 (1959).

A concrete example will illustrate the difference between a commercial contract and an Economy Act contract. Suppose that, towards the end of fiscal year 1996, an agency develops the need for some sort of statistical study. It enters into a contract with a private party a few days before the end of the fiscal year, obligating fiscal year 1996 appropriations, knowing full well that most of the work will be done in the following year. Assuming the need was legitimate, the obligated funds remain available to pay for the work. Now take the same situation except the contract is with another government agency under the Economy Act and the work is to be done by personnel of the performing agency. The 1996 funds may be used only for work actually done in the remaining days of that fiscal year. The remainder must be deobligated and reobligated against

1997 appropriations. See B-223833, November 5, 1987; B-134099, December 13, 1957.

The deobligation requirement of 31 U.S.C. § 1535(d) applies only to obligations under the Economy Act and has no effect on obligations for interagency transactions under other statutory authorities. E.g., 55 Comp. Gen. 1497 (1976); 51 Comp. Gen. 766 (1972); B-108332, March 26, 1952; B-95760, June 27, 1950.[22]

(4) Applicability of limitations and restrictions

Every agency is subject to a variety of authorities, limitations, restrictions, and exemptions. Some are governmentwide. Others are agency-specific. Still others may be bureau- or even program-specific. In analyzing the relationship of such provisions to an Economy Act transaction, it is important to start with an understanding of what the Economy Act is and is not supposed to do. As we have noted previously, the law is designed to permit an agency to accomplish some authorized task more simply and economically by using another agency's experience and/or expertise. It is not intended to permit an agency to avoid legislative restrictions on the use of its funds, nor is it intended to permit an agency running short of money to dip into the pocket of another vulnerable and more budgetarily secure agency.

The rule, as stated in 18 Comp. Gen. 489, 490-491 (1938), is as follows:

> "Funds transferred from the appropriations under one department to another department for the performance of work or services under authority of [the Economy Act], or similar statutory authority, are available for the purposes for which the appropriation from which transferred are available, and also subject to the same limitations fixed in the appropriations from which the funds are transferred."

Under the first part of this rule, the purpose availability of the funds is determined by reference to the purpose availability of the source appropriation. This is closely related to the rule discussed earlier under the "Funds available" heading, that an Economy Act transfer cannot expand that purpose availability.

[22]See Chapter 7 for further elaboration and case summaries.

The second part of the rule is easier to state than to apply. Transferred funds remain subject to limitations and restrictions applicable to the transferring agency, as a general rule. One example is expenditure limitations applicable to the source appropriation. 17 Comp. Gen. 900 (1938); 17 Comp. Gen. 73 (1937); 16 Comp. Gen. 545 (1936).[23] A 1951 decision, 31 Comp. Gen. 109, held that an appropriation rider which limited the filling of vacancies arising during the fiscal year followed an advance of funds to a working fund. A decision just two months later found the result equally applicable to payment by reimbursement. B-106101, November 15, 1951.

The same rule applies to exemptions from general prohibitions. For example, a statute long since repealed prohibited what GAO's decisions referred to as "the employment of personal services" in the District of Columbia without express authority. The Navy had a statutory exemption. The Army had one too, but it was much more limited. In a case where the Army was doing Economy Act work for the Navy, GAO held that the exemption applicable to the Navy controlled. Therefore, the Army could proceed without regard to the restriction it would have had to follow when making direct expenditures for its own work. 18 Comp. Gen. 489 (1938). In a similar case, the Commerce Department needed to procure supplies for use in Economy Act work it was doing for the Army. Both agencies had exemptions from the advertising requirement of 41 U.S.C. § 5 for small dollar amounts—$500 for the Army but only $25 for Commerce. The Comptroller General advised that even though Commerce was doing the purchasing, it could do so under the Army's more liberal exemption because it would be using Army money to make the purchase. 21 Comp. Gen. 254 (1941). See also B-54171, December 6, 1945.

There have been a number of exceptions to the rule that Economy Act transfers are subject to the limitations of the source appropriation. The substantive aspects of the exceptions are less important than their rationale. One case, B-106002, October 30, 1951, concluded that funds advanced or reimbursed in Economy Act

[23]The rule quoted in the text from 18 Comp. Gen. 489 refers to the Economy Act "or similar statutory authority." Hence, the cases cited in the text commingle Economy Act and non-Economy Act applications without distinction.

transactions were not subject to a monetary limit on personal services contained in the ordering agency's appropriation, because it could be clearly demonstrated that the ceiling was based on the cost of employees on the agency's payroll and did not include the estimated cost of Economy Act services either performed by the agency or reimbursed to it.

A similar limitation for the Bureau of Reclamation was the subject of another exception in B-79709, October 1, 1948. Legislative history revealed that the limitation stemmed from a congressional concern over an excessive number of administrative and supervisory personnel employed by the Bureau. Thus, the limitation was more on the Bureau than on the funds in the sense that it was apparently not intended to limit funds which could be transferred to some other agency, and spent by it to pay its own personnel used in performing Economy Act work requested by the Bureau. Thus, the Bureau could pay for Economy Act work without regard to the ceiling. However, work the Bureau did for other agencies had to be charged against the ceiling because, unlike the situation in B-106002 noted above, the figures upon which the ceiling in B-79709 was based did include transfers from other agencies.

Still another group of exceptions involved the authority to employ (and pay) personnel without regard to certain of the civil service laws. The issue first arose in 21 Comp. Gen. 749 (1942), in connection with Economy Act work being performed by the Bureau of the Census for various national defense agencies. The question was whether the Census Bureau was bound by limitations in the source appropriations. The decision noted the line of cases applying the general rule, such as 18 Comp. Gen. 489 and 21 Comp.Gen. 254, summarizing them as follows:

> "[S]uch decisions involved cases in which it was sought to employ transferred funds for purposes for which the funds would not have been available in the transferring agency; or where it was sought to use transferred funds to employ personal services when such services could not have been employed (regardless of the method of appointment or the rates of pay) by the transferring agency; or where the transferred funds were directly subject to restrictions regarding the amount expendable therefrom for passenger-carrying automobiles, or for procurements without advertising, etc." Id. at 752.

The decision then went on to distinguish the prior cases on the following grounds:

"What is involved in the instant matter is essentially different being the accomplishment of certain object for which the funds of the transferring agency are available and which the agency to which the transfer is made is equipped to accomplish by the use of personnel and equipment it already has or is otherwise authorized to procure. Under such circumstances, the charge to be made by the performing agency against the funds of the agency desiring the services—whether under a reimbursement or advance-of-funds procedure—should be on the basis of the rates of compensation which the performing agency is otherwise authorized by law to pay to its personnel used in the performance of the services." Id.

Later cases applying this holding are B-38515, December 22, 1943, B-43377, August 14, 1944, and B-76808, July 29, 1948. A similar rationale is found in B-259499, August 22, 1995, advising the Central Intelligence Agency on the extent to which it could use its own personal services contractors in performing Economy Act orders where the ordering agency lacks authority to contract for personal services. Where the CIA is merely using the contractors along with its own employees to perform otherwise authorized work, there is no violation. This is merely "a means to an otherwise authorized end, and not an end in itself." Id. at 8. However, B-259499 noted, the Economy Act would be violated by placing the contractors under the direct supervision and control of the ordering agency, or by procuring the contractors solely in response to the ordering agency's needs. The latter two situations would amount to using the Economy Act to circumvent limitations on the ordering agency's authority.

We have noted that one of the Economy Act's objectives is to avoid improper augmentations. An Economy Act transaction carried out in accordance with law serves this purpose. It has been stated that Economy Act agreements "do not increase or decrease the appropriation of the requisitioned agency." A-99125, November 21, 1938. That case held that Economy Act transactions would not violate an appropriation proviso which limited the amounts available to a particular agency to the funds appropriated in that act. Similarly, absent some indication of a contrary intent, a monetary limit on general transfer authority is aimed at transfers which supplement the appropriation in question, and does not apply to credits to that appropriation incident to otherwise proper Economy Act transactions. B-120414, June 17, 1954. Variations in discernible intent may change the result. See B-30084, November 18, 1942.

In 31 Comp. Gen. 190 (1951), an agency whose appropriation contained a monetary ceiling on personal services asked whether

the ceiling applied to services provided to others under the Economy Act or, more precisely, whether reimbursements received from ordering agencies counted against the ceiling. Viewing the limitation as applicable to expenses incurred for the agency itself, and noting the point from A-99125, November 21, 1938, that Economy Act transactions do not serve to increase or decrease the performing agency's appropriation, the decision said no. Absent evidence of a contrary intent, the rationale of 31 Comp. Gen. 190 would presumably apply as well to other types of limitations on the performing agency.

(5) Accountability issues

A payment to another federal agency differs from a payment to a private party in that an overpayment or erroneous payment to another agency does not result in an actual loss of funds to the United States. 24 Comp. Gen. 851, 853 (1945); B-156022, April 28, 1966; B-116194, October 5, 1953; B-44293, September 15, 1944. As stated in 24 Comp. Gen. at 853:

> "The question here presented does not involve the discharge of a Government obligation to a non-Government agency or individual where an excess payment might result in a loss to the United States. In case of an overpayment by one department to another, the matter can be adjusted upon discovery."

Consistent with this, the Economy Act includes in its payment provision the statement that a "bill submitted or a request for payment is not subject to audit or certification in advance of payment." 31 U.S.C. § 1535(b). The language had appeared in various places prior to the Economy Act, one example being the 1926 Navy working fund statute noted in our introductory comments. While research discloses no attempt to define "certification" for purposes of these statutes, the term does have a plain and well-known meaning in the payment context—the verification and endorsement of a payment voucher by a certifying officer or other authorized official—normally performed in advance of payment. See 31 U.S.C. § 3528. As the narrower and more specific provision, the no advance certification language in 31 U.S.C. § 1535(b) would take precedence over the more general certification requirements of 31 U.S.C. § 3528.

Thus, an ordering agency is not required to certify vouchers prior to payment when making payment to another federal entity, whether in

advance or by reimbursement, in an Economy Act transaction.[24] However, keeping in mind that the ordering agency "remains accountable to the Congress for activities under appropriations made to it" (46 Comp. Gen. 73, 76 (1966)), an agency could presumably, on a voluntary basis, pass vouchers through some form of limited certification process as an internal control device, at least as long as it does not materially delay payment. Certainly the no audit or certification in advance of payment language does not permit the agency to completely disregard the conditions set forth in 31 U.S.C. § 1535(a). 16 Comp. Gen. 3, 4-5 (1936). Of course, the no advance certification language has no application to disbursements by a performing agency.

The preceding paragraphs presuppose a two-step payment process—payment by the ordering agency to the performing agency either preceded or followed by obligation and payment by the performing agency. There is an approach, described and approved in 44 Comp. Gen. 100 (1964), that consolidates these into a single step and effectively removes the no advance certification language from consideration. In that case, the former Department of Health, Education, and Welfare (HEW) was performing Economy Act services for the Agency for International Development (AID). Under the terms of the arrangement, AID would establish appropriate fund limitations and HEW certifying officers would certify vouchers directly against AID appropriations for direct payment of costs incurred in performing, with HEW being responsible for staying within the established fund limitations. Once it was established that the agencies were agreeable to operating this way, the primary legal obstacle was that certifying officers are normally supposed to be employees of the agency whose funds they are certifying. The solution was a slight bit of legerdemain that could be referred to as "cross-certification." The ordering agency appoints the performing agency's certifying officer as an officer or employee of it, the ordering agency, without compensation, and then designates him or her as one of its own certifying officers. Voila!

[24]To the extent it supports a contrary proposition, the editors view 39 Comp. Gen. 548 (1960) as incorrect. It inexplicably fails to consider the no advance certification language, and is inconsistent with the plain terms of the Economy Act itself (see 37 Op. Att'y Gen. 559 (1934)), and with applications of similar language in other statutes, such as 44 U.S.C. § 310 (payments for printing and binding). See also 56 Comp. Gen. 980 (1977); A-30304-O.M., February 10, 1930.

The concept of "cross-certification" has a number of applications in situations where financial services are themselves the subject of an Economy Act agreement. For example, the General Services Administration not infrequently enters into Economy Act "support agreements" with smaller agencies, boards, or commissions to provide administrative support services, including the processing of payment vouchers. In 55 Comp. Gen. 388 (1975), GSA inquired as to the potential liability of its certifying officers in such a situation. The answer is that it depends on exactly what has preceded the GSA certifying officer's actions. Certainly, GSA could provide full certification under the agreement, in which event the GSA certifying officer would be the equivalent of the HEW certifying officer in 44 Comp. Gen. 100. However, if an official of the client agency certifies the voucher before it gets to GSA, GSA's administrative processing is not "certification" for purposes of the accountable officer laws, and the GSA official will be liable only for errors made during his or her final processing.

For temporary agencies, the support agreement may include the payment of obligations after the agency has gone out of existence. However, the "appointment without compensation" sleight-of-hand cannot possibly be stretched to apply where the agency no longer exists. In such a case, before the GSA certifying officer can certify the voucher, (1) the agencies must have entered into an Economy Act agreement while the client agency was still "alive," (2) the agreement must expressly authorize GSA to perform this function, and (3) the debt in question must have been incurred prior to the client agency's expiration. 59 Comp. Gen. 471 (1980).

The cross-certification concept has also found overseas applications. For example, State Department officials may perform certifying and disbursing functions for military departments overseas, charging payments directly to the applicable military appropriations. 44 Comp. Gen. 818 (1965); 22 Comp. Gen. 48 (1942). Similarly, when the Department of Education was created and took over responsibility for the Defense Department's Overseas Dependents' Schools, Education wanted to retain Defense's financial support services which had been in place for decades. It could accomplish this with an Economy Act agreement, applying guidance from decisions such as 44 Comp. Gen. 100 and 55 Comp. Gen. 388. B-200309-O.M., April 3, 1981.

Anyone processing payments for the Defense Department will sooner or later run into a confidential "emergency or extraordinary expense" payment. In a 1993 case, a State Department certifying officer in Haiti asked whether he could properly certify a voucher for unspecified "emergency or extraordinary" expenses where nobody would furnish supporting documentation or tell him what the money was for. Under 10 U.S.C. § 127, all that is required is a certification of confidentiality by an authorized military official. The State Department official could not question that certification. Under these circumstances, the State Department certifying officer's "certification"—certifying merely that the payment was being charged to the emergency expense appropriation for that fiscal year—was little more than "subsequent administrative processing" as discussed in cases like 55 Comp. Gen. 388. 72 Comp. Gen. 279 (1993).

Fiscal services provided under an Economy Act agreement can, in appropriate circumstances, include disbursing cash from an imprest fund. The fact that the cashier is disbursing another agency's money has no effect on accountability or liability. 65 Comp. Gen. 666, 675-77 (1986).

d. What Work or Services May Be Performed

(1) Details of personnel

A very common type of interagency service is the loan or detail of personnel. A detail is "the temporary assignment of an employee to a different position or a specified period, with the employee returning to regular duties at the end of the detail." 64 Comp. Gen. 370, 376 (1985). Some of the earliest administrative decisions deal with details of personnel.

In 14 Comp. Dec. 294 (1907), the Comptroller of the Treasury was asked to advise the Secretary of the Treasury on a proposal to loan an employee to another agency, with the "borrowing agency" to reimburse only the employee's travel and incidental expenses, but not basic salary. The Comptroller knew what the answer should be:

> "If these were questions of first impression I would be impelled to answer each of them in the negative, because of that provision in the statute [31 U.S.C. § 1301(a)] which requires all appropriations to be used exclusively for the purposes for which made." 14 Comp. Dec. at 295.

However, he continued, "they are not questions of first impression." Id. The practice had developed in the executive branch of loaning employees without reimbursement except for extra expenses incurred on account of the detail. This practice had been around for so long, according to the Comptroller, that it was virtually etched in stone. Id. at 295-96. As long as the agency could spare the employee for the requested time, it would be

> "in the interest of good government and economy to so utilize his services. His regular salary would be earned in any event, and in all probability without rendering in his own Department adequate services therefor. Therefore reimbursement has never, to my knowledge, been made on such details for regular salaries. But where additional expenses have accrued because of such detail such expenses have always been reimbursed to the regular appropriation from which originally paid . . . ." Id. at 296.

This rationale was quite remarkable. Subsequent comptrollers obviously struggled with the rationale's weakness and were careful not to expand the rule of the 1907 case. Thus, if the loaning agency had to employ someone else to do the detailed employee's job while he was gone, the salary was reimbursable. 22 Comp. Dec. 145 (1915). A 1916 case, 23 Comp. Dec. 242, soundly attacked the rationale of 14 Comp. Dec. 294, specifically the assumption that the employee "would have remained idle if he had not been loaned," 23 Comp. Dec. at 245, and came close to throwing it out, but did not. Early GAO decisions failed to seize the opportunity but instead adhered to the "no reimbursement" rule. E.g., 6 Comp. Gen. 217 (1926).[25]

The 1932 enactment of the Economy Act provided the vehicle for change, but it was slow to implement. It was quickly recognized that the Economy Act authorized fully reimbursable details of personnel. 13 Comp. Gen. 234 (1934). However, as with the first round of Economy Act decisions in other contexts, the early decisions held that agencies had a choice. If they chose not to enter into a written Economy Act agreement expressly providing for full reimbursement, they could continue to operate under the old rules.

[25]Oddly, the early decisions were not so rigid when it came to intra-agency work. Where an employee did work for different bureaus within the same agency, the agency could prorate the salary among the appropriations involved, or could pay the entire salary from one appropriation and seek reimbursement from the others. 5 Comp. Gen. 1036 (1926).

Id. at 237. The question of how you could have nonreimbursable details in light of 31 U.S.C. § 1301(a) never went away but, like a stubborn weed in the garden, the "informal accommodation" approach survived (e.g., B-182398, March 29, 1976; B-30084, November 18, 1942), and was reaffirmed as late as 59 Comp. Gen. 366 (1980).

If enactment of the Economy Act was the first shoe dropping, the second shoe didn't drop until 64 Comp. Gen. 370 (1985). After reviewing the prior decisions and the legislative history of the Economy Act, the Comptroller General said in 1985 what the Economy Act probably thought it was saying in 1932, and certainly what the Comptroller of the Treasury really wanted to say in 1907:

> "Although Federal agencies may be part of a whole system of Government, appropriations to an agency are limited to the purposes for which appropriated, generally to the execution of particular agency functions. Absent statutory authority, those purposes would not include expenditures for programs of another agency. Since the receiving agency is gaining the benefit of work for programs for which funds have been appropriated to it, those appropriations should be used to pay for that work. Thus, a violation of the purpose law does occur when an agency spends money on salaries of employees detailed to another agency for work essentially unrelated to the loaning agency's functions." 64 Comp. Gen. at 379.

Accordingly, absent specific statutory authority to the contrary, details of personnel between agencies or between separately funded components of the same agency may not be done on a nonreimbursable basis, but must be done in accordance with the Economy Act, which requires full reimbursement of actual costs, one of which is the employee's salary. The fact that the loaning agency pays the employee from a revolving fund changes nothing; a nonreimbursable detail still creates an unauthorized augmentation of the receiving agency's appropriation, as well as violates the purpose limitations of 31 U.S.C. § 1301(a). B-247348, June 22, 1992.

Apart from details which may be reimbursable under some specific statutory authority, the decisions recognize two exceptions. First, nonreimbursable details are permissible "where they involve a matter similar or related to matters ordinarily handled by the loaning agency and will aid the loaning agency in accomplishing a purpose for which its appropriations are provided." 64 Comp. Gen. at 380. Second, details "for brief periods when the numbers of persons and cost involved are minimal" and "the fiscal impact on the appropriation is negligible" do not require reimbursement. Id.

at 381. GAO has declined to attempt to specify the limits of the "de minimis" exception but it could not, for example, be stretched to cover a detail of 15-20 people. 65 Comp. Gen. 635 (1986).

The Department of Justice's Office of Legal Counsel has taken essentially the same position as 64 Comp. Gen. 370. 13 Op. Off. Legal Counsel 188 (1989) (United States Attorney's Office for the District of Columbia must reimburse Defense Department for year-long detail of 10 lawyers); 12 Op. Off. Legal Counsel 233 (1988) (detail of Internal Revenue Service agents to investigate tax fraud for an Independent Counsel could be nonreimbursable under the commonality of functions exception). While the OLC's approach and analysis are otherwise the same, it has misgivings over the propriety of a "de minimis" exception. 13 Op. Off. Legal Counsel at 190 n.3.

While the agreement should normally precede the detail, an agreement entered into after the detail has started can include the services already performed. B-75052, May 14, 1948. Reimbursement should include accrued annual and sick leave. 17 Comp. Gen. 571 (1938). It should also include travel expenses incurred in connection with the detail work. 15 Comp. Gen. 334 (1935); B-141349, December 9, 1959. If the detail is to be for a substantial period of time, the loaning agency should change the employee's official duty station to the location of the detail and then restore it when the assignment is done. If applicable to the distances involved, the employee may then become entitled to allowances incident to a permanent change of station, such as shipment of household goods. 24 Comp. Gen. 420 (1944). A case where this was done is B-224055, May 21, 1987.

If interagency details are authorized under statutory authority other than the Economy Act, whether or not they are reimbursable will naturally depend on the terms of the statute. A statute which is silent on the issue will generally be construed as not precluding reimbursement unless a contrary intent is manifested. For example, 5 U.S.C. § 3341 authorizes intra-agency details within the executive branch for renewable periods of not more than 120 days. The statute says nothing about reimbursement. GAO regards this as merely providing authority to make the details and not as exhibiting an intent that they be nonreimbursable. 64 Comp. Gen. at 381-82. The same applies to 5 U.S.C. § 3344 which authorizes detailing of administrative law judges but is similarly silent on the issue of

reimbursement. 65 Comp. Gen. 635 (1986). The Justice Department has said the same thing with respect to "temporary reassignments" under the Anti-Drug Abuse Act of 1988. 13 Op. Off. Legal Counsel 188 (1989). An example of a statute which addresses reimbursement is 3 U.S.C. § 112, which authorizes details of executive branch employees to various White House offices and requires reimbursement for details exceeding 180 calendar days in any fiscal year. See 64 Comp. Gen. at 380; B-224033, May 26, 1987 (internal memorandum).

A different type of statute, discussed and applied in B-247348, June 22, 1992, is 44 U.S.C. § 316, which prohibits details of Government Printing Office employees "to duties not pertaining to the work of public printing and binding . . . unless expressly authorized by law."

Finally, it is not uncommon for agencies to detail employees to congressional committees. Two 1942 decisions, 21 Comp. Gen. 954 and 21 Comp. Gen. 1055, addressed this situation and held essentially that the details could be nonreimbursable if the committee's work for which the detail was sought could be said to help the agency accomplish some purpose of its own appropriations. These cases were the source of the "commonality of function" exception which 64 Comp. Gen. 370 applied across the board. See 64 Comp. Gen. at 379. The second 1942 decision emphasized that "mutuality of interest" is not enough.

> "[I]t must appear that the work of the committee to which the detail or loan of the employee is made will actually aid the agency in the accomplishment of a purpose for which its appropriation was made such as by obviating the necessity for the performance by such agency of the same or similar work." 21 Comp. Gen. at 1058.

A 1988 decision applied these precedents to conclude that the Treasury Department could detail two employees to the House Committee on Government Operations on a nonreimbursable basis to work with the committee on the oversight and review of the FTS-2000 telecommunications project. B-230960, April 11, 1988.

As to reimbursable details, section 202(f) of the Legislative Reorganization Act of 1946, 2 U.S.C. § 72a(f), provides that "[n]o committee [of the Congress] shall appoint to its staff any experts or other personnel detailed or assigned from any department or agency of the Government, except with the written permission of" specified

committees. The Justice Department's Office of Legal Counsel regards this as implicit authority for reimbursable details of executive branch personnel to congressional committees, the theory being that a restriction like 2 U.S.C. § 72a(f) would be rather pointless if the authority didn't already exist. 12 Op. Off. Legal Counsel 184, 185 (1988). See also 1 Op. Off. Legal Counsel 108 (1977). However, the OLC cautions that agencies should have due regard for potential ethics and separation-of-powers concerns. 12 Op. Off. Legal Counsel at 186-89. GAO has pointed out that 2 U.S.C. § 72a(f) is a limitation on the authority of congressional committees, not a limitation on the loaning agency, and that compliance is not the loaning agency's responsibility. B-129874, January 4, 1971.

GAO details its own personnel to congressional committees under various authorities. A provision in GAO's organic legislation, 31 U.S.C. § 712(5), requires the agency to provide requested help, presumably including loans of personnel, to committees "having jurisdiction over revenue, appropriations, or expenditures." Details under this provision are not required to be reimbursed. B-129874, January 4, 1971; B-130496-O.M., March 13, 1957. In addition, GAO has applied the two 21 Comp. Gen. decisions to itself. B-41849, May 9, 1944; B-130496-O.M., above. Another statute, 31 U.S.C. § 734, provides that the Comptroller General "may assign or detail [GAO employees] to full-time continuous duty with a committee of Congress for not more than one year." A part of this statute which required reimbursement by the Senate was deleted in the 1985 Legislative Branch Appropriations Act "to put the Senate on the same basis as the House in this regard." S. Rep. No. 98-515, 15 (1984).

(2) Loans of personal property

Another area where the Economy Act wrought considerable change was reimbursement for interagency loans of equipment and other personal property. Prior to 1932, there was no authority to charge another government agency for the use of borrowed property. E.g., 9 Comp. Gen. 415 (1930). Also, as discussed under the Interagency Claims heading in Chapter 12, the borrowing agency lacked authority to use its appropriations to repair the borrowed property unless for its own continued use, the theory being that the property belonged to the United States and not to any individual agency. To

some extent at least, the Economy Act amounts to "tacit recognition of property ownership rights in the various departments and agencies possessing such property." 30 Comp. Gen. 295, 296 (1951).

Thus, one early case held that the Economy Act provided sufficient authority for the old Civil Aeronautics Board to lease surplus aircraft from another government agency. 24 Comp. Gen. 184 (1944). It also authorized the Soil Conservation Service to borrow a shallow draft river boat from the Bureau of Land Management for certain work in Alaska. 30 Comp. Gen. 295 (1951). The logic of the 1951 decision is simple. If the Economy Act authorizes the permanent transfer of equipment, and it unquestionably does, then it must also authorize "lesser transactions between departments on a temporary loan basis." Id. at 296. Another boat was involved in 38 Comp. Gen. 558 (1959). The Maritime Administration wanted to loan a tug to the Coast Guard and asked if the transaction was within the scope of 24 Comp. Gen. 184. Sure it was, GAO replied. There was no "essential difference" between the lease in the 1944 case and the loan in this one (id. at 559), and therefore no reason not to follow 24 Comp. Gen. 184 and 30 Comp. Gen. 295.

That the Economy Act authorizes interagency loans of personal property has been confirmed in several judicial decisions, a rare example of the Economy Act coming before the courts in any context. The cases arose out of the 1973 occupation of the village of Wounded Knee, South Dakota, by members of a group called the American Indian Movement. Various law enforcement agencies had been called in, including the United States marshals and the Federal Bureau of Investigation. The Army provided substantial amounts of equipment, such as sniper rifles, protective vests, and armored personnel carriers. Defendants charged with obstructing law enforcement officers tried to argue that the Army's involvement violated 18 U.S.C. § 1385, the so-called Posse Comitatus Act, which prohibits use of the Army or Air Force for law enforcement unless specifically authorized. With one exception, the courts held that the Posse Comitatus Act applies to personnel, not to equipment, and in any event providing the equipment was authorized by the Economy Act. United States v. McArthur, 419 F. Supp. 186, 194 (D.N.D. 1976), aff'd sub nom. United States v. Casper, 541 F.2d 1275 (8th Cir. 1976), cert. denied, 430 U.S. 970; United States v. Red Feather, 392 F. Supp. 916, 923 (D.S.D. 1975); United States v. Jaramillo, 380 F. Supp. 1375, 1379 (D. Neb. 1974), appeal dismissed, 510 F. 2d 808 (8th Cir.

1975). As the McArthur court noted, borrowing "highly technical equipment . . . for a specific, limited, temporary purpose is far preferable" to having to maintain the equipment permanently. 419 F. Supp. at 194. One court disagreed, holding that the Economy Act applies "only to sales, and not to loans." United States v. Banks, 383 F. Supp. 368, 376 (D. S.D. 1974). However, Banks goes against the clear weight of authority in this respect.[26]

The reimbursement of "actual costs" is somewhat different for loans of personal property than for other Economy Act transactions. If an agency loans a piece of equipment to another agency and the borrowing agency returns it in as good condition as when loaned, the loaning agency has not incurred any direct costs. Thus, the decision at 24 Comp. Gen. 184 (lease of surplus aircraft) said merely that the borrowing agency should agree "to reimburse the department for the cost, if any, necessarily incurred by it in connection with such transaction," plus repair costs. Id. at 186. Depreciation is an identifiable indirect cost, but recovery of depreciation is normally inappropriate under the standard of 57 Comp. Gen. 674 (1978), previously discussed under the Actual Cost heading. Reimbursable costs (or costs the borrowing agency should pay directly in the first instance) include such things, as and to the extent applicable, as transportation, activation, operation, maintenance, and repair. See, e.g., 38 Comp. Gen. 558, 560 (1959). Another permissible item of "cost" is a refundable deposit on containers. B-125414, September 30, 1955. An important expense which the borrowing agency should assume under the agreement, discussed further in Chapter 12, is the cost of repairing and/or restoring the property so as to return it to the lending agency in the same condition as when borrowed. E.g., 30 Comp. Gen. 295 (1951).

While there is no payment for the bare use of the property, i.e., divorced from some cost actually incurred by one of the agencies, the Economy Act should not be used for loans for indefinite periods

[26]Subsequent to the Wounded Knee litigation, Congress enacted 10 U.S.C. § 372, which expressly authorizes the Secretary of Defense to make equipment available to law enforcement organizations. At first, reimbursement was discretionary. See Pub. L. No. 97-86, § 905(a)(1), 95 Stat. 1099, 1116 (1981); 6 Op. Off. Legal Counsel 464 (1982). The reimbursement provision, 10 U.S.C. § 377, was amended in 1988 to require reimbursement, with certain exceptions, "[t]o the extent otherwise required" by the Economy Act or other applicable law.

which amount to permanent transfers in disguise. The reason is that a permanent transfer, while authorized under the Economy Act, requires payment for the property. 59 Comp. Gen. 366, 368 (1980); 38 Comp. Gen. 558, 560 (1959). In 16 Comp. Gen. 730 (1937), for example, an agency had loaned office equipment to another agency. When the borrowing agency's need for the property continued to the point where the lending agency had to replace it for its own use, the borrowing agency paid for the equipment. Agencies desiring a permanent transfer without reimbursement should seek statutory authority. 38 Comp. Gen. at 560.

A permanent transfer raises the question of how to value the property. The same question arises when property loaned under the Economy Act is totally destroyed. The decision at 16 Comp. Gen. 730 does not specify how the amount of the payment was calculated. In a case where property was destroyed, the question was whether value should be set at acquisition value or the value of similar property being disposed of as surplus property. GAO declined to choose, advising that the amount to be billed "is primarily a matter for adjustment and settlement" between the agencies concerned. B-146588, August 23, 1961. In 25 Comp. Gen. 322 (1945), however, a case involving lost property, the answer was zero. The parties could have provided for the situation in an Economy Act agreement, except they didn't enter into one. Once the property was lost, "there existed no proper subject of a purchase and sale," and, absent a prior agreement to that effect, the borrowing agency's appropriations were not available to purchase nonexistent property. Id. at 325.

(3) Common services

Questions concerning the provision and funding of common services arise most frequently in the case of larger agencies made up of component bureaus or offices funded under separate appropriations. It often makes sense, economically as well as operationally, to provide certain common services, procurement for example, centrally. How the agency goes about doing this depends primarily on its appropriations structure.

One approach might be to budget specifically for common services from a single, centralized appropriation. For example, a Department might receive an appropriation which is available for certain

specified department-wide services such as personnel, information resources management, and "other necessary expenses for management support services to offices of the Department." Under this type of structure, questions of reimbursement should not arise. Indeed, requiring reimbursement from the component bureaus when Congress has provided funding in the departmental appropriation would be improper. B-202979-O.M., September 28, 1981.

A different approach is illustrated by 43 U.S.C. § 1467, which establishes a working capital fund for the Interior Department, to be available for specified common services—reproduction (of documents, we think), communication, supply, library, and health—plus "such other similar service functions as the Secretary determines may be performed more advantageously on a reimbursable basis." The receiving components are required to reimburse the fund "at rates which will return in full all expenses of operation, including reserves for accrued annual leave and depreciation of equipment." Under this structure, services within the scope of the working fund are provided centrally, but each component bureau must budget for its own needs, much as agencies budget for and pay rent to the General Services Administration.

If each bureau receives its own appropriations for support services and there is no further statutory guidance, the agency may centralize the provision of common services on a reimbursable basis under authority of the Economy Act—provided the reimbursements correspond to the value actually received. 70 Comp. Gen. 592, 595 (1991) (executive computer network); B-77791, July 23, 1948 (procurement of office supplies); B-202979-O.M., September 28, 1981 (legal services).

The centralization of common services may be equally desirable in the case of a single bureau with more than one operating appropriation, or a smaller agency which is not divided into component entities but which nevertheless receives several separate appropriations. While statutory authority is necessary because separate appropriations are involved, the Economy Act does not apply in this situation. 38 Comp. Gen. 734, 737-738 (1959). Following the 1959 decision, the Bureau of the Census, to whom that decision had been addressed, sought and received specific authority to charge common services to any available appropriation, provided the benefiting appropriation(s) reimbursed the financing

appropriation no later than the end of the fiscal year. Pub. L. No. 87-489, 76 Stat. 104 (1962). Other agencies sought similar authority and GAO supported the enactment of governmentwide legislation. See B-136318, December 20, 1963. This was done a few years later, and the authority is now found at 31 U.S.C. § 1534, discussed under the Transfer heading in Chapter 2.

Thus, for intra-bureau services, or intra-agency services for agencies not divided into component entities, 31 U.S.C. § 1534 provides the necessary authority. For agencies composed of separately funded bureaus or offices, 31 U.S.C. § 1534 exists side-by-side with the Economy Act, and the agency would appear to have discretion in choosing which authority to use, although 31 U.S.C. § 1534 seems somewhat broader. The difference may be illustrated by the situation in 17 Comp. Gen. 748 (1938). The Bureau of Prisons entered into a contract for safety inspections and evaluations of all federal prisons. It proposed charging the contract price to the appropriation for one penitentiary, subject to proportionate reimbursement by the others. This, the decision concluded, could not be authorized under the Economy Act. At the time, the only option was for the voucher to list all contributing accounts, although a single check could of course be issued. Id. at 751. Now, however, assuming federal prisons were still receiving individual line-item appropriations, which they are not, this type of "convenience transaction" could presumably be done under authority of 31 U.S.C. § 1534.

(4) Other examples

As summarized earlier, the subject of an Economy Act transaction must be something the ordering agency is authorized to do and the performing agency is in a position to provide. Also, there must be direct benefit to the paying agency. B-16828, May 21, 1941; B-170587-O.M., October 21, 1970. Apart from these general prescriptions, the Economy Act makes no attempt to define the kinds of work, services, or materials that can be ordered. This is in apparent recognition of the great diversity of tasks and functions one encounters in the federal government, and the fact that these tasks and functions are subject to change over time. The legislative history gives some idea of what Congress had in mind:

"For illustration, the Navy maintains a highly specialized and trained inspection service. Why should not this personnel, when available, be used by other departments to inspect materials and supplies ordered to make certain that such materials comply strictly with specifications? Or if a department needs statistical work that can be more expeditiously done by another department it should have the right to call upon the agency especially equipped to perform the work. The Bureau of Standards is a highly specialized agency and its equipment and technical personnel should be made available to other services. Frequently the engineering staff of one department might be utilized by another department to great advantage.

"The War and Navy Departments are especially well equipped to furnish materials, work, and services for other departments. . . .

"The Treasury Department, Department of Justice, Interior Department, and Shipping Board have many vessels at sea. The Government navy yards should be available to these whenever repairs or other work can be done by the Navy Department as expeditiously and for less money than the materials and services will cost elsewhere.

"Illustrations might be multiplied but the above are sufficient to give a general idea of what may reasonably be expected under the [bill]." H.R. Rep. No. 72–1126, 15-16 (1932).

The examples we offer here are cases in which the cited decision or opinion either directly approved the proposed transaction (which does not necessarily mean that it actually took place), or at least noted it without further question in a context which can fairly be viewed as implicit approval.

One situation is the provision of administrative support services. Typically, the Economy Act is used to enable the General Services Administration to provide support services to smaller agencies. E.g., B-130961, April 21, 1976 (Federal Election Commission). In the case of a temporary agency or commission, the agreement may authorize GSA to perform various "posthumous" functions necessary for the liquidation of the agency's assets and liabilities. E.g., B-210226, May 28, 1985. However, there is no authority for anyone to do anything until the agency actually comes into existence and enters into such an agreement. B-230727, August 1, 1988 (legislative authority would be necessary to enable GSA or Treasury or anyone else to accept or act as custodian of private funds donated for use of commission prior to its statutory effective date).

Another group of cases involves the use of federal facilities (real property) of one type or another. A long line of decisions predating

the Federal Property and Administrative Services Act of 1949 established the proposition that an agency could, under authority of the Economy Act, make surplus space available to other agencies. For government-owned buildings, the amount charged could include special services such as utilities and janitor services, but not rent. 26 Comp. Gen. 677 (1947); B-70978, December 5, 1947. For leased premises, the charge could include a proportionate share of the rent. 27 Comp. Gen. 317 (1947); 24 Comp. Gen. 851 (1945); B-74905, May 13, 1948; B-48853, April 21, 1945. It could also include alterations made by the agency holding the lease to adapt the space for use by the new tenant. B-72269, January 16, 1948. Agencies subject to the Federal Property Act now obtain their space requirements through GSA and no longer need to rely on the Economy Act. However, in situations not covered by the Federal Property Act, the old cases continue to apply. E.g., 43 Comp. Gen. 687 (1964). That case involved a proposal to make space in leased Postal Service facilities available to the Customs Service for it to perform its mail examining responsibilities. Since the Postal Service has its own space acquisition authorities, and since GSA regarded Customs' space as "special purpose space" and hence beyond GSA's responsibility, the solution was an Economy Act agreement based on 24 Comp. Gen. 851 and its progeny.

Similarly, when the Coast Guard needed temporary residential facilities at an airport in Alaska pending construction of permanent quarters, it could obtain them from the Federal Aviation Administration under the Economy Act. B-150530, January 28, 1963. See also B-14855, February 8, 1941 (agency can store and service another agency's motor vehicles if it can do so at less cost than private sources).

Medical services and facilities are not treated any differently. Thus, the Department of Veterans Affairs can make its hospitals available to nonveteran beneficiaries of other agencies, such as the Public Health Service, on a space-available basis, but cannot "bump" its own veteran beneficiaries in order to put itself in a position to do so. B-156510, June 7, 1965; B-156510, February 23, 1971. See also B-183256-O.M., December 22, 1975, and B-133044-O.M., August 11, 1976 (Economy Act authorizes VA to provide medical services to persons eligible for medical assistance from the Defense Department). A variation is B-171924, April 7, 1971, holding that an Air Force hospital on Clark Air Force Base in the Philippines could

provide services to a child struck by a Coast Guard vehicle, to be reimbursed by the Coast Guard under the Economy Act.[27] A final medical case is B-62540, February 12, 1947, holding that the Economy Act was the appropriate authority for using agencies to pay proportionate shares of the operating cost of an emergency room run by the Public Health Service in a federal office building.

Another broad area in which the Economy Act is particularly useful is the occasional need by one agency of something another agency performs or produces on a regular basis. One example noted earlier is 13 Comp. Gen. 138 (1933), in which a government corporation authorized to issue securities sought help from what is now the Bureau of the Public Debt. Similarly, when Congress directed the Treasury Department to sell a portion of the nation's gold reserves, Treasury entered into an Economy Act agreement with the General Services Administration to conduct the sale. B-183192, June 17, 1975. Again, when the Defense Department wanted to conduct examinations of credit unions at U.S. military installations overseas, it logically turned to what is now the National Credit Union Administration, which routinely conducts similar examinations of credit unions stateside. B-158818, May 19, 1966. Other examples in this family are 54 Comp. Gen. 624, 630 (1975) (Secret Service protection for government officials other than those statutorily entitled to receive it); B-192875, January 15, 1980 (hearing examiners provided to other agencies by the Equal Employment Opportunity Commission in discrimination complaints); B-150322, December 7, 1962 (poll of employees of a private corporation on a labor relations issue conducted by National Labor Relations Board for the Federal Mediation and Conciliation Service); B-98216, October 2, 1950 (purchase by Defense Department of surplus potatoes from Department of Agriculture); B-95094, June 2, 1950 (technical services by National Bureau of Standards for the Bureau of the Mint).

Finally, we note a few miscellaneous cases, primarily to try to give some idea of the variety of transactions that can fit under the Economy Act's umbrella. The Economy Act has been used in, or at least was recognized as available for, the following situations:

[27]This is another example where the Economy Act was used as authority even though there was no written agreement "up front."

- Sale of arms by Defense Department to Central Intelligence Agency for use in covert operations. B-225832-O.M., February 25, 1987.
- Civic/humanitarian assistance activities by the Defense Department overseas. 63 Comp. Gen. 422, 443-46 (1984).
- Agreement between Veterans Administration and Navy whereby Navy would execute and superintend a contract for the construction of the Corregidor-Bataan Memorial. 46 Comp. Gen. 73 (1966).
- Attendance at conference (non-training) by employees of agencies other than sponsoring agency. B-190244, November 28, 1977.
- Purchase by Walter Reed Army Medical Center of motion picture supplies and services from Department of Agriculture. B-140652, November 9, 1959.
- Agreement between Bureau of Land Management and Fish and Wildlife Service for "control of predatory animals and rodents" on public domain lands. A-82570/B-120739, August 21, 1957.
- Services of National Park Service in planning and supervising installation of equipment in Franklin D. Roosevelt Library. B-64762, March 31, 1947.
- A congressional subcommittee study concluded that agencies could and should share federal laboratories under the Economy Act, if no more specific authority was available. Subcommittee on Science, Research, and Development, House Committee on Science and Astronautics, 90th Cong., 2d Sess., Utilization of Federal Laboratories (Comm. Print 1968).

e. What Work or Services May Not Be Performed

Apart from the restrictions specified in the Economy Act itself, limitations on what can be done under the Economy Act derive largely from common sense and axiomatic requirements of the appropriations process. One rule frequently encountered is that the Economy Act may not be used for services which the performing agency is required by law to provide and for which it receives appropriations. As the Department of Justice has noted, this rule "is required in order to prevent agencies from agreeing to reallocate funds between themselves in circumvention of the appropriations process." 9 Op. Off. Legal Counsel 96, 98 (1985) (preliminary print). See also 61 Comp. Gen. 419, 421 (1982) (charging the receiving agency "would compromise the basic integrity of the appropriations process" and would amount to a "usurpation of the congressional prerogative").

For example, if a GAO audit enables an agency to recover overcharges, the amounts recovered may not be paid over to GAO to

help defray the cost of conducting the audit. B-163758-O.M., December 3, 1973. The reason is that conducting audits is GAO's job and it receives appropriations for that purpose. Similarly, the Social Security Administration is not authorized to charge the Railroad Retirement Board for information it is required to furnish under 45 U.S.C. § 231f(b)(7). 44 Comp. Gen. 56 (1964).[28]

Nor may the Justice Department, which is required by law to conduct the government's litigation and which receives appropriations for its litigation functions, pass the costs on to the "client agency." 16 Comp. Gen. 333 (1936). However, while Justice must conduct the litigation, the client agency typically provides a variety of support to the Justice Department, and to that extent Economy Act agreements are possible, even extending to the hiring of additional attorneys, provided that the work for which the client agency is paying is work it is authorized to do itself. 9 Op. Off. Legal Counsel 96 (1985) (preliminary print); 2 Op. Off. Legal Counsel 302 (1978). The types and extent of support depend in part on the breadth of the client agency's own statutory authority. 2 Op. Off. Legal Counsel at 305-06.

If a service is required to be provided on a nonreimbursable basis, the inadequacy of the providing agency's appropriations is legally irrelevant and does not permit reimbursement by the receiving agency. 18 Comp. Gen. 389, 391 (1938). If the service is authorized but not required, there may be circumstances under which reimbursement is permissible. An internal memorandum, B-194711-O.M., January 15, 1980, discussed one such situation. Each agency is required by 44 U.S.C. § 3102 to have a records management program. In addition, the National Archives and Records Administration has oversight and assistance responsibilities, which include conducting surveys and inspections. When NARA is performing its oversight function, or conducts a study on its own initiative, the general rule applies and NARA's appropriations must bear the cost. However, if an agency wants to conduct a study of its own program and asks NARA to do it, and NARA's appropriations are insufficient, nothing precludes a reimbursable arrangement under the Economy Act. Also, if

[28]Several additional examples are summarized under the "Other Augmentation Principles and Cases" heading in Chapter 6.

Congress has provided appropriations for a particular activity for an initial start-up period, and later discontinues funding with the intent that the activity become self-sufficient, reimbursement under the Economy Act is authorized. B-165117-O.M., December 23, 1975.

An agency providing services over and above what it is required by law to provide may invoke the Economy Act to recover the actual costs of the non-required services. For example, 44 U.S.C. § 1701 requires the Government Printing Office to provide addressing, wrapping, and mailing services for certain public documents. It cannot charge for these required services. 29 Comp. Gen. 327 (1950). However, section 1701 specifically excludes certain documents from its mandate. Since, GPO was also in a position to provide those services in an efficient and economical manner with respect to the excluded documents, it could do so on a reimbursable basis under the Economy Act. Id. Similarly, the Secret Service is statutorily required to provide protective services to specified officials. Officials other than those specified may obtain the services only by "purchasing" them under the Economy Act. 54 Comp. Gen. 624 (1975), modified on other grounds, 55 Comp. Gen. 578 (1975).

A variation worthy of note occurred in 34 Comp. Gen. 340 (1955). A series of decisions in the early 1950s had held that the Patent and Trademark Office could not charge fees to other government agencies for services performed in administering the patent and trademark laws. 33 Comp. Gen. 559 (1954), modified, 34 Comp. Gen. 340 (1955); 33 Comp. Gen. 27 (1953), amplified, 33 Comp. Gen. 559 (1954); 32 Comp. Gen. 392 (1953). In 34 Comp. Gen. 340, the Army had entered into an agreement with the United Kingdom for a royalty-free license to an invention, with the Army to bear all costs associated with filing and prosecuting a patent application in the United States. GAO agreed with the Patent Office that the rule need not apply because the services were not really being rendered to another government agency. The fees were essentially part of the consideration for the license. The law was changed in 1965 to authorize the Patent Office to charge fees to other government agencies, subject to discretionary waiver in the case of an "occasional or incidental request." 35 U.S.C. § 41(e). While the payment in 34 Comp. Gen. 340 would now be authorized under the statute, the approach of that decision could still be useful in analogous situations.

Closely related in both concept and rationale is the principle that an agency may not transfer administrative functions to another agency under the aegis of the Economy Act. Even under the Economy Act's 1920 predecessor, the Comptroller of the Treasury had held that "a particular duty placed on one branch of the Government by enactment of Congress or going to the essence of its existence" could not be transferred to another agency without statutory authority. 27 Comp. Dec. 892, 893 (1921). See also 8 Comp. Gen. 116 (1928). The rule continued under the Economy Act, its rationale being stated as follows in B-45488, November 11, 1944:

> "The theory . . . is that there is inherent in a grant of authority to a department or agency to perform a certain function, and to expend public funds in connection therewith, a responsibility which, having been reposed specifically in such department or agency by the Congress, may not be transferred except by specific action of the Congress. The soundness of this principle is without question . . . ."

The difficulty in applying the rule is that no one has ever attempted to define the admittedly vague term "administrative function" in this particular context, although as the rule has evolved a definition is arguably unnecessary. Certainly it would prohibit transfer of an entire appropriation. Decision of July 7, 1923 (no file designation), 23A MS 101. That decision stated the following rather fundamental proposition:

> "The intent of the Congress in requiring estimates and the making of appropriations thereon is the imposition of a duty upon the department to which [the appropriations are] made to act and be responsible for the expenditures made under the appropriations."

The rule has been held to embrace functions with respect to which an agency has authority to make "final and conclusive" determinations. Thus, the Veterans Administration could not transfer to the Federal Housing Administration management and disposal functions with respect to property acquired incident to its credit programs. B-156010-O.M., March 16, 1965. Equally unauthorized is the transfer of debt collection responsibilities under the Federal Claims Collection Act. While debt collection services can be provided under the Economy Act, they may not include the taking of final compromise or termination action. B-117604(7)-O.M., June 30, 1970. Both of these cases involve functions subject to "final and conclusive" authority. See also 17 Comp. Gen. 1054 (1938) holding, in a case predating the Federal Claims Collection Act, that there was no authority for an agency to transfer its debt collection

responsibilities. In any event, while "final and conclusive," authority will most likely bring a function under the rule, it is not an indispensable prerequisite.

Earlier decisions seemed to emphasize the permanency of the proposed transfer. E.g., 14 Comp. Gen. 455 (1934). However, later decisions recognize the crucial factor as who ends up exercising ultimate control. The first case to adopt this approach appears to have been B-45488, November 11, 1944. The Civil Service Commission proposed, at least for the duration of wartime conditions, to advance to the Army funds from the Civil Service Retirement and Disability Fund. The Army would hold the money in a trust account and treat it as a working fund from which to make refunds of retirement deductions to certain separating civilian employees. All concerned seemed to accept, as a starting premise, that the proposal amounted to performance by the Army of an administrative function of the Civil Service Commission. However, the proposal also contemplated that the Commission would audit all cases of refunds, and this, said the decision, "must be considered as a retention of a certain degree of supervision and control." Thus, while the Army would be actually making the refunds, "responsibility for the performance of the function generally would remain" in the Commission. Therefore, the proposal was authorized under the Economy Act.

In sum, the lesson of B-45488 is that, for purposes of applying the "administrative function" rule, the allocation of ultimate responsibility is more important than becoming immersed in a semantic morass over what does or does not constitute an administrative function. An agency can acquire services under the Economy Act, but cannot turn over the ultimate responsibility for administering its programs or activities.

f. Contracting Out and "Off-Loading"

As originally enacted, the Economy Act made no provision for the performing agency to contract out all or any part of its performance. Indeed, the law authorized only work or services the performing agency was "in a position" to provide, and GAO construed this as precluding performance by use of contracts with third parties. 20 Comp. Gen. 264 (1940); 19 Comp. Gen. 544 (1939). Notwithstanding this limitation, it soon became clear that the use of commercial contracts in performing Economy Act orders could in certain circumstances be advantageous.

In 1942, Congress considered legislation which would have amended the Economy Act to authorize all agencies to use private contracts in performing Economy Act orders. GAO found the proposal unobjectionable. See B-18980, February 13, 1942. However, the legislation as enacted (Act of July 20, 1942, ch. 507, 56 Stat. 661) authorized contracting out only if the ordering agency was one of five specified agencies—Army, Navy, Treasury, Federal Aviation Administration, and Maritime Administration. The only explanation appearing in any printed legislative history materials was some concern over "trading going on among too many departments." See 52 Comp. Gen. 128, 133 (1972). This remained the law for 40 years.

The only decisional incursion of any significance during this period was 52 Comp. Gen. 128 (1972), advising the Environmental Protection Agency that the Economy Act did not inhibit the joint funding of contracts to carry out mutually beneficial projects where EPA was statutorily authorized to cooperate with the other participating agencies. The decision further noted that the Economy Act would not preclude EPA from acting as grantor under specific authority to make grants to other agencies which might in turn use contracts as part of their performance. Id. at 134.

In 1982, Congress again amended the Economy Act, this time authorizing all agencies to obtain goods and services by contract in fulfilling Economy Act orders. Pub. L. No. 97–332, 96 Stat. 1622. The legislative history described some of the potential advantages:

"Since 1942, when the Economy Act was amended to allow agencies to contract out for goods and services on behalf of only 5 specified agencies, numerous areas of agency expertise have been developed. With the authority extended to allow agencies to contract out on behalf of any other Federal agency, an agency having only an occasional requirement in a specific area could turn to an agency with substantial experience in the area for assistance. This would eliminate the need to duplicate the requisite expertise. For instance, if the Immigration and Naturalization Service has a requirement for night sensors for border protection, that agency could seek assistance from the Department of Defense which presumably has already developed expertise in that area. Or, if the Coast Guard had a requirement for navigational equipment, it could seek assistance from the Department of the Navy to acquire such, rather than duplicate research and development already under way or completed. Various statutes now permit such interagency requisitioning in specific areas; however, removal of the general restriction allows the maximum utilization by the Government of valuable expertise developed over the years in the various Government agencies. In addition, such generally available authority creates the potential for wider use by the Government of quantity discounts or other benefits which may not have been available in the

past. It will also permit an agency to use another agency which has some, though not all, of the capability to do the requisitioned work by allowing the requisitioned agency to simply contract out the part of the work that it cannot do." H.R. Rep. No. 97–456, 4 (1982), reprinted in 1982 U.S.C.C.A.N. 3182, 3185.

The 1982 amendment changed the Economy Act in three ways. First, it amended 31 U.S.C. § 1535(a)(3) to generally authorize performing agencies to obtain ordered goods and services by contract, and deleted the limitation to the five named agencies. This eliminated the existing inhibition. Second, it amended 31 U.S.C. § 1535(a)(4)—the "lower cost" determination quoted at the beginning of our coverage—to replace the specific reference to competitive bids with a more general reference to providing the goods or services simply "by contract." The intent of this change was to permit the performing agency to use whatever methods of procurement are available to it. H.R. Rep. No. 97–456 at 5; 1982 U.S.C.C.A.N. at 31, 86. Finally, it added 31 U.S.C. § 1535(c):

"A condition or limitation applicable to amounts for procurement of an agency or unit placing an order or making a contract under this section applies to the placing of the order or the making of the contract."

This provision is designed to preclude use of the Economy Act to avoid legal restrictions on the availability of appropriated funds. Originally recommended by GAO,[29] it "prevents the ordering agency from accomplishing under the guise of an Economy Act transaction, objects or purposes outside the scope of its authority." B-259499, August 22, 1995, at 8.

The Competition in Contracting Act requires that procuring agencies obtain full and open competition "except in the case of procurement procedures otherwise expressly authorized by statute." 41 U.S.C. § 253(a)(1) (civilian procurements); 10 U.S.C. § 2304(a)(1) (military procurements). For purposes of this provision, the Economy Act is one of the otherwise authorized procedures. National Gateway Telecom. Inc. v. Aldridge, 701 F. Supp. 1104, 1113 (D.N.J. 1988), aff'd

[29]Reorganization Act of 1981; Amend Economy Act to Provide That All Departments and Agencies Obtain Materials of Services from Other Agencies by Contract; and Amend the Federal Grant and Cooperative Agreement Act: Hearings on H.R. 2528 et al. Before a Subcomm. of the House Comm. on Government Operations, 97th Cong., 1st Sess. 78 (1981) (statement of Milton J. Socolar, Special Assistant to the Comptroller General of the United States).

mem., 879 F.2d 858 (3d Cir. 1989) (10 U.S.C. § 2304); 70 Comp. Gen. 448, 453-54 (1991) (41 U.S.C. § 253). Thus, an agency can obtain its needs under another agency's requirements contract, as long as the transaction is in compliance with the Economy Act and the action is permissible under the performing agency's contract. National Gateway, 701 F. Supp. at 1114; 70 Comp. Gen. at 454; B-244691.2, November 25, 1992, recons. denied, B-244691.3, January 5, 1993. Exceeding a maximum quantity specified in the contract, however, would be outside the scope of the contract and would violate CICA's competition requirements. 70 Comp. Gen. at 457.

One of the Economy Act requirements the ordering agency must satisfy is the "lower cost" determination, 31 U.S.C. § 1535(a)(4). For example, in B-244691.2, November 25, 1992, the ordering agency made the determination without testing the open market because the price under the performing agency's requirements contract was lower than the current Federal Supply Schedule price, and agencies are permitted to purchase from a Supply Schedule contract without seeking further competition. This, GAO found, was perfectly reasonable.

As long as the various requirements of the Economy Act are satisfied, the ordering agency may also legitimately take into consideration such factors as administrative convenience or procurement risks, 70 Comp. Gen. at 454 n.5, or the need to obligate funds to avoid future funding cuts, National Gateway, 701 F. Supp. at 1111.

In the late 1980s and early 1990s, congressional attention to reported abuses under the Economy Act resulted in a detailed report by the Subcommittee on Oversight of Government Management, Senate Committee on Governmental Affairs—Off-Loading: The Abuse of Inter-Agency Contracting to Avoid Competition and Oversight Requirement, S. Prt. No. 61, 103d Cong., 2d Sess. (1994). The report's title reflects the birth of a new term, off-loading, defined (on page 1 of the Senate report) as "when one agency buys goods or services under a contract entered and administered by another agency." The report found that government agencies "off-load billions of dollars of contracts every year," and that "improper off-loads total at least in the hundreds of millions of dollars, and losses to the taxpayers are at least in the tens of millions of dollars." Id.

at 5. Among the abuses the report cited were the use of off-loading to avoid competition, to direct contracts to favored contractors, to improperly obligate expiring year-end appropriations, and to make a variety of inappropriate purchases. Id. at 6. The report recommended that off-loading be limited and subject to stronger regulatory controls. Id. at 44-46.

Congress responded with two pieces of legislation: for military procurements, section 844 of the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1547, 1720, enacted into law as the Senate report was being written; and for civilian procurements, section 1074 of the Federal Acquisition Streamlining Act of 1974, Pub. L. No. 103-355, 108 Stat. 3243, 3271. The two provisions are virtually identical and require that the governing procurement regulations be amended to:

- permit off-loading only if the performing agency (a) has an existing contract for the same or similar goods or services, (b) is better qualified to enter into or administer the contract by reason of capabilities or expertise the ordering agency does not have, or (c) is specifically authorized by law to act in that capacity;
- require that off-loads be approved in advance by an authorized official of the ordering agency; and
- prohibit the payment of any fee in excess of the performing agency's actual costs or, if not known, estimated costs.

Implementing regulations are found in the Federal Acquisition Regulation, 48 C.F.R. Subpart 17.5 (60 Fed. Reg. 49720, September 26, 1995).[30] In addition, the law directed the Secretary of Defense and the Administrator for Federal Procurement Policy to develop systems to collect and evaluate data in order to monitor compliance.

2. Other Authorities

Although the best known interagency authority is the Economy Act, there are many others. Some are mandatory; most are optional. Some of the more common, like printing by the Government

[30]A very preliminary review of implementation indicated reasonable progress. See Interagency Contracting: Controls Over Economy Act Orders Being Strengthened, GAO/NSIAD-96-10 (October 1995).

Printing Office or the various services provided by the General Services Administration, are touched upon elsewhere in this work. Our purpose here is to present a few of the lesser-known authorities.

The Economy Act will not apply in the face of a more specific statute. E.g., 44 Comp. Gen. 683 (1965); 6 Op. Off. Legal Counsel 464 (1982); Integrated Systems Group, Inc. v. GSA and Department of the Army, GSBCA No. 13108-P, 95-1 B.C.A. ¶ 27, 484 (1995). Having said this, there are still situations in which it is legitimate to look to the Economy Act for guidance even though, strictly speaking, it does not apply, an example being where the statute prescribes reimbursement only in general terms. E.g., 72 Comp. Gen. 159 (1993) (term "reimbursable basis" in statute directing agencies to furnish certain services to Nuclear Regulatory Commission can include "added factor" for overhead). Be that as it may, the starting point is that each statute stands on its own with respect to what services can be provided, who the customers may be, and who bears the costs.

Government Employees Training Act. Under the Government Employees Training Act, an agency covered by the act (as defined in 5 U.S.C. § 4101) can extend its training to employees of other government agencies. The key provision is 5 U.S.C. § 4104:

"An agency program for the training of employees by, in, and through Government facilities under this chapter shall . . .

"(2) provide for the making by the agency, to the extent necessary and appropriate, of agreements with other agencies in any branch of the Government, on a reimbursable basis when requested by the other agencies, for—

"(A) use of Government facilities under the jurisdiction or control of the other agencies in any branch of the Government; and

"(B) extension to employees of the agency of training programs of other agencies."

The legislative history of this provision, discussed in B-193293, November 13, 1978, makes clear that training can be reimbursable or nonreimbursable, in the discretion of the agency providing it. Thus, the Defense Department may, in its discretion, make its procurement training courses available on a space-available and tuition-free basis to employees of civilian agencies. Id. An agency choosing to charge a fee for its training is equally free to do so, and may credit fees received from other government agencies (but not

private participants) to the appropriation which financed the training. B-241269, February 28, 1991.

Department of Defense. The Defense Department has the following provision:

> "If its head approves, a department or organization within the Department of Defense may, upon request, perform work and services for, or furnish supplies to, any other of those departments or organizations, without reimbursement or transfer of funds." 10 U.S.C. § 2571(b).

Authority to furnish the supplies or perform the services already exists under the Economy Act, so this provision adds nothing in that respect. What it does is authorize the military department or organization, at its discretion, to provide the supplies or services to another military entity on a nonreimbursable basis, i.e., free.

Tennessee Valley Authority. The Tennessee Valley Authority is authorized to "provide and operate facilities for the generation of electric energy for the use of the United States or any agency thereof." 16 U.S.C. § 831h-1. Rates charged are calculated to produce sufficient revenue to cover the operation, maintenance, and administration of the power system, payments to states and counties in lieu of taxes, required payments to the United States Treasury, and commitments to bondholders. 16 U.S.C. § 831n-4(f). This is an example of a statute which is sufficiently specific and detailed to wholly displace the Economy Act. 44 Comp. Gen. 683 (1965). Since electric power is a utility service, the General Services Administration can, under 40 U.S.C. § 481(a)(3), contract with TVA for periods of up to 10 years, and can delegate this authority to other agencies. Id.

District of Columbia. Enacted as part of the 1973 District of Columbia home rule legislation, 31 U.S.C. § 1537 authorizes the United States government and the District of Columbia government to provide reimbursable services to each other. Services provided under this authority are to be documented in an agreement negotiated by the respective governments and approved by the Director of the Office of Management and Budget and the Mayor of the District of Columbia. Subsection (c) provides that—

"(1) costs incurred by the United States Government may be paid from appropriations available to the District of Columbia government officer or employee to whom the services were provided; and

"(2) costs incurred by the District of Columbia government may be paid from amounts available to the United States Government officer or employee to whom the services were provided."

Charges are to be "based on the actual cost of providing the services." 40 U.S.C. § 1537(b)(2). Under this authority, for example, the Bureau of Prisons could provide personnel to the District of Columbia Department of Corrections in the event of a strike by District employees. 4B Op. Off. Legal Counsel 826 (1980). Another example is printing done for the District of Columbia by the Government Printing Office. 60 Comp. Gen. 710 (1981). That decision pointed out that, since the District is not a federal agency, the federal agency providing the services can charge interest on overdue accounts, and can collect a debt by administrative offset, but not against amounts withheld from the salaries of federal employees for D.C. income tax.

National Academy of Sciences. A statute dating back to the Civil War era (1863, to be precise) provides that the National Academy of Sciences—

"shall, whenever called upon by any department of the Government, investigate, examine, experiment, and report upon any subject of science or art, the actual expense of such investigations, examinations, experiments, and reports, to be paid from appropriations which may be made for the purpose, but the academy shall receive no compensation whatever for any services to the Government of the United States." 36 U.S.C. § 253.

This statute authorizes the Academy to be reimbursed for its "actual expenses," but nothing beyond that. A formal contract is not required, although the documentation used should adequately describe the services to be provided and the payment terms. B-37018, October 14, 1943.

An agreement calling for a fixed price which is not confined to reimbursement of actual expenses has been said to violate the statute. B-4252, June 21, 1939. It is probably more accurate to say that it creates no obligation over and above the payment of actual expenses. The other side of the coin is that the Academy has been permitted to recover the excess where its actual expenses exceeded

the fixed price. 39 Comp. Gen. 71 (1959), as modified by 39 Comp. Gen. 391 (1959). GAO's suggestion is that the agreement should provide for the reimbursement of actual expenses up to a stipulated maximum, and should also provide that no costs be incurred above that amount unless authorized by some form of supplemental agreement. 39 Comp. Gen. at 392. A flat surcharge for overhead also violates the statute, but if the interagency work causes the Academy to increase its normal overhead, the amount of the increase (or a reasonable approximation) constitutes part of the actual expenses. B-19556, August 28, 1941. Cases like these do not stand for the proposition that the Academy's cost recovery cannot be subjected to contractual limits. Thus, a 1977 decision held the Academy's recovery of Independent Research and Development costs limited by provisions in procurement regulations to which it had agreed to be bound. B-58911, August 1, 1977.

Inspection of Personal Property. Section 201(d) of the Federal Property and Administrative Services Act, 40 U.S.C. § 481(d), provides that, subject to General Services Administration regulations—

> "any executive agency may utilize the services, work, materials, and equipment of any other executive agency, with the consent of such other executive agency, for the inspection of personal property incident to the procurement thereof, and notwithstanding section 1301(a) of title 31 or any other provision of law such other executive agency may furnish such services, work, materials, and equipment for that purpose without reimbursement or transfer of funds."

This provision is similar to the Defense Department statute noted above in that the service involved—property inspection in this case—could have been furnished under the Economy Act. Like the Defense Department statute, the significance of 40 U.S.C. § 481(d) is that it authorizes the providing agency to waive reimbursement.

National Archives and Records Administration. The Archivist of the United States has a range of duties and responsibilities with respect to the custody and preservation of government records. The Archivist is authorized by 44 U.S.C. § 2116(c) to charge a user fee for making or authenticating copies or reproductions of materials in his custody, calculated to recover costs including increments for the estimated cost of equipment replacement. The statute further provides:

"The Archivist may not charge for making or authenticating copies or reproductions of materials for official use by the United States Government unless appropriations available to the Archivist for this purpose are insufficient to cover the cost of performing the work."

The problem with this is that NARA receives a lump-sum operating appropriation and has the normal range of discretion in using it. Therefore, unless the Office of Management and Budget were to apportion a specific amount for reproducing documents for other agencies, when could it fairly be said that appropriations were insufficient? To avoid this problem, NARA simply stopped requesting appropriations for that specific purpose and funded the entire program on a reimbursable basis, an approach GAO approved in 64 Comp. Gen. 724 (1985). This, observed GAO, was "the most equitable way of allocating cost in performing this activity," since any other approach would inevitably favor early (in the fiscal year) users over later ones. Id. at 726.

3. Franchise Funds

Many agencies, and certainly most if not all of the larger ones, have working capital funds for providing common services. Each agency's working capital fund is designed primarily to service that agency. An idea that gained ground in the 1990s was to foster competition among agencies in the area of providing common services, the theory being that this would result in increased efficiency at reduced cost.

Section 403 of the Government Management Reform Act of 1994, Pub. L. No. 103-356, 108 Stat. 3410, 3413, 31 U.S.C. § 501 note, introduced the concept of the "franchise fund" as a pilot program. Subsection (a) authorizes the establishment of franchise funds in six executive agencies to be selected by the Office of Management and Budget in consultation with specified congressional committees. Subsection (b) provides:

"Each such fund may provide, consistent with guidelines established by [OMB], such common administrative support services to the agency and to other agencies as the head of such agency, with the concurrence of the Director, determines can be provided more efficiently through such a fund than by other means. To provide such services, each such fund is authorized to acquire the capital equipment, automated data processing systems, and financial management and management information systems needed. Services shall be provided by such funds on a competitive basis."

Subsection (c) addresses funding by providing those elements commonly found in revolving fund legislation. It authorizes the necessary start-up appropriations and the transfer of certain unexpended balances and inventories. It also addresses the charging and disposition of fees as follows:

> "Fees for services shall be established by the head of the agency at a level to cover the total estimated costs of providing such services. Such fees shall be deposited in the agency's fund to remain available until expended, and may be used to carry out the purposes of the fund." Pub. L. No. 103-356, § 403(c)(2), 108 Stat. 3414.

Thus, a franchise fund is basically a type of working capital fund, which in turn is a type of revolving fund, designed to compete with similar funds of other agencies to provide common administrative services. Examples of such services include accounting, financial management, information resources management, personnel, contracting, payroll, security, and training.[31]

The following franchise funds were established in 1997 appropriation acts:

- Department of Veterans Affairs, Pub. L. No. 104-204, 110 Stat. 2874, 2880 (1996).
- Environmental Protection Agency, Pub. L. No. 104-204, 110 Stat. at 2912.
- Federal Aviation Administration, Pub. L. No. 104-205, 110 Stat. 2951, 2957 (1996).
- Department of the Interior, Pub. L. No. 104-208, § 113, 110 Stat. 3009, 3009-200 (1996).
- Department of the Treasury, Pub. L. No. 104-208, 110 Stat. at 3009-316.

The provisions are fundamentally similar. Each provision authorizes the rates to include depreciation and accrued leave. Each authorizes up to four percent of total annual income to be retained as a reserve for acquisition of capital equipment and enhancement of support systems, with any excess to be transferred to the Treasury. The Interior, EPA, and FAA statutes mandate payment in advance;

[31]Susan Spurling, So VA Has a Franchise . . . What Does It Mean?, reprinted in 7 JFMIP News 13 (No. 4, 1996).

advance payment is permissible but not mandatory in the Treasury and VA statutes.

C. Revolving Funds

1. Introduction

a. Concept and Definition

A recurrent theme throughout much of this publication is the attempt to balance the legitimate need for executive flexibility with the constitutional role of the legislature as controller of the purse. While this theme underlies much of federal fiscal law, it is perhaps nowhere as clear as in the area of revolving funds.

Most Treasury accounts are either receipt accounts or expenditure accounts, but not both. Under the typical or "traditional" funding arrangement, any money an agency receives from any source outside of its congressional appropriations must, unless Congress has provided otherwise, be deposited in the Treasury to the credit of the appropriate general fund receipt account. 31 U.S.C. § 3302(b). Absent an appropriation, you do not withdraw money from a receipt account. Congress provides the agency's operating funds by making direct appropriations from the general fund of the Treasury. These are carried on Treasury's books in the form of general fund expenditure accounts. It is possible to credit money to an appropriation (expenditure) account—if specifically authorized by statute or if the money qualifies as a "repayment," such as the recovery of an erroneous payment, but the money is subject to the same limitations as the appropriation to which credited. Most importantly, its obligational availability expires along with the rest of the appropriation, and if the appropriation has already expired for obligational purposes at the time of the deposit, the funds deposited have only the limited availability of expired balances.[32] It should be

[32]Congress can, of course, authorize reimbursements to be made to appropriations "currently available" or "then current and chargeable." See B-75345, May 20, 1948. While this affects the agency's ability to re-use the money, the reimbursement still cannot remain available beyond the appropriation to which credited.

apparent that a key element of congressional control is the ability to control the disposition and use of receipts.

A revolving fund, while classified as an expenditure account, combines elements of both receipt and expenditure account types. The term "revolving fund" may be defined as "a fund established by the Congress to finance a cycle of operations through amounts received by the fund." Revolving Funds: Full Disclosure Needed for Better Congressional Control, GAO/PAD-77-25, 2 (August 30, 1977). See section 2-1520 of the Treasury Financial Manual (defining revolving funds). See also 38 Comp. Gen. 185, 186 (1958) (quoting an almost identical definition from an obsolete Budget-Treasury regulation, the apparent source of the Treasury definition). As this definition implies, the concept of a revolving fund is to permit the financing of some entity or activity on what is regarded as a more "business-like" basis. GAO's 1977 report explained this as follows:

> "In concept, expenditures from the revolving fund generate receipts which, in turn, are earmarked for new expenditures, thereby making the Government activity a self-sustaining enterprise. The concept is aimed at selected Government programs in which a buyer/seller relationship exists to foster an awareness of receipts versus outlays through business-like programming, planning, and budgeting. Such a market atmosphere is intended to create incentives for customers and managers of revolving funds to protect their self-interest through cost control and economic restraint, similar to those that exist in the private business sector." GAO/PAD-77-25 at 2.

By authorizing the agency to retain receipts and deposit them back into the fund, a revolving fund provides the authority necessary to avoid the miscellaneous receipts requirement of 31 U.S.C. § 3302(b).

Revolving funds in the federal government appear to have developed in the latter part of the 19th century. Although, we have not been able to identify the first revolving fund, the Navy is said to have had one as far back as 1878. GAO/PAD-77-25 at 11. Some years later, as part of the Navy's 1894 appropriation act, Congress created a permanent naval supply fund for the purchase of "ordinary commercial supplies . . ., to be reimbursed from the proper naval appropriations whenever the supplies purchased under said fund are issued for use." Act of March 3, 1893, 27 Stat. 715, 723-24. The term "revolving fund" does not appear in the early statutes, but seems to have come into use in the early 1900s. Thus, the Comptroller of the Treasury observed in a 1919 decision:

"The Congress has at times barred the application of [31 U.S.C. § 3302(b)] by authorizing expenditures under appropriations to be reimbursed such appropriations, and in recent years has used the term revolving fund for such purpose and the further purpose generally of permitting the use of the moneys without the fiscal year limitations which usually attend appropriations."
26 Comp. Dec. 295 (1919).

Within just a few more years, the term could be said to have an established meaning as a fund which (1) functioned as both a receipt account and an expenditure account and (2) continued available without fiscal year limitation. 1 Comp. Gen. 704 (1922). These, then, are the two key features of a revolving fund:

- A revolving fund is a single combined account to which receipts are credited and from which expenditures are made. Treasury does not establish separate "receipt" and "appropriation" accounts.
- The generated or collected receipts are available for expenditure for the authorized purposes of the fund without the need for further congressional action and without fiscal year limitation.

Thus, a revolving fund amounts to "a permanent authorization for a program to be financed, in whole or in part, through the use of its collections to carry out future operations." GAO/PAD-77-25 at 47. The fund's continuing availability is what distinguishes a revolving fund from a reimbursable appropriation. In the case of a reimbursable appropriation, the reimbursements are available only during the same period that the appropriation itself is available, whereas in a revolving fund, "monies are paid in and out over and over again for the same purpose." B-75345, May 20, 1948.

Proponents of revolving funds cite several advantages. See Senate Committee on Government Operations, Financial Management in the Federal Government, S. Doc. No. 87-11 (1961), at 267-68.

Since it involves only one "pocket," a revolving fund provides a simpler funding structure. A revolving fund presents a clearer picture of an activity's profit or loss. Also, reflecting expenditures in budget totals on a net basis, as is done with revolving funds, helps reduce budget distortion. Most important from the perspective of the spending agency is the increased flexibility under a revolving fund since the agency does not have to ask Congress for the money. For these reasons, particularly the last, most executive agencies,

naturally and understandably, will take all the revolving funds they can get.

b. Types

There are three broad categories of revolving funds—public enterprise, intragovernmental, and trust.[33] Since they are all revolving funds, they share the common elements of revolving funds: they are created by act of Congress (more on this later), they operate as combined receipt and expenditure accounts, and they authorize use of the receipts without further congressional action.

(1) Public enterprise revolving fund

A public enterprise revolving fund is a revolving fund which derives most of its receipts from sources outside of the federal government. It usually involves (1) a business-type operation, (2) which generates receipts, (3) which are in turn used to finance a continuing cycle of operations. Although not a legal requirement, the fund should be self–sustaining or nearly so. GAO/PAD-77-25 at 7, 51.

Most government corporations are financed by public enterprise revolving funds. They are also commonly used for credit programs (direct loan, loan guarantee) of agencies such as the Department of Housing and Urban Development and the Small Business Administration. Although not necessary, the governing legislation sometimes explicitly designates the fund as a "public enterprise" fund. An example is 31 U.S.C. § 5136, the United States Mint Public Enterprise Fund. Either way, if it meets the criteria, Treasury will assign it an account symbol from the 4000-4499 group reserved for public enterprise revolving funds.[34]

(2) Intragovernmental revolving fund

An intragovernmental revolving fund (Treasury accounts 4500–4999) is, as the name implies, a revolving fund whose receipts come primarily from other government accounts. It is designed to carry

[33]Our definitions are culled from several sources: Budget Glossary Exposure Draft, supra note 15 at 5-6; GAO/PAD-77-25 at 4-6; Treasury Financial Manual, § 2-1520; OMB Circular No. A-34, § 21.1 (1994).

[34]In most cases, the type of fund should be apparent from the statutory language and context. If not, the account symbol will at least tell you how Treasury regards it.

out a cycle of business-type operations with other federal agencies or separately funded components of the same agency. Examples of funds designed to finance dealings with other agencies are the various revolving funds available to the General Services Administration—the General Supply Fund and the Federal Buildings and Information Technology Funds. Another example is 5 U.S.C. § 1304(e), the revolving fund used by the Office of Personnel Management for training, background investigations, and other reimbursable functions.

Examples of intra-agency revolving funds are the working capital funds available in most larger agencies and several smaller ones to finance the centralized provision of common services. A working capital fund is—

"[a] revolving fund that operates as an accounting entity [in which] the assets are capitalized and all income is in the form of offsetting collections derived from the fund[s] operations and available in their entirety to finance the fund[s] continuing cycle of operations without fiscal year limitation."[35]

A typical example is the Commerce Department's working capital fund, 15 U.S.C. § 1521:

"There is hereby established a working capital fund of $100,000, without fiscal year limitation, for the payment of salaries and other expenses necessary to the maintenance and operation of (1) central duplicating, photographic, drafting, and photostating services and (2) such other services as the Secretary, with the approval of the Director of the [Office of Management and Budget], determines may be performed more advantageously as central services; said to be reimbursed from applicable funds of bureaus, offices, and agencies for which services are performed on the basis of rates which shall include estimated or actual charges for personal services, materials, equipment (including maintenance, repairs, and depreciation) and other expenses: . . . Provided further, That a separate schedule of expenditures and reimbursements, and a statement of the current assets and liabilities of the working capital fund as of the close of the last completed fiscal year, shall be included in the annual Budget."

[35]Budget Glossary Exposure Draft, supra note 15, at 86.

Note the common elements of a working capital fund law, most of which are exhibited in 15 U.S.C. § 1521.[36] Specifically:

- It may, as the Commerce Department statute does, fix the fund's capital. Many similar statutes do this; some, such as 20 U.S.C. § 3483, do not.
- The funds are available without fiscal year limitation.
- The statute will address the services to be covered in one of three ways: it may list the services (e.g., 42 U.S.C. § 3513), leave it to the agency's discretion (e.g., 42 U.S.C. § 3535(f)), or, like the Commerce statute, provide some combination. Discretion is not unbridled, but must remain within the scope of the fund statute. 6 Op. Off. Legal Counsel 384, 386 n.8 (1982).
- It will require payment at least by reimbursement. It may also authorize advance payments. An advance payment provision may limit the advance's availability to that of the paying appropriation. E.g., 7 U.S.C. § 2235.
- It may require some form of budgetary disclosure.
- Every statute we reviewed includes some direction on determining the amount of reimbursement, the inclusion of depreciation being the most common.

Another common element, this one not included in 15 U.S.C. § 1521, is a provision requiring periodic return of excess amounts to the general fund of the Treasury. E.g., 15 U.S.C. § 278b(f).

As the Justice Department has pointed out, a working capital fund statute like 15 U.S.C. § 1521 provides the necessary authority to tap the appropriations of the component bureaus to pay for the services, regardless of whether they were previously funded on a centralized or decentralized basis. 6 Op. Off. Legal Counsel 384 (1982). The Justice opinion also notes several services which an agency could

[36]Other working capital funds include 7 U.S.C. § 2235 (Agriculture); 15 U.S.C. § 278b (National Institute of Standards and Technology); 20 U.S.C. § 3483 (Education); 22 U.S.C. § 2684 (State); 28 U.S.C. § 527 (Justice); 29 U.S.C. §§ 563, 563a (Labor); 31 U.S.C. § 322 (Treasury); 40 U.S.C. § 293 (General Services Administration); 42 U.S.C. § 3513 (Health and Human Services); 42 U.S.C. § 3535(f) (Housing and Urban Development); 43 U.S.C. § 1467 (Interior); 43 U.S.C. § 1472 (Bureau of Reclamation); and 49 U.S.C. § 327 (Transportation). The Defense Department legislation (10 U.S.C. §§ 2208, 2216a) is covered separately later. Further discussion of the Labor, Justice, and GSA funds may be found in GAO's report Working Capital Funds: Three Agency Perspectives, GAO/AIMD-94-121 (May 1994).

legitimately place under its working capital fund: stockroom, health unit, fiscal, travel, audio-visual, messenger, and laundry services. Id. at 386-387 and n.8.

Other types of intragovernmental revolving funds are stock funds, industrial funds, and supply funds. Stock funds are used to finance inventories of consumable items. Industrial funds are used to finance industrial- and commercial-type activities. See Financial Management in the Federal Government, cited above, at 171. Both are found primarily within the Defense establishment. A supply fund is largely self-explanatory and is used to finance the operation and maintenance of an agency's supply system, plus whatever else the governing legislation may specify. Examples are 38 U.S.C. § 8121, establishing a revolving supply fund for the Department of Veterans Affairs, and 14 U.S.C. § 650, the Coast Guard Supply Fund.

(3) Trust revolving fund

A trust revolving fund (Treasury accounts 8400-8499) is similar to the other types—a fund permanently established to finance a continuing cycle of business-type operations—except that it is used for specific purposes or programs in accordance with a trust agreement or statute under which the government has essentially a fiduciary relationship with respect to amounts credited to the fund. An example is the Federal Deposit Insurance Corporation's Bank Insurance Fund (12 U.S.C. § 1821), into which are deposited the FDIC's assessments collected from member banks. Other examples are found in employee benefit programs which involve employee contributions. E.g., 5 U.S.C. § 8348 (Civil Service Retirement and Disability Fund), 5 U.S.C. § 8714 (Employees' Life Insurance Fund), 5 U.S.C. § 8909 (Employees Health Benefits Fund).

c. Congressional Control

There are no rules of law that either mandate or prohibit the creation of revolving funds in particular contexts. Accordingly, whether to create a revolving fund or not is a policy matter for Congress to decide. However, GAO has suggested that the normal budget and appropriation process is the best means for effective congressional control, and that when Congress creates a revolving fund it should be aware that it is yielding a portion of this control to the executive branch. E.g., B-139412, May 29, 1959; B-137458, October 10, 1958. See also Revolving Funds: Full Disclosure Needed

for Better Congressional Control, GAO/PAD-77-25, 59-60 (August 30, 1977).

GAO has also taken the position that revolving funds should be created only upon a clear demonstration of need. Thus:

"[D]epartures from [the normal budget and appropriation process] should be permitted only on a clear showing that an activity cannot be successfully operated in the public interest within this framework. Any contemplated change in funding methods which may diminish this congressional control should be carefully considered as to its need. All practical means available within the framework of the regular financing structure should be fully explored. In the absence of special circumstances, we believe that the revolving fund method should be adopted only if its demonstrable merits in terms of more efficient operation of the activity clearly outweigh the disadvantages of reduced congressional control." B-137458, August 31, 1959.

There is even less justification for a revolving fund where the fund is not intended to be self-sustaining. B-142952, June 13, 1960.

The reduced visibility of a revolving fund activity "leaves the door open for management to embark on programs which may not have been contemplated and for which funds may not have been granted if requested." B-137458, October 10, 1958. Once established, the program can effectively develop a life of its own and continue to exist beyond the point where Congress might have chosen to abolish it had it been more visible. B-150004, June 17, 1966.

One device GAO has frequently recommended is the inclusion of a provision making funds available only to the extent provided annually in appropriation acts. E.g., B-143181, March 27, 1967; B-141651, June 13, 1960; B-140602, September 14, 1959. This, of course, deprives the fund of one of the key features of its "revolving" status.[37] An alternative approach in appropriate circumstances, which would allow flexibility while retaining congressional control over normal operations, might be the enactment of a permanently available, separate emergency fund to be replenished by annual

[37]A provision in the 1996 Legislative Branch Appropriations Act subjected several House of Representatives revolving funds to such a requirement. The House Appropriations Committee described the action as "abolishing" the funds. H.R. Rep. No. 104-141, at 17 (1995). This is arguably a bit too strong. See B-272197, June 27, 1996.

appropriations as and to the extent disbursed. National Flood Insurance Program—Major Changes Needed If It Is To Operate Without a Federal Subsidy, GAO/RCED-83-53, 36 (January 3, 1983); B-120047, September 10, 1959. GAO has also recommended that monetary ceilings be imposed on revolving supply funds. B-128197, June 26, 1956.

Despite the impression some of these documents might create, GAO's attitude towards revolving funds is not one of unyielding hostility. More recent reports recognize that public enterprise revolving funds may be appropriate when three criteria are met: (1) a continuing cycle of operations generates receipts, mostly from nonfederal sources; (2) the fund will be substantially self-sustaining over a period of several years; and (3) there is a substantial and continuing need for flexibility to meet unforeseen requirements. Proposed National Technical Information Service Revolving Fund, GAO/RCED-83-218, 5, 9 (August 25, 1983); GAO/RCED-83-53, at 36. In the case of the United States Mint's numismatic programs, GAO has gone so far as to recommend the establishment of a public enterprise revolving fund. Financial Management: The U.S. Mint's Accounting and Control Problems Need Management Attention, GAO/AFMD-89-88 (July 1989).

Even when looking favorably on a revolving fund proposal, GAO's reports and comments always recommend the retention of congressional controls. These include such things as periodic reauthorization; annual submission of business-type financial statements and budgets to Congress; limiting activities to those which have been reported to Congress in advance; and the return to the Treasury of net income, after prior-year adjustments, in excess of the amount needed to meet approved activities. GAO/RCED-83-218, at 6, 11. And, in its report on the Mint's numismatic programs, GAO recommended that the operations to be financed through the proposed revolving fund "be reviewed and approved through the annual appropriations process." GAO/AFMD-89-88, at 49.

To sum up GAO's position, revolving funds automatically and unavoidably diminish the congressional spending power. Nevertheless, where the advantages of revolving funds can be clearly demonstrated, GAO has not viewed them unfavorably,

particularly where safeguards are available to assure congressional oversight.

2. Creation/Establishment

Perhaps the most fundamental rule relating to revolving funds is that a federal agency may not establish a revolving fund unless it has specific statutory authority to do so. 44 Comp. Gen. 87, 88 (1964); A-68410, January 20, 1936; A-65286, October 1, 1935; GAO/PAD-77-25, at 46. The reason is that 31 U.S.C. § 3302(b), the so-called "miscellaneous receipts statute," requires that any money a federal agency receives from any source outside of its congressional appropriations be deposited in the general fund of the Treasury unless otherwise provided. Since this requirement is statutory, exceptions must be statutory. Thus, agencies have no authority to administratively establish revolving funds even within a single fiscal year, let alone without fiscal year limitation.

The legislative authority creating a revolving fund must be explicit. Authority to reimburse an appropriation does not authorize the creation of a revolving fund. See 38 Comp. Gen. 185 (1958); B-75345, May 20, 1948. The authority to establish a revolving fund may, of course, be contained in an appropriation act. The National Technical Information Service revolving fund, for example, was created in the 1993 appropriation act for the Departments of Commerce, Justice, and State. See Pub. L. No. 102-395, tit. II, 106 Stat. 1828, 1853. See also B-127121, April 3, 1956 (appropriation act riders used over long period of time to modify restrictive provision in the Alaska Railroad's revolving fund).

While the authority must be explicit, there is no prescribed formula. Certainly the words "revolving fund" help. As noted earlier, there is a long-established congressional pattern of using the term "revolving fund" to mean the authority to retain specified receipts and to use them for authorized purposes without further congressional action and without fiscal year limitation. 1 Comp. Gen. 704 (1922); 26 Comp. Dec. 295 (1919); B-209680, February 24, 1983. However, as long as the statute contains the required elements, use of the words "revolving fund" is not necessary and failure to use them is not controlling. GAO/PAD-77-25, at 6; B-135037-O.M., June 19, 1958.

In order to create a revolving fund, a statute must, at a minimum, do the following:

- It must specify the receipts or collections which the agency is authorized to credit to the fund (user charges, for example).
- It must define the fund's authorized uses, i.e., the purpose or purposes for which the funds may be expended.
- It must authorize the agency to use those receipts for those purposes without fiscal year limitation.

A statute illustrating this is 15 U.S.C. § 1527a, the Commerce Department's Economics and Statistics Administration Revolving Fund:

> "There is hereby established the Economics and Statistics Administration Revolving Fund which shall be available without fiscal year limitation. For initial capitalization, there is appropriated $1,677,000 to the Fund: Provided, That the Secretary of Commerce is authorized to disseminate economic and statistical data products as authorized by [15 U.S.C. §§ 1525-1527] and charge fees necessary to recover the full costs incurred in their production. Notwithstanding [31 U.S.C. § 3302], receipts received from these data dissemination activities shall be credited to this account as offsetting collections, to be available for carrying out these purposes without further appropriation."

First, it specifies the receipts for credit to it—the fees charged to recover the costs in production of the data products to be disseminated. Second, it defines the authorized uses of the fund—to carry out the purposes of 15 U.S.C. §§ 1525-1527. Third, the statute uses the term "revolving fund" and states it "shall be available without fiscal year limitation." Statutes creating revolving funds often specify additional features that exceed the "minimum" requirements we have identified. This one, for example, provides the initial working capital and its treatment of receipts as "offsetting collections" insures—although it would have happened even without the language—that the fund will be presented in the budget totals on a net basis. In addition, such statutes may fix the amount of the fund's capital; authorize the fund to be maintained at the desired level by periodic appropriations as needed; direct that the fund be self-sustaining, or substantially so; require the return of excess amounts to the Treasury or, alternatively, authorize investment of these funds; or impose reporting requirements or other congressional control devices.

A statute which does not use the words "revolving fund" is 12 U.S.C. § 1755, the National Credit Union Administration's operating fund. However, it contains the attributes of a revolving fund, and the

Treasury Department's Federal Account Symbols and Titles in fact classifies it as a public enterprise revolving fund.

Examples of statutes requiring the return of excess amounts to the Treasury are cited later under the Augmentation and Impairment heading. Examples of the alternative approach—authorizing investment of funds not needed for current operations—are 12 U.S.C. § 1755(e), the revolving fund of the National Credit Union Administration, and 42 U.S.C. § 2000e-4(k)(3), the Equal Employment Opportunity Commission's Education, Technical Assistance, and Training Revolving Fund. Typically, as in these two instances, the statute authorizes investment only in obligations of, or whose principal is guaranteed by, the United States, and authorizes income from the investment to be retained by the fund.

The requirement for specific statutory authority applies to federal agencies. It does not apply to the use of revolving fund financing by grantees or contractors unless prohibited by the relevant grant agreement or contract. The question in 44 Comp. Gen. 87 (1964) was whether an educational institution funded by a State Department grant could use a revolving fund to finance the printing and sale of publications. The answer was yes, because nothing in the grant documents prohibited it and the miscellaneous receipts statute does not apply to funds in the hands of a grantee. A 1974 case, B-164031(1)-O.M., October 3, 1974, applied the same result to the publishing activities of a contractor. A requirement in the contract that unexpended funds be returned to the government upon completion did not stand in the way; the contractor's accountability upon completion of the contract did not alter its discretionary authority during the course of performance.

If it takes a statute to create a revolving fund, it logically follows that it also takes a statute to terminate one, unless the law establishing the fund includes some sort of built-in termination mechanism. Legislation terminating a revolving fund should address the payment of existing debts if any remain, and the disposition of the fund's balance and future receipts.[38]

[38]See Revolving Funds: Office of the Attending Physician Revolving Fund Can Be Terminated, GAO/AFMD-89-29, 2-3 (December 1988).

3. Receipts and Reimbursements

Since a revolving fund is a creature of statute, the statute which established the fund (or subsequent amendments or appropriation acts) will determine what may go into the fund. Receipts may be lumped generally into two categories, initial and ongoing or operational.

The typical revolving fund receives an initial infusion of working capital (called the fund's "corpus") to enable it to finance operations until the "operational receipts" start coming in. This initial capitalization, which the fund may be required to repay, is normally furnished as part of the legislation establishing the fund. It may be in the form of an initial lump-sum appropriation, a transfer of balances from some existing appropriation or fund, a transfer of property and/or equipment, borrowing authority, or some combination of these.

An example of a fund capitalized by a direct appropriation is the Economics and Statistics Administration Revolving Fund, 15 U.S.C. § 1527a ("For initial capitalization, there is appropriated $1,677,000 to the Fund"). Capitalization by transfer is illustrated by the Equal Employment Opportunity Commission Education, Technical Assistance, and Training Revolving Fund, which received its initial working capital by a transfer of $1,000,000 from the Commission's Salaries and Expenses appropriation. 42 U.S.C. § 2000e-4(k)(4). The Corps of Engineers Civil Revolving Fund authorized the Secretary of the Army "to provide capital for the fund by capitalizing the present inventories, plant and equipment of the civil works functions of the Corps of Engineers." 33 U.S.C. § 576. An example of one form of borrowing authority to capitalize a fund is 31 U.S.C. § 5136, the United States Mint Public Enterprise Fund, which authorized the Secretary of the Treasury, subject to reimbursement within one year, to "borrow such funds from the General Fund as may be necessary to meet obligations incurred prior to the receipt of revenues into the Fund."

After the initial capitalization, the defining feature of a revolving fund is, as we have seen, its ability to retain and use receipts. Normally, the receipts will be those generated by the fund's operations as this is the very concept of a revolving fund. See, e.g.,

B-124995, September 27, 1955; B-112395, October 20, 1952; B-105693, October 22, 1951.[39] This is not a firm legal requirement, however, and a revolving fund can mean "a fund which when reduced is replenished by new funds from specified sources," whether or not generated by the fund's operations. 23 Comp. Gen. 986, 988 (1944).

Either way, the authority to retain receipts is an exception to 31 U.S.C. § 3302(b). E.g., 19 Comp. Gen. 791 (1940), amplified, 20 Comp. Gen. 280 (1940). When describing 31 U.S.C. § 3302(b), we usually say that it requires that all receipts be deposited in the Treasury as miscellaneous receipts absent statutory authority for some other disposition. From the revolving fund perspective, it is more accurate to restate this a bit and to say that the statute requires that receipts be deposited in the Treasury either to the credit of an appropriation or fund where specifically authorized, or, where not so authorized, to the general fund as miscellaneous receipts. Thus, a revolving fund is an exception to the miscellaneous receipts requirement of 31 U.S.C. § 3302(b), but does not render the entire statute inapplicable. The portion of the statute requiring that receipts be deposited in the Treasury promptly and without deduction applies fully to revolving fund deposits. B-72105, November 7, 1963.

The statute will prescribe the types of receipts which may be credited to the fund and, where contextually appropriate, the method of payment. The prescription of sources is found in varying degrees of specificity, depending on the purpose of the fund. A fund intended to finance an entity rather than a particular activity tends to have broader language, an example being the Bonneville Power Administration's provision, 16 U.S.C. § 838i(a) ("all receipts, collections, and recoveries from all sources"). Some funds expressly authorize the crediting of receipts from the sale or exchange of, and payments for loss or damage to, fund property. E.g., 5 U.S.C. § 1304(e)(3) (OPM investigation/training fund); 44 U.S.C. § 309(b) (GPO revolving fund). Unlike an activity funded by direct appropriations, a revolving fund would, even without this explicit

[39]These three cases involve the Vessels Operations Revolving Fund, 46 U.S.C. App. § 1241a. While the scope of the fund was later expanded (46 U.S.C. App. §§ 1241b and 1241c) so that the specific result in at least two of the three cases would now be different, the relationship of receipts to fund operations remains.

authority, be able to retain payments for loss or damage to fund property. 50 Comp. Gen. 545 (1971).

The specification of authorized receipts operates, as one might expect, as a limitation as well as an authorization, although this principle should not be applied to the exclusion of common sense. Thus, a provision of the Agricultural Marketing Act providing that payments of principal or interest on loans be deposited in a revolving fund (12 U.S.C. § 1141f(b)) includes sale proceeds obtained in a foreclosure proceeding as well as voluntary payments. 12 Comp. Gen. 553 (1933).

Revolving fund legislation will also commonly address method of payment. At a minimum, payment by reimbursement is usually authorized. The statute also may or may not authorize advance payments. If the statute specifies reimbursement and is silent as to advances, advances are not authorized. 32 Comp. Gen. 99 (1952). But see 32 Comp. Gen. 45 (1952), in which legislative history was used to conclude that reimbursement did not preclude payment in advance. While the approach in 32 Comp. Gen. 45 appears questionable as a general proposition, the apparent congressional intent in that case was buttressed by a separate provision in the same appropriation act which made the appropriations of the client agencies available "for advances or reimbursements" to the fund.[40] An interesting linguistic variation found in several of the working capital fund statutes is "reimbursed in advance." E.g., 20 U.S.C. § 3483(b) (Department of Education); 42 U.S.C. § 3513 (Health and Human Services); 49 U.S.C. § 327(d) (Transportation).

Customer agencies receiving goods or services from the Government Printing Office's revolving fund are required to pay promptly upon the Public Printer's written request, "either in advance or upon completion of the work, all or part of the actual or estimated cost, as the case may be, and bills rendered by the Public Printer are not subject to audit or certification in advance of payment." 44 U.S.C. § 310. Under this provision, regardless of the status of the work, "[p]ayment of an acceptable invoice may not be

[40]The statute in that case, the Office of Personnel Management revolving fund, was subsequently amended to specifically include advances.

delayed in order to complete a prepayment audit." 56 Comp. Gen. 980, 981 (1977).

Where receipts are based on the cost of work or services, such as the typical working capital fund, the statute will generally require the recovery of indirect costs (overhead) as well as direct costs. For example, the Corps of Engineers Civil Revolving Fund, 33 U.S.C. § 576, requires payment "at rates which shall include charges for overhead and related expenses, depreciation of plant and equipment, and accrued leave." In B-167790, December 23, 1977, an agency whose regulations precluded reimbursement of administrative overhead nevertheless entered into an agreement with the Corps for revolving fund work. Since the requirement to charge for overhead was statutory, it had to prevail over the contrary provision in the customer agency's regulations. The burden properly fell upon the agency which had violated its own regulations, even if it did not fully understand that the Corps would be using its revolving fund. A more recent decision involving the same revolving fund, advised that the fund could recover its costs for "idle time" where fund property was forced to remain idle as the result of a congressional enactment, even though the effect may be that the reimbursing appropriations are paying for periods of non-use. B-257064, April 3, 1995. Precisely how to account for these costs (allotments, rate adjustments, etc.) is within the Corps's discretion.

The statutory language may be less explicit, providing merely for recovery on an "actual cost" basis, an example being the Office of Personnel Management revolving fund, 5 U.S.C. § 1304(e)(1). GAO has construed this language to include indirect costs, consistent with similar language in the Economy Act. B-206231-O.M., September 12, 1986. See also 72 Comp. Gen. 159 (1993) (similar interpretation of term "reimbursable basis"). GAO also encourages the administering agency to establish a clear definition of general terms like these. See OPM's Revolving Fund Policy Should Be Clarified and Management Controls Strengthened, GAO/GGD-84-23 (October 13, 1983).

It is not uncommon for revolving funds to enter into contracts with private parties as part of their performance. If a customer agency cancels an order and the revolving fund is forced to terminate the commercial contract for the convenience of the government and bear the resultant termination costs, it may recover these costs from

the customer agency. 60 Comp. Gen. 520 (1981). However, the fund itself should bear the loss if it terminates a contract it entered into merely to build up its inventory in anticipation of customer orders. Id. at 523. In accord is 69 Comp. Gen. 112 (1989), holding that the General Services Administration may assess termination charges, payable to its Information Technology revolving fund, against an agency which had withdrawn from GSA's telecommunications system. The alternative in both cases would have been to pass those costs on to other customers.

We should note one final potential source of capital for a revolving fund—the United States Treasury. If a fund is falling behind its goal of self-sufficiency, or if there has been a significant impairment of capital, or if Congress wishes to increase the fund's capital, it can provide additional appropriations. Some revolving fund statutes expressly recognize this possibility (for example, 31 U.S.C. § 5142, the Bureau of Engraving and Printing Fund), although, subject to a possible point of order, absence of the language can't stop Congress from making the appropriation. Also, some revolving funds have borrowing authority, one example being the Rural Electrification and Telephone Revolving Fund, 7 U.S.C. § 931.[41]

4. Expenditures/Availability

a. Status as Appropriation

There are perhaps two "foundation rules" of revolving funds from which all else flows. One, discussed earlier, is that specific statutory authority is necessary to create a revolving fund. The second is that a revolving fund is an appropriation. Hence, funds in a revolving fund are appropriated funds. The significance of this rule is twofold. First, except as may be otherwise specified by statute, a revolving fund is available for expenditure without further appropriation action by Congress. It "is in no way dependent on the existence of [a separate] appropriation for the same purpose." B-209680, February 24, 1983. Second, unless specifically exempted, funds in a revolving fund are subject to the various limitations and restrictions applicable to appropriated funds.

[41]For a detailed analysis of borrowing authority, see Spending Authority Recordings in Certain Revolving Funds Impair Congressional Budget Control, GAO/PAD-80-29 (July 2, 1980).

The rationale for the rule that revolving funds are appropriated funds follows from the Miscellaneous Receipts Act, 31 U.S.C. § 3302(b), and the Appropriations Clause. U.S. Const., art. I, § 9, cl. 7.

In addition, 31 U.S.C. §§ 701(2) and 1101(2) define "appropriations" as including "other authority making amounts available for obligation or expenditure." A revolving fund certainly fits this definition. Discussing a now-obsolete fund called the "Farm Labor Supply Revolving Fund," the Comptroller General set forth the principle in these terms:

> "The payments received from the growers who make use of the workers represent moneys collected for the use of the United States and in the absence of specific statutory authority would be required to be deposited into the general fund of the Treasury as miscellaneous receipts under [31 U.S.C. § 3302(b)]. In this case, the specific statutory authority to use the moneys is supplied by the referred-to legislation establishing the Fund. The result of such legislation is to continuously appropriate such collections for the authorized expenditures for which the Fund is available . . . . Thus, we conclude that the 'Farm Labor Supply Revolving Fund' does represent an 'appropriation' . . . ." 35 Comp. Gen. 436, 438 (1956).

GAO has expressed this principle on numerous occasions. E.g., 63 Comp. Gen. 31 (1983), aff'd on recons., B-210657, May 25, 1984 (operating fund of National Credit Union Administration is an appropriation and thus subject to certain employee compensation provisions in title 5 of the United States Code; the 1984 decision includes the more detailed discussion of the appropriation issue); 60 Comp. Gen. 323 (1981) (Federal Prison Industries revolving fund is an appropriated fund for purposes of surplus personal property provisions of Federal Property and Administrative Services Act); 35 Comp. Gen. 615 (1956) (statutory restriction on use of appropriated funds applies to operating fund of National Credit Union Administration's predecessor); B-204078.2, May 6, 1988 (Panama Canal Revolving Fund); B-217281-O.M., March 27, 1985 (revolving funds of Pension Benefit Guaranty Corporation subject to federal procurement laws and regulations); B-148229-O.M., May 15, 1962 (General Services Administration's General Supply Fund is an appropriated fund for purposes of administrative payment under Federal Tort Claims Act). The decisions have consistently rejected the suggestion that revolving funds should be regarded as nonappropriated funds. E.g., 60 Comp. Gen. at 327; B-210657, May 25, 1984.

The fact that the initial capitalization has been paid back to the general fund of the Treasury and the revolving fund has thereafter become fully self-sustaining through collections from private parties does not change the fund's character as an appropriation. 60 Comp. Gen. at 326; 35 Comp. Gen. at 438.

Most of the cases involve public enterprise revolving funds because it is there that the miscellaneous receipts statute comes into play. It is much harder to try to suggest that an intragovernmental revolving fund is not an appropriated fund, in effect, that moving money from one government pocket to another changes its status. E.g., 31 Comp. Gen. 7 (1951) (Navy Management Fund is an appropriation).[42] See also Pulsar Data Systems, Inc. v. General Services Administration, GSBCA No. 13223, 96-2 B.C.A. ¶ 28,407 (1996), a case involving a lease funded under GSA's working capital fund in which there is not the slightest suggestion that the monies are anything but appropriated funds.

The Court of Appeals for the District of Columbia Circuit is in agreement. Holding a military stock fund subject to certain procurement laws, the court stated that the revolving fund legislation "eliminated the need for a new appropriation each fiscal year by creating what was, in effect, an on-going appropriation." United Biscuit Co. v. Wirtz, 359 F.2d 206, 212 (D.C. Cir. 1965). Indeed, the court went on to note, in view of the Appropriations Clause of the Constitution, if a revolving fund is not an appropriation, its constitutionality is cast into doubt. Id. at 213 n.14. See also B-67175, July 16, 1947.

b. Purpose

Since funds in a revolving fund are appropriated funds, they are fully subject to 31 U.S.C. § 1301(a) which restricts the use of appropriated funds to their intended purpose(s). 63 Comp. Gen. 110, 112 (1983); 37 Comp. Gen. 564 (1958); B-203087, July 7, 1981. The purpose requirement, as discussed in detail in Chapter 4, applies to revolving funds in exactly the same manner that it applies to direct appropriations.

[42]A management fund may or may not be a revolving fund. See, e.g., 10 U.S.C. § 2209.

You look first and foremost to the statute creating the fund—in effect, the "appropriation"—to identify the fund's authorized purposes. Since revolving funds are by definition creatures of statute, this step is of paramount importance. The governing legislation may be somewhat general, or it may be painstakingly specific. Either way, the rule is the same: the terms of the statute, in conjunction with other applicable statutory provisions, circumscribe the fund's availability. Thus, for example, revolving funds for the Senate recording and photographic studios may not, without further statutory authority, be invested in short-term certificates of deposit since this is not a specified purpose under the enabling legislation (2 U.S.C. §§ 123b(g) and (h)). B-203087, July 7, 1981. Similarly, the General Services Administration's Working Capital Fund, which is available for the expenses of operating "a central blueprinting, photostating, and duplicating service" (40 U.S.C. § 293), may not be used to finance the agency's central library or travel office. B-208697, September 28, 1983. While reimbursing the Working Capital Fund from the appropriations which should have been charged in the first instance will avoid an Antideficiency Act violation, use of the Fund for unauthorized items was nevertheless improper. Id.

While the statute is the first and most important source for determining purpose availability, it cannot be expected to spell out every detail. If the statute does not directly address the item in question one way or the other, the next step is to apply the "necessary expense" rule the same as with a direct appropriation. E.g., 63 Comp. Gen. 110, 112 (1983); B-230304, March 18, 1988; B-216943, March 21, 1985. This means that a revolving fund is available for expenditures which are directly related to, and which materially contribute to accomplishing an authorized purpose of, the fund and which are not otherwise specifically provided for or prohibited.

One revolving fund whose purpose statement is quite general is the Bureau of Engraving and Printing Fund, 31 U.S.C. § 5142. The Fund is available "to operate the Bureau of Engraving and Printing" (31 U.S.C. § 5142(a)(1)) or, in the original language, "for financing all costs and expenses of operating and maintaining the Bureau" (64 Stat. 409). Under this language, the Fund has been held available for various alterations and improvements to the Bureau's real property (replacements and additions of elevators, air conditioning,

electrical, plumbing and heating equipment, partitions, flooring, etc.), as these are clearly necessary costs of operating and maintaining the Bureau. B-104492, October 4, 1951. It may be used to send representatives to meetings of societies of coin collectors as this is sufficiently related to the Bureau's activities for purposes of 5 U.S.C. § 4110. B-152624, February 18, 1965. And, in view of legislative history strongly indicating an intent that the language be broadly construed, it satisfies the requirement of 5 U.S.C. § 3109(b) that the procurement of experts and consultants be "authorized by an appropriation or other statute." B-122562, May 26, 1955. However, GAO concluded in 43 Comp. Gen. 564 (1964) that the revolving fund was not available to compile and publish a 100-year history of the Bureau. The publication's relationship to the operations of what was essentially a manufacturing establishment were rather tenuous and the Bureau lacked authority to disseminate information.

Another illustration is the Rural Housing Insurance Fund, 42 U.S.C. § 1487, which, under subsection (j)(3), is available for "servicing of loans, and other related program services and expenses." One "related expense" chargeable to the fund is the purchase of surety bonds needed to obtain the release of deeds of trust for borrowers where the Farmers Home Administration could not find, and therefore could not deliver, the original canceled promissory note. B-114860, December 19, 1979. GAO also regards the fund as available to pay the pro rata share of developing and installing a new computerized program accounting system, intended in part to permit prompter and more accurate loan servicing. B-226249, March 2, 1988 (internal memorandum).

A somewhat more specific purpose statement was contained in the now-defunct Farm Labor Supply Revolving Fund. The Agricultural Act of 1949 authorized the Department of Labor to incur, on a reimbursable basis, certain expenses incident to the transportation and subsistence of farm workers. The revolving fund was available "for payment of transportation, subsistence, and all other expenses" which were reimbursable under the Agricultural Act (65 Stat. 741). One decision concluded that the fund was available for the cost of physical examinations because they could be regarded as directly connected with the transportation of the workers into the country. Of course this also meant that the costs were reimbursable and would ultimately be borne by the employers of the imported

workers and not the taxpayers. 33 Comp. Gen. 425 (1954). However, the "necessary expense" rationale could not be stretched far enough to justify charging the revolving fund for the cost of a management survey of the program. B-119354, March 30, 1959.

An example of an expenditure which is otherwise provided for is B-230304, March 18, 1988, concluding that the Federal Prison Industries' revolving fund was not available to construct a prison camp because Congress had provided statutory procedures and specific appropriations for prison construction. An expenditure which is otherwise prohibited is illustrated in B-67175, July 16, 1947, finding a revolving fund unavailable for the purchase of motor vehicles without the specific authority required by 31 U.S.C. § 1343(b). By way of contrast, in B-122562, May 26, 1955, one of the Bureau of Engraving and Printing cases noted above, explicit legislative history combined with sufficiently broad statutory language were found to supply the necessary authority.

In analyzing the purpose availability of a revolving fund, as with a direct appropriation, the agency has reasonable discretion in selecting means of implementation, as long as its exercise is consistent with the statutory objectives. Since the 1970s, the Department of Housing and Urban Development had a revolving fund to finance something called the New Community Development Program. The fund was available for specified forms of credit and other financial assistance, and for "any other program expenditures." When the program failed and the incipient new communities raced toward insolvency, HUD was faced with a variety of options. In one decision, GAO advised that, under the statute, HUD could acquire the property by foreclosing on its security and undertake a variety of expenditures incident to engaging a new builder. Actions specifically authorized by the statute had to be regarded as "program expenditures," and nothing in the law required HUD to choose the option which would minimize the government's loss. B-170971, July 9, 1976. The discretion was not open-ended, however. Another decision, cautioning that "program expenditures" means "expenses of the program established by other sections" of the statute, found no basis for using the revolving fund to, in effect, step into the developer's shoes and maintain and operate a development, except pursuant to a bona fide

determination to acquire a given security. B-170971, January 22, 1976.

The desirability of a proposed expenditure is not enough to supply legal authority which is otherwise lacking. In 40 Comp. Gen. 356 (1960), for example, the Veterans Administration proposed using its revolving supply fund to finance a program to recover silver from X-ray developing solutions. There was no question that the proposal was a good idea. The problem was that recovering silver was more of an industrial-type operation than the furnishing of supplies and the reclaimed silver was apparently of no benefit to any of the appropriations which supported the supply fund. Therefore, GAO was forced to conclude that the proposal was not an authorized revolving fund activity, but urged the VA to seek an amendment to its statute. This was done, and the statute now specifically includes the "reclamation of used, spent, or excess personal property." 38 U.S.C. § 8121(a).

Chapter 4 uses over a dozen broad subject areas to illustrate different aspects of purpose availability. The same authorities and limitations apply to revolving funds. For example:

- Statutes dealing with the use of appropriated funds to pay the expenses of attendance at meetings apply to revolving funds. 34 Comp. Gen. 573 (1955) (37 U.S.C. § 412 (DOD)); B-152624, February 18, 1965 (5 U.S.C. § 4110).
- Employees paid from revolving funds are subject to the statutory restriction on payment of compensation to noncitizens. 50 Comp. Gen. 323 (1970);[43] B-161976, August 10, 1967.
- Like direct appropriations, revolving funds are not available for entertainment without statutory authority. B-170938, October 30, 1972.
- Revolving fund may be used to subsidize employee cafeteria if properly justified under the "necessary expense" rule. B-216943, March 21, 1985.

[43]Technically, 50 Comp. Gen. 323 involved a "special deposit account," but the decision points out that it was similar to a revolving fund in that it authorized the crediting of receipts and their use for specified purposes.

- Revolving funds are subject to the prohibition in 31 U.S.C. § 1348(a)(1) on providing telephone service to private residences. 35 Comp. Gen. 615 (1956).

An intragovernmental revolving fund presents a further complication. Its uses are, of course, governed by the statute which created it. See, e.g., 40 Comp. Gen. 356, holding that a revolving supply fund is available to finance a supply operation and not an industrial-type program. In addition, it is necessary to consider the purpose availability of the supporting appropriations, i.e., the appropriations from which the revolving fund is advanced or reimbursed. A decision addressing the Navy Industrial Fund stated the rule that the Fund is "available only for the purposes permissible under [the] source appropriation, and subject to the source restrictions." 63 Comp. Gen. 145, 150 (1984). See also, e.g., 18 Comp. Gen. 489, 490-91 (1938); B-106101, November 15, 1951. Statements like this must be read with caution. They do not mean that purpose restrictions on the source appropriation follow the money into the grave. If, for example, the Office of Personnel Management conducts a background investigation from its revolving fund and is reimbursed from the client agency's Salaries and Expenses appropriation, the fact that the client agency's appropriation may be subject to a restriction on, say, some form of lobbying has no relevance once the money is in OPM's account. What the rule does mean is that revolving fund financing cannot be used to permit the customer agency to evade restrictions on its funds or to accomplish some purpose it is not authorized to do directly. E.g., 30 Comp. Gen. 453 (1951) (working capital fund not available for construction where customer agency lacks the authority required by 41 U.S.C. § 12). See also 34 Comp. Gen. 573 (1955); B-161976, August 10, 1967. For related material, see the "Applicability of limitations and restrictions" heading in the Economy Act section of this chapter.

c. Time

If purpose availability illustrates a revolving fund's strongest resemblance to a direct appropriation, time availability highlights perhaps the clearest divergence. As pointed out earlier in this discussion, one of the key features of a revolving fund is that it is available without further congressional action and without fiscal year limitation. This continuing availability has long been recognized as an inherent characteristic of a revolving fund, at least as that term is used in statutes enacted by the United States

Congress. While the more modern statutes tend to include explicit language such as "without fiscal year limitation," without more, the term "revolving fund" alone would be construed to mean the same thing. 1 Comp. Gen. 704 (1922); 26 Comp. Dec. 295 (1919).

Thus, the various rules discussed in Chapter 5 governing the obligation and expenditure of fixed-year appropriations with respect to time do not apply to revolving funds. For purposes of comparison, the time availability of a revolving fund, unless otherwise restricted by statute, is similar to that of a no-year appropriation—the money is "available until expended." This being the case, the rules for no-year appropriations provide a useful analogy. Under a no-year appropriation—and therefore a revolving fund as well—"all statutory time limits as to when the funds may be obligated and expended are removed." 40 Comp. Gen. 694, 696 (1961). Amounts credited to the fund are treated as unobligated balances and are available for obligation the same as any other unobligated money in the fund. Id. at 697. Deobligated funds are treated the same way. B-200519, November 28, 1980.

A question which appears to have drawn little attention is whether 31 U.S.C. § 1555 applies to revolving funds. That statute requires that a no-year account be closed if the agency head determines that the purposes of the appropriation have been carried out and if there have been no disbursements from the account for two consecutive fiscal years. In a 1979 memorandum, GAO's General Counsel took the position that the statute would apply to uranium enrichment revenues which the Department of Energy was authorized under 42 U.S.C. § 5821(h) to retain and use for program expenses without fiscal year limitation. B-159687-O.M., October 25, 1979. The only difference between this and a true revolving fund was that the authority to retain and use the revenues was not permanent but had to be implemented in annual appropriation acts. In 72 Comp. Gen. 295 (1993), the Treasury Department had invoked 31 U.S.C. § 1555 to terminate the Check Forgery Insurance Fund, a revolving fund. GAO found closure improper because the reasons the fund had been created continued to exist. While the issue was not directly raised in the decision, both Treasury and GAO regarded 31 U.S.C. § 1555 as applicable to the revolving fund without question.

The apparent purpose of 31 U.S.C. § 1555 is to encourage the closing of inactive accounts (39 Comp. Gen. 244, 245 (1959)), and there is no

reason this should not apply to a revolving fund whose inactivity legitimately suggests that it is no longer needed. If for whatever reason the period of inactivity does not indicate that the account should be closed, the agency administering the fund has the power to ward off closure by simply declining to make the "purposes served" determination.

With the limitations of a fixed-year appropriation out of the picture, there is little left to the bona fide needs rule as applied to a revolving fund, except perhaps a simple affirmation that the fund should be used only for valid purposes. E.g., 57 Comp. Gen. 865, 868-869 (1978). Of course, use of a revolving fund to liquidate obligations incurred prior to its creation would be improper unless expressly authorized. In this connection, it is not uncommon for legislation to authorize a newly created revolving fund to assume both the assets and the liabilities of specified existing accounts. An example is the Corps of Engineers Civil Revolving Fund, 33 U.S.C. § 576.

A common manifestation of the absence of bona fide need concerns is the use of revolving funds for multi-year contracts. As long as considerations of purpose and amount are satisfied, a number of decisions have sanctioned the use of multi-year contracts under revolving funds. E.g., 57 Comp. Gen. at 869 (lease of computer equipment); 48 Comp. Gen. 497, 502 (1969); 45 Comp. Gen. 59, 66 (1965) (purchase of supplies under stock fund).

As with the purpose arena, the intragovernmental revolving fund introduces an additional complication because it implicates the appropriations of the customer agency. When entering into a transaction with a revolving fund, the customer agency must apply the various time rules to its own appropriation. Thus, the freedom from time limitations most evident in the case of a public enterprise revolving fund is, in an intragovernmental fund, necessarily circumscribed by the nature and status of the supporting (customer) appropriations. Specifically, the customer agency must obligate its appropriation within its specified period of availability and for a bona fide need attributable to that period. With respect to performance, the revolving fund is in the same position as any other contractor unless the transaction is governed by a deobligation requirement like that found in the Economy Act. 31 Comp. Gen. 83 (1951).

To restate the thrust of the preceding paragraph, use of a revolving fund does not change the period of availability of the customer agency's appropriation. It is improper, for example, for a customer funded by fiscal-year appropriations to place orders with an industrial fund in excess of legitimate needs, thereby using the revolving fund to extend the life of the appropriation. Improper Use of Industrial Funds by Defense Extended the Life of Appropriations Which Otherwise Would Have Expired, GAO/AFMD-84-34 (June 5, 1984). It is equally improper to amend a properly placed order so as to increase the scope of the work in the subsequent fiscal year and to charge the amendment to expired funds of the prior year. Id. at 9. In 55 Comp. Gen. 1012, 1017 (1976), GAO approved a proposal by the General Services Administration to lease computer equipment on a multi-year basis, the lease to be assigned to a user agency which would agree to reimburse GSA's revolving fund, as long as the user agency was not obligating fiscal-year money to reimburse GSA. Similarly, advancing money to a revolving fund does not transform a fixed-year appropriation into no-year money. 23 Comp. Gen. 668 (1944).

d. Amount

As with direct appropriations, authorities and limitations relating to the amount that can be obligated or expended apply to revolving funds unless specifically exempted. Limitations fall into three categories. First are governmentwide limitations. An example is 35 Comp. Gen. 436 (1956), finding a revolving fund bound by the statute, since repealed, limiting obligations or expenditures for improvements to real property to 25 percent of the first year's rent. The only real issue was whether the revolving fund constituted an appropriation; if it did—and, of course, it did—the statute applied.

Next are limitations or restrictions specific to the particular fund. An unusual situation occurred in 46 Comp. Gen. 198 (1966). Hurricane Betsy caused considerable damage in several southern states in 1965. Part of the congressional response was a law authorizing the Small Business Administration to cancel portions of outstanding indebtedness. The indebtedness to be forgiven stemmed from loans financed by a revolving fund. The law authorized the appropriation of $70 million. Congress subsequently appropriated half that amount, $35 million. The SBA asked if it could grant relief in excess of $35 million, noting quite logically that forgiving an obligation does not require an appropriation. "You may not have needed one," the decision concluded, "but you got one and

it can't be ignored." The authorization and appropriation reflected the congressional determination to maintain the revolving fund for future program use. (The alternative would have been to let the fund dwindle and pump more money into it later.) Congress chose to enact the limitation, and the agency could not disregard it.

The final category, applicable in the case of intragovernmental revolving funds, consists of limitations on the appropriation from which the fund will be reimbursed. For example, Defense Department industrial funds can finance authorized military construction, reimbursable from Operation and Maintenance appropriations. "Minor military construction" projects may be charged to O&M appropriations up to a monetary ceiling set by 10 U.S.C. § 2805. It is improper to use the industrial fund for a construction project whose cost has been split to evade the ceiling. B-234326.15, December 24, 1991. Similarly improper is the use of revolving fund financing to exceed a ceiling on travel expenses applicable to the reimbursing appropriation. B-120480, September 6, 1967.

Of course, the most important law relating to amount is the Antideficiency Act, which by its terms applies to an "appropriation or fund." 31 U.S.C. § 1341(a)(1)(A). It is clear that the statutory prohibition against overobligating applies to revolving funds. E.g., 72 Comp. Gen. 59 (1992). It also applies to annual obligation limitations on revolving funds. B-248967.2, April 21, 1993 (Antideficiency Act applies "to any fund administered by a federal employee").

The law is violated by creating an obligation in excess of available budgetary resources. 60 Comp. Gen. 520, 522 (1981). For a revolving fund, available budgetary resources include (a) orders from other government accounts that represent valid obligations of the ordering account, and (b) orders from the public, but only to the extent accompanied by an advance. OMB Circular No. A-34, § 11.2 (1995). However, the concept does not include inventory. 60 Comp. Gen. 520. Nor does it include anticipated receipts from transactions that have not yet occurred. The Air Force Has Incurred Numerous Overobligations in Its Industrial Fund, GAO/AFMD-81-53 (August 14, 1981); B-195316-O.M., January 30, 1980; OMB Circular No. A-34, § 21.4. A statutory exception is 10 U.S.C. § 2210(b), which authorizes Defense Department stock funds (but not industrial funds) to obligate against anticipated reimbursements if necessary to

maintain stock levels planned for the next fiscal year. The Coast Guard Supply Fund has similar authority. 14 U.S.C. § 650(b). The rules relating to indemnification discussed in detail in Chapter 6 apply fully to revolving funds. 63 Comp. Gen. 145 (1984).

A revolving fund can also violate the Antideficiency Act by overspending a specific monetary limitation. B-120480, September 6, 1967. If an overobligation or overexpenditure would have been authorized under some other appropriation or fund available at the time of the overobligation or overexpenditure, reimbursement from the proper source—assuming it is still available—cures the violation. B-208697, September 28, 1983.

As discussed in Chapter 6, a violation can also occur if an agency charges an obligation or expenditure to an appropriation which is not legally available for that item, regardless of how much money is in the account. The same is true if the proper funding source does not contain adequate budgetary resources to cover the obligation or expenditure when the accounts are adjusted. A problem of this sort arose when the Defense Supply Agency charged the Defense Stock Fund with a renewal option on a multi-year fuel storage service contract. The contractor argued that exercise of the option violated the Antideficiency Act because a Defense Department Directive required that supply administration contracts be charged to Operation and Maintenance appropriations and not to stock funds. There was no question that charging the stock fund was unauthorized. The Armed Services Board of Contract Appeals, however, found that the Defense Directive was merely an "in-house accounting [measure] not relevant to determining the availability of appropriated funds." Therefore, and since there was no statutory limitation on using stock funds for otherwise authorized fuel storage contracts, there was no Antideficiency Act violation. The Board further noted that, even if the stock fund was considered to be legally unavailable, there would be no violation as long as a funding adjustment could be made. New England Tank Industries of New Hampshire, Inc., ASBCA No. 26474, 88-1 B.C.A. ¶ 20,395, at 103,169 and n.23 (1987). While vacating and remanding the Board's decision on other grounds, the Court of Appeals for the Federal Circuit expressly agreed that using the stock fund, although unauthorized, did not violate the Antideficiency Act. New England Tank Industries of New Hampshire, Inc. v. United States, 861 F.2d 685, 692 n.15 (Fed. Cir. 1988).

Another part of the Antideficiency Act requires the apportionment of appropriations (defined to include "funds") by the Office of Management and Budget. 31 U.S.C. §§ 1511(a), 1512, 1513. While fixed-year appropriations are generally apportioned by time, appropriations for an indefinite period are apportioned "to achieve the most effective and economical use." 31 U.S.C. § 1512(a). Overobligating or overspending an apportionment is just as illegal as overobligating or overspending the appropriation itself. 31 U.S.C. § 1517(a). That the apportionment statutes apply to revolving funds is reinforced by 31 U.S.C. § 1516(2), which authorizes OMB to exempt from apportionment "a working capital fund or a revolving fund established for intragovernmental operations."

The applicability of the apportionment laws to revolving funds is reflected in OMB Circular No. A-34. OMB's illustration of the Standard Form 132 Apportionment Schedule (Exhibit 35G) expressly specifies both public enterprise and intragovernmental revolving funds, while section 30.2 restates OMB's authority to exempt particular intragovernmental funds. For purposes of assessing violations, the fact that the fund includes unapportioned budgetary resources greater than the amount of the deficiency is irrelevant. Id. § 22.4. The authority of 10 U.S.C. § 2210(b), mentioned above, can be exercised only "with the approval of the President." This means OMB apportionment. B-179708-O.M., July 10, 1975.

An important concept covered in Chapter 4 is the agency's spending discretion under a lump-sum appropriation, illustrated in decisions such as 55 Comp. Gen. 307 (1975) and 55 Comp. Gen. 812 (1976). The same discretion applies under a revolving fund. In one year, for example, committee reports expressed the view that the Economic Development Administration not make any direct loans in the upcoming fiscal year. Since this desire did not find its way into any statutory language, the agency's revolving fund was legally available to make the loans. Of course, the agency was also within its discretion to comply with the committee preference and not make any direct loans. B-209680, February 24, 1983.

e. Obligation Requirement

Nothing exempts revolving funds from the obligation recording provisions of 31 U.S.C. § 1501. When a revolving fund does something that meets one of the statutory recording criteria, it must, just like a direct appropriation, record an obligation. 72 Comp.

Gen. 59 (1992) (entering into contract to procure equipment). See also 60 Comp. Gen. 700, 703 (1981); 51 Comp. Gen. 631 (1972).[44]

Under a multi-year contract, the amount to be recorded as an obligation depends on the nature and extent of the government's commitment. If the contract does not restrict the government's obligation to less than the full contract amount, then the full contract amount is the amount of the obligation. B-104492, April 23, 1976 (internal memorandum). If the contract consists of a basic period plus renewal options, the obligation is the cost of the base period plus any amounts payable for failure to exercise the options (termination costs), this being the least amount of the government's potential liability. 62 Comp. Gen. 143 (1983); 48 Comp. Gen. 497, 502 (1969).

Congress can, of course, vary the above treatment by statute. Statutory exceptions have tended to involve multi-year contracts under the rather large Defense Department revolving funds where the chances of premature termination are, from practical and political perspectives, remote. Under a Navy ship-leasing program financed by the Navy industrial fund, for example, Congress enacted a provision authorizing the Navy to obligate only 10 percent of the outstanding gross termination liability. See B-174839, March 20, 1984. A case several years earlier considered a recurring Defense appropriation act provision which authorized Defense working capital funds to maintain cash balances only to the extent necessary to cover cash disbursements at any time, and further authorized transfers between such funds when and if necessary.[45] This provision amounted to an exception to the requirement to obligate for termination liability. 51 Comp. Gen. 598 (1972).

Under an intragovernmental revolving fund, it is also necessary to consider the obligational treatment of the supporting

[44]Both cases discuss the recording of obligations under credit programs financed by revolving funds. While some of the specifics have been superseded by the Federal Credit Reform Act of 1990, 2 U.S.C. §§ 661, et seq., in neither case was the applicability of the recording statute called into question.

[45]The fiscal year 1997 version of this provision is section 8006 of the Department of Defense Appropriations Act, which is found in the Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 101(b), 110 Stat. 3009, 3009-88 (1996).

appropriations. That treatment generally is determined by applying the appropriate recording standard of 31 U.S.C. § 1501—either subsection (a)(1) (binding agreement in writing) or subsection (a)(3) (order required by law to be placed with another agency). For example, when an agency places an order with the General Services Administration for work to be financed from one of GSA's revolving funds, placing the order obligates the customer agency's appropriations if the order is one which is required by law—including GSA's statutory regulations—to be placed with GSA. If the order is not required by law to be placed with GSA, the job order itself does not obligate the customer's funds. The obligation occurs as and when GSA performs or enters into a contract for performance. 34 Comp. Gen. 705 (1955). See also 23 Comp. Gen. 88, 90 (1943) (similar principle prior to enactment of 31 U.S.C. § 1501).

An application of 34 Comp. Gen. 705 occurred just a few weeks after the decision was issued. The Social Security Administration placed a job order with GSA for alterations to a building late in fiscal year 1954, but GSA was not able to do the work until the following fiscal year. Since the Social Security Administration was required by law to have the work done by GSA, the obligation of SSA funds occurred when SSA placed the job order and was chargeable to that year. The obligation was governed by subsection (a)(3) rather than (a)(1), and there was therefore no need for SSA to deobligate the funds at the end of fiscal year 1954. None of this was affected by the fact that GSA was financing the work under a revolving fund. 35 Comp. Gen. 3 (1955).

Obligating for purchases from stock or supply funds (Defense Department stock funds or GSA's General Supply Fund, for example) has its own set of rules. For common-use stock items which are on hand or on order and expected to be delivered promptly, placing the order obligates the customer agency's appropriation. 34 Comp. Gen. 705, 707 (1955); 34 Comp. Gen. 418, 422 (1955); 32 Comp. Gen. 436 (1953). For other orders of items which are part of the stock fund system, there is a measure of discretion. The fund can develop a system—for example, a list of items which constitutes an offer to sell at the published prices—under which placing the order "accepts" the offer and creates the recordable obligation. See Criteria for Recording Obligations for Defense Stock Fund Purchases Should Be Changed, GAO/AFMD-83-54 (August 19, 1983); B-208863, April 11, 1983

(internal memorandum). Otherwise, if the customer's order is the offer, a recordable obligation requires acceptance by the revolving fund unless the order is required by law to be placed with the fund. 34 Comp. Gen. at 707-708; 34 Comp. Gen. at 422; 32 Comp. Gen. 436. For items which are not part of the stock fund system, the order must be accepted before an obligation can be recorded. GAO/AFMD-83-54, at 5.

It is also possible to program an industrial fund to automatically accept certain orders resulting in a recordable obligation even where subsection (a)(3) of 31 U.S.C. § 1501 (requiring documentary evidence of an order required to be placed with the performing agency) does not apply. B-208863, May 23, 1983 (internal memorandum). Modern electronic technologies can satisfy the requirement of 31 U.S.C. § 1501(a)(1)(A) that the agreement be "in writing." Id.

If a revolving fund finds that it has undercharged the supporting (customer) appropriations, and those appropriations have expired for obligational purposes, the restoration authority of 31 U.S.C. § 1553(a) may be used to reimburse the revolving fund. Use of this authority merits close scrutiny, however, because it has the effect of reviving expired budget authority and giving it no-year status. For this reason, GAO has taken the position that any such restoration should be supported by adequate documentation of the underlying obligations. Use of statistical methods is not sufficient where the agency cannot identify the underlying transactions. B-236940, October 17, 1989; Financial Management: Defense Accounting Adjustments for Stock Fund Obligations Are Illegal, GAO/AFMD-87-1 (March 1987).[46] Presumably, although we have found no published decision, if the customer account has been closed pursuant to 31 U.S.C. § 1552(a), a validly supported reimbursement could be charged to current appropriations in accordance with, and subject to the limitations of, 31 U.S.C. § 1553(b).

Any statement of obligations an agency furnishes either to the Office of Management and Budget in connection with an appropriation

[46]The report and legal opinion cited in the text both predated the current statutory account closing structure, but the principle should remain valid.

request, or to the Congress or a congressional committee, is required to be consistent with the obligational criteria of 31 U.S.C. § 1501(a). 31 U.S.C. §§ 1108(c), 1501(b). GAO has recognized that, at least prior to the Federal Credit Reform Act of 1990, applying this requirement to guaranteed and insured loans financed by revolving funds sometimes results in a "square peg in a round hole" situation, and has suggested that reporting can depart from an exact obligation basis if acceptable to OMB. However, in the case of direct outlays such as direct loans or administrative expenses payable from the revolving fund, similar departure is not justified. 51 Comp. Gen. 631, 634 (1972).

5. Augmentation and Impairment

One of the cornerstones of congressional control of the purse is the rule, covered extensively in Chapter 6, that an agency may not augment its appropriations without authority of law, or, in other words, may not retain for credit to its own appropriations anything Congress has not expressly authorized. The primary statutory manifestation of this rule is the miscellaneous receipts requirement of 31 U.S.C. § 3302(b). We have previously noted that a revolving fund is an exception to the miscellaneous receipts requirement. While this is certainly true, it is not a blanket exemption but goes only so far as the governing legislation specifies. The improper augmentation of a revolving fund can occur in either of two ways: (1) putting something in the fund which Congress has not authorized to be put there, or (2) leaving something in the fund, regardless of the propriety of the original deposit, beyond the point Congress has said to take it out. The presence or absence of a fixed dollar ceiling on the fund's capital is irrelevant.

GAO has frequently used the following formulation of the anti-augmentation rule:

> "[W]hen Congress specifies the source of money and property that go to make up the permanent working capital of revolving funds there may not be added additional sources which serve to increase the working capital in the absence of specific statutory authority therefor." B-149858-O.M., August 15, 1968.

The legislation establishing a revolving fund will prescribe what may go into the fund. Depositing anything not expressly authorized by the statute is an improper augmentation. E.g., 23 Comp. Gen. 986 (1944); 20 Comp. Gen. 280 (1940); 19 Comp. Gen. 791 (1940). In these cases, all related and dealing with the same fund, a statute

authorized an agency to use, as a revolving fund, income derived from operations of a particularly special fund. It did not authorize the agency to retain and re–use income from any other source, including operations of the revolving fund itself (as opposed to the special fund from whose income the revolving fund was derived), and this income therefore had to be treated as miscellaneous receipts. The situation was admittedly unusual in that the typical revolving fund does depend on self-generated receipts, but in this case Congress had chosen a different approach. "The statute thus having expressly specified the sources of the money that comprise the revolving fund, other sources may not be added by construction." 23 Comp. Gen. at 988.

The lesson of the preceding paragraph is simple: the precise terms of the statute control. Another illustration, closely related to the cases cited above, is the treatment of interest income. Interest income earned on revolving fund operations can be added to the fund if and only if the statute says so. An example is the revolving fund created by the Agricultural Marketing Act, 12 U.S.C. § 1141d. Payments of "principal or interest" on authorized loans "shall be covered into the revolving fund." 12 U.S.C. § 1141f(b). Another example is interest on rural electrification loans. 7 U.S.C. § 931(a)(3). Of course, general language which is sufficiently inclusive will also do the job, e.g., the Bonneville Power Administration's authority in 16 U.S.C. § 838i(a) to retain "all receipts, collections, and recoveries from all sources." Alternatively, Congress may authorize interest to be deposited to a revolving fund and later paid over to the general fund in whole or under some statutory formula. See, e.g., 15 U.S.C. § 633(c) (Small Business Administration Business Loan and Investment Fund). If the statute does not include authority of the types noted, interest income must be deposited in the Treasury as miscellaneous receipts. 26 Comp. Dec. 295 (1919); A-96531, October 24, 1940. See also 1 Comp. Gen. 656 (1922) (same principle applies to reimbursable appropriation as opposed to revolving fund). Contrary to the impression a superficial look might give, this is not an example of logic versus the law. It is a matter of the choices Congress has made as to the scope and purposes of the revolving fund.

Some further examples of unauthorized augmentations are:

- Increasing a revolving fund's working capital by transferring funds to it from other revolving funds (or non-revolving appropriation accounts, for that matter) either without statutory authority or in excess of applicable statutory authority. See Operations of General Services Administration's General Supply Fund, GAO/LCD-76-421 (March 19, 1976).
- Retention of funded reserve for accrued annual leave after the employees have transferred to another agency. B-149858-O.M., August 15, 1968.
- Retention of jury service fees remitted by an employee paid from a revolving fund. B-113214-O.M., January 16, 1953.

Our discussion thus far has emphasized the need to follow the precise statutory language. In addition, there are, as discussed in Chapter 6, certain nonstatutory exceptions to the miscellaneous receipts requirement, and these apply to revolving funds just as to direct appropriations. For example, receipts which qualify as "refunds," such as the recovery of overpayments or erroneous payments, may be credited to a revolving fund even though not specified in the governing legislation. 69 Comp. Gen. 260 (1990). That decision held that the Federal Emergency Management Agency could deposit in its revolving fund recoveries under the False Claims Act sufficient to reimburse the fund for losses suffered as a result of the false claim, including administrative expenses incurred in investigating and prosecuting the case, but must deposit any recoveries in excess of those amounts (treble damages, for example) in the Treasury as miscellaneous receipts.

Similarly, although we do not have a case precisely on point, a revolving fund may retain excess reprocurement costs recovered from a defaulting contractor, at least to the extent necessary to fund the reprocurement or corrective work, regardless of whether the recovery occurs before or after the fund has incurred the additional costs. As discussed in Chapter 6, this is the case where the procurement is funded under a no-year appropriation. If it is true for a no-year appropriation, it is true for a revolving fund.[47]

[47]One older case seemingly to the contrary, 14 Comp. Gen. 106 (1934), must be regarded as overruled by 62 Comp. Gen. 678 (1983). See 65 Comp. Gen. 838, 841 (1986), and the detailed coverage in Chapter 6.

A variation on this principle is illustrated in two cases involving the Corps of Engineers Civil Revolving Fund, 33 U.S.C. § 576. When supervising military construction under 10 U.S.C. § 2851, the Corps charges its "customer" a flat percentage (5.5 percent in the cases discussed here) of the contract price for "supervision and administration." The charge is designed to enable the revolving fund to break even over the long term. In one case, faulty design caused the Air Force to incur additional construction costs, which in turn increased the Corps's "S&A" charge. GAO advised the Air Force that it could retain the money recovered from the architect to cover its increased construction costs and the S&A fees actually paid to the revolving fund. However, the portion of the recovery representing S&A expenses over and above the 5.5 percent, which the revolving fund had absorbed, had to go to the Treasury as miscellaneous receipts. Had the fund been charging its customers on an actual cost basis, it could have been reimbursed the entire amount of S&A expenses actually incurred. However, since the percentage fee was designed to recover actual costs over time, and the Corps had already received this from the Air Force, any additional reimbursement would amount to an unauthorized augmentation of the fund. 65 Comp. Gen. 838 (1986). On the other hand, the fund can be reimbursed for expenses actually incurred which are not covered by the flat rate. B-237421, September 11, 1991 (additional "supervision and administration" costs resulting from contractor delay can be reimbursed from recovery of liquidated damages since delay costs are not factored into uniform rate).

The cases cited in the preceding paragraph point to a common feature of most revolving funds—they are intended to operate on a break-even basis or reasonably close to it, at least over the long term. One thing this means is that the fund should not augment its working capital by retaining excess profits. To nudge this process along, revolving fund statutes frequently include the requirement for the periodic payment of surplus amounts to the general fund of the Treasury. We quote three variations:

(1) General Services Administration's General Supply Fund, 40 U.S.C. § 756(e)(1):

"As of September 30 of each year, there shall be covered into the United States Treasury as miscellaneous receipts any surplus in the General Supply Fund, all assets, liabilities, and prior losses considered, above the amounts transferred or appropriated to establish and maintain said fund."

(2) Bureau of Engraving and Printing Fund, 31 U.S.C. § 5142(d):

"The Secretary shall deposit each fiscal year, in the Treasury as miscellaneous receipts, amounts accruing to the Fund in the prior fiscal year that the Secretary decides are in excess of the needs of the Fund. However, the Secretary may use the excess amounts to restore capital of the Fund reduced by the difference between the charges for services of the Bureau and the cost of providing those services."

(3) Office of Personnel Management Revolving Fund, 5 U.S.C. § 1304(e)(4):

"Any unobligated and unexpended balances in the fund which the Office determines to be in excess of amounts needed for activities financed by the fund shall be deposited in the Treasury . . . as miscellaneous receipts."

The General Supply Fund provision is the most restrictive, at least on its face.[48] The other two examples confer more discretion. The OPM provision is the most discretionary and permits OPM to reduce retained earnings by freezing or reducing fees, purchasing equipment, or using the money essentially for any authorized purpose, or depositing surplus as miscellaneous receipts. B-206231-O.M., September 12, 1986. While this provision clearly does not require the OPM fund to operate on a break-even basis each year, GAO has voiced the opinion that operating with deficits or surpluses for periods of several years is not consistent with the statutory objective. OPM's Revolving Fund Policy Should Be Clarified and Management Controls Strengthened, GAO/GGD-84-23, 9 (October 13, 1983).

The absence of a provision requiring periodic payments of surplus to the Treasury does not eliminate augmentation as a concern. For example, the Defense Department working capital fund authority, 10 U.S.C. § 2208, contains no such provision. It nevertheless remains the case that the fund should try to minimize annual gains or losses. Absence of statutory limitation merely means that the fund has more discretion in adjusting its charges periodically to recover losses or offset profits of prior periods. B-181714-O.M., January 3, 1975.

[48]A separate provision, 40 U.S.C. § 756a, authorizes GSA to retain surplus to the extent necessary to maintain a sufficient level of inventory.

The provisions quoted above for the General Supply Fund and Bureau of Engraving and Printing Fund expressly authorize reductions from surplus for certain capital restoration, with the net amount then to be paid over to the Treasury. This introduces a concept which does not exist in the case of direct appropriations—the concept of capital impairment. If the objective is to maintain a revolving fund at a certain level, then impairment—diminution of fund capital—is as important to guard against as augmentation.

This concern manifests itself in the statutes in various ways. The revolving fund of the National Institute of Standards and Technology, for example, directs that earned net income be paid over to the general fund of the Treasury at the close of each fiscal year, but may first be applied "to restore any prior impairment of the fund." 15 U.S.C. § 278b(f). GAO considered the meaning of this provision in 58 Comp. Gen. 9 (1978). The decision first noted that "impairment" is not a term of art with an established meaning in the accounting world. Id. at 10. Then, after reviewing legislative history and similar provisions in other laws, GAO concluded that impairment in the context of a revolving fund statute means operating losses, specifically, losses sustained by providing services at prices which do not recover costs. Id. at 12. The term does not include losses caused by inflation. Under the language of the statute as it then existed, the fund could not retain profits to offset increased equipment replacement costs. (The statute was subsequently amended to permit this.) Two of the statutes GAO reviewed in the course of reaching its conclusion were the Bureau of Engraving and Printing and the General Supply Fund provisions, linguistic variations of the anti-impairment concept.

The original version of the OPM statute included anti–impairment language similar to 15 U.S.C. § 278b, but it was deleted in the 1969 amendment which recast the provision in the form quoted above. In view of the discretionary language used, the amendment in no way diminished OPM's ability to restore capital impairment. Rather, it expanded OPM's authority to use surplus: from the limited purpose of the restoration of impairment, to any authorized fund purpose. See B-110497, May 10, 1968 (GAO's comments on the proposed amendment); B-206231-O.M., September 12, 1986.

6. Property Management and Utilization

A few revolving funds consist only of money. These amount to little more than devices to permit the retention and use of user fees without congressional involvement. Most revolving funds, however, include various types of property and equipment used in their operations. To be sure, it would be possible to structure even this type of revolving fund to include only money, with the property handled under the operating appropriations of the administering agency. While this approach might boast the advantage of simplicity, it would significantly understate the costs of the program the fund was intended to finance, and, at least to the extent a more businesslike operation was envisioned, would defeat one of the purposes of having a revolving fund. Therefore, consistent with the theory of a revolving fund, items of property and equipment are typically treated as assets of the fund itself.[49] This in turn raises issues which implicate augmentation and impairment concerns.

One type of cost the fund will necessarily incur is the cost of equipment replacement. The fund anticipates this by including depreciation in its charges and fees, and establishing a reserve for this purpose. E.g., B-75212, June 16, 1955. The problem is that inflationary pressures drive prices up over time, and a piece of replacement equipment will almost certainly cost more than the original equipment did, sometimes a lot more. Simple enough, you say, just raise prices. The obstacle here is that statutory authority is needed in order to avoid an augmentation. The agency had no such authority in 58 Comp. Gen. 9 (1978), the impairment case discussed above. The decision explained:

> "We believe that the term 'cost,' absent something in the law or its legislative history indicating otherwise, means historical cost, and not replacement cost. Thus, when capitalizing fixed assets in the fund, the value of the asset is determined by historical cost (e.g., acquisition cost) and it is this value that depreciation allocates over the useful life of the asset." Id. at 14.

See also B-151204-O.M., December 9, 1971. Since the agency could not base depreciation on replacement cost, its next thought was to

[49]There are also situations in which property acquired by some other operating appropriation should nevertheless be recorded as an asset on a revolving fund's financial statements, with an appropriate explanatory footnote. For a discussion of the criteria an item must meet in order to qualify as a reportable asset, see GAO/AIMD-94-107R (B-256562, May 3, 1994).

treat the difference between the depreciation reserve and replacement cost as an impairment of capital and to take the difference from surplus before turning it over to the Treasury. It was in this context that the decision defined "impairment."

In some cases, the rule that depreciation refers to historical cost and not replacement cost is expressed in the statute. For example, the Bureau of Engraving and Printing is directed to provide for equipment replacement "by maintaining adequate depreciation reserves based on original cost or appraised values." 31 U.S.C. § 5141(b)(1)(C). In view of this language, and the rule that would have been applied even without it, the Bureau had no authority to augment its depreciation reserve through a surcharge. B-104492, April 23, 1976 (internal memorandum).

One solution is to amend the statute. The statute in 58 Comp. Gen. 9, 15 U.S.C. § 278b(f), was later amended to authorize the application of net income "to ensure the availability of working capital necessary to replace equipment and inventories." The Bureau of Engraving and Printing statute also received a legislative solution with the 1977 enactment of 31 U.S.C. § 5142(c)(3), which permits it to adjust its prices "to permit buying capital equipment and to provide future working capital." Under this amendment, the Bureau can now levy a surcharge, or it can simply raise its prices. B-114801-O.M., November 19, 1979. Similarly, at one time, the General Services Administration could not charge using agencies the replacement cost of motor pool vehicles as it would have amounted to an unauthorized augmentation of the General Supply Fund. B-158712-O.M., October 4, 1976. Legislation was enacted in 1978 (40 U.S.C. § 491(d)(2)) to authorize GSA to charge for estimated replacement costs and to retain those increments in the fund, but only for replacement purposes. Still another statutory approach is to require payment to the Treasury at the end of a fiscal year of any balance "in excess of the estimated requirements for the ensuing fiscal year." See B-100831-O.M., March 1, 1951. In addition, the exchange/sale authority of 40 U.S.C. § 481(c) is available to a revolving fund. See B-149858-O.M., February 25, 1963. If none of these approaches affords a solution, the fund has little choice but to seek additional appropriations from Congress. 58 Comp. Gen. at 14.

It has also been stated as a general proposition that "the corpus of [a] revolving fund should not be impaired by the transfer of assets."

B-121695, February 3, 1955. Of course, transfers authorized by law to be made without reimbursement are an exception. Id.; B-149858-O.M., February 25, 1963. Property can become excess to a revolving fund just as it can to any other entity. Unless the fund's own legislation provides specific authority, the disposal of excess property should be handled under authority of the Federal Property and Administrative Services Act and the implementing regulations of the General Services Administration. 56 Comp. Gen. 754 (1977); B-121695, February 3, 1955.

One section of the Federal Property Act, 40 U.S.C. § 485(c), provides that transfers shall be reimbursable when "the property transferred or disposed of was acquired by the use of funds either not appropriated from the general fund of the Treasury or appropriated therefrom but by law reimbursable from assessment, tax, or other revenue or receipts." This language includes revolving funds. 56 Comp. Gen. at 757; B-116731, November 4, 1953. Another section of the Federal Property Act, 40 U.S.C. § 483(a)(1), states that reimbursement of the fair value of transferred excess property is required "whenever net proceeds are requested pursuant to section 485(c)." In view of these provisions, unless the revolving fund legislation itself requires reimbursement, the rule is that the transfer of excess property from a revolving fund is reimbursable if and when requested by the transferring agency. The agency has discretion in the matter. 35 Comp. Gen. 207 (1955); B-233847, April 14, 1989. The same rationale authorizes a military department to credit to its industrial fund the proceeds from the sale of scrap and salvage generated by fund operations, regardless of the potentially large amounts of money involved. B-162337-O.M., October 2, 1967.

Some revolving fund statutes require reimbursement. An example is the Veterans Affairs Supply Fund which provides that the fund "shall be . . . credited with . . . all other receipts resulting from the operation of the fund, including . . . the proceeds of disposal of scrap, excess or surplus personal property of the fund." 38 U.S.C. § 8121(a)(3). Under this type of legislation, the disposal would still be done under the authority and procedures of the Federal Property Act and GSA regulations, except that the agency no longer has the discretion to decline reimbursement. The mandatory language of the statute overcomes the discretionary language of 40 U.S.C. § 483(a) and the statement now codified in 41 C.F.R. § 101-36.285

that "[i]t is the current executive branch policy that working capital fund property shall be transferred without reimbursement."

If the authorized transfer of excess property from a revolving fund without reimbursement is not an impairment of the fund, it is equally true that the transfer of excess property to a revolving fund without reimbursement, when authorized by law, is not an improper augmentation. B-110497, August 28, 1952.

Thus far, we have been talking about fund property as opposed to property purchased by the fund on behalf of a customer. Property in the latter category no longer needed by the customer agency, apart from transactions which may be authorized under the Federal Property Act, does not revert to the revolving fund simply because it was initially purchased by the fund; converting the property to cash and then retaining and using those proceeds improperly augments the revolving fund because it would credit the revolving fund with amounts supplied by the customer. 40 Comp. Gen. 356 (1960). Somewhat similarly, if an agency using fund property has paid the full cost of the item and then no longer needs it, nothing prevents the fund from making the property available to a second user at rates based on fair market value. The income should not be used to augment the fund's capital, however, but should, to the extent it exceeds costs, be treated as net income subject to a "transfer to Treasury" provision if there is one. B-151204-O.M., December 9, 1971.

An unusual provision of law is found in 22 U.S.C. § 2358(a), which authorizes the Agency for International Development to receive excess property from other agencies for foreign assistance purposes, and to stockpile that property "in advance of known requirements therefor," up to a specified monetary ceiling. In determining compliance with the ceiling, AID may properly deduct the amount of unfilled orders received from overseas missions since the receipt of an order represents a known requirement. B-160485-O.M., January 17, 1967.

The Federal Property and Administrative Services Act does not apply to the Senate or House of Representatives. However, they may purchase services under the act from GSA, if they choose. 40 U.S.C. § 474. Therefore, when a revolving fund of the Senate or House of Representatives has excess property, it may either request

GSA's assistance or dispose of the property through the official or body with operational control of the particular fund. B-205013, January 27, 1982 (Senate); B-114842, October 17, 1979 (House).

In Chapter 12, we discuss the principle that, at least in situations governed by direct appropriations, a federal agency is not liable for damage it causes to the personal property of another agency unless it has consented to such liability in an agreement under the Economy Act or comparable authority. Where the property is "owned" by a revolving fund, the rules are different. A 1986 decision, 65 Comp. Gen. 910, held that a revolving fund which had loaned vehicles to another agency for use on a project unrelated to the fund's purpose should be reimbursed for damage which occurred while the vehicles were in the borrower's custody. Although the decision specifically notes that the vehicles were not being used for fund work at the time of the damage, this factor does not appear necessary to the decision. Acknowledging the general prohibition on interagency damage liability, the decision states:

> "It is our opinion, however, that even in the absence of an Economy Act or similar agreement, the prohibition should not apply where the fund that would be charged with the cost of repair if reimbursement were not permitted is a reimbursable or revolving fund." Id. at 911.

The decision further pointed out that the fund in that case, the Air Force Industrial Fund, treated repair costs as an indirect cost factored into its charges, but it is assumed that this referred to damage which occurred while the property was being used by the Air Force on fund work, not damage caused by another agency.

The view that a revolving fund should be reimbursed for damage to fund property caused by another agency is supported by the approach taken in 59 Comp. Gen. 515 (1980). The regulations of the General Services Administration provide that GSA will charge the using agency for damage to motor pool vehicles which occurs while the vehicle is assigned or issued to that agency, unless the damage can be attributed to the fault of an identifiable party other than the using agency or its employee. 41 C.F.R. § 101-39.406(a). Motor pool vehicles (it is probably more politically correct to use the less greasy term "fleet management vehicles") are financed under GSA's General Supply Fund. Reviewing an earlier (but not substantially different in principle) version of the regulations, GAO agreed that GSA was well

within its discretion because repair cost is certainly a cost of maintaining the service. The decision further noted:

> "In addition, since the GSA revolving fund is intended to be operated on a businesslike basis, it is inequitable to impose upon the revolving fund a loss for which the managing agency is in no way responsible." 59 Comp. Gen. at 518.

The two cases discussed above involve damage caused by a using agency. A related issue is loss or damage caused by some nonuser such as a carrier. In 50 Comp. Gen. 545 (1971), GAO advised the National Credit Union Administration that it could credit to its revolving fund recoveries for property lost or damaged in transit. The fund consists of fees paid by member credit unions, and the decision emphasized legislative history expressing the intent that "the Administration will not cost the taxpayers a single penny." Id. at 546. Several revolving fund statutes—mostly intragovernmental funds where the "not cost the taxpayers a penny" rationale has no meaning—expressly authorize the retention of payments for loss or damage to fund property. E.g., 5 U.S.C. § 1304(e)(3)(B) (OPM revolving fund); 38 U.S.C. § 8121(a)(3) (VA Supply Fund); 40 U.S.C. § 756(c) (General Supply Fund); 44 U.S.C. § 309(b)(2) (GPO revolving fund).

7. Revolving Funds in the Department of Defense

At the outset of our discussion, we noted that revolving funds in the federal government appear to have originated within the defense establishment. Their use in that establishment has grown over the course of the past century so that they now play a highly significant role in financing defense operations.

The most important piece of legislation was section 405 of the National Security Act Amendments of 1949, which enacted what is now 10 U.S.C. § 2208. Pleased with the success of the Navy's working capital funds through two World Wars, Congress decided to expand the concept and extend it to all of the military departments. The objectives Congress sought to achieve were—

> "most effectively to control and account for the cost of the programs and work performed, to provide adequate, accurate, and current cost data which can be used as a measure of efficiency, and to facilitate the most economical administration and operation of the military departments." S. Rep. No. 81-366, at 17 (1949), reprinted in 1949 U.S.C.C.A.N. 1771, 1788.

Subsection (a) of 10 U.S.C. § 2208 authorizes the Secretary of Defense to create working capital funds to:

"(1) finance inventories of such supplies as he may designate; and

"(2) provide working capital for such industrial-type activities, and such commercial-type activities that provide common services within or among departments and agencies of the Department of Defense, as he may designate."

These are known as, respectively, stock funds and industrial funds. The stock fund concept was intended to standardize procurement, storage, and issue policies and thereby encourage interservice utilization; reduce over-all inventory requirements; facilitate procurement of seasonal items at times when the market is most favorable; facilitate cost control; and permit standard pricing. S. Rep. No. 81-366 at 19, 1949 U.S.C.C.A.N. at 1791. The Senate report described the intended operation of industrial funds as follows:

"All costs of the operation of [the] industrial-type or commercial-type activity would be paid from the working capital fund, utilizing standard, accepted, and approved commercial practices for the distribution of direct and indirect costs to jobs in process. The activity which places a work order with the industrial-type or commercial-type activity would establish proper commitments and obligations against moneys appropriated to it—generally in the same manner as would be followed if the order were placed for the work to be done by a private concern. The industrial plant would enter the order and distribute the work in the plant by its own job orders—a fundamentally sound procedure. When the work is completed and the cost of the job ascertained, the plant will invoice or bill the cost to the ordering military agency and its proper appropriation or budget program . . . . The invoice charges would include items of cost for labor, material, and current operating expense." Id. at 20-21, 1949 U.S.C.C.A.N. at 1793.

Subsection (b), 10 U.S.C. § 2208(b), directs the Secretary of the Treasury to establish the appropriate accounts on Treasury's books upon request of the Secretary of Defense. Subsection (c) "provides legal authority for the operation of the funds" (S. Rep. No. 81-366 at 17, reprinted in 1949 U.S.C.C.A.N. at 1789) by authorizing the funds to be charged with the cost of supplies and services, including administrative expenses, and to be reimbursed from available appropriations.

Subsection (d) authorizes the capitalization of existing inventories and the appropriation of necessary amounts. Subsection (e) authorizes internal reorganization of military departments in order

to take maximum advantage of the revolving funds. Subsection (f), described as a congressional control provision (S. Rep. No. 81-366 at 18, reprinted in 1949 U.S.C.C.A.N. at 1790), prohibits a requisitioning agency from incurring costs for supplies or services from any of the revolving funds in excess of "the amount of appropriations or other funds available for those purposes."

Under subsection (g), supplies returned to inventory are charged to the applicable revolving fund and the proceeds credited to "current applicable appropriations" of the customer agency. Where the return takes place in a subsequent fiscal year, this amounts to an augmentation of the current appropriation (B-132900-O.M., February 1, 1974), but it is expressly authorized. This procedure is intended to encourage the return of materials found not to be immediately needed and to "reduce the temptation to overbuy." S. Rep. No. 81-366 at 18, 1949 U.S.C.C.A.N. at 1790. Subsection (h) authorizes implementing regulations. The remaining portions of the statute were added in later amendments.

According to one commentator, performance of the military revolving funds "is not well documented." Although there is "some evidence" that they are achieving the desired benefits, the evidence is "mixed." Patricia E. Byrnes, Defense Business Operating [sic] Fund: Description and Implementation Issues, 13 Public Budgeting & Finance 29, 32 (No. 4, 1993). According to Byrnes:

> "Revolving funds are intended to provide at least three important benefits. First, in contrast to the services budgeted and financed through the appropriation process, the contractual relationship between the fund activity (supplier) and the customer improves supplier incentives for efficient, demand-driven production. Second, because revolving funds are intended to operate across organization boundaries, economies of scale can be achieved in procurement and use of facilities. Finally, in addition to reduced rates from more efficient provision of services, the customers should also realize advantages of stabilized rates typical of contractual arrangements." Id. at 31-32.

While, as Byrnes points ont, the measure of success of an activity intended to be businesslike is how closely it resembles a commercial activity, the goal of a government revolving fund, in sharp contrast with a private business's goal of profit maximization, is "a zero fund balance." Id. at 32.

In any event, after operating under the structure established by the 1949 legislation for over four decades, the next major development

took place in late 1991 with the introduction of the "DBOF"—the Defense Business Operations Fund. The Defense Department had proposed the DBOF as a consolidation of the various stock and industrial funds already in existence, together with other activities, such as the Defense Commissary Agency and the Defense Finance and Accounting Service, which would be converted to revolving fund status. Considering the proposal as part of Defense's 1992 appropriations package, the congressional reception was cautious. The Senate Appropriations Committee reported:

> "The DBOF proposal has been met with both antipathy and confusion. The antipathy arises, for the most part, from the perception of Congress losing influence on and oversight of programs to be subsumed in the fund. The confusion arises from several factors; probably the most important of these was the Department having not clearly defined the advantages of establishing DBOF when the proposal was first made to Congress." S. Rep. No. 102-154, at 354 (1991).

The conference committee shared the concern over the potential loss of oversight. H.R. Conf. Rep. No. 102-328, at 176 (1991). These concerns notwithstanding, Congress gave the DBOF its initial statutory basis in section 8121 of the 1992 Department of Defense Appropriations Act, Pub. L. No. 102-172, 105 Stat. 1150, 1204 (1991), as "a working capital fund under the provisions of" 10 U.S.C. § 2208.

To call the DBOF "big" would be somewhat of an understatement. Testifying before a congressional subcommittee only six months after the DBOF was established, a GAO official noted that for fiscal year 1993, when compared with the "Fortune 500," the DBOF's sales "would make the Fund equivalent to the fifth largest corporation in the world."[50] The Fund experienced a number of management problems, and GAO issued a steady stream of reports over the next few years.[51]

[50]Financial Management: Defense Business Operations Fund Implementation Status, GAO/T-AFMD-92-8, 2 (1992) (Statement of Assistant Comptroller General Donald H. Chapin before the Subcomm. on Readiness, House Comm. on Armed Services).

[51]E.g., Defense Business Operations Fund: DOD Is Experiencing Difficulty in Managing the Fund's Cash, GAO/AIMD-96-54 (April 1996); Defense Business Operations Fund: Management Issues Challenge Fund Implementation, GAO/AIMD-95-79 (March 1995); Financial Management: Status of the Defense Business Operations Fund, GAO/AIMD-94-80 (March 1994).

In 1996, as part of the National Defense Authorization Act for Fiscal Year 1996 (Pub. L. No. 104-106, § 371, 110 Stat. 186, 277), Congress repealed the 1991 provision and codified the DBOF in more detailed legislation, 10 U.S.C. § 2216a, which restricts the DBOF to a list of specified funds and activities. Later that year Congress directed the Secretary of Defense to prepare and submit a comprehensive plan to improve the management and performance of the DBOF. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 363, 110 Stat. 2422, 2493 (1996). In December 1996, the Defense Department initiated a reorganization, and in effect a "de-consolidation," of the DBOF and created four new working capital funds—Army, Navy, Air Force, and Defense-wide.[52]

The funds' various permutations notwithstanding, the legal issues they raise and the analytical approach used in resolving them are not fundamentally different from other revolving funds, and cases and reports dealing with the military funds have been included in the various topics throughout our discussion. While the funds are certainly here to stay in one form or another, their precise scope and direction will almost certainly continue to evolve.

D. User Charges

This section, like our earlier coverage of the Economy Act, deals with the authority of federal agencies to charge for goods and services they provide—to other federal entities in the case of the Economy Act; to mostly private parties under the authorities discussed in this section.

1. Providing Goods or Services to Private Parties

We start with a principle regarded as so elementary that references to it invariably include the word "fundamental," as in the following statement from 28 Comp. Gen. 38, 40 (1948):

> "It is fundamental that Federal agencies cannot make use of appropriated funds to manufacture products or materials for, or otherwise supply services to, private parties, in the absence of specific authority therefor."

[52]Memorandum from the Under Secretary of Defense (Comptroller), Subject: Working Capital Funds for Defense Support Organizations, December 11, 1996 (copy on file with editors). The reorganization is noted in Navy Ordnance: Analysis of Business Area Price Increases and Financial Losses, GAO/AIMD/NSIAD-97-74 (March 1997).

This simple-sounding principle goes to the essence of the relationship between the federal government and the taxpayers. When Congress creates and funds a department or agency, it does so to serve one or more public purposes. If accomplishing these public purposes produces incidental benefit to some private interest, no harm is done. If the roles become reversed, however, and the public purpose becomes incidental to the private benefit, or the private benefit exists independent of any public purpose, closer scrutiny is warranted. The theory, abetted by the statutory bar on using appropriated funds for unauthorized purposes (31 U.S.C. § 1301(a)), is that the activity should be undertaken only if it has been explicitly authorized by the elected representatives of the taxpayers. The miscellaneous receipts statute, 31 U.S.C. § 3302(b), discourages violations by prohibiting agencies from keeping any proceeds they may receive from the private parties.

The earliest administrative decisions dealt with the sale of commodities. In 15 Comp. Dec. 178 (1908), the Army, which manufactured hydrogen for use in aviation balloons, asked if it could sell hydrogen to private individuals. Can't sell it to private parties "at any price or for any purpose," the Comptroller of the Treasury responded. Since the miscellaneous receipts act would require the proceeds to go into the general fund of the Treasury, the practical effect would be to deplete the Army's appropriation for the manufacture of hydrogen on purposes not contemplated by Congress. Id. at 179. However, the manufacturing process produced oxygen as a by-product, for which the Army had no use. This could be sold to the private sector, the Comptroller continued, but the proceeds would have to be deposited as miscellaneous receipts. Id. at 181.

Restated, 15 Comp. Dec. 178 said two things. First, a government agency has no authority, on its own initiative, to produce something in order to sell it to a private interest. Second, an agency, which in the ordinary course of its operations, necessarily produces a surplus of any commodity may sell that surplus, but must account for the proceeds as miscellaneous receipts unless it has statutory authority for some other disposition. The portion of the rule dealing with the sale of surplus commodities has been applied to surplus electric power produced by government-owned generating plants (28 Comp. Gen. 38 (1948); 5 Comp. Gen. 389 (1925)); excess water produced by a Veterans Administration hospital water filtration plant (55 Comp.

Gen. 688 (1976)); and surplus steam from a government power plant (A-34549, December 19, 1930). As several of these cases point out (e.g., 5 Comp. Gen. at 391), the alternative would be to let the surplus commodity go to waste.

Turning from goods to services, the concept of "surplus" of course has no relevance (notwithstanding the reference to "surplus services" in 55 Comp. Gen. at 690), and we are left with the prohibitory rule as quoted above and as applied in the first portion of 15 Comp. Dec. 178. It makes no difference that the recipient is willing to reimburse the government. B-69238, July 13, 1948.[53] Nor does it matter that the proposed reimbursement is in the form of credits rather than cash. 28 Comp. Gen. 38, 41 (1948) (pointing out that even where the service or sale is authorized, the agency would have to transfer the value of the credit from its appropriations to miscellaneous receipts). The rule is not limited to private interests, but applies as well to units of state or local government. 31 Comp. Gen. 624 (1952). Applications of the rule include 34 Comp. Gen. 599 (1955) (construction of a sewerage system in excess of the government's needs so that it may be shared with a local government) and 62 Comp. Gen. 323, 334-335 (1983) (use of military personnel as chauffeurs and personal escorts at presidential inaugural and pre-inaugural activities).

A judicial application of the rule may be found in the case of National Forest Preservation Group v. Volpe, 352 F. Supp. 123 (D. Mont. 1972), recons. denied, 359 F. Supp. 136 (D. Mont. 1973), in which the court, holding that the designation of an access road as a "Federal-aid primary highway" exceeded the Department of Transportation's statutory authority, enjoined federal funding of the construction. The road would primarily have served the interests of private corporations who wanted to develop recreational property. The court stated:

"There is no rationale for the expenditure of federal funds which serve to benefit directly this type of private business venture without explicit congressional authorization. To allow the primary highway designation to stand would have the

[53]The result in B-69238 was modified by B-69238, September 23, 1948, upon a showing that the services in question were in fact authorized, although GAO continued to emphasize that receipts had to go to the Treasury's general fund as miscellaneous receipts.

effect of holding that the [Federal Highway Administration] may become a partner in private enterprise without explicit statutory authority." 352 F. Supp. at 130.

To sum up, regardless of who pays or what happens to the money, a government agency needs statutory authority in order to provide goods or services to nongovernment parties. Fiscal issues come into play only after this authority has been established.

2. The Concept of User Charges

When Congress authorizes a program or activity that will benefit private interests, it must also decide how to finance that program or activity. Basically, the choices are subsidization, user financing, or some combination of the two. Subsidization means funding the activity from appropriated funds, thus spreading the cost among all taxpayers. The user financing option involves some form of user charge or fee, under which part or all of the cost is borne by the recipients of the benefit. A user fee may be defined as "a price charged by a governmental agency for a service or product whose distribution it controls,"[54] or "any charge collected from recipients of Government goods, services, or other benefits not shared by the public."[55]

We all pay a variety of user fees. When you buy postage stamps at your local post office, buy a fishing license, or pay highway tolls, you are paying a user fee. These common examples show some of the different types of user fees. You pay the toll only when you use the highway; if you never use the highway, you never need to pay the toll. Similarly, if you have no intention of going fishing, you don't need to buy a fishing license. Once you buy the license, however, whether you ever use it or not is irrelevant to the issuing authority. You can use it as often as you like during the fishing season, but it becomes worthless once the season or specified time period is over, and even if you've never used it you can't get your money back. You can use the postage stamp for its intended purpose, or you can save

[54]Clayton P. Gillette and Thomas D. Hopkins, Federal User Fees: A Legal and Economic Analysis, 67 B.U.L. Rev. 795, 800 (1987). This is a comprehensive and valuable reference on the subject.

[55]The Congress Should Consider Exploring Opportunities to Expand and Improve the Application of User Charges by Federal Agencies, GAO/PAD-80-25 (March 28, 1980), at 1.

it. Although you can't sell it back to the post office, it never loses its face value as long as it remains unused.[56]

The advantages and disadvantages of user financing are much discussed and debated in the public financing literature. Supporters of user fees regard them as equitable because they place the economic burden on those receiving the benefit. They are also politically and "budgetarily" attractive as an alternative to general tax increases. This was especially true during the budgetary shortfalls of the 1980s and early 1990s. CBO has noted that

"[m]ost of the new and increased [user fee] charges of the 1980s followed the passage of the Balanced Budget Act of 1985. As the search for new sources of funds intensified, changes in law and budget processes helped assure the enactment of new user charges." CBO, The Growth of Federal User Charges xi (August 1993).

Moreover, the legal basis for setting user charges expanded from reimbursing an agency's costs of providing services, to financing all or specified portions of the agency's budget. Id.

While user fees at the federal level are not new,[57] they received relatively little attention prior to the final third of the 20th century. In March 1980, GAO issued its report The Congress Should Consider Exploring Opportunities to Expand and Improve the Application of User Charges by Federal Agencies, GAO/PAD-80-25, the thrust of which is evident from its title. Page 1 of that report stated:

"Both individuals and businesses are concerned with tax burdens. Businesses are also concerned with the fact that compliance with Federal regulations is often expensive. Both concerns can be addressed by the Government's promotion of economy and efficiency through actively employing user charges. [Footnote omitted.]

"User charges can reduce Federal taxes, as well as the costs of certain types of regulation. They are a source of revenue that can partially replace general taxation

[56]The further categorization of user fees is beyond our scope. Two approaches may be found in studies by the Congressional Budget Office—Charging for Federal Services 10 (December 1983) and The Growth of Federal User Charges 3-7 (August 1993).

[57]See, e.g., United States v. Grimaud, 220 U.S. 506, 521-522 (1911), to the effect that a statute addressing the use or disposition of fees implicitly authorizes imposition of the fees.

of individuals and businesses. They also reduce the amount of taxes needed to finance the production of goods and the delivery of services to the extent that charging higher prices reduces recipient demand."

In addition, GAO has issued a minor deluge of reports analyzing, and encouraging optimum use of, user fees in specific contexts.[58] The fever spread to Congress generally as well as the Office of Management and Budget and the rest of the executive branch, with the result that the growth of user fees mushroomed. Between 1980 and 1991, CBO found, user charges increased by 54% in constant dollars, and financed much larger shares of many agencies' budgets. CBO, Growth of Federal User Charges (1993). A later GAO report supports the notion that this trend continued during the 1990s, as many agencies became increasingly more reliant upon user fees, over general tax revenues, to fund their programs and operations, Federal User Fees: Budgetary Treatment, Status, and Emerging Management Issues, GAO/AIMD-98-11 (December 1997).

Political attractions aside, levying user fees is not simply a question of raising revenue, but can implicate a variety of other economic and public policy issues as well. For example, increasing a user fee can result in capital losses in the form of decreased asset values. This in turn raises questions as to the desirability of some form of compensation for these losses. A GAO analysis of these issues can be found in Congressional Attention Is Warranted When User Charges or Other Policy Changes Cause Capital Losses, GAO/PAD-83-10 (October 13, 1982). The case study presented in that report is the use of water in the Columbia Basin Project in the Pacific Northwest. The study showed that, if the price charged for water provided to farmers for irrigation purposes were raised to market levels, water would be diverted from farming to the production of electricity, and the value of farmland would drop significantly.

[58]A few examples are U.S. Forest Service: Fees for Recreation Special-Use Permits Do Not Reflect Fair Market Value, GAO/RCED-97-16 (December 1996); Federal Lands: Fees for Communications Sites Are Below Fair Market Value, GAO/RCED-94-248 (July 1994); INS User Fees: INS Working to Improve Management of User Fee Accounts, GAO/GGD-94-101 (April 1994); USDA Revenues: A Descriptive Compendium, GAO/RCED-93-19FS (November 1992); and Parks and Recreation: Recreational Fee Authorizations, Prohibitions, and Limitations, GAO/RCED-86-T49 (May 1986). In addition, GAO/PAD-80-25 includes a 4-page appendix listing reports issued in the 1969-1978 period.

3. The Independent Offices Appropriation Act

a. Origin and Overview

In 1950, the Senate Committee on Expenditures in the Executive Departments (the forerunner of the Committee on Governmental Affairs) conducted a study of user fees in the federal government, and issued a report entitled "Fees for Special Services," S. Rep. No. 81–2120 (1950). The committee's governing philosophy was that "those who receive the benefit of services rendered by the Government especially for them should pay the costs thereof." Id. at 3. The report concluded:

> "On the basis of the limited study reported upon herein, the committee has established conclusively that opportunity exists for the equitable transfer of many financial burdens from the shoulders of the taxpaying general public to the direct and special beneficiaries." Id. at 15.

The report did not recommend any particular legislation, but left it to the jurisdictional committees to consider and develop legislative proposals within their respective areas of responsibility.

Several committees then began their own studies. The following year, while many of these studies were in process, Congress enacted general user fee authority to fill in the gaps. Its intent, the House Appropriations Committee reported, was to

> "provide authority for Government agencies to make charges for . . . services in cases where no charge is made at present, and to revise charges where present charges are too low, except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made." H.R. Rep. No. 82–384, at 3 (1951).

The new legislation was Title V of the Independent Offices Appropriation Act, 1952, Pub. L. No. 82-137, 65 Stat. 268, 290, known as the "IOAA" or the "User Charge Statute."[59] Codified at 31 U.S.C. § 9701, the law provides in part as follows:

> "(a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed ownership Government corporation) to a person (except a

[59]For a judicial summary of the history outlined in the text, see Beaver, Bountiful, Enterprise v. Andrus, 637 F.2d 749, 754-55 (10th Cir. 1980).

person on official business of the United States Government) is to be self-sustaining to the extent possible.

"(b) The head of each agency (except a mixed ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be—

"(1) fair; and

"(2) based on—

(A) the costs to the Government;

(B) the value of the service or thing to the recipient;

(C) public policy or interest served; and

(D) other relevant facts."

Although enacted as an appropriation act rider, the IOAA is permanent legislation and applies to all agencies, not just those funded by the act in which it originally appeared. B-178865, April 19, 1974. The statute is permissive rather than mandatory. It authorizes fees; it does not require them. Aeronautical Radio, Inc. v. United States, 335 F.2d 304, 307 (7th Cir. 1964), cert. denied, 379 U.S. 966; 42 Comp. Gen. 663 (1963); B-128056, July 8, 1966. Thus, while the law encourages uniformity, an agency's authority to charge a fee under the IOAA is not diminished by the fact that other agencies may choose not to charge for similar services. Ayuda, Inc. v. Attorney General, 661 F. Supp. 33, 36 (D.D.C. 1987), aff'd, 848 F.2d 1297 (D.C. Cir. 1988); B-167087, July 25, 1969. Nor is failing to charge a fee where one could have been charged a violation of law. B-130961-O.M., September 10, 1976; B-114829-O.M., June 11, 1975.[60] Guidance for the executive branch is found in Office of Management and Budget Circular No. A-25 (1993), entitled "User Charges."

[60]One occasionally encounters a description in mandatory terms. E.g., Bunge Corp. v. United States, 5 Cl. Ct. 511, 515 (1984) ("The IOAA directs all federal agencies to charge fees . . ."), aff'd, 765 F.2d 162 (Fed. Cir. 1985). However, no one has ever actually applied it that way.

It is also important to note that the IOAA merely provides authority to charge fees, not authority to provide the underlying services. The legal basis for the services-which, as noted at the outset of this section, must exist before you ever get to the question of fees—must be found elsewhere. 62 Comp. Gen. 262, 263 (1983).

The IOAA is not free from difficulty or controversy. Gillette and Hopkins offer the following rather harsh assessment:

> "[T]he IOAA does not constitute a model of clarity and precision. To the contrary, the statute uses vague terms and invokes ephemeral principles that demand substantial interpretation. The statute provides little guidance concerning the constituents of a 'service or thing of value' and leaves fairly open the appropriate mechanisms for computing a proper charge. Instead, the statute recites considerations that are, at best, inconclusive, and, at worst, inherently conflicting." Gillette and Hopkins, supra note 54, at 826-27 (footnote omitted).

b. Fees v. Taxes

The government has many ways to get money. In National Cable Television Ass'n v. United States, 415 U.S. 336 (1974), the Supreme Court distinguished two of them, fees and taxes. A fee is something you pay incident to a voluntary act on your part, for some benefit the government has bestowed or will bestow on you which is not shared by other members of society, examples being "a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." Id. at 340. Taxes, on the other hand, need not be related to any specific benefits. Congress can take your money by taxation merely because you have it to be taken. Id. at 340-41. The distinction had lurked in the bushes since shortly after the IOAA was enacted. In B-108429, March 24, 1952, for example, GAO advised a Member of Congress that "in the absence of clear and convincing evidence to the contrary," GAO would be unwilling "to assume that [any government agency] would attempt to levy a tax . . . under the guise of a fee" as authorized by the IOAA.

The issue remained largely dormant until the National Cable Television decision, in which the Supreme Court held that the IOAA authorizes fees but not taxes. In that case, the cable TV industry challenged fees assessed by the Federal Communications Commission, which had been under pressure from both Congress and the Office of Management and Budget to recoup its full costs from the highly profitable industry it regulated. After drawing the distinction noted above, the Court added that the primary measure of a fee under the IOAA is the "value to the recipient" standard of

31 U.S.C. § 9701(b)(2)(B). An attempt to recoup total cost would go beyond this by charging recipients for the public as well as private benefits of the FCC's regulatory activities,[61] which would at least arguably amount to levying a tax. Holding that the FCC could not do so, the Court considerably narrowed the scope of the IOAA, stating:

> "It would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read [the IOAA] narrowly as authorizing not a 'tax' but a 'fee'." 415 U.S. at 341.

By adopting this narrower interpretation, the Court was able to avoid having to directly confront the constitutional issue of the extent to which Congress could delegate its power to tax.

In determining the proper scope of the IOAA's fee-setting authority, the Court suggested extreme caution in applying the criteria of 31 U.S.C. §§ 9701(b)(2)(C) and (D)—"public policy or interest served" and "other relevant facts—which tend to indicate assessments more in the nature of taxes." 415 U.S. at 341. As lower courts have recognized, National Cable Television effectively "read [these two criteria] out of the statute." E.g., Seafarers Internat'l Union v. Coast Guard, 81 F.3d 179, 183 (D.C. Cir. 1996); Bunge Corp. v. United States, 5 Cl. Ct. 511, 515 (1984), aff'd mem., 765 F.2d 162 (Fed. Cir. 1985)."

On the same day it decided National Cable Television, the Court also decided the companion case of FPC v. New England Power Co., 415 U.S. 345 (1974), applying National Cable Television to invalidate annual assessments levied on pipeline companies by the Federal Power Commission. The Court agreed with the Court of Appeals for the District of Columbia Circuit (467 F.2d 425) that the IOAA does not authorize assessments on whole industries, but applies only with respect to "specific charges for specific services to specific individuals or companies." 415 U.S. at 349. The Court noted with approval portions of OMB Circular No. A-25, now found at sections 6 (agencies should assess user charges to "identifiable recipients"),[62] and 6a(4) (agencies should not assess fees "when the identification

[61]"Certainly some of the costs inured to the benefit of the public, unless the entire regulatory scheme is a failure, which we refuse to assume." 415 U.S. at 343.

[62]The 1993 revision of OMB Cir. No. A-25 changed "should" to "will."

of the beneficiary is obscure"). This, said the Court, "is the proper construction of the [IOAA]" and helps to restrain it from crossing the line into the realm of taxes. 415 U.S. at 351.

Notwithstanding overbroad language occasionally encountered in some lower court decisions,[63] National Cable Television and New England Power do not stand for the proposition that Congress may not delegate the authority to assess charges which are more appropriately categorized as taxes. Indeed, as we will see later under the Other Authorities heading, it is now settled that Congress can do so as long as the statutory delegation is sufficiently explicit and provides intelligible guidelines. Rather, these cases hold merely that Congress did not do so in the IOAA.

c. Establishing the Fee

(1) Need for regulations

In order to assess fees under the IOAA, an agency must first issue regulations. Sohio Transportation Co. v. United States, 766 F.2d 499, 502 (Fed. Cir. 1985); A1yeska Pipeline Service Co. v. United States, 624 F.2d 1005, 1009 (Ct. Cl. 1980); Alaskan Arctic Gas Pipeline Co. v. United States, 9 Cl. Ct. 723, 732-733 (1986), aff'd, 831 F.2d 1043 (Fed. Cir. 1987) (issuance of regulations a "condition precedent"). All of these cases applied the original language of the IOAA (each agency "is authorized by regulation to prescribe" fees, 65 Stat. 290), under which the requirement was clear beyond question. The 1982 recodification into 31 U.S.C. § 9701 as quoted above ("each agency . . . may prescribe regulations") muddied the water somewhat, although the substance is not supposed to change.

A simple policy statement to the effect that fees will be charged for special services has been held too vague to support fee assessment. Diapulse Corp. of America v. FDA, 500 F.2d 75, 79 (2d Cir. 1974). Rather, since rulemaking under the Administrative Procedure Act must provide the opportunity for public comment, the agency's notice must include, or make available on request, a reasonable explanation of the basis for the proposed fee. This, one court has held, must be one that "the concerned public could understand." Engine Manufacturers Association v. EPA, 20 F.3d 1177, 1181 (D.C. Cir. 1994). In that case, the court rejected as inadequate an agency

[63]See Gillette and Hopkins, supra note 54, at 823.

cost analysis which, according to the court, "contains page after page of impressive looking but utterly useless tables" and some "complete gibberish." Id. It is probably impossible to predict what would be acceptable to any given court at any given time, but cases like this demonstrate the need for the agency to observe at least some minimal level of clarity and provide its explanation "in intelligible if not plain English." Id. at 1183. The Court of Appeals for the District of Columbia Circuit has also stressed the need for the agency to make a clear public statement of the basis for its fees so that a reviewing court can measure the agency's action against the Supreme Court's standards. National Cable Television Association v. FCC, 554 F.2d 1094, 1100, 1104-05 (D.C. Cir. 1976).

(2) Benefit under the IOAA

The first step in establishing a fee or fee schedule under the IOAA is to "identify the activity which justifies each particular fee" the agency wishes to assess. National Cable Television Association v. FCC, 554 F.2d at 1100. Thus, the threshold question is what kinds of government services or activities are regarded as conferring special benefits for purposes of the IOAA?[64] The statute itself refers merely to "a service or thing of value provided by the agency." 31 U.S.C. § 9701(b). That this phrase should be construed broadly[65] is made clear by comparing the source language, 65 Stat. 290, which authorized fees for:

> "any work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility performed, furnished, provided, granted, prepared, or issued by any Federal agency to or for any person (including groups, associations, organizations, partnerships corporations or businesses). . . ."

OMB Circular No. A-25, section 6a, provides further guidance.

[64]Some of the examples in the text are now covered by specific statutory authority and thus reliance on the IOAA may no longer be necessary. Our examples are intended merely to illustrate the types of services or activities which have been regarded as within the IOAA's scope.

[65]Ayuda, Inc. v. Attorney General, 848 F.2d 1297 1300 (D.C. Cir. 1988).

One area in which the issue has arisen with some frequency is the government's regulatory activities. On the one hand, the mere fact of regulation is not enough to justify a fee. Engine Manufacturers Ass'n v. EPA, 20 F.3d 1177, 1180 (D.C. Cir. 1994); Central & Southern Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 729 (D.C. Cir. 1985). On the other hand, however, the granting of a license or similar operating authority clearly is enough. Seafarers International Union v. United States Coast Guard, 81 F.3d 179 (D.C. Cir. 1996) (merchant marine licensing by Coast Guard); Engine Manufacturers Ass'n, 20 F.3d at 1180 (EPA certificate of approval for motor vehicles); Mississippi Power & Light Co. v. United States Nuclear Regulatory Commission, 601 F.2d 223, 229 (5th Cir. 1979), cert. denied, 444 U.S. 1102 (license from NRC to operate nuclear facility); National Cable Television, 554 F.2d at 1103 (grant of operating authority by FCC); B-217931-O.M., April 2, 1985 (drug and antibiotic review and approval by Food and Drug Administration).

Where an application is voluntarily withdrawn before final agency action, the First Circuit has held that the agency can charge a fee for work done prior to withdrawal. New England Power Co. v. United States Nuclear Regulatory Commission, 683 F.2d 12 (lst Cir. 1982). The agency's intent to do so must be specified in its regulations. Id. If failure to process is attributable to the government, e.g., a change in program requirements, no fee should be charged and any amounts collected should be refunded to the applicants. 53 Comp. Gen. 580 (1974).

An agency may also charge a fee under the IOAA for services which assist regulated entities in complying with statutory duties. Electronic Industries Ass'n v. FCC, 554 F.2d 1109, 1115 (D.C. Cir. 1976) (tariff filings, equipment testing and approval); Raton Gas Transmission Co. v. FERC, 852 F.2d 612, 617 (D.C. Cir. 1988) (rate reduction application); Phillips Petroleum Co. v. FERC, 786 F.2d 370, 376 (10th Cir. 1986), cert. denied, 479 U.S. 823; Mississippi Power & Light, 601 F.2d at 231 (routine safety inspections of nuclear facilities); B-216876, January 30, 1985 (internal memorandum) (pipeline safety inspection). This is particularly true where the statute was enacted "in large measure for the benefit of the individuals, firms, or industry upon which the agency seeks to impose a fee." Central & Southern Tariff Ass'n, 777 F.2d at 734 (tariff filing requirement of Interstate Commerce Act and Motor Carrier Act).

Use of government property is another activity for which fees may be charged under the IOAA. A common example is the granting of a right-of-way over public lands. B-118678, May 11, 1976. Rights-of-way are sought for such things as the construction of power transmission facilities and energy pipelines. E.g., Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983) (electricity transmission lines); Alaskan Arctic Gas Pipeline Co. v. United States, 9 Cl. Ct. 723 (1986), aff'd, 831 F.2d 1043 (Fed. Cir. 1987) (gas pipeline); Sohio Transportation Co. v. United States, 5 Cl. Ct. 620 (1984), aff'd, 766 F.2d 499 (Fed. Cir. 1985) (oil pipeline). Other examples are nonfederal use under a revocable license (B-180221, August 20, 1976), and commercial leasing by the Alaska Railroad (B-124195-O.M., April 12, 1977). This category also illustrates the point that those liable for fees under the IOAA can, in appropriate circumstances, include government employees. E.g., B-148736, April 6, 1976 (use of facilities at certain national parks as "guest houses" for federal officials); B-212397-O.M., July 13, 1984 (locker room facilities in government building).

Information is certainly a "thing of value." Accordingly, the dissemination or distribution of information is another area subject to the IOAA to the extent not governed by some other statute such as the Freedom of Information Act. IOAA user fees have been held appropriate for such things as subscriptions to government publications (B-110418, July 8, 1952), subscription to a Department of Agriculture market news wire service (B-128056, July 8, 1966), and international flight documentation provided to aviation interests by the National Weather Service (B-133202-O.M., September 17, 1976). Examples from the procurement arena are B-209933, June 6, 1983 (fee for solicitation documents) and B-184007, September 24, 1975 (fee for copy of bid abstract). The statute applies even to requests for information directly about the requester. Reinoehl v. Hershey, 426 F.2d 815 (9th Cir. 1970) (pre-indictment request for documents from Selective Service file).

Starting in the 1980s, emphasis began to shift to electronic dissemination. A 1986 congressional study found the IOAA not particularly suited to information services but still better than nothing, and told agencies to do the best they could under it until

something better comes along.[66] Some of the complexities are illustrated in B-219338, June 2, 1987, discussing a Department of Agriculture system established under a statute (7 U.S.C. § 2242a) which mandates consistency with the IOAA.

An agency may permit a contractor to provide information to the public, with the contractor assessing and retaining the fees, but the fees may not exceed what the agency could have charged had it provided the information directly. 61 Comp. Gen. 285, 287 (1982); B-166506, October 20, 1975. See also Chapter 3 of GAO's report ADP Acquisition: SEC Needs to Resolve Key Issues Before Proceeding With Its EDGAR System, GAO/IMTEC-87-2 (October 1986).

Another activity susceptible to IOAA fees is adjudicatory services by an administrative agency. The services may or may not be incident to a regulatory program. An example of the former is Federal Energy Regulatory Commission review of administrative appeals of remedial orders. B-224596, August 21, 1987. An example of the latter is the range of adjudicatory services rendered to aliens by the Immigration and Naturalization Service. Ayuda, Inc. v. Attorney General, 661 F. Supp. 33 (D.D.C. 1987), aff'd, 848 F.2d 1297 (D.C. Cir. 1988); B-125031-O.M., July 23, 1974. As the Ayuda appellate court stressed, the procedures "are triggered only at the instance of the individual who seeks, obviously, to benefit from them." 848 F.2d at 1301. Another example is B-167062, June 13, 1969 (IOAA reimbursement to former Civil Service Commission for advisory opinions rendered at request of foreign military representatives in United States).

Fees incident to litigation in the courts are also commonplace, but they implicate certain constitutional considerations and are prescribed under statutes other than the IOAA. See 28 U.S.C. §§ 1911 (Supreme Court), 1913 (courts of appeals), 1914 (district courts), 1926 (Court of Federal Claims), 1930 (bankruptcy fees). The rule is that, with the exception of certain indigent situations, reasonable fees may be charged to those seeking access to the courts. E.g., Lumbert v. Illinois Department of Corrections, 827 F.2d 257 (7th Cir. 1987). Fees may be charged even to involuntary

[66] Electronic Collection and Dissemination of Information by Federal Agencies: A Policy Overview, H.R. Rep. No. 99-560, at 37-38 (1986).

litigants provided they do not unduly burden access to the judicial process, determined by balancing the litigant's interest against the government's interest in assessing the fee. Otasco, Inc. v. United States, 689 F.2d 162 (10th Cir. 1982), cert. denied, 460 U.S. 1069; In re Red Barn, Inc., 23 B.R. 593 (Bankr. D. Me. 1982).

Still another example is transportation services. Thus, if local services are not available, the National Park Service may provide transportation to injured or ill visitors in national parks, but should attempt to recover its costs under the IOAA. B-198032, June 3, 1981. A case analogous to the "information contractor" cases noted above is 46 Comp. Gen. 616 (1967). Public transportation to a Veterans Administration hospital in an isolated area had been discontinued due to a low level of usage. Aware that visits by family members often have significant therapeutic value to patients, GAO agreed that the VA could use its appropriated funds to remedy the situation. One approach would have been for the VA to furnish transportation directly, presumably charging the riders under authority of the IOAA. However, the VA found it would be substantially less expensive to enter into a "subsidy contract" with a private carrier under which the carrier would be paid a guaranteed annual amount less fares collected, the fares to be comparable to commercial common carrier fares. GAO concurred, advising that payment should be on a net balance basis and that the contract should include adequate controls to insure proper accounting of the fares collected.

While it is possible to categorize a great many of the user fee situations as we have tried to do here—regulatory activities, use of government property, dissemination of information, adjudicatory services, transportation services-there are also many situations which defy further generalization, the test being simply whether an activity fits the terms of the statute as the courts have construed it. Thus, GAO has regarded the IOAA's authority as extending to the following:

- Fees charged to nonfederal participants in government-sponsored conference. B-190244, November 28, 1977.

- Surcharge for expedited processing of passport applications. B-118682, June 22, 1970.[67] (The basic fee is authorized by 22 U.S.C. § 214.)
- Fees for certain allotments from the pay of civilian employees under 5 U.S.C. § 5525. 42 Comp. Gen. 663 (1963) (state income tax where withholding is not required); B-152032, August 1, 1963 (private disability income insurance).[68] OPM's regulations implementing 5 U.S.C. § 5525 are found at 5 C.F.R. Part 550, Subpart C.

(3) Public v. private benefit

The Supreme Court, in its National Cable Television decision discussed earlier, cautioned that an attempt by a regulatory agency to recover its full operating costs would amount to charging the regulated entities for those portions of the program that benefit the public as a whole. This would go beyond the concept of a "fee," which is all the IOAA authorizes. Implicit in this is the recognition that a government activity which benefits a private party also to greater or lesser extent includes an element of public benefit, and it may not always be possible to draw a clear line of demarcation.

Although the Supreme Court has not revisited the IOAA since its two 1974 decisions, two important principles have emerged from the body of lower court jurisprudence:[69]

1. When establishing a fee for a specific benefit conferred on an identifiable beneficiary, the agency must exclude expenses incurred in serving some independent public interest.

[67]The State Department's 1995 appropriation act provided permanent authority to credit these charges to the Administration of Foreign Affairs account as an offsetting collection. Pub. L. No. 103-317, 108 Stat. 1724, 1760 (1994).

[68]GAO had also held that a reasonable fee could be charged to unions for the payroll deduction of union dues (42 Comp. Gen. 342 (1963)), but legislation now prohibits charging either the union or the employee. 5 U.S.C. § 7115(a).

[69]Mississippi Power & Light Co. v. United States Nuclear Regulatory Commission, 601 F.2d 223, 229-230 (5th Cir. 1979), cert. denied, 444 U.S. 1102; Phillips Petroleum Co. v. Federal Energy Regulatory Commission, 786 F.2d 370 (10th Cir. 1986), cert. denied, 479 U.S. 823; National Cable Television Ass'n v. FCC, 554 F.2d 1094, 1104 (D.C. Cir. 1976); Electronic Industries Ass'n v. FCC, 554 F.2d 1109, 1114-15 (D.C. Cir. 1976); Engine Manufacturers Ass'n v. EPA, 20 F.3d 1177, 1180 (D.C. Cir. 1994); OMB Circ. No. A-25, section 6a(3).

2. Once it is established that a given activity confers a specific benefit on an identifiable beneficiary. The agency may charge its full costs of providing the service, regardless of the fact that the service may incidentally benefit the general public as well.

The D.C. Circuit has offered the following test:

"If the asserted public benefits are the necessary consequence of the agency's provision of the relevant private benefits, then the public benefits are not independent, and the agency would therefore not need to allocate any costs to the public." Central & Southern Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 732 (D.C. Cir. 1985).

More recently, the D.C. Circuit has come to view the term "private benefit" with disfavor because it can mislead parties into attempting to weigh the "public" versus "private" benefits of a given government activity. The correct principle, said the court, is simply that the IOAA authorizes an agency to charge the full cost of a service which confers a specific benefit on an identifiable beneficiary, notwithstanding any incidental benefit to the general public. There is no need to weigh the relative public and private interests. Seafarers Internat'l Union v. Coast Guard, 81 F.3d 179, 183-185 (D.C. Cir. 1996). The Seafarers decision also contains an illustration of an "independent" public benefit although the court uses a slightly different characterization. If, as part of the process of issuing merchant marine licenses to qualified individuals, the Coast Guard chooses to conduct boat inspections, it cannot include the cost of the boat inspections in the fee charged to the applicants because those costs are not "materially related" to the statutory license requirements. Id. at 186.

One issue which has provided a battleground for these concepts is whether a fee authorized by the IOAA can include the cost of preparing an environmental impact statement (EIS) required by the National Environmental Policy Act. In 1976, in an opinion to a Member of Congress, GAO expressed what would later become the established rule:

"[W]here an impact statement is required to be prepared in connection with the processing of a right-of-way, we believe that the agency may include its cost as a direct cost attributable to the special benefit represented by the right-of-way which is chargeable to the applicant under 31 U.S.C. § [9701]." B-118678, May 11, 1976.

In view of the substantial sums involved, however, it was inevitable that the issue would find its way to the courts—again and again. The first published court decision to consider the question was Public Service Company v. Andrus, 433 F. Supp. 144 (D. Colo. 1977), in which the plaintiffs had sought rights-of-way over federal lands for electric power transmission lines. The plaintiffs argued—as they would in every case—that the National Environmental Policy Act was enacted for the primary benefit of the general public, not them. The court agreed, holding that EIS costs "are not of primary benefit to the right of way applicant, and thus cannot properly be charged as fees" under the IOAA. Id. at 153.

While Public Service has never been directly overruled,[70] this portion of it has been effectively repudiated. The Fifth Circuit considered the issue in connection with Nuclear Regulatory Commission licensing fees, holding that the NRC could include the EIS costs notwithstanding the "obvious public benefit" because they are a mandatory prerequisite to the issuance of a license and hence properly chargeable as part of the full cost of conferring the benefit. Mississippi Power & Light Co. v. NRC, 601 F.2d 223, 231 (5th Cir. 1979), cert. denied, 444 U.S. 1102. A few years later, the Tenth Circuit, the governing circuit of the Colorado court which decided the Public Service case, said the same thing. Nevada Power Co. v. Watt, 711 F.2d 913, 933 (10th Cir. 1983).[71] Other cases reaching the same result are Alaskan Arctic Gas Pipeline Co. v. United States, 9 Cl. Ct. 723 (1986), aff'd, 831 F.2d 1043 (Fed. Cir. 1987), and Sohio Transportation Company v. United States, 5 Cl. Ct. 620 (1984), aff'd, 766 F.2d 499 (Fed. Cir. 1985).

[70]An article written by an Interior Department attorney explains that Public Service was not appealed because the Bureau of Land Management thought that the newly enacted Federal Land Policy and Management Act provided the necessary authority. Kristina Clark, Public Lands Rights-of-Way: Who Pays for the Environmental Studies? 2 Natural Resources & Environment 3, 4 (1986).

[71]Nevada Power also held that EIS costs can be assessed under the Federal Land Policy and Management Act, but only to the extent warranted by a consideration of the reasonableness factors listed in 43 U.S.C. § 1734(b). 711 F. 2d. at 933. See also Alumet v. Andrus, 607 F.2d 911 (10th Cir. 1979).

(4) Calculation

Up to this point, we have established that the agency must identify its activities which provide specific services within the scope of the IOAA, and must be able to identify specific beneficiaries; having done this, it may charge those beneficiaries the full cost of providing the services, any incidental benefits to the general public notwithstanding, but excluding the cost of independent public benefits. It remains to translate this into dollars and cents.

The agency must first separate its beneficiaries into "recipient classes" (applicants, grantees, carriers, etc.), among which costs will be allocated. Each recipient class should be "the smallest unit that is practical." Electronic Industries Ass'n v. FCC, 554 F.2d 1109, 1116 (D.C. Cir. 1976). The agency then proceeds to calculate the cost basis for each fee assessed against each recipient class.

Full cost for purposes of the IOAA includes both direct and indirect costs. Engine Manufacturers Ass'n v. EPA, 20 F.3d 1177, 1181 (D.C. Cir. 1994); Electronic Industries Ass'n, 554 F.2d at 1117; Public Service Co. v. Andrus, 433 F. Supp. 144, 155 (D. Colo. 1977); OMB Circ. No. A-25, sec. 6d; B-237546, January 12, 1990. As GAO points out, the original version of the IOAA specified direct and indirect costs (65 Stat. 290), but the 1982 recodification into 31 U.S.C. § 9701 dropped the words as unnecessary. B-237546, January 12, 1990. Indirect costs include administrative overhead. 55 Comp. Gen. 456 (1975). They also include depreciation of plant and equipment. 38 Comp. Gen. 734 (1959), amplified, 56 Comp. Gen. 275, 277 (1977). The Fifth Circuit has offered the following explanation:

"The cost of performing a service, such as granting a license to construct a nuclear reactor, involves a greater cost to the agency than merely the salary of the professional employee who reviews the application. The individual must be supplied working space, heating, lighting, telephone service and secretarial support. Arrangements must be made so that he is hired, paid on a regular basis and provided specialized training courses. These and other costs such as depreciation and interest on plant and capital equipment are all necessarily incurred in the process of reviewing an application. Without these supporting services, professional employees could not perform the services requested by applicants.

"Such costs may be assessed against an applicant as part of the total cost of processing and approving a license; we emphasize again that the Commission may recover the full cost of providing a service to a beneficiary." Mississippi Power &

Light Co. v. United States Nuclear Regulatory Commission, 601 F.2d 223, 232 (5th Cir. 1979), cert. denied, 444 U.S. 1102.

The agency is not required to calculate its costs with "scientific precision." Central & Southern Motor Freight Tariff Ass'n v. United States, 777 F.2d 722, 736 (D.C. Cir. 1985). Reasonable approximations will suffice. Id.; Mississippi Power & Light, 601 F.2d at 232; National Cable Television Ass'n v. FCC, 554 F.2d 1094, 1105 (D.C. Cir. 1976); 36 Comp. Gen. 75 (1956). Thus, it was "entirely sensible and reasonable" for an agency to use the governmental fringe benefit cost percentage from OMB Circular No. A-75 rather than conduct its own probably duplicative study. Central & Southern Tariff Ass'n, 777 F.2d at 736.

The final step is for the agency to "divide that cost among the members of the recipient class . . . in such a way as to assess each a fee which is roughly proportional to the 'value' which that member has thereby received." National Cable Television Ass'n, 554 F.2d at 1105-06.

The fee cannot exceed the agency's cost of rendering the service. Central & Southern Tariff Ass'n, 777 F. 2d. at 729; Mississippi Power & Light, 601 F.2d at 230; Electronic Industries Ass'n, 554 F.2d at 1114. The fee must also be reasonably related to the value of the service to the recipient, and may not unreasonably exceed that value. Central & Southern Tariff Ass'n, 777 F.2d at 729; National Cable Television Ass'n, 554 F.2d at 1106. This is because the IOAA requires that the fee be based on both factors and that it be "fair." 31 U.S.C. §§ 9701(b)(1),(b)(2)(A) and (B). While the courts have not suggested that the agency must engage in a separate calculation of "value to the recipient" in order to compare it to the government's costs, neither have they furnished instruction on how to measure that value. The D.C. Circuit, in a 1996 case, tried to simplify matters by stating that "the measure of fees is the cost to the government of providing the service, not the intrinsic value of the service to the recipient," but acknowledged that this would still be subject to the statutory fairness prescription. Seafarers Internat'l Union v. Coast Guard, 81 F.3d 179, 185 and n.4 (D.C. Cir. 1996). Thus, the agency must calculate its fee on the basis of its actual or estimated costs. Nonetheless, the law seems to require that "value to the recipient" be taken into consideration. Perhaps it can be said that cost to the

government can be presumptively regarded as reflecting value to the recipient, unless considerations of "fairness" dictate otherwise.

Applying these principles, assuming one could hypothesize a high-cost but low-value service, the agency might well not be able to recover its full costs.[72] Conversely, in a situation where the value to the recipient may substantially exceed the cost to the government, the agency will be able to recover its full costs but no more. It is improper, for example, to look to the value the recipient may derive from the service, such as anticipated profits. National Cable Television Ass'n, 554 F.2d at 1107. In the cited case, the fee charged to cable operators was based on the number of subscribers. The court recognized the possibility that increased numbers of subscribers could produce increases in agency regulatory costs, but required evidence of that linkage to avoid concluding that the fee was based on revenues, which the IOAA does not authorize. Id. at 1108. Similarly, the IOAA does not authorize an agency to levy a surcharge over and above its costs, or to vary its fees among beneficiaries. B-237546, January 12, 1990; Capital Cities Communications, Inc. v. FCC, 554 F.2d 1135, 1138 (D.C. Cir. 1976). Of course there is no objection to use of a sliding scale if the graduated fees in fact reflect graduated costs. B-237546, supra; Electronic Industries Ass'n, 554 F.2d at 1116.

Depending on the circumstances, a fee system which permits deviation from established schedules may be acceptable. The case of Phillips Petroleum Co. v. Federal Energy Regulatory Commission, 786 F.2d 370 (10th Cir. 1986), cert. denied, 479 U.S. 823, provides an illustration. The agency had a fee schedule for regulatory filings, but occasionally received filings which were much more extensive than average. Factoring the extraordinary cases into the regular schedule would have meant that the average filings would be subsidizing the extensive ones. To avoid this,the agency developed a system, published in its orders, whereby an extraordinary filing would be billed not under the schedules but on the basis of the direct and indirect costs associated with that specific filing. The court found

[72]Gillette and Hopkins conclude that "[i]n effect courts limit fees to either cost to the government or value to the beneficiary, whichever is lower." Gillette and Hopkins, supra note 54, at 839.

this system in accord with the IOAA and a reasonable exercise of the agency's discretion, not just a pretext to avoid work. Id. at 378-379.

If any of this sounds easy, it is not. The D.C. Circuit conceded the "extreme difficulty" of the task, which, it said in an oft-quoted passage, "resembles unscrambling eggs." Electronic Industries Ass'n, 554 F.2d at 1117. GAO in its many reports on the IOAA also acknowledges the difficulty of the task but regards the obstacles as not insurmountable. B-201667-0.M., May 5, 1981. A more detailed discussion may be found in Establishing a Proper Fee Schedule Under the Independent Offices Appropriation Act, 1952, GAO/CED-77-70 (May 6, 1977).

The foregoing discussion has all been in the context of providing services. The same rules do not necessarily apply when the government is selling goods or property. In this connection, OMB Circular No. A-25, sec. 6a(2)(b), provides:

> "[U]ser charges will be based on market prices (as defined in Section 6d) when the Government, not acting in its capacity as sovereign, is leasing or selling goods or resources, or is providing a service (e.g., leasing space in federally owned buildings). Under these business-type conditions, user charges need not be limited to the recovery of full cost and may yield net revenues."

The Court of Claims has upheld this approach. Yosemite Park and Curry Co. v. United States, 686 F.2d 925 (Ct. Cl. 1982). That case involved a contract for the sale of electricity by the National Park Service to a concessioner at Yosemite. The court found that the cost-based system stemming from the two 1974 Supreme Court decisions was not required in the situation presented, and that the government could use the comparative-rate system derived from the OMB circular.

d. Refunds

It would seem an elementary proposition that money collected in excess of what is due should be refunded, and there is no reason this should not apply to fees under the IOAA. After the Supreme Court handed down its decision in National Cable Television Ass'n v. United States, 415 U.S. 336 (1974), holding that the IOAA authorized only fees, not taxes, the Federal Communications Commission refunded the cable television fees it had collected under the

schedule the Court struck down.[73] Shortly thereafter, other regulated entities which had paid fees under the same schedule sued the FCC to have their fees refunded. In National Association of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976), the court held that the FCC's broadcast system fees were vulnerable under the Supreme Court's interpretation the same as its cable television fees. It did not follow, however, that the entire fee was invalid. Noting what it called the "mandate" of the IOAA that government services to identifiable beneficiaries should be self-sustaining to the extent possible (31 U.S.C. § 9701(a)), the court said:

> "It is our interpretation of this mandate that the Commission should retain the maximum portion of the fees collected that would be permissible under the principles announced in [the 1974 Supreme Court decisions] and the statute." 554 F.2d at 1133.

Accordingly, the court remanded the case to the FCC to calculate a proper fee under the court's guidelines and to then "refund that portion of the money which was collected in excess thereof." Id.

The court was careful to point out that it was not asking the agency to engage in "retroactive rulemaking." Id. at 1133 n.42. The D.C. Circuit revisited this concept several years later in Air Transport Ass'n of America v. Civil Aeronautics Board, 732 F.2d 219 (D.C. Cir. 1984). The defendant agency had revised its fee schedules following the fee/tax refund litigation of the mid-1970s and announced a refund policy under which it would offset the total amount of fees a claimant had paid during a calendar year against the total amount of recalculated fees the agency could have charged, and actually pay a refund only if and to the extent the former exceeded the latter. Finding that this "offset" policy amounted to unlawful retroactive rulemaking, the court emphasized that the principle of National Association of Broadcasters must be applied on an individual fee basis. Id. at 226-28. The court also flatly rejected a claim for the refund of the full amount of the fees as "irreconcilable" with National Association of Broadcasters. Id. at 228 n.17.

If the principle of National Association of Broadcasters—that the agency may retain what it could have charged under a properly

[73] National Cable Television Ass'n v. FCC, 554 F.2d 1094, 1098 n.9 (D.C. Cir. 1976).

established fee and must refund only the excess—is circumscribed by considerations of retroactive rulemaking, one situation in which refund of the entire fee would appear appropriate is where the agency did not have regulations to begin with. The Court of Claims reached this result in A1yeska Pipeline Service Co. v. United States, 624 F.2d 1005 (Ct. Cl. 1980). See also B-145252,November 12, 1976 (internal memorandum).

If an agency is refunding fees which were improperly assessed under IOAA guidelines, and if those fees were deposited in the Treasury as miscellaneous receipts as the IOAA requires, then the refund is chargeable to the permanent, indefinite appropriation entitled "Refund of Moneys Erroneously Received and Covered," established by 31 U.S.C. § 1322(b)(2). 55 Comp. Gen. 243 (1975);[74] B-181025, July 11, 1974. If the agency has been authorized to credit the fee to some other appropriation or fund, the refund is chargeable to the appropriation or fund to which the fee was credited. See, e.g., 55 Comp. Gen. 625 (1976).

Absent statutory direction to the contrary, the rules of the preceding paragraph apply equally to refunds of fees collected under statutes other than the IOAA. For example, fees under the Federal Land Policy and Management Act are deposited in a "special account" from which they are authorized to be appropriated. 43 U.S.C. § 1734(b). Erroneous or excessive fees may be refunded "from applicable funds." 43 U.S.C. § 1734(c). Where an appropriation from the special account has actually been made, that appropriation is the "applicable fund." 61 Comp. Gen. 224 (1982). If the statute is silent as to disposition, the fees are properly treated as miscellaneous receipts, in which event refunds of erroneous or excessive fees are chargeable to the "Erroneously Received and Covered" account. Id.

OMB Circular A-25, sec. 6a(2)(c), tells agencies to collect user fees "in advance of, or simultaneously with, the rendering of services unless appropriations and authority are provided in advance to allow reimbursable services." An agency collecting a fee in advance

[74]The question of the amount to be refunded was not raised in the GAO decision. In any event, to the extent 55 Comp. Gen. 243 implies that the entire fee should be refunded, it is of course to that extent superseded by the subsequent D.C. Circuit precedent.

should use common sense to avoid depositing the money in the general fund prematurely. In 53 Comp. Gen. 580 (1974), for example, fees for certain permits had been deposited as miscellaneous receipts when a change in the law authorized transfer of permit issuance to the states but made no provision for transfer of funds. When the state also charged a fee, applicants naturally sought refund of the fees they had already paid to the federal government and for which they had received nothing. Although not discussed in the decision, the "Erroneously Received and Covered" appropriation presumably was not available because the receipt of the fees had been entirely proper. The solution was a two-step procedure—make an adjustment from the receipt account to the agency's suspense account to correct the erroneous deposit, then make the refund from the suspense account. The proper accounting treatment should have been to retain the fees in the suspense account or a trust account until they were "earned" by performance, then transferred to the appropriate general fund receipt account. See, e.g., A-44005, April 24, 1935.

For refund purposes, whether or not the fees were paid under protest is immaterial. Alyeska Pipeline Service Co., 624 F.2d at 1018; 55 Comp. Gen. at 244. However, waiting too long to assert a claim could be fatal under the doctrine of laches if, for example, through no fault on the part of the agency, records are no longer available from which the fees could be recalculated. Air Transport Ass'n of America, 732 F.2d at 225-226. Laches will not help an agency which fails to retain adequate records if it is on notice of a challenge to its fee schedule. Id. at 226 n.14. Whether a simple payment under protest will serve this purpose is not clear.

4. Other Authorities

a. Subsection (c) of the IOAA

For approximately 35 years, although there were other fee statutes on the books, the IOAA was the predominant federal user fee statute, and it remains the only governmentwide authority. In the mid-1980s, however, as the need to attack the growing budget deficit took center stage, and general tax increases were not forthcoming, congressional attention turned increasingly to user fees as a revenue

source. Starting in 1986, Congress enacted dozens of fee provisions directed at particular agencies or activities.[75]

The relationship between the IOAA and these other statutes is addressed in the IOAA itself, specifically 31 U.S.C. § 9701(c):

"(c) This section does not affect a law of the United States—

"(1) prohibiting the determination and collection of charges [or directing] the disposition of those charges; and

"(2) prescribing bases for determining charges, but a charge may be redetermined under this section consistent with the prescribed bases."[76]

This is largely a codification of the canon of construction that a general statute must yield to the terms of a specific statute addressing the same subject matter.

Perhaps the simplest application of subsection (c) is the prohibitory statute, in which case the IOAA is knocked out of the picture. An example is 21 U.S.C. § 695 which provides that, except for certain overtime services, the "cost of inspection . . . under the requirements of laws relating to Federal inspection of meat and meat food products shall be borne by the United States." Enacted in 1948, this statute replaced an unsuccessful one-year experiment in financing federal meat inspections through user fees. See S. Rep. No. 81–2120, supra, at 5; Combs v. United States, 98 F. Supp. 749 (D. Vt. 1951). Unlike the broad proscription of the meat inspection statute, a prohibitory statute may simply have the effect of barring reliance on

[75]They tend to be found in omnibus legislation. Several important provisions appeared in the Consolidated Omnibus Budget Reconciliation Act of 1985 (Pub. L. No. 99-272, 100 Stat. 82), the Omnibus Budget Reconciliation Act of 1986 (Pub. L. No. 99-509, 100 Stat. 1874), and the Omnibus Budget Reconciliation Act of 1990 (Pub. L. No. 101-508, 104 Stat. 1388). For more detail, see CBO, The Growth of Federal User Charges 19-22 (August 1993), and The Growth of Federal User Charges: An Update (October 1995).

[76]In the recodified version carried in the U.S. Code, the word "and" appears in place of the words bracketed in the text, which is clearly erroneous. The meaning is clarified by resort to the source provision: the IOAA shall not "modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge, or price" (65 Stat. 290). The conjunctive "and" is meaningless because a statute which prohibits charging a fee would have no occasion to then address, much less prohibit, disposition.

the IOAA, effectively requiring more explicit authority. A proviso in the Food and Drug Administration's 1996 appropriation, for example, prohibits use of the FDA's Salaries and Expenses money "to develop, establish, or operate any program of user fees authorized by 31 U.S.C. 9701." Pub. L. No. 104-37, 109 Stat. 299, 327 (1995). The origin of this proviso is discussed in B-217931, July 31, 1985. The FDA does have a user fee system, but it is authorized under the FDA's own detailed and specific legislation (21 U.S.C. § 379h), not the IOAA.

GAO stated its approach to subsection (c) vis-a-vis other fee statutes in 55 Comp. Gen. 456, 461 (1975):

> "[I]t has consistently been our view that . . . 31 U.S.C. § [9701(c)] preclude[s] the imposition of additional user charges under that section only to the extent that another statute expressly or by clear design constitutes the only source of assessments for a service."

b. IOAA Incorporated by Reference

One form of user fee statute is based directly on the IOAA and makes explicit reference to it. An example is 14 U.S.C. § 664(a):

> "A fee or charge for a service or thing of value provided by the Coast Guard shall be prescribed as provided in section 9701 of title 31."

Another very similar Coast Guard statute is 46 U.S.C. § 2110(a)(1). The main thrust of statutes like these is to remove the discretionary aspect of the IOAA and to make the authority mandatory. The reference to the IOAA also serves as a check against excessive fees. See Boat Owners Ass'n of the United States v. United States, 834 F. Supp. 7, 12 (D.D.C. 1993). A statute of this type may include its own limitations on use of the authority. For example, the Coast Guard legislation prohibits charging a fee for any search or rescue service. 46 U.S.C. § 2110(a)(5).

Another example is 42 U.S.C. § 2214(b), applicable to the Nuclear Regulatory Commission, enacted as part of the 1990 OBRA:

> "Pursuant to section 9701 of Title 31, any person who receives a service or thing of value from the Commission shall pay fees to cover the Commission's costs in providing any such service or thing of value."

Like the Coast Guard statutes, use of the word "shall" makes mandatory what would otherwise be discretionary under the IOAA.

One step removed from these is a statute which authorizes or directs the charging of fees, with the link to the IOAA appearing in legislative history rather than the statute itself. An example is the original version of the Freedom of Information Act which specified merely "fees to the extent authorized by statute." Committee reports made it clear that the IOAA was the statute Congress had in mind. See Diapulse Corp. v. Food and Drug Administration, 500 F.2d 75, 78 (2d Cir. 1974); B-161499-O.M., August 13, 1971. The Freedom of Information Act now includes its own detailed fee provisions.

A variation is 7 U.S.C. § 2242a. Subsection (a) authorizes the Department of Agriculture to charge reasonable user fees for departmental publications or software. Subsection (b) then goes on to state that "[t]he imposition of such charges shall be consistent with section 9701 of title 31." GAO analyzed USDA's authority under this provision in B-219338, June 2, 1987. Finding no legislative history to explain what Congress intended by the "consistent with" terminology, GAO concluded that the agency was not required to adopt every wrinkle of judicial interpretation under the IOAA. GAO advised:

> "At a minimum . . . we take it to mean that the charges may be cost-related under any of the various formulations sanctioned by the decisions of the courts, or, in the absence of a cost-based fee schedule, reasonable. Also, the requirement that fees be 'consistent' with section 9701 fees clearly does not mean that they must be identical to those that would be imposed under section 9701 or that they must have been promulgated in accordance with all the procedural requirements [of the IOAA]." Id.

c. Statutes "In Pari Materia"

Another type of user fee statute one encounters is a statute which authorizes or directs an agency to charge a fee or to recover costs in general terms, without making specific reference to the IOAA. The statute may apply to a specific type of activity or to a broader range. Unless there is something in the statute or its legislative history to compel a different result, the approach is to regard it as being "in pari materia" with the IOAA—i.e., statutes dealing with the same subject matter or having a common purpose (Black's Law Dictionary 791 (6th ed. 1990))—and to construe them together as part of an overall statutory scheme. Where this principle applies, it is legitimate to look to the body of law developed under the IOAA for guidance in construing the other statute. This includes the guidance under OMB Circular A-25. See OMB Cir. No. A-25, sec. 4.b.

For example, the National Park Service is authorized to furnish utility services to concessioners "on a reimbursement of appropriation basis." 16 U.S.C. § lb(4). In Yosemite Park and Curry Co. v. United States, 686 F.2d 925 (Ct. Cl. 1982), a concessioner at Yosemite National Park who had been purchasing electricity from the Park Service challenged the Park Service's rate structure, which was based on the average of rates charged by other area utilities rather than cost reimbursement. Viewing 16 U.S.C. § lb(4) and the IOAA as being "in pari materia," the court analyzed the propriety of the fee structure under the IOAA, as implemented by OMB Circular No. A-25, and found it authorized under both statutes.

Another illustration is 30 U.S.C. § 185(1), part of the Mineral Leasing Act:

> "The applicant for a right-of-way or permit shall reimburse the United States for administrative and other costs incurred in processing the application, and the holder of the right-of-way or permit shall reimburse the United States for the costs incurred in monitoring the construction, operation, maintenance, and termination of any pipeline and related facilities on such right-of-way or permit area . . . ."

This provision does not supersede or override the requirement of the IOAA that fees be assessed only pursuant to regulations. A1yeska Pipeline Service Co. v. United States, 624 F.2d 1005 (Ct. Cl. 1980); Sohio Transportation Co. v. United States, 5 Cl. Ct. 620 (1984), aff'd, 766 F.2d 499 (Fed. Cir. 1985). The lower court in the Sohio litigation also looked to precedent under the IOAA to determine that the Bureau of Land Management's pipeline right-of-way fees were not taxes. 5 Cl. Ct. at 628.

The Communications Satellite Act of 1962 directs the National Aeronautics and Space Administration to furnish satellite launching and associated services to the Communications Satellite Corporation upon request and "on a reimbursable basis." 47 U.S.C. § 721(b)(3). Reimbursement under this provision should be determined in accordance with the IOAA, GAO has concluded, since nothing in the language or legislative history of the Communications Satellite Act suggests the contrary. B-168707-O.M., May 11, 1970. The same applies to 22 U.S.C. § 2661, which requires the State Department to obtain reimbursement for certain expenses incurred in procuring information for private parties. See 36 Comp. Gen. 75 (1956). Another example might be 13 U.S.C. § 8(b), which authorizes the Secretary of Commerce to provide statistical information to, or

to make special statistical compilations and surveys for, any public or private person "upon payment of the actual or estimated cost of such work."

A final illustration is the legislation governing the Comptroller of the Currency's assessments against national banks. At one time, the law directed the Comptroller to recover the expense of required examinations by assessments on the national banks in proportion to their assets or resources. 12 U.S.C. § 482 (1988 ed.). Applying the "pari materia" concept in effect if not in terms, one court sustained the Comptroller's assessment regulations, concluding that "the Comptroller is directed, to the fullest possible extent, to assess fees reflective of the actual cost of examination while adhering to the statutory guideline of asset and resource size." First National Bank of Milaca v. Smith, 445 F. Supp. 1117, 1123 (D. Minn. 1977), aff'd sub nom., First National Bank of Milaca v. Heimann, 572 F.2d 1244 (8th Cir. 1978). The district court rejected the bank's argument that 31 U.S.C. § 9701(c) rendered the IOAA inapplicable; 12 U.S.C. § 482 did not fix the amount of the fee but merely provided a basis for calculation, in which event section 9701(c) encourages fee recalculation to more fully achieve, or at least approach, self-sufficiency. 445 F. Supp. at 1123. A 1991 amendment to 12 U.S.C. § 482 deleted the asset/resource size requirement and the statute now merely provides a general assessment requirement. The amendment does not appear to affect the relationship of section 482 to the IOAA.

d. Statutes Entirely Independent of the IOAA

Once you eliminate those user fee statutes that are tied in to the IOAA either expressly or by a "pari materia" rationale, those that are left have little in common other than their independence of the IOAA by virtue of 31 U.S.C. § 9701(c). The only safe generalization is that each statute stands alone and its own terms determine its coverage and limitations. Many of the laws stem from the post-1985 period and there is little interpretive case law. Accordingly, our objective here is essentially to present a typology to illustrate the different kinds of user fee laws and the different things Congress has tried to do with them.

Perhaps the simplest type is a provision that directly fixes the amount of the fee. An example is 8 U.S.C. § 1356(d):

"In addition to any other fee authorized by law, the Attorney General shall charge and collect $6 per individual for the immigration inspection of each passenger arriving at a port of entry in the United States, or for the preinspection of a passenger in a place outside of the United States prior to such arrival, aboard a commercial aircraft or commercial vessel."

Subsection (e) sets forth limitations. While this type of statute may generate other questions of interpretation, it eliminates the calculation nightmare. Of course, a fixed-fee approach is not always viable. Conceptually similar is a statute which fixes the amount of the fee and provides a mechanism for periodic adjustment by the administering agency. An example is 47 U.S.C. § 158 (Federal Communications Commission application fees).

Another simple type, at least simple to administer, is a fee set as a percentage of some reference amount. Congress enacted legislation in 1985 directing the Federal Reserve Bank of New York to deduct 1-1/2 percent of the first $5 million and 1 percent of any amount over $5 million from every award by the Iran-United States Claims Tribunal in favor of a United States claimant. The deduction was intended to reimburse the government for expenses of its participation in the claims program. Pub. L. No. 99-93, § 502, 99 Stat. 405, 438, 50 U.S.C. § 1701 note. In United States v. Sperry Corp., 493 U.S. 52 (1989), the Supreme Court upheld the deduction against a variety of challenges, one of which was that the government had failed to demonstrate the relationship of the amount of the deduction to the costs presumably being reimbursed. The Court responded:

"This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. Nor does the Government need to record invoices and billable hours to justify the cost of its services. All that we have required is that the user fee be a 'fair approximation of the cost of benefits supplied.' Massachusetts v. United States, 435 U.S. 444, 463, n.19 (1978)." 493 U.S. at 60.

The statute declared the deduction to be a user fee, and it is the claimant's burden to demonstrate otherwise. Id. Of course there are limits to this rationale. The Court continued:

"The deductions authorized by § 502 are not so clearly excessive as to belie their purported character as user fees. This is not a situation where the Government has appropriated all, or most, of the award to itself and labeled the booty as a user fee. . . . We need not state what percentage of the award would be too great a take to

qualify as a user fee, for we are convinced that on the facts of this case, 1-1/2% does not qualify as a 'taking' by any standard of excessiveness." Id. at 62.

There is no apparent reason why the Court's approach in Sperry would not apply equally to a fee in the form of a fixed dollar amount. Also, as the statute in Sperry illustrates, a fixed-amount fee or a fixed-percentage fee can be in the form of a sliding scale.

Most user fee statutes are not this simple. Rather than fixing the amount of the fee, they tend to prescribe the basis for determining the fee and vary greatly in their level of detail. At one end of the spectrum are laws that prescribe a cost basis and include some additional detail, basically enough to escape the aegis of the IOAA. Section 304 of the Federal Land Policy and Management Act, for example, 43 U.S.C. § 1734, authorizes fees "with respect to applications and other documents relating to the public lands" and lists several factors to be considered in determining reasonableness. See Nevada Power Co. v. Watt, 711 F.2d 913 (10th Cir. 1983). Additional examples are the fee provisions of the Grain Standards Act, 7 U.S.C. §§ 79(j) (inspection) and 79a(1) (weighing). In holding the IOAA inapplicable to these statutes, the Claims Court noted that "accepted principles of statutory construction require that a specific legislative enactment be given effect to the exclusion of a more general one." Bunge Corp. v. United States, 5 Cl. Ct. 511, 516 (1984), aff'd mem., 765 F.2d 162 (Fed. Cir. 1985).

At the other end of the spectrum are statutes containing a complex fee-setting mechanism set forth in considerable detail, often including waiver authority. One example is 7 U.S.C. § 136a-1, prescribing fees for pesticide registration under the Federal Insecticide, Fungicide, and Rodenticide Act. The law combines fixed fees for certain pesticides, fees set administratively within limits for other pesticides, and formula fees for reregistration. The law also includes annual ceilings per registrant and an aggregate target revenue amount.

Another example is 21 U.S.C. § 379h, fees for the Food and Drug Administration. The law authorizes three fees—drug application fees, establishment fees, and product fees. The fees are fixed dollar amounts subject to an adjustment mechanism. The law also specifies aggregate fee revenue amounts which must be specified in advance in appropriation acts. Subsection (f)(1) of the law prohibits

the FDA from assessing fees in any fiscal year unless it has received a Salaries and Expenses appropriation for that year not less than its 1992 appropriation.

A well-known user fee is the fee prescribed in the Freedom of Information Act, 5 U.S.C. § 552(a)(4), which illustrates still a different fee-setting approach. Fees are based on "reasonable standard charges" and are set at three levels. The highest level is commercial-use requesters, who pay for search, duplication, and review. The lowest level includes educational or noncommercial scientific institutions and the news media, who pay only for duplication. All others are charged for search and duplication. Each agency is to issue its own fee regulations, but in the interest of uniformity they must conform to Office of Management and Budget guidelines. OMB's guidelines are found in 52 Fed. Reg. 10012 (March 27, 1987). An agency's own regulations may simply adopt the OMB guidelines. Media Access Project v. FCC, 883 F.2d 1063 (D.C. Cir. 1989).

Several user fee provisions were included in the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82—"COBRA." The Congressional Budget Office has observed that if the IOAA was the first turning point in user fee legislation in the post-World War II era, COBRA was the second. The Growth of Federal User Charges 19 (1993). This is because several of the COBRA provisions departed from the traditional approach of basing fees on the cost of specific benefits, and instead linked fees to recovering part or all of an agency's operating budget.

One provision of COBRA, the amended version of which is found at 42 U.S.C. § 2213, directed the Nuclear Regulatory Commission to assess annual charges on its licensees so that the annual charges, when added to the fees the NRC was already assessing under the IOAA, would approximate 33 percent of the NRC's operating budget. The annual charges "shall be reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service." 42 U.S.C. § 2213(1)(B). A group of licensees sued, arguing that the COBRA provision must be read as incorporating the limitations of the IOAA, otherwise it would amount to an unconstitutional delegation by Congress of its power to tax. The challenge was rejected in Florida Power & Light Co. v. United States, 846 F.2d 765 (D.C. Cir. 1988),

cert. denied, 490 U.S. 1045. The court first held that COBRA was intended to go beyond the IOAA by authorizing the NRC to recover "generic costs, that is, costs which do not have a specific, identifiable beneficiary." Id. at 769. The court then went on to hold that, even if you wanted to call the annual charges a "tax," the COBRA provision satisfied the Supreme Court's test for a permissible delegation because it provided adequate standards for the implementing agency to apply. Id. at 772-776.

The Omnibus Budget Reconciliation Act of 1990 added a provision,codified at 42 U.S.C. § 2214, directing the NRC to collect fees and charges to approximate 100 percent of its budget authority. The Justice Department's Office of Legal Counsel has determined that this includes other federal agencies which hold NRC licenses. 15 Op. Off. Legal Counsel 91 (preliminary print, 1991).

Another COBRA provision, now codified at 49 U.S.C. § 60301, directs the Secretary of Transportation to collect annual fees from operators of various pipeline facilities. The fees are to be calculated to cover the costs of activities under the Natural Gas Pipeline Safety Act of 1968 and the Hazardous Liquid Pipeline Safety Act of 1979, not to exceed 105 percent of the total appropriations made for those activities in a given year. As with the NRC provision noted above, there was no way this provision could pass muster under the rigid interpretations of the IOAA, and, again as with the NRC provision, the operators were in court before the ink on the statute was dry. This time, the litigation produced a Supreme Court decision which once and for all laid to rest the "taxing issue" (bad pun) which had hovered over all user fee statutes since the 1974 IOAA decisions. The case is Skinner v. Mid-America Pipeline Co., 490 U.S. 212 (1989). This time, the plaintiffs conceded that the statute satisfied the requirements of the nondelegation doctrine, but argued that the standards should be tighter when Congress is delegating authority under its taxing power. Not so, held the Court:

> "Even if the user fees are a form of taxation, we hold that the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges." Id. at 223.

As to the 1974 IOAA cases:

"National Cable Television and New England Power stand only for the proposition that Congress must indicate clearly its intention to delegate to the Executive the discretionary authority to recover administrative costs not inuring directly to the benefit of regulated parties by imposing additional financial burdens, whether characterized as 'fees' or 'taxes,' on those parties. . . . Of course, any such delegation must also meet the normal requirements of the nondelegation doctrine." Id. at 224.

Thus, what is important is not whether you call something a fee or a tax, but whether Congress has legislated its intention with sufficient clarity.

Another COBRA provision in this family is 42 U.S.C. § 7178, which directs the Federal Energy Regulatory Commission to "assess and collect fees and annual charges in any fiscal year in amounts equal to all of the costs incurred by the Commission in that fiscal year." 42 U.S.C. § 7178(a)(1). Like the NRC statute noted earlier, this provision does not replace fees charged under other laws but prescribes charges which, when added to those other fees, will reach the desired budgetary goal. In this case, the fees expressly preserved are those authorized under the Federal Power Act. 42 U.S.C. § 7178(a)(2). A case interpreting the Power Act fee provision is City of Vanceburg v. FERC, 571 F.2d 630 (D.C. Cir. 1977), cert. denied, 439 U.S. 818.

A final example is 21 U.S.C. § 886a, enacted as part of the Justice Department's 1993 appropriation act. It directs the Drug Enforcement Administration to set fees under its diversion control program "at a level that ensures the recovery of the full costs of operating the various aspects of that program." 21 U.S.C. § 886a(3). In American Medical Association v. Reno, 857 F. Supp. 80 (D.D.C. 1994), the court held the IOAA inapplicable, rejecting what has become almost a ritualistic challenge that the restrictive IOAA standards should continue to govern.

In sum, we have the IOAA and its progeny designed to recover the cost of providing goods and services, and we have the COBRA provisions and their progeny designed to recover part or all of an agency's operating budget. Perhaps the next step will be for Congress to tell an agency, in effect, "if you want to go in a particular direction, get the money from your customers." Precedent for this approach already exists. The Federal Bureau of Investigation had received authority in appropriation acts to establish and collect fees for certain fingerprint and name check activities. The authority is

discretionary and applies to services provided to other federal agencies. 15 Op. Off. Legal Counsel 21 (preliminary print, 1991). The FBI's 1991 appropriation made the authority permanent and authorized the agency to—

> "establish such fees at a level to include an additional amount to establish a fund to remain available until expended to defray expenses for the automation of fingerprint identification services and associated costs." Pub. L. No. 101-515, 104 Stat. 2101, 2112 (1990), 28 U.S.C. § 534 note.

5. Disposition of Fees

The rule governing the accounting and disposition of user fees is the same rule that governs the accounting and disposition of receipts in general—they must, as required by 31 U.S.C. § 3302(b), be deposited in the general fund of the Treasury to the credit of the appropriate miscellaneous receipts account unless the agency has statutory authority to do something else.

a. Fees Under the IOAA

Normally, fees collected under the authority of the IOAA must be deposited as miscellaneous receipts. E.g., 49 Comp. Gen. 17 (1969). The original version of the IOAA specifically included the miscellaneous receipts requirement (65 Stat. 290). When the IOAA became 31 U.S.C. § 9701 in 1982, the recodifiers dropped the miscellaneous receipts language because there was no need for the IOAA to repeat what was already clearly the case by virtue of the general requirement of 31 U.S.C. § 3302(b). See Revision Note following 31 U.S.C. § 9701. As the Claims Court has pointed out, there is no other significance to the deletion. Bunge Corp. v. United States, 5 Cl. Ct. 511, 516 n.2 (1984), aff'd mem., 765 F.2d 162 (Fed. Cir. 1985).

Of course, Congress is always free to legislate exceptions. Thus, it is possible to have a fee authorized and governed by the IOAA but with specific authority for a different disposition in whole or in part. See B-215127, October 30, 1984. Several of the decisions cited later in our case study of the Customs Service provide specific examples.

b. Fees Under Other Authorities

Again, the rule is the same—the fees are deposited as miscellaneous receipts unless Congress has provided otherwise. As noted earlier, the IOAA itself reinforces this result by expressly preserving, in 31 U.S.C. § 9701(c)(1), any other statute which addresses the disposition of fees. This provision looks both forward and

backward. For later enacted statutes, the result would at least arguably be the same under the specific versus general canon. For statutes predating the IOAA, subsection (c)(1) eliminates any possibility of an implied repeal or "later enactment of Congress" argument. See, e.g., 36 Comp. Gen. 75 (1956). Thus, there is no need to determine when a given fee statute was enacted. If it is silent as to disposition, the miscellaneous receipts statute governs. If it specifically addresses disposition, its own terms control.

It is not at all uncommon for fee statutes to address disposition. The precise approach varies depending on what Congress is trying to accomplish, or perhaps what the agency is able to persuade its oversight committees to permit, but it is nevertheless possible to identify broad categories.

(1) Miscellaneous receipts

Although silence would produce the same result, a number of statutes expressly require that the fees be deposited as miscellaneous receipts. One example is the statute requiring a percentage deduction from awards of the Iran-United States Claims Tribunal. The statute specifies that amounts deducted "shall be deposited into the Treasury of the United States to the credit of miscellaneous receipts." Pub. L. No. 99-93, § 502(b), 99 Stat. 405, 438, 50 U.S.C. § 1701 note. Another example is 44 U.S.C. §1307(b) (fees received by National Oceanic and Atmospheric Administration from sale and/or licensing of nautical or aeronautical products).

Congress sometimes uses the term "general fund" which, for deposit purposes, is synonymous with "miscellaneous receipts." (See Chapter 6, Availability of Appropriations: Amount.) Thus, application fees paid to the Federal Communications Commission are to be "deposited in the general fund of the Treasury." 47 U.S.C. § 158(e). The same language is used for permit fees paid to the Secretary of Commerce by owners or operators of foreign fishing vessels. 16 U.S.C. § 1824(b)(10)(B).

Miscellaneous receipts is a particularly appropriate disposition when the fees are intended to recoup the operating budget of some agency or activity rather than augment the agency's operating funds. For example, we noted earlier 42 U.S.C. § 7178, which directs the Federal Energy Regulatory Commission to assess fees to recover all

of its costs. The statute goes on to provide that "[a]ll moneys received under this section shall be credited to the general fund of the Treasury." 42 U.S.C. § 7178(f).

(2) Credit to agency's appropriation

Another group of fee statutes authorizes the agency to retain the fees for credit to its own operating appropriations. This approach is used when Congress wants to let an agency augment its congressional appropriation and finance a greater program level than would be possible under the amount Congress is willing to appropriate directly. Perhaps the clearest form of augmentation approach is the fee statute for the Food and Drug Administration, 21 U.S.C. § 379h. Subsection (g)(1) provides:

> "Fees collected for a fiscal year . . . shall be credited to the appropriation account for salaries and expenses of the [FDA] and shall be available in accordance with appropriation Acts until expended without fiscal year limitation."

The augmentation feature is highlighted by 21 U.S.C. 379h(f)(1), under which fees in any fiscal year must be triggered by a Salaries and Expenses appropriation at least equal to a specified base year. Lest anyone think these user fees are pocket change, the FDA's 1996 appropriation act appropriated almost $85 million in fees under section 379h to the FDA's Salaries and Expenses account. Pub. L. No. 104-37, title VI, 109 Stat. 299, 326 (1995). Another example of an "augmentation fee" is the FBI fingerprint and name check fee provision, cited previously, which also authorizes credit of the fees to the FBI's Salaries and Expenses appropriation. Pub. L. No. 101-515, 104 Stat. 2101, 2112, 28 U.S.C. § 534 note.

Another situation in which Congress may authorize crediting to an appropriation account is where the fee amounts primarily to reimbursement of expenses borne by the receiving appropriation. Some examples are:

- The Department of Agriculture may sell various products and services of the National Agricultural Library, at prices set to at least recoup costs. Sale proceeds "shall be deposited in the Treasury of the United States to the credit of the applicable appropriation and shall remain available until expended." 7 U.S.C. § 3125a(f).
- Another Agriculture Department statute authorizes the furnishing of departmental paper or electronic publications at "reasonable" fees.

The fees may be used to pay related costs and "may be credited to appropriations or funds that incur such costs." 7 U.S.C. § 2242a(c)(2).

- The State Department is authorized to incur certain expenses incident to procuring information for private parties on a reimbursable basis. Reimbursements are to be "credited to the appropriation under which the expenditure was charged." 22 U.S.C. § 2661.
- Military departments may furnish stevedoring and terminal services and facilities to certain vessels at "fair and reasonable rates." Proceeds "shall be paid to the credit of the appropriation or fund out of which the services or facilities were supplied." 10 U.S.C. § 2633(c).

Each statute must be examined to determine the availability of the fees to the collecting agency in two important respects. First, statutes which authorize crediting of fees to operating appropriations may require further congressional action to make the fees available for obligation, like 21 U.S.C. § 379h, or may, like 7 U.S.C. § 3125a, in effect permanently appropriate the receipts similar to a revolving fund.

Second, the statute may direct which fiscal year receives the credit. For example, reimbursements to the Immigration and Naturalization Service for detention, transportation, hospitalization, and other expenses of detained aliens "shall be credited to the appropriation for the enforcement of this chapter for the fiscal year in which the expenses were incurred." 8 U.S.C. § 1356(a). Although not a user fee statute, the very next subsection illustrates the contrasting approach. Moneys spent by the INS to purchase evidence and subsequently recovered are "reimbursed to the current appropriation" of the INS. 8 U.S.C. § 1356(b). More directly on point is 10 U.S.C. § 2481(b), under which proceeds from the sale of certain utilities and related services by military departments "shall be credited to the appropriation currently available for the supply of that utility or service."

Collections credited to appropriation accounts are a form of offsetting collection (OMB Circular No. A-11, § 14.2(d)), and some statutes use this terminology. Federal Communications Commission regulatory fees "shall be deposited as an offsetting collection in, and credited to, the account providing appropriations to carry out the

functions of the Commission." 47 U.S.C. § 159(e). Similarly, the National Oceanic and Atmospheric Administration's 1995 appropriation act authorized it to assess fees to be "credited to this appropriation as offsetting collections to be available until expended, to recover the costs of administering marine sanctuary and aeronautical charting programs," with the target of reducing the general fund appropriation by $6 million, at which point any additional fees are not available for obligation until the next fiscal year. Pub. L. No. 103317, title II, 108 Stat. 1724, 1741 (1994). The same appropriation provides that receipts from the sale of aeronautical charts resulting from an increase in price above a specified base level "shall be deposited in this account as an offsetting collection and shall be available for obligation." (The base price, as noted above, goes to miscellaneous receipts.) Use of the "offsetting collection" language is of significance primarily for budgetary purposes and by itself has no impact on the availability of the money to the agency.

(3) Special account or fund

In addition to crediting fees to an agency appropriation, Congress can "dedicate" the fees to a particular purpose by authorizing deposit to a revolving fund, a trust account, or a "special account," which simply means a receipt account earmarked by statute for a particular purpose.[77] The special account may be permanently appropriated, or it may require further congressional action to make the funds available for obligation. An example of the former is the treatment of Department of Agriculture grain inspection fees under 7 U.S.C. § 79. Subsection 79(j) provides:

> "Such fees, and the proceeds from the sale of samples obtained for purposes of official inspection which become the property of the United States, shall be deposited into a fund which shall be available without fiscal year limitation for the expenses of the Secretary incident to providing services under this chapter."

The statute may direct deposit into an already existing fund. The Agriculture Department also charges fees for grain weighing services; they are "deposited into the fund created in section 79(j) of this title." 7 U.S.C. § 79a(t)(1). Another example is 13 U.S.C. § 8(d)

[77]See Budget Glossary Exposure Draft, supra note 15, at 5.

which governs the disposition of fees for certain documents and services furnished by the Census Bureau:

"All moneys received in payment for work or services enumerated under this section shall be deposited in a separate account which may be used to pay directly the costs of such work or services, to repay appropriations which initially bore all or part of such costs, or to refund excess sums when necessary."

An example requiring further congressional action is section 304(b) of the Federal Land Policy and Management Act, 43 U.S.C. § 1734(b), which provides:

"The moneys received for reasonable costs under this subsection shall be deposited with the Treasury in a special account and are hereby authorized to be appropriated and made available until expended."

Similar to many of the statutes authorizing credit to appropriations, statutes establishing special accounts may prescribe that the deposits be treated as offsetting receipts.[78] An example is 21 U.S.C. § 886a, which establishes "in the general fund of the Treasury a separate account known as the Diversion Control Fee Account." Certain fees charged by the Drug Enforcement Administration are deposited in the account "as offsetting receipts," and are periodically refunded by Treasury to the DEA to reimburse expenses incurred in the DEA's diversion control program, the target being the recovery of the program's full operating costs. The Immigration and Naturalization Service has several similar accounts—8 U.S.C. §§ 1356(h) (Immigration User Fee Account), 1356(m) (Immigration Examinations Fee Account), and 1356(q) (Land Border Inspection Fee Account), all of which specify treatment of deposits as offsetting receipts.

Finally, there are instances where "offsetting receipts" terminology is used solely for accounting purposes and not tied in to any form of dedicated or earmarked account. An example is the following Coast Guard statute, 14 U.S.C. § 664(b):

[78]An offsetting receipt is a form of offsetting collection which is credited to a receipt account rather than an appropriation account. Budget Glossary Exposure Draft, supra note 15, at 27-29. Again, the terminology is significant primarily for budgetary purposes.

"Amounts collected by the Secretary for a service or thing of value provided by the Coast Guard shall be deposited in the general fund of the Treasury as proprietary receipts of the department in which the Coast Guard is operating and ascribed to Coast Guard activities."[79]

6. Customs Service: A Case Study

The Customs Service, because of the nature of its mission, has considerable exposure to the private sector in its day-to-day operations. This exposure in turn enhances the agency's potential for various forms of user financing. A survey of cases and statutes dealing with user financing in the Customs Service is instructive because it illustrates in practice virtually every concept and principle we have covered thus far in our discussion.

In the decades before the IOAA was enacted, Customs was in the same boat as most other agencies, and various proposals for user financing had to be rejected. E.g., 11 Comp. Gen. 153 (1931); 10 Comp. Gen. 209 (1930); 3 Comp. Gen. 128(1923); 2 Comp. Gen. 775 (1923). It made no difference that the private parties were perfectly willing to pay, and in many cases had in fact initiated the offer, in order to get services over and above what Customs was able or willing to provide. In addition, the proposals often involved paying the salaries of customs officials which, without congressional authorization, would have amounted to an improper augmentation of Customs' appropriations. 2 Comp. Gen. at 776. To make matters worse, a provision of the criminal code (now found at 18 U.S.C. § 209) makes it illegal for anyone to supplement or contribute to the salary of a government employee and for the employee to accept it.

Once the IOAA was in place, Customs began to explore its new options. A series of decisions approved proposals to assess user fees for a variety of services, including the following:

- Preclearance of air passengers at major airports in Canada over and above what the operation would cost if performed entirely in the United States. 48 Comp. Gen. 24 (1968). Preclearance, it could be demonstrated, conferred a financial benefit on the airlines and, some felt, attracted passengers. Id. at 25.

[79]A "proprietary receipt" is simply a type of offsetting receipt representing collections from outside the government. Budget Glossary Exposure Draft, supra note 15, at 29.

- Additional costs of extended hours at certain highway crossing points along the Canadian and Mexican borders. 48 Comp. Gen. 262 (1968). This case, as did 48 Comp. Gen. 24, pointed out that the charges could include employee compensation. In effect, the authority of the IOAA removed both the augmentation concern and the potential bar of 18 U.S.C. § 209.
- Reimbursement for the services of a customs officer upon the temporary designation of a community airport as an international airport. B-171027, December 7, 1970.
- Reimbursement (which could include free or reduced-rate transportation or accommodations) of the costs of providing employees to train private travel agents in Customs regulations and procedures. 62 Comp. Gen. 262 (1983).

In addition, each of these decisions noted that Customs could, as specifically authorized by 19 U.S.C. § 1524, credit the fees to the appropriations from which the costs in question had been paid. The Customs statute had been on the books long before the IOAA, and, as we have seen, 31 U.S.C. § 9701(c) expressly defers to any specific disposition authority. A similar provision is 19 U.S.C. § 1755(b), reflected in Customs regulations at 19 C.F.R. § 147.33, which requires that fair operators reimburse the Customs Service for "actual and necessary" expenses of services provided in connection with trade fairs, the reimbursement to be credited to the appropriation from which the expenses were paid.

In a 1980 decision, GAO was called upon to review its 1968 preclearance decision, 48 Comp. Gen. 24, in light of the intervening judicial decisions which had restrictively interpreted the IOAA. Some airlines had argued that preclearance was really for the benefit of the general public. However, Customs pointed out that preclearance was provided only when an airline specifically requested it. Accordingly, based on the body of jurisprudence from the Supreme Court and the courts of appeals, GAO agreed with Customs that the fees were within the scope of the IOAA. 59 Comp. Gen. 389 (1980). Among the costs Customs could recover were those specified in its regulations (19 C.F.R. § 24.18): "housing allowances, post of duty allowances, home leave and associated transportation costs, and equipment, supplies and administrative costs over and above that which Customs would normally incur." In addition, Customs could include that portion of the costs of its computerized

data processing system attributable to the preclearance sites. 59 Comp. Gen. at 395.

Of course, there are limits on how far you can take the IOAA and another 1980 decision, 59 Comp. Gen. 294, illustrates one of them. The Miami International Airport is a busy place, and long delays incident to customs clearance were producing a lot of complaints. Local business and community leaders suggested that the airport or airlines might reimburse Customs to permit it to hire additional staff to expedite clearance during normal business hours. Congress had authorized Customs to charge for certain overtime services and for certain "special services" performed during normal duty hours. The Miami proposal involved neither situation, however. Accordingly, the decision concluded:

> "Since the Congress has appropriated monies to provide for the salary of Customs inspectors to perform clearance functions during regular business hours and has authorized the collection of fees only for certain special services, the collection of funds for clearance services performed during regular business hours on behalf of the general public would constitute an augmentation of [Customs appropriations]." Id. at 296.

While all of this IOAA activity was going on, the Customs Service had several other statutes which authorized it to do certain specific things on a reimbursable basis. Examples are 19 U.S.C. §§ 1447 (supervise the unloading of cargo from vessels at locations other than ports of entry); 1456 (compensation of customs officer stationed on a vessel or vehicle proceeding from one port of entry to another); 1457 (customs officer directed to remain on vessel or vehicle to protect revenue); 1458 (supervise unloading of bulk cargo under extension of time limit); and 1555(a) (supervise receipt and delivery of merchandise to and from bonded warehouses). Each of these statutes directs that the compensation of the customs officers performing the services "shall be reimbursed" by the appropriate owner, proprietor, or "party in interest."[80] These and other situations are set forth in Customs regulations, 19 C.F.R. § 24.17. At one time, the reimbursement obligation was held to include statutorily

[80]"Party in interest" for purposes of 19 U.S.C. § 1447 can include another federal agency. See 48 Comp. Gen. 622 (1969) (services performed on air force base billed to Department of the Air Force).

retroactive salary increases. 31 Comp. Gen. 417 (1952). However, that is no longer the case. 55 Comp. Gen. 226 (1975).

The relationship of these specific statutes to the IOAA was the subject of 55 Comp. Gen. 456 (1975). Under 31 U.S.C. § 9701(c), the IOAA yields to other statutes which prohibit the collection of a fee, or either fix the amount of a fee or prescribe the basis for determining it. The statutes in question do none of these things, nor was there any indication that any of them were intended to be exclusive. Accordingly, Customs could recover the kinds of costs authorized under the IOAA—specifically, administrative overhead—in addition to the reimbursements required by the other statutes. Customs regulations (19 C.F.R. § 24.21) now include administrative overhead.

A highly unusual approach is found in 19 U.S.C. § 58a. In addition to the statutes noted above, Customs had several other user fee statutes, some of which were old and prescribed fees which had long become economically obsolete (for example, 20 cents for various documents). Legislation in 1978 repealed several of these old laws and replaced them with 19 U.S.C. § 58a, a simple authorization for the Secretary of the Treasury to charge fees to recover the costs of services "similar to or the same as services furnished by customs officers under the sections repealed by subsection (a)." Problem is, "subsection (a)" refers to the 1978 legislation and is nothing more than the repealer provision. Therefore, in order to determine what services are covered by section 58a, it is necessary to consult the 1976 edition of the United States Code. See, for example, 19 U.S.C. § 58 (1976 ed.) for the 20-cent items noted above.

During the mid-1980s, the Customs Service like other parts of the federal government, received additional user fee authority. The process started innocuously enough with a provision of the Trade and Tariff Act of 1984,[81] now codified at 19 U.S.C. § 58b, which authorized user fees to cover the cost of providing customs services at a number of small airports, defined as those whose volume or value of business is not sufficient to otherwise justify the availability of customs services. Fees were to be deposited in a special account

[81]Pub. L. No. 98-573, § 236, 98 Stat. 2948, 2992 (1984).

dedicated to the particular airport which earned them, but required further appropriation action to make them available for obligation. Two years later, COBRA 1985 amended the funding provision to permanently appropriate the fees, but retained the dedication aspect and emphasized that the fees could not be used for any other purpose.[82] The law was expanded in 1989 to include seaports and other facilities.[83]

Then came 19 U.S.C. § 58c. Although its origin in COBRA 1985 was humble enough, it has evolved into a statute of nearly indescribable complexity.[84] Given its level of detail, it clearly displaces the IOAA to the extent of its coverage. The law prescribes a schedule of fees, a mixture of fixed fees and ad valorem levies, applicable to a variety of passenger and merchandise processing services. It also includes a variety of qualifications and limitations.

Disposition of the fees, which could be the subject of a board game, is addressed in 19 U.S.C. § 58c(f). Merchandise processing fees—those prescribed by subsections (a)(9) and (a)(10)—are deposited in the Customs User Fee Account, a separate account in the Treasury, where they are available, to the extent provided in appropriation acts, to pay the costs of the Customs Service's commercial operations. The rest of the fees—those prescribed by 19 U.S.C. § 58c(a) except for subsections (9) and (10)—are, in grossly oversimplified terms, permanently appropriated to be used to, in this order: (1) reimburse Customs appropriations for costs incurred for overtime compensation; (2) make a deficit reduction transfer to the general fund of the Treasury, potentially as much as $18 million per year, supposedly reflecting savings in overtime payments;
(3) reimburse Customs appropriations for the costs of premium pay, agency contributions to the Civil Service Retirement and Disability Fund, preclearance services for which reimbursement is not

[82]Pub. L. No. 99-272, § 13032, 100 Stat. 82, 310 (1986).

[83]Pub. L. No. 101-207, § 3(f), 103 Stat. 1833, 1835 (1989).

[84]A good piece, although ending in 1988 because it was written in 1988, is Frederick M. Kaiser, U.S. Customs Service User Fees: A Variety of Charges and Counter Charges, 8 Pub. Budgeting & Fin. 78 (1988). More recent information may be found in a GAO report, Customs Service: Information on User Fees, GAO/GGD-94-165FS (June 1994).

otherwise required,[85] and foreign language proficiency awards; (4) maintain a $30 million contingency fund; and (5) if there is anything left, hire personnel and procure equipment to enhance services to fee-payers, to be distributed in proportion to the fees collected under subsections (a)(1) through (a)(8).

The advent of statutes like 19 U.S.C. § 58c has an obvious impact on the kind of analysis needed to resolve problems. Questions of agency discretion under broad statutory language are necessarily replaced by an almost algebraic application of excruciatingly detailed provisions. An example is 71 Comp. Gen. 444 (1992), in which GAO concluded that the Customs Service is not authorized to charge express air freight carriers for clearance services at centralized hub facilities during normal duty hours. The law provides for charges at centralized hub facilities, but incorporates a definition from Customs regulations which was limited to services outside of regular operating hours. See 19 U.S.C. §§ 58c(b)(9) and (e)(6). Another decision advised that user fees reimbursed to appropriations under 19 U.S.C. § 58c(f)(3)(A)(i) could be used to defray inspectional overtime costs in the Commonwealth of Puerto Rico but not the U.S. Virgin Islands. B-253292, December 30, 1994.

7. User Fee as Grant Condition

In our chapter on grants, we present the established proposition that Congress may, within constitutional bounds, attach conditions to the receipt of federal money. Congress is not required to establish grant programs, and if it chooses to do so, may use the "carrot and stick" approach to foster some policy objective. An example is section 204(b) of the Federal Water Pollution Control Act, also known as the Clean Water Act, 33 U.S.C. § 1284(b).

As amended in 1972, the Federal Water Pollution Control Act authorizes the Environmental Protection Agency to make grants for the construction of publicly-owned waste treatment facilities up to a specified percentage of construction costs. 33 U.S.C. §§ 1281(g), 1282. The law includes the following condition:

[85]This, in conjunction with portions of 19 U.S.C. § 58c(e), represents a change from the IOAA proposals GAO had previously reviewed, although the preclearance expenses are still user-funded.

"[T]he Administrator shall not approve any grant for any treatment works under section 1281(g)(1) of this title . . . unless he shall first have determined that the applicant has adopted or will adopt a system of charges to assure that each recipient of waste treatment services within the applicant's jurisdiction . . . will pay its proportionate share . . . of the costs of operation and maintenance (including replacement) of any waste treatment services provided by the applicant[.]"
33 U.S.C. § 1284(b)(1).

The requirement that grant applicants adopt user charge systems has two purposes: first, to assure adequate funding once the plant is constructed, and second, to encourage water conservation. City of New Brunswick v. Borough of Milltown, 519 F. Supp. 878, 883 (D.N.J. 1981), aff'd, 686 F.2d 120 (3d Cir. 1982).

A number of localities which employed ad valorem tax systems complained and argued that an ad valorem tax should be acceptable. An ad valorem tax is one which is based on the value of the property being taxed. The question reached the Comptroller General who concluded in 54 Comp. Gen. 1 (1974) that an ad valorem tax could not be used to satisfy the user charge requirement of 33 U.S.C. § 1284(b)(1). The decision quoted extensively from legislative history. As explained in several subsequent letters (e.g., B-183788, February 25,1976, and B-166506, October 31, 1974), the decision rested on several grounds:

- The statute, supported by more legislative history than one normally finds, clearly contemplated a user charge system, not a tax system.
- An ad valorem tax would violate the statutory requirement that each recipient pay its proportionate share because (a) tax-exempt users would not contribute, and (b) certain taxable nonusers—industrial facilities with their own waste treatment systems and residences with their own septic systems—would pay more than their proportionate share.
- An ad valorem tax system would not further the goal of promoting water conservation.

GAO emphasized that it was not going to get into the business of evaluating one user charge system against another, but noted that a system which included a minimum usage charge did not appear legally objectionable. B-183788, February 25, 1976; B-183788, January 14, 1976. The important thing is that whatever system is adopted must "achieve a greater degree of proportionality among

users than is obtainable through an ad valorem tax system." B-183788, June 13, 1975.

The controversy continued and, as documented in B-166506, August 26, 1974, at least one major city turned down a grant rather than change its system. The concluding sentence of 54 Comp. Gen. 1 had advised EPA to seek a legislative solution if it felt ad valorem taxes would be appropriate in some circumstances. Id. at 5. This was done, and 33 U.S.C. § 1284(b)(1) was amended in 1977 to make an ad valorem tax acceptable if (1) it is a dedicated tax; (2) it was in use as of December 27, 1977, the date of the amendment; and (3) it "results in the distribution of operation and maintenance costs for treatment works to each user class, in proportion to the contribution to the total cost of operation and maintenance of such works by each user class." Thus, the amended version of the law would continue to use the federal financial "carrot" to influence the choice in all future cases, but would not force an applicant who already had a qualifying ad valorem system in place to change. EPA's regulations, 40 C.F.R. § 35.929-1(b), set forth the requirements for a "dedicated" tax.

GAO's 1974 decision recognized the difficulty of achieving true proportionality short of using meters, "which no one contends are required." 54 Comp. Gen. at 5. Some localities did go to a metering system, and this too produced its complaints. See, e.g., B-183788, June 13, 1975. The 1977 amendment to 33 U.S.C. § 1284 added subsection (b)(4), which specifies that a system of charges "may be based on something other than metering," as long as the applicant has a system to assure that the necessary funds for operation and maintenance will be available, and residential users are notified as to what portion of their total payment is allocated to waste treatment services.

The user charge condition has been upheld as a legitimate exercise of the congressional power to fix the terms on which it disburses federal money. Middlesex County Utilities Authority v. Borough of Sayreville, 690 F.2d 358 (3d Cir. 1982), cert. denied, 460 U.S. 1023; City of New Brunswick v. Borough of Milltown, 686 F.2d 120 (3d Cir. 1982), cert. denied, 459 U.S. 1201 (1983). In addition, both cases upheld EPA's right to withhold or suspend grant payments for noncompliance. See also Metropolitan Saint Louis Sewer District v. Ruckelshaus, 590 F. Supp. 385, 388 (E.D. Mo. 1984) (EPA's right to

withhold funds conceded). EPA's remedies are spelled out in its regulations, 40 C.F.R. §§ 35.929 and 35.965.

E. Motor Vehicles

1. Acquisition

a. Need for Statutory Authority

Statutory controls over the acquisition and use of motor vehicles date back to 1914 with the enactment of what is now 31 U.S.C. § 1343(b). The 1914 law required specific authority to use appropriated funds "for the purchase of any motor-propelled or horse-drawn passenger-carrying vehicle for any branch of the Government service."[86] The law was restated as part of the Administrative Expenses Act of 1946[87] and amended to delete the quadruped reference and to exempt vehicles for the use of the President, "secretaries to the President," or the heads of the departments listed in 5 U.S.C. § 101 (the so-called cabinet departments). Other exemptions are listed in 31 U.S.C. § 1343(e). The statute also requires specific authority to use appropriations, other than those of the armed forces, to buy, maintain or operate aircraft. 31 U.S.C. § 1343(d).

In what may be record time, the first decision under this law, 21 Comp. Dec. 14 (1914), was issued just seven days after enactment. In it, the Comptroller of the Treasury confirmed that the statute applies to the entire federal government regardless of geographical location, and to all appropriations, no-year as well as annual. It does not, however, apply to mixed-ownership government corporations. B-94685-O.M., May 8, 1950 (Federal Deposit Insurance Corporation).

The major issue of the early decades of the statute's life was the definition of "passenger vehicle," attributable in part perhaps to the fact that the "motor car" was still somewhat of a novelty. Short of

[86]Act of July 16, 1914, ch. 141, § 5, 38 Stat. 454, 508.

[87]Pub. L. No. 79-600, § 16(a), 60 Stat. 806, 810 (1946).

Rosebud, virtually every contrivance in or on which a human could ride was the subject of a decision. Of course, this was more than academic. If a given vehicle did qualify as a passenger vehicle, it was—and is—subject to the statutory requirement for specific authority. If it did not so qualify, then unless there was some other applicable restriction, its acquisition was simply a matter of applying the "necessary expense" doctrine. E.g., 18 Comp. Gen. 226 (1938).

As one might expect, the key distinction was between a passenger vehicle and a truck. The statute "has no effect whatever" on the purchase of trucks. 21 Comp. Dec. 38 (1914). It does not apply to a pickup truck (16 Comp. Gen. 320 (1936)) or a panel truck (29 Comp. Gen. 213 (1949)). An agency's appropriations are available to buy a truck without regard to 31 U.S.C. § 1343(b) if, as noted above, the expenditure is "reasonably necessary to carry out the object for which the appropriation is made." 18 Comp. Gen. at 227. The fact that the truck may be used to transport personnel is not controlling. 2 Comp. Gen. 573 (1923); B-150028-O.M., November 16, 1962. See also 3 Comp. Gen. 900 (1924).

From these and similar decisions, the following test developed:

> "[T]he question whether a vehicle is 'passenger-carrying' must be determined from the character of the vehicle as shown by its construction and design, and not from its intended use, and where it appears that the automobile is in fact a passenger-carrying vehicle, the prohibition of [31 U.S.C. §1343(b)] applies irrespective of the purpose of the Government department or agency involved to convert it to other usages . . . . That is to say, the provisions of the act may not be evaded upon the plea that a passenger-carrying automobile, once acquired, will be used otherwise than for the transportation of passengers." 16 Comp. Gen. 260, 261 (1936).

Similar statements appear in numerous decisions. E.g., 8 Comp. Gen. 636, 637 (1929) and 23 Comp. Dec. 19, 20 (1916).

Thus, a station wagon clearly is a passenger vehicle. 26 Comp. Gen. 542 (1947); 15 Comp. Gen. 451 (1935); 14 Comp. Gen. 367 (1934). So is an ordinary motorcycle. 22 Comp. Dec. 324 (1916). And a prison van. 26 Comp. Dec. 879 (1920). However, "jeeps" have been

held not to be passenger vehicles for purposes of 31 U.S.C. § 1343(b). 23 Comp. Gen. 955 (1944).[88] Nor are motor boats, "vehicle" being defined in terms of land transportation. 22 Comp. Dec. 262 (1915); 26 Comp. Dec. 904 (1920). Initially, the Comptroller of the Treasury held the statute inapplicable to ambulances. 21 Comp. Dec. 830 (1915). However, the specific exemption for ambulances from the later-enacted price limitation provision of 31 U.S.C. § 1343(c), discussed below, showed that Congress "has classified ambulances as passenger vehicles and thus subject to the prohibition against purchase without specific authorization." 33 Comp. Gen. 539, 540 (1954). See also 41 Comp. Gen. 227, 229 (1961).

Stating the test in terms of construction and design rather than intended use inevitably led to a number of cases dealing with a variety of structural and other alterations. In the most simple situation, painting "truck" on the door of a limousine doesn't make it a truck. See 23 Comp. Dec. 19, 20 (1916). Slight changes, such as adding a tool box or similar attachment to a passenger vehicle, do not change the vehicle's character. 21 Comp. Dec. 116 (1914); B-117843-O.M., January 27, 1954. However, structural alterations which are of sufficient magnitude to preclude use of a vehicle for carrying passengers will remove it from the statute's coverage. 24 Comp. Gen. 123 (1944); B-115608, June 16, 1953; B-62865, January 30, 1947. The converse is equally true. 33 Comp. Gen. 539 (1954) (panel truck converted to ambulance use thereby became a passenger vehicle). Similarly, although an ordinary motorcycle is regarded as a passenger vehicle, a motorcycle constructed and equipped for freight-carrying purposes loses its character as a passenger vehicle. 27 Comp. Dec. 1016 (1921); 4 Comp. Gen. 141 (1924).

While the statement of the test in many of the decisions suggests that the intended use of the vehicle is irrelevant, this is not entirely accurate. In one very early case, for example, GAO advised

[88]The courts have held that a jeep is a passenger vehicle for transportation rate classification purposes. E.g., Union Pacific R. Co. v. United States, 91 F. Supp. 762 (Ct. Cl. 1950) (the leading case on the point); United States v. Louisville & Nashville RR., 217 F.2d 307 (6th Cir. 1954). Although GAO has followed these cases in the transportation rate context (e.g., B-145028, August 8, 1961), they have never been held to affect 23 Comp. Gen. 955.

something called the Federal Board for Vocational Education that it could, without specific authority, purchase unserviceable vehicles to be used for instructional purposes in shops and classrooms. 1 Comp. Gen. 58 (1921). Similarly, passenger automobiles to be used for research or testing purposes and not as a means of transportation have been viewed as exempt from 31 U.S.C. § 1343(b). 49 Comp. Gen. 202 (1969) (air pollution control testing); 1 Comp. Gen. 360 (1922) (fuel consumption testing). See also 4 Comp. Gen. 270 (1924) (automobile chassis as part of defense mobile searchlight unit). In such cases, an appropriate certification should appear on or accompany the voucher. 49 Comp. Gen. at 204; 1 Comp. Gen. at 361.

The original enactment of 31 U.S.C. § 1343(b) used only the word "purchase." It was soon held that "purchase" included "hire," at least hire by the month or year, and certainly an indefinite hire, otherwise the prohibition would be a sham. 4 Comp. Gen. 836 (1925); 21 Comp. Dec. 462 (1915). The statutory language was expanded to "purchase or hire" in the 1946 amendment, and "hire" became "lease" in the 1982 recodification of Title 31. This does not apply to the rental of taxicabs or other vehicles on a "per trip" basis incident to the normal performance of day-to-day business. 21 Comp. Dec. at 463; 33 Comp. Gen. 563 (1954); 2 Comp. Gen. 693 (1923). Nor does it apply to the rental of vehicles by employees on official travel. 24 Comp. Dec. 189 (1917). If "purchase" included "hire" under the early decisions for purposes of the prohibition, the authority to purchase logically should include the authority to hire. 4 Comp. Gen. 453 (1924); 22 Comp. Dec. 187 (1915). The issue has not been revisited since "hire" was specifically added to the statute, but there appears to be no compelling reason for a different result.

The statute specifies that the concept of purchase includes a transfer between agencies. 31 U.S.C. § 1343(a). Thus, the transfer of a vehicle declared excess under the Federal Property and Administrative Services Act, with or without reimbursement, is a "purchase" requiring specific authority under subsection (b). 44 Comp. Gen. 117 (1964). However, this is true only where the transfer has the effect of augmenting the number of vehicles the receiving agency is authorized to have. The statute does not apply to transfers without reimbursement for replacement or upgrading purposes where the receiving agency reports an equal number of vehicles as excess. 45 Comp. Gen. 184 (1965).

If the transfer of an excess vehicle to another agency is a "purchase" for purposes of 31 U.S.C. § 1343(b), so is a transfer to another agency's grantee. 55 Comp. Gen. 348 (1975). Custody and accountability for the transferred vehicle would pass to the grantor agency even though the grantee would have actual use during the life of the grant. Also, upon completion of the grant, the vehicle could well revert to the grantor. Id. at 351. This is distinguishable from a situation, such as that encountered in 43 Comp. Gen. 697 (1964), in which a grantee, incident to its performance and where not otherwise restricted, purchases a vehicle with grant funds. In a case where the government was authorized to purchase vehicles for use by a contractor, GAO cautioned that, upon completion of the contract, the agency could not retain the vehicles to augment its fleet in disregard of 31 U.S.C. § 1343(b). B-146876-O.M., June 8, 1965.

An acquisition not subject to the statute is illustrated in B-122552, February 7, 1957. The government seized an automobile which had been purchased with the proceeds of a forged check. The Secret Service found that it would be cheaper to retain the car (which the government was authorized to do under a settlement agreement) and use it than to convert it to cash. GAO found that the government had acquired the car "not by purchase, but by operation of law as a partial recovery of the sum it lost through the forgery." Under the circumstances, 31 U.S.C. § 1343(b) did not apply to the acquisition or to the transfer of the car's reasonable value from Secret Service appropriations to the account which had suffered the loss.

The authority required by 31 U.S.C. § 1343(b) must be specific. It cannot be implied from broad grants of discretionary authority. 13 Comp. Gen. 226 (1934). The authority to purchase necessary supplies and equipment is not enough. 26 Comp. Dec. 904, 905 (1920). The phrase "means of transportation" has also been found insufficient. 21 Comp. Dec. 671 (1915). The authority may be conferred in an appropriation act or elsewhere, and appears in a variety of forms. An agency may be authorized to use its operating appropriations for the purchase and/or hire of motor vehicles; a specific amount may be earmarked for this purpose from a lump-sum appropriation; the legislation may specify the number of vehicles authorized to be acquired. Following are a few random examples to illustrate the variety:

- The Navy's 1995 Other Procurement appropriation was available for "the purchase of not to exceed 262 passenger motor vehicles, of which 162 shall be for replacement only." Pub. L. No. 103-335, 108 Stat. 2599, 2609 (1994).
- A proviso in the 1995 appropriation for the Office of the Director, National Institutes of Health, stated that "funding shall be available for the purchase of not to exceed five passenger motor vehicles for replacement only." Pub. L. No.103-333, 108 Stat. 2539, 2553 (1994).
- A general provision in the Commerce Department's 1995 appropriation act provided that, "[d]uring the current fiscal year, appropriations made available to the Department of Commerce by this Act for salaries and expenses shall be available for the hire of passenger motor vehicles as authorized by 31 U.S.C. 1343 and 1344." Pub. L. No. 103-317, § 202, 108 Stat. 1724, 1748 (1994).
- The Federal Aviation Administration's 1997 Operations appropriation was made available for "lease or purchase of four passenger motor vehicles for replacement only." Pub. L. No. 104-205, 110 Stat. 2951, 2955 (1996).

For some agencies, authority exists in permanent legislation. An example is 50 U.S.C. § 403j(a)(t), under which appropriations made available to the Central Intelligence Agency may be used for "purchase, maintenance, operation, repair, and hire of passenger motor vehicles, and aircraft, and vessels of all kinds." An agency with no authority to purchase or hire motor vehicles can still obtain them from the General Services Administration's motor pool.

b. Price Limitations

Statutory price limitations on the purchase of passenger motor vehicles first appeared in the 1934 Treasury and Post Office Departments Appropriations Act, Pub. L. No. 72-428, § 3, 47 Stat. 1489, 1513 (1933). Out of apparent concern that the ceiling could be evaded by offering essentially a frame at a basic price with such frills as wheels and an engine priced separately as extras, the ceiling applied to vehicles "completely equipped for operation." This gave rise to another lengthy series of decisions holding that such things as heaters (28 Comp. Gen. 720 (1949)) and air conditioners (40 Comp. Gen. 205 (1960)) had to be charged against the ceiling. The phrase "completely equipped for operation" came to include all equipment or accessories permanently attached to the vehicle which contributed to "the comfort and convenience of the passengers and the efficient operation of the vehicle." 36 Comp. Gen. 725, 726 (1957). While the decisions doubtlessly reflected the intent of the

legislation, they reached a level of trivia in which GAO was asked whether such items as a replacement gas cap and an extra length of heater hose were chargeable against the ceiling. See B-140843, October 19, 1959 (internal memorandum).

In 1970, Congress amended the law (Pub. L. No. 91-423, 84 Stat. 879), and it is now found at 31 U.S.C. § 1343(c):

"(1) Except as specifically provided by law, an agency may use an appropriation to buy a passenger motor vehicle (except a bus or ambulance) only at a total cost (except costs required only for transportation) that—

> "(A) includes the price of systems and equipment the Administrator of General Services decides is incorporated customarily in standard passenger motor vehicles completely equipped for ordinary operation;
>
> "(B) includes the value of a vehicle used in exchange;
>
> "(C) is not more than the maximum price established by the agency having authority under law to establish a maximum price; and
>
> "(D) is not more than the amount specified in a law.

"(2) Additional systems and equipment may be bought for a passenger motor vehicle if the Administrator decides the purchase is appropriate. The price of additional systems or equipment is not included in deciding whether the cost of the vehicle is within the maximum price specified in a law."

The monetary ceiling is adjusted annually and set forth as a government-wide general provision in the Treasury, Postal Service Appropriation Act. For fiscal year 1997, the provision states:

"Unless otherwise specifically provided, the maximum amount allowable during the current fiscal year in accordance with [31 U.S.C. § 1343(c)], for the purchase of any passenger motor vehicle (exclusive of buses, ambulances, law enforcement, and undercover surveillance vehicles), is hereby fixed at $8,100 except station wagons for which the maximum shall be $9,100: Provided, That these limits may be exceeded by not to exceed $3,700 for police-type vehicles, and by not to exceed $4,000 for special heavy-duty vehicles . . . ."[89]

The first feature to note about 31 U.S.C. § 1343 is that the exemptions for subsection (b) differ from those for subsection (c).

[89]Treasury, Postal Service and General Government Appropriations Act, 1997, § 604, Pub. L. No. 104-208, § 101(f), 110 Stat. 3009, 3009-353 (1996).

Subsection 1343(b) precludes the use of appropriated funds to acquire vehicles for the use of anyone other than certain specified officials. Subsection (c), however, sets price ceilings on all vehicle purchases. Thus, the acquisition of a vehicle for the use of a cabinet secretary does not require specific authority, but it is subject to the price limitation. 32 Comp. Gen. 345 (1953). Conversely, buses and ambulances are exempt from the price limitation but require specific authority. 33 Comp. Gen. 539 (1954). Apart from the exemptions specified in the statute, a passenger vehicle for one subsection is a passenger vehicle for the other. If, for example, a vehicle to be used solely for research or testing purposes is not considered a passenger vehicle for purposes of 31 U.S.C. § 1343(b), it is not subject to the price limitation of subsection (c). B-81562, December 1, 1948. The price limitation has been held inapplicable to purchases from a trust fund made up of testamentary gifts. B-78578, August 4, 1948.

Under 31 U.S.C. § 1343(c), GSA decides what is or is not included in a vehicle "completely equipped for ordinary operation," and the price ceiling applies to this package. Additional equipment, again within GSA's discretion, is not charged against the ceiling. GSA's regulations provide that standard passenger vehicles as defined in Federal Standard 122[90] will be regarded as "completely equipped for ordinary operation," with items other than those listed as standard to be considered additional equipment for purposes of 31 U.S.C. § 1343(c). 41 C.F.R. § 101-26.501(b). GSA has taken the position, and GAO agrees, that dealers should not be permitted to circumvent the statutory limitation "by transferring part of the basic vehicle cost to the portion of the bid price allocated to additional systems and equipment," and that contracting officers should examine bid prices to guard against this. B-182754, February 18, 1975. Similarly, GAO sustained GSA's rejection of a bid which attempted to include required options not specified in the solicitation. B-188439, June 30, 1977.

Subsection (c)(1)(B) specifies that any trade-in value is part of the total cost chargeable against the ceiling. This means that the

[90]GSA issues "Federal Vehicle Standards" for passenger motor vehicles and various classes of trucks, updated for each new model year. Federal Standard No. 122 is the standard for passenger vehicles.

trade-in value is part of the price and, when added to the balance paid in cash, may not exceed the limit. 17 Comp. Gen. 215 (1937); 17 Comp. Gen. 580 (1938). Determining trade-in value is not an exact science. The so-called "blue book" published by the National Automobile Dealers Association is a guide but is not conclusive and any reasonable method of valuation is acceptable. 28 Comp. Gen. 495, 497 (1949); B-74529, October 20, 1948. However, the valuation must not be a sham to avoid the statutory limitation. 17 Comp. Gen. 911, 913 (1938) ("ridiculously low" trade-in allowance an obvious circumvention); 28 Comp. Gen. at 497 (allowance approximating scrap value questionable where vehicle had not been wrecked and was not unserviceable). In legitimate circumstances, there is no legal objection to trading in more than one used vehicle toward the purchase of a new one. 17 Comp. Gen. at 582; 28 Comp. Gen. 495. However, if one of the old vehicles is excess, it should be disposed of in accordance with the Federal Property and Administrative Services Act. See 27 Comp. Gen. 30 (1947).

While trade-in value of an old vehicle actually traded in must be factored in, it is improper to consider the future trade-in value of the vehicle being purchased. This is because anticipated or prospective depreciation is regarded as too uncertain to be used as a bid evaluation factor. 33 Comp. Gen. 108 (1953).

Subsection (c) further provides that transportation costs are to be excluded for purposes of determining compliance with the price ceiling. Decisions applying this principle in a variety of factual contexts and contract terms include 21 Comp. Gen. 474 (1941); 20 Comp. Gen. 677 (1941); 14 Comp. Gen. 82 (1934); and B-127291, March 22, 1956.

Under a rental agreement whereby title to the vehicle passes to the government when total rental payments reach a stated value, or sooner if, upon termination, the government pays the difference between total payments and the stated value, the total amount paid, rental payments included, may not exceed the price ceiling. 29 Comp. Gen. 21 (1949). The decision distinguished 21 Comp. Gen. 548 (1941), in which, for purposes of exercising a recapture provision in a cost reimbursement contract, the rentals paid by the contractor prior to recapture were not required to count against the ceiling.

2. Use

a. The "Official Purpose" Limitation

Vehicles purchased or rented by the United States government are supposed to be used for government business; anything else is illegal. The first sentence of 31 U.S.C. § 1344(a)(1) makes the point:

> "Funds available to a Federal agency, by appropriation or otherwise, may be expended by the Federal agency for the maintenance, operation, or repair of any passenger carrier only to the extent that such carrier is used to provide transportation for official purposes."

The "official purpose" limitation originated as a government-wide general provision in appropriations acts in the 1930s and early 1940s. 3 Op. Off. Legal Counsel 329, 330 (1979). See A-19101, July 25, 1942, for an example. It became permanent as part of section 16 of the Administrative Expenses Act of 1946, and was reenacted in 1986 as part of the general revision of 31 U.S.C. § 1344.

The coverage of the statute is unusually broad. The phrase "appropriation or otherwise" covers all types of funding. Subsection (g)(1) defines "passenger carrier" as any "passenger motor vehicle, aircraft, boat, ship, or other similar means of transportation that is owned or leased by the United States Government." Subsection (g)(2) defines "Federal agency" to include, in addition to the "regular" departments and agencies, government corporations, mixed-ownership government corporations, the Executive Office of the President, independent regulatory agencies, the Smithsonian Institution, and nonappropriated fund instrumentalities. Subsection (h) even drags in the Postal Service. As did the Administrative Expenses Act of 1946, the law exempts the Senate, House of Representatives, and Architect of the Capitol.

With one significant exception, one thing the law does not do is define "official purposes." In fact, perhaps wisely, apart from the conventional wisdom that contrasts "official" with "personal," no one has attempted to do so. Lacking a definition, one is left with whatever one can glean from the cases.

By far, the overwhelming majority of activity under 31 U.S.C. § 1344 has involved home-to-work transportation, what one Senator once

called "the ultimate status symbol for a Federal bureaucrat."[91] Power to Lenin may have come from the barrel of a gun, but to many in Washington it comes from being picked up at your front door in a chauffeured limousine, courtesy of the taxpayers. It is settled beyond any debate that ordinary home-to-work commuting is the personal responsibility—and personal expense—of the individual. E.g., 27 Comp. Gen. 1 (1947); 19 Comp. Gen. 836 (1940); B-233591, September 21, 1989. From this rule it is but a small and logical step to conclude that using a government vehicle for home-to-work transportation is not an "official purpose," unless of course Congress has authorized it.

The motor vehicle provision of the Administrative Expenses Act of 1946 (60 Stat. 810) included a home-to-work prohibition with a few exceptions. While the very existence of the statute perhaps deterred excessive abuse, some argued that home-to-work transportation could be provided on the basis of little more than an "interest of the government" determination. The argument derived support, according to its proponents, from language in GAO decisions such as 25 Comp. Gen. 844 (1946). Over time, GAO came to view the law's intent as unclear and advocated legislative clarification. E.g., B-178342, July 16, 1973; B-178342, May 8, 1973.

Home-to-work transportation became the "topic du jour" of the early 1980s and, in 62 Comp. Gen. 438 (1983), GAO tried to resolve the confusion. The thrust of 62 Comp. Gen. 438 was that, apart from those exceptions sanctioned in the statute plus a couple of fairly narrow nonstatutory exceptions, the use of government vehicles for home-to-work transportation is statutorily prohibited, period. Agencies have no discretion to exercise in the matter. The decision (id. at 446) quoted a Justice Department opinion, 3 Op. Off. Legal Counsel 329 (1979), which a few years earlier had given very similar advice. If anything, Justice was even more direct. To those who argued that chauffeured limousine service enabled them to extend their work day by working while being transported, the answer was simple: come in earlier, stay later, or live closer to the office. 3 Op. Off. Legal Counsel at 332. While the decision in 62 Comp. Gen. 438 lowered the boom on discretionary use of government vehicles for home-to-work transportation, it also recognized that GAO, itself,

[91] 132 Cong. Rec. 30249 (1986) (Sen. Proxmire).

had contributed to the confusion on this issue. Thus, GAO both applied its decision prospectively, and suspended its application entirely—pending the end of the-then present Congress in order to allow Congress a chance to legislatively resolve the matter. 62 Comp. Gen. at 440. Meanwhile, GAO reports continued to document existing practice.[92]

In 1986, Congress enacted Public Law No. 99-550, 100 Stat. 3067, which completely overhauled 31 U.S.C. § 1344. The objective was clear:

"Whatever the cause for the continued violation of 31 U.S.C. 1344, it is obvious that legislation is needed to end the confusion, by providing clear congressional guidance which will prevent future waste of government funds." H. R. Rep. No. 99-451, at 5 (1985), reprinted in 1986 U.S.C.C.A.N. 5171, 5175.

The revised 31 U.S.C. § 1344(a)(1) starts with the general "official purposes" requirement quoted above. It then adds:

"Notwithstanding any other provision of law, transporting any individual other than the individuals listed in subsections (b) and (c) of this section between such individual's residence and such individual's place of employment is not transportation for an official purpose."

The "notwithstanding any other provision of law" means that 31 U.S.C. § 1344 prevails over any other inconsistent legislation unless enacted in specific contravention of that section. H.R. Rep. No. 99-451 at 7, 1986 U.S.C.C.A.N. at 5177. The legislative history makes clear that residence means "the primary place where an individual resides while commuting to a place of employment," and is not to be confused with the concept of legal domicile where the two differ. Id. It also makes clear that the prohibition does not affect temporary duty situations. Id. Travel between a temporary duty site and a temporary residence such as a motel is not regarded as home-

[92]E.g., Use of Government Motor Vehicles for the Transportation of Government Officials and the Relatives of Government Officials, GAO/GGD-85-76 (September 16, 1985); Use of Government Vehicles for Home-to-Work Transportation, GA0/NSIAD-83-3 (September 28, 1983).

to-work transportation for purposes of 31 U.S.C. § 1344. 41 C.F.R. § 101-6.400(b). This has always been the case. See, e.g., B-159210-O.M., January 4, 1967.

The statute also specifies the permissible exemptions. They fall into two categories—position and situation. Subsection (b) lists the position exceptions. The list starts, of course, with the President and Vice-President. The President then is given 16 discretionary designations, 6 in the Executive Office of the President and 10 in other federal agencies. The remainder of the list includes: cabinet heads and a "single principal deputy" for each; Justices of the Supreme Court; principal diplomatic and consular officials abroad; several high-level military officials; Ambassador to the United Nations; CIA and FBI directors and Administrator of Drug Enforcement Administration; Chairman of the Board of Governors of the Federal Reserve; Comptroller General and Postmaster General.

What we call the situational exceptions are found in subsections (a)(2)(A), (a)(2)(B), and (b)(9). Subsection (a)(2)(A) preserves an exception from the 1946 law and provides that home-to-work transportation "required for the performance of field work," in accordance with regulations prescribed by the General Services Administration, is permissible when approved in writing by the agency head. "Field work" is—

> "official work performed by an employee whose job requires the employee's presence at various locations that are at a distance from the employee's place of employment . . . or at a remote location that is accessible only by Government-provided transportation." 41 C.F.R. § 101-6.401(g).

The simple act of calling something a "field office" does not by virtue of that fact make the work performed there "field work." Id. Subsection (a)(2)(B) authorizes home-to-work transportation which is "essential for the safe and efficient performance of intelligence, counterintelligence, protective services, or criminal law enforcement duties," again when approved in writing by the agency head. See, e.g., B-195073, November 21, 1979 (certain FBI agents authorized to take government vehicles home in order to maintain

emergency response capability).[93] The"protective services" part of this exemption is reinforced by subsection (c) of the statute, which authorizes home-to-work transportation for anyone entitled to Secret Service protection under 18 U.S.C. § 3056(a).

Subsection (b)(9) gives a statutory basis to some nonstatutory exemptions recognized in the prior decisions. GAO had expressed the view that the law should allow an exception for emergencies. E.g., B-181212, August 15, 1974. Of course, this presumes a real emergency. B-152006-O.M., July 26, 1965, quoting B-152006-O.M., October 22, 1963. ("[I]t is difficult to believe that emergencies arise at the Savannah River plant with such frequency as to warrant an average of 442 trips per month in connection with overtime work.")

A "clear and present danger" of terrorist activities in foreign countries became another nonstatutory exception. 54 Comp. Gen. 855 (1975). Now, under 31 U.S.C. § 1344(b)(9), the head of any federal agency can provide home-to-work transportation to any officer or employee by making a written determination, in accordance with GSA regulations, "that highly unusual circumstances present a clear and present danger, that an emergency exists, or that other compelling operational considerations make such transportation essential to the conduct of official business." Transportation under this subsection is for a maximum of 15 calendar days, but may be extended for additional 90-day periods. 31 U.S.C. § 1344(d)(2). While there is obviously some discretion under these standards, the statute makes clear that "comfort and convenience" is not sufficient justification. 31 U.S.C. § 1344(e)(1).

A public transportation strike may trigger the emergency exception. The GSA regulations provide:

> "An emergency may occur where there is a major disruption of available means of transportation to or from a work site, an essential Government service must be provided, and there is no other way to transport those employees." 41 C.F.R. § 101-6.401(i).

[93]Since subsection (a)(2)(B) did not exist in 1979, the decision had to strain somewhat to try to apply the field work exception, which did exist. All pre-1986 decisions should be reexamined in light of the 1986 law and GSA regulations. Those we cite here illustrate points which appear unaffected by the subsequent changes.

Prior GAO decisions, which may be helpful in applying this regulation, had emphasized that the unavailability of public transportation alone does not shift to the government the employee's responsibility to get to work. In other words, a transit strike is not automatically an "emergency" justifying home-to-work transportation. 60 Comp. Gen. 420 (1981); B-200022, August 3, 1981. In two other cases, however, the circumstances were found to justify exceptions. In a 1975 case, the local Social Security Administration Office hired buses to transport employees to work from predetermined pick-up points during a San Francisco transit strike. Absent this or similar action, the processing of claims and payments at one of the nation's major Social Security centers would have come to an abrupt halt. GAO agreed that the action was within the agency's discretion as a "temporary emergency measure." 54 Comp. Gen. 1066 (1975). Some years earlier, during a New York City subway strike, an Internal Revenue Service supervisor "directed" one of his employees to use his own car to take five other employees to and from home during the strike. GAO agreed that the driver's "excess commuting costs" could be paid. A key factor here was that the (then) Civil Service Commission had authorized employees to stay home without a charge to leave. Thus, the supervisor's action enabled the work of the office to continue at minimum expense, as opposed to having to pay the employees anyway for doing no work. B-158931, May 26, 1966.

In view of the comprehensive nature and intent of the 1986 legislation, there are no longer any "nonstatutory" exceptions to 31 U.S.C. § 1344. Home-to-work transportation may be provided only as authorized under the statute and GSA regulations. There is, for example, no authority for the government to provide, or pay for, home-to-work transportation in connection with the performance of overtime work. 16 Comp. Gen. 64 (1936); B-190071, May 1, 1978. It makes no difference that the additional work is performed on non-regular work days (B-171969.42, January 9, 1976), or is "call-back" overtime (36 Comp. Gen. 171 (1956); B-189061, March 15, 1978).

Nor is there authority to provide home-to-work transportation for handicapped employees. B-198323-O.M., March 24, 1981. The situation in B-216602, January 4, 1985, could possibly be considered under the "compelling operational considerations" exception. The Solicitor of Labor had received a serious injury and during his

recovery period was forbidden to drive an automobile or ride public transportation. Government transportation was the only way he could get to work, and the Secretary said his availability was "essential." GAO agreed that he could receive transportation "during the period in which he is medically incapable of otherwise commuting to and from his office," but that he should reimburse the government to the extent of his normal commuting costs. Alternatively, if GSA were to conclude that a situation like this is not covered by any of the statutory exceptions, it might be possible to take advantage of one of the President's discretionary designations under 31 U.S.C. § 1344(b)(1)(C) if any are available at the time.

The prohibition on home-to-work transportation applies to any portion of transportation between home and work. Thus, unless one of the exceptions can somehow be invoked, there is no authority for an agency to provide shuttle service for its employees to and from various intermediate areas. B-162326, September 14, 1967; B-183617-O.M., August 2, 1976. A more recent illustration is B-261729, April 1, 1996. An agency which had relocated one of its offices was concerned that many of its employees were not overly excited over commuting the extra distance. It proposed to equip a bus with phones and computers, call it a "mobile work site," and use it to transport employees from the old location to the new one. Noble motive, the decision concluded, but it's still commuting and would require statutory authority.

The law does not prohibit use of government transportation from an employee's home to an airport incident to official travel, subject to whatever guidance the Federal Travel Regulations may choose to include. 70 Comp. Gen. 196 (1991).

Agencies are required to "maintain logs or other records necessary to establish the official purpose" of home-to-work transportation they provide. 31 U.S.C. § 1344(f). The information to be recorded is set forth in 41 C.F.R. § 1016.403(a). Public access to these records would be governed by the disclosure requirements and exemptions of the Freedom of Information Act. B-233995, February 10, 1989. Of course the records must be made available for legitimate audit purposes. A 1991 GAO study found that the revised 31 U.S.C. § 1344 seemed to be working and that agencies were generally complying with it. Government Vehicles: Officials Now Rarely Receive

Unauthorized Home-to-Work Transportation, GAO/GGD-91-27 (March 1991).

Although the home-to-work prohibition captures the lion's share of attention under 31 U.S.C. § 1344, it is only one form of unauthorized use. Personal use of a government vehicle on weekends and holidays is another. E.g., B-216016, March 23, 1987. Still another controversial area is the use of government vehicles to transport family members. It does not violate the law for an agency to permit a family member to accompany an employee while the vehicle is being used for official business. 68 Comp. Gen. 186 (1989); 57 Comp. Gen. 226 (1978). The same principle applies to government aircraft. B-192053-O.M., August 3, 1978. See also B-155950, July 10, 1975. It is illegal, however, to use a government vehicle to shuttle about family members on personal errands. B-211856-O.M., July 8, 1983. It is equally unauthorized to permit a family member to use the vehicle for personal business. E.g., Clark v. United States, 162 Ct. Cl. 477, 483-84 (1963).

In B-275365, December 17, 1996, an official used a government car to drive himself and several other employees to the funeral of another employee's child because "he wanted to send a message that he cared for his people." GAO was unwilling to say that there are no circumstances in which this sort of thing might qualify as an "official purpose," but in this particular case use of the car violated the statute because, if for no other reason, the official made the decision himself and did not seek agency approval.

Use of a government vehicle, not so much for personal business, but in furtherance of an agency program was the subject of 63 Comp. Gen. 257 (1984). In that decision, the Veterans Administration had acquired a passenger bus to use in transporting students from a medical college to a VA hospital as part of a statutory training program. GAO agreed that the driver could keep the bus at home. The alternative would have been for the driver to make two round trips—one to pick up the bus and another to transport the students. Under the circumstances, any personal benefit to the driver was purely incidental to carrying out the program. The GSA regulations now recognize this type of situation. See 41 C.F.R. § 101-6.405(e). Providing transportation to representatives of foreign nations is also an "official purpose." B-216670, December 13, 1984.

In 71 Comp. Gen. 469 (1992), GAO held that use of a government vehicle to transport students incident to the agency's participation in a "partnership in education" program does not violate the statute. GAO, however, discouraged the practice because of the increased potential for government liability in the event of an accident. Id. at 472. This is also the case where an employee is transporting a family member (68 Comp. Gen. 186 (1989)), or for that matter in any case of expanded use (B-254296, November 23, 1993). Agencies should take precautions to limit potential tort liability in these situations. A device that has been used on occasion in the case of space-available transportation in government aircraft is the waiver of liability. Such waivers are generally valid although there is some state-to-state variation. See B-231930, November 23, 1988 (internal memorandum). In any event, there is no authority to use appropriated funds to purchase, or to reimburse an employee-driver for liability insurance. 45 Comp. Gen. 542 (1966).

Another provision of law, 31 U.S.C. § 1349(b), gives 31 U.S.C. § 1344 some teeth. It provides:

> "An officer or employee who willfully uses or authorizes the use of a passenger motor vehicle or aircraft owned or leased by the United States Government (except for an official purpose authorized by section 1344 of this title) or otherwise violates section 1344 shall be suspended without pay by the head of the agency. The officer or employee shall be suspended for at least one month, and when circumstances warrant, for a longer period or summarily removed from office."

The penalty applies only to "willful" violations. For a violation found to be willful, the minimum penalty of a month's suspension without pay is mandatory. E.g., Clark v. United States, 162 Ct. Cl. 477, 486-87 (1963). As such, it cannot be reduced by an arbitrator. Devine v. Nutt, 718 F.2d 1048, 1055 (Fed. Cir. 1983), rev'd. on other grounds, sub nom. Cornelius v. Nutt, 472 U.S. 648 (1985).

GAO will not decide whether a violation is "willful." B-275365, December 17, 1996. The Merit Systems Protection Board, which sees many of these cases in its review of adverse actions, has developed a test. The Board will consider a violation as willful if the employee "had actual knowledge that the use of the vehicle would be characterized as nonofficial or that he acted in reckless disregard as to whether the use was for nonofficial purposes." Fischer v. Department of the Treasury, 69 M.S.P.R. 614, 617 (1996). The Court of Appeals for the Federal Circuit endorses this approach. Kimm v.

Department of the Treasury, 61 F.3d 888 (Fed. Cir. 1995); Felton v. Equal Employment Opportunity Commission, 820 F.2d 391 (Fed. Cir. 1987). In addition, the Board will not regard a violation as willful if it involves "minor personal use" while the vehicle is being used primarily on official business. Fischer, 69 M.S.P.R. at 617; Madrid v. Department of the Interior, 37 M.S.P.R. 418, 423 (1988). Acting with advice of counsel, however misguided or flat wrong that advice may be, would most likely preclude a finding that a violation was willful. 64 Comp. Gen. 782, 786 (1985).

Examples of situations in which the Board has sustained imposition of a penalty include the following:

- Using government vehicle to commute from duty station to law school classes. Aiu v. Department of Justice, 70 M.S.P.R. 509 (1996).
- Driving loan officer to lawyer's residence to sign papers on a personal loan. Madrid, 37 M.S.P.R. 418.
- Transporting agency employees and equipment to supervisor's residence to help build a fish pond. Barrett v. Department of the Interior, 65 M.S.P.R. 186 (1994).
- Transporting employee's son on personal business. Campbell v. Department of Health and Human Services, 40 M.S.P.R. 525 (1989). See also Davis v. Department of the Army, 56 M.S.P.R. 583 (1993). Under the particular circumstances involved in Kimm v. Department of the Treasury, cited above, however, driving a child to day care was found not to constitute a willful violation.
- Being arrested drunk and asleep while parked on the side of the road with the motor running. Tenorio v. Department of Health and Human Services, 30 M.S.P.R. 136 (1986). This one got the employee fired.

A car rented by an employee while on official travel is not "owned or leased by the United States Government" for purposes of 31 U.S.C. § 1349. Chufo v. Department of the Interior, 45 F.3d 419 (Fed. Cir. 1995). When an employee is renting a car while on travel or temporary duty, there is nothing wrong with using the car for personal business. The impropriety enters the picture when the employee tries to charge the government for the personal portion of the use. In contrast, a government-furnished vehicle may be used only for official purposes. Federal Travel Regulations, 41 C.F.R. § 301-2.6(a). As it should be, the concept of official purpose is somewhat broader in the travel/temporary duty context than at the regular duty station. Id.; B-254296, November 23, 1993 (limited

recreational use permissible at remote location where no other transportation available).

It would appear that the Board's "minor personal use" exception now has a statutory basis. Section 503 of the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, 1755, as amended by Pub. L. No. 101-280, § 6(b), 104 Stat. 149, 160 (1990), 31 U.S.C. § 1344 note, provides, in part:

"Notwithstanding any other provision of law, the head of each department, agency, or other entity of each branch of the Government may prescribe by rule appropriate conditions for the incidental use, for other than official business, of vehicles owned or leased by the Government . . . ."

While some would certainly like to view this as effectively negating the home-to-work prohibition, GAO regards it as

"designed simply to provide reasonable agency latitude under prescribed rules for minor nonofficial vehicle use incidental to otherwise authorized official use. Section 503 does not provide the authority for any agency to ignore the provisions of the home-to-work transportation law . . . ." Government Vehicles: Officials Now Rarely Receive Unauthorized Home-to-Work Transportation, GAO/GGD-91-27, 8 (March 1991).

b. GSA Motor Pools

Under section 211 of the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 491, the General Services Administration has broad authority to establish, operate, and discontinue interagency vehicle motor pools.[94] Subsection (b) of the statute authorizes GSA, subject to regulations issued by the President and if determined advantageous in terms of economy, efficiency, or service, to—

"(1) consolidate, take over, acquire, or arrange for the operation by any executive agency of, motor vehicles and other related equipment and supplies for the purpose of establishing motor vehicle pools and systems to serve the needs of executive agencies; and (2) provide for the establishment, maintenance, and operation (including servicing and storage) of motor vehicle pools or systems for transportation of property or passengers, and for furnishing such motor vehicle and related services to executive agencies . . . . [GSA] shall, so far as practicable, provide any of the services specified in this subsection to any Federal agency . . . ."

[94]GSA now calls them "interagency fleet management systems." They're still motor pools.

The President's regulations, mandated by 40 U.S.C. § 491(c), are contained in Executive Order No. 10579, November 30, 1954, 40 U.S.C. § 486 note, section 11 of which authorizes GSA to issue supplementary regulations. GSA's regulations are found at 41 C.F.R. Part 101-39. "Federal agency," as used in 40 U.S.C. § 491(b), includes the judicial branch. B-158712, March 7, 1977. Also, nothing in the statute or executive order prohibits GSA from permitting the use of motor pool vehicles by cost-reimbursement contractors. B-157729, February 10, 1966.

The statute quoted above, allows GSA, when forming a motor pool, "to take over" vehicles purchased by another agency with its own appropriations. See 41 C.F.R. § 101-39.104-1(a). GSA must reimburse the fair market value only if the vehicle was originally acquired through a revolving fund or trust fund and not previously reimbursed. 40 U.S.C. § 491(g); 41 C.F.R. § 101-39.104-2. This does not include a reimbursable but non-revolving fund appropriation. 38 Comp. Gen. 185 (1958).

GSA's activities under 40 U.S.C. § 491 are financed through GSA's revolving General Supply Fund (40 U.S.C. § 756) and must be reimbursed by the customer agencies. Under 40 U.S.C. § 491(d)(1), the Supply Fund is available for "all elements of cost . . . incident to the establishment, maintenance, and operation" of motor pools. Subsection (d)(2) provides that GSA should fix reimbursements so as to recover "all such elements of cost," including increments to cover estimated replacement costs. The law further provides that the purchase price of vehicles and equipment, plus the replacement increments, cannot be charged all at once but must be recovered through amortization. Id. It also directs GSA to use accrual accounting. Id.; B-139506, October 1, 1959.

The General Supply Fund is available for improvements to government-owned property incident to the establishment and operation of motor pools. This includes such things as fences, gasoline pumps and storage tanks, parking facilities, service station and storage facilities. B-134511, March 10, 1958. It is also available for the initial financing, subject to reimbursement as with other costs, of temporary service facilities and equipment on leased property. 43 Comp. Gen. 738 (1964).

A frequently recurring question has been GSA's authority to charge the using agency for damage to the vehicle. For many years, GSA's regulations provided that GSA would charge the using agency for damage caused by negligence or misuse attributable to the using agency, and GAO consistently upheld GSA's authority to include such a provision. The first decision considering a challenge to the regulation was 37 Comp. Gen. 306 (1957), in which the Comptroller General stated at page 307:

> "There can be no question but that the costs of making repairs to vehicles damaged while being operated in a motor vehicle pool (or the amount of the loss where the vehicle is incapable of being repaired) are elements of cost incident to the operation of such motor vehicle pool."

The provision of the statute requiring amortization of the purchase price has no effect on GSA's ability to charge for damage. Id. at 307-08. The very next decision, 37 Comp. Gen. 308 (1957), reached the same conclusion where the damage was caused by an employee of the using agency other than the vehicle operator, and pointed out that 40 U.S.C. § 491 and the implementing regulations override the nonstatutory rule under which an agency is normally not liable for damage to the property of another agency. The validity of GSA's regulation was upheld again in 41 Comp. Gen. 199 (1961), and still again in 59 Comp. Gen. 515 (1980).

The regulations have changed since those decisions and now provide that GSA will charge the using agency for all damage to the vehicle unless caused by mechanical failure, normal wear and tear, or the negligence or willful act of an identifiable party other than an employee of the using agency. 41 C.F.R. § 101-39.406. There is no apparent reason why the principle of the earlier decisions should not apply equally to this version of the regulation. The using agency is responsible for investigating accidents and filing the required accident and investigation reports with GSA. 41 C.F.R. §§ 101-39.401, 101-39.403. GSA makes the initial determination based on this material. The using agency can dispute GSA's finding but GSA has the final word. 41 C.F.R. § 101-39.406(d).

GSA provides a range of services from short-term use to shuttle and driver services to indefinite assignment. 41 C.F.R. § 101-39.201. An agency which lacks the specific authority to purchase or hire passenger motor vehicles as required by 31 U.S.C. § 1343(b) can nevertheless use its appropriations to reimburse GSA for motor

vehicle services provided under 40 U.S.C. § 491. B-158712, March 7, 1977. In other words, lack of authority to acquire the vehicles directly is not an impediment to obtaining them through the GSA interagency fleet system. Similarly, if GSA delegates leasing authority to a requesting agency because GSA cannot satisfy the agency's requirements, the agency can use its appropriations to lease vehicles pursuant to the delegation notwithstanding any lack of specific authority otherwise required by 31 U.S.C. § 1343(b). B-210657-O.M., July 15, 1983. A delegation from GSA can also be used to augment an agency's specific statutory authorization. B-158712-O.M., January 11, 1977.

c. Expenditure Control Requirements

In fiscal year 1985, the 20 federal agencies with the largest motor vehicle fleets controlled a total of more than 340,000 vehicles and spent $915 million on their acquisition, operation, and disposal.[95] Concerned with these numbers, Congress, as part of the Consolidated Omnibus Budget Reconciliation Act of 1985, enacted the provisions found at 40 U.S.C. §§ 901-913. The legislation applies to executive agencies (excluding the Tennessee Valley Authority) which operate at least 300 motor vehicles. Twenty agencies then met this qualification. They were identified in GAO/GGD-88-40, at 9 n.1. The legislation contained short-term cost-reduction goals (which GAO found in GGD-88-40 were generally met) and permanent requirements.

Each covered agency is to designate an office or officer to establish a central monitoring system and to provide oversight of the agency's motor vehicle operations. 40 U.S.C. § 901. The agency is also directed to develop a system to "identify, collect, and analyze" cost data with respect to its motor vehicle operations. 40 U.S.C. § 902.

The agency must include with each appropriation request a statement specifying total motor vehicle costs (acquisition, maintenance, leasing, operation, and disposal) for three fiscal years, and justifying why its requirements cannot be met more cheaply by some other means, such as increased use of GSA's motor pool system. 40 U.S.C. § 903(a). The President's budget submission is to

[95] Federal Motor Vehicles: Agencies' Progress in Meeting Expenditure Control Requirements, GAO/GGD-88-40, 8 (March 1988).

include a summary and analysis of these statements. 40 U.S.C. § 904(a).

GSA has a number of duties under this legislation. It is to develop requirements, in cooperation with GAO and the Office of Management and Budget, for agency data collection systems (40 U.S.C. § 902(b)); look for opportunities to consolidate vehicles, equipment, and related functions, with the goal of reducing the size and cost of the federal fleet (40 U.S.C. § 906(a)); reduce vehicle storage and disposal costs, and develop a program of vehicle reconditioning designed to improve the rate of return on vehicle sales (40 U.S.C. § 907).

3. Chauffeurs

Very little has been written about the use of appropriated funds for what may be the most sacred perk of all, chauffeurs. There is no government-wide statute or statutory regulation purporting to authorize, prohibit, or restrict the use of chauffeurs. Accordingly, most of the GAO reports which broach the subject—and they are few to begin with—are merely exercises in fact-finding. E.g., Use of Government Vehicles for Home-to-Work Transportation, GAO/NSIAD-84-27 (December 13, 1983) (presenting overtime data in tabular form).

While there are no government-wide provisions, there is the occasional restriction that appears in an appropriations act. For example, section 412 of the 1997 Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act includes the following general provision:

> "Except as otherwise provided in section 406, none of the funds provided in this Act to any department or agency shall be obligated or expended to provide a personal cook, chauffeur, or other personal servants to any officer or employee of such department or agency." Pub. L. No. 104-204, § 412, 110 Stat. 2874, 2922.

Section 406 is another general provision that reiterates the home-to-work prohibition and exemptions of 31 U.S.C. § 1344. Section 412 would not prohibit chauffeured home-to-work transportation for the Secretaries of HUD and VA, but the Veterans Administration was not covered before it became a cabinet department and a former Administrator reimbursed the government for the costs of what was then improper. See Office Refurbishing, Use of a Government Vehicle and Driver, and Out-of-Town Travel by the Former

Administrator of Veterans Affairs, GAO/HRD-83-10 (January 18, 1983). GAO suggested in that report that a definition of "chauffeur" for purposes of section 412 would be helpful. Id. at 20. Is it, for example, intended to cover someone designated to drive for several officials or who has non-driving duties as well?

The most controversial use of chauffeurs tends to be in the context of home-to-work transportation. GAO has summarized its position as follows:

> "While the law does not specifically include the employment of chauffeurs as part of the prohibition in [31 U.S.C. § 1344(a)], GAO has interpreted this section, in conjunction with other provisions of law, as authorizing such employment only when the officials being driven are exempted . . . from the prohibition." 62 Comp. Gen. 438, 441 (1983).

As support for this passage, the 1983 decision cited B-150989, April 17, 1963, which contains the following statement:

> "Chauffeurs for Cabinet officers are not expressly provided for by law, however, it is implicit in [31 U.S.C. §§ 1343, 1344] that the use of automobiles by Cabinet officers, purchased or leased with appropriated funds, is to be considered as a use for official purposes. Consequently, the general employment authority conferred upon heads of Departments by [5 U.S.C. § 3101] constitutes authority to employ chauffeurs when an appropriation is available for the payment of their compensation."

These decisions would seem to support the proposition that an official who is authorized to use a government vehicle for home-to-work transportation may also use a chauffeur unless restricted by some agency-specific legislation.

In a 1975 decision, B-162111, December 17, 1975, an official of the Selective Service System, without seeking agency approval, used an employee to chauffeur him to and from work in his (the official's) own car. The agency head, upon learning of the arrangement, disapproved, and the official resigned. As to what further action should be taken, GAO first noted that the home-to-work statutes were inapplicable because the official had used his own car. There might well have been a violation of 5 U.S.C. § 3103 which provides that an individual may be employed "only for services actually rendered in connection with and for the purposes of the appropriation from which he is paid," but the penalty for violating 5 U.S.C. § 3103 is removal and the violator was already gone.

Accordingly, and since congressional intent in the area was "quite uncertain," GAO's advice was to consider the case closed.

A final decision involves a situation other than home-to-work transportation. The question was whether the Equal Employment Opportunity Commission could use appropriated funds to hire a chauffeured limousine to transport a witness (who happened to be a Senator) from the airport to a hearing site and back to the airport. Since the home-to-work statutes were not involved, and since the Commission had authority to hire passenger vehicles (assuming it was needed for this type of hire), the question boiled down to one of purpose availability. The Commission had statutory authority to reimburse the expenses of a witness, and could have done so even without the specific authority. The agency chose to provide transportation rather than reimburse expense, and while GAO chided that it would have been cheaper to call a taxi, the choice could not be called illegal. B-194881, December 27, 1979.

Chapter 16

Real Property

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Real Property

A. Introduction and Terminology

Question: Who is the Nation's biggest landowner?

Answer: Uncle Sam.

The federal government owns nearly one-third of all the land in the United States. The pattern of ownership is geographically imbalanced, with the United States owning large portions of land in several western states and very small amounts in many eastern states. It averages out, however, to slightly under one-third.[1]

At one time or another, the federal government owned most of the land, apart from the original 13 colonies, that is now the United States. It acquired this land by purchase (the Louisiana Purchase of 1803, for example) and by conquest (the Indians). The legal basis of the federal government's title to its original lands (the theories of title by discovery and title by conquest) was explored in depth, and settled, by Chief Justice John Marshall in an early decision of the Supreme Court, Johnson and Graham's Lessee v. McIntosh, 21 U.S. (8 Wheat.) 543 (1823).

The history of America in the 19th century is largely the story of the acquisition and disposal by the United States of the "public domain." The land policy of the United States during the 19th century was, in a word, disposal. Land was granted to individuals for homesteads and farming, to states for various purposes, to railroads, etc. It is largely in this way that the Nation was built.

Federal "management" over the public domain during this period was virtually nonexistent. As the public domain diminished, America began to develop a heightened awareness that its resources were not unlimited. Gradually toward the close of the 19th century, and more rapidly in the 20th, federal policy shifted from disposal to

[1]More precisely, the figure was 29.15 percent as of 1990. Marla E. Mansfield, A Primer of Public Land Law, 68 Washington Law Review 801, 802 n.1 (1993). The material in this Introduction has been distilled from many sources. A couple, in addition to the Mansfield article, are George C. Coggins and Charles F. Wilkinson, Federal Public Land and Resources Law (1981), and Paul W. Gates, Public Land Law Review Commission, History of Public Land Law Development (1968).

retention.[2] Along with retention came the need for management and conservation.

The first stage of this new policy was "withdrawal." When land is "withdrawn" from the public domain, it is removed from the operation of some or all of the disposal laws. All federal land has now been withdrawn from the homestead laws. The concept of "withdrawal" is still used, but it now has a somewhat more limited meaning. When public land is withdrawn today, it usually means withdrawal from sale or some form(s) of resource exploitation. Section 103(j) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1702(j), provides a statutory definition:

"The term 'withdrawal' means withholding an area of Federal land from settlement, sale, location, or entry, under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area or reserving the area for a particular public purpose or program . . . ."

Once public land has been withdrawn, the next step is "reservation." The reservation of withdrawn land means the dedication of that land to some specific use or uses. Shoshone-Bannock Tribes v. Reno, 56 F.3d 1476, 1479 (D.C. Cir. 1995). Most federal land is now reserved. The Supreme Court has upheld the power of Congress to withdraw and reserve public lands. Light v. United States, 220 U.S. 523 (1911). Withdrawals and reservations may be temporary or permanent. The concepts would have no particular relevance to land which is newly acquired now or in the future for a specific purpose.[3]

[2]This policy is now reflected in the Federal Land Policy and Management Act of 1976, which declares it to be the policy of the United States that "the public lands be retained in Federal ownership, unless . . . it is determined that disposal of a particular parcel will serve the national interest." 43 U.S.C. § 1701(a)(1).

[3]"Acquired lands" are sometimes distinguished from public domain lands. See, e.g., 30 U.S.C. § 351. The former are lands granted or sold to the United States by a state or private party whereas public domain lands "were usually never in state or private ownership." Watt v. Alaska, 451 U.S. 259, 264 n.7 (1981), citing Wallis v. Pan American Petroleum Corp., 384 U.S. 63, 65 n.2 (1966); B-203504, July 22, 1981. For purposes of our discussion, it is sufficient to note that the distinction exists.

Withdrawal is usually accomplished by an act of Congress, which may be specific or may delegate the power to the President or to an executive department. If Congress chooses to delegate, it may prescribe the method by which the authority is to be exercised. Lutzenhiser v. Udall, 432 F.2d 328 (9th Cir. 1970); Mountain States Legal Foundation v. Andrus, 499 F. Supp. 383 (D. Wyo. 1980).

The executive branch has long asserted the inherent authority of the President to make withdrawals, and some significant withdrawals have been accomplished by executive order. Prior to 1976, congressional acquiescence in the executive's assertions of an implied power of withdrawal was seen as confirming the power's existence. United States v. Midwest Oil Co., 236 U.S. 459 (1915); Portland General Electric Co. v. Kleppe, 441 F. Supp. 859 (D. Wyo. 1977); 40 Op. Att'y Gen. 73 (1941). In an uncodified section of the FLPMA, § 704(a), 90 Stat. 2792, Congress expressly repealed "the implied authority of the President to make withdrawals and reservations resulting from acquiescence of the Congress." However, the FLPMA was prospective only, preserved all existing executive withdrawals (id. § 701(c), 90 Stat. 2786), and gave the Secretary of the Interior express new withdrawal authority to be exercised in accordance with statutory procedures (id. § 204, 43 U.S.C. § 1714).[4]

An exception to the FLPMA withdrawal authority is 43 U.S.C. § 156, under which a withdrawal or reservation of public land of more than 5,000 acres "for any one defense project or facility of the Department of Defense" requires an act of Congress. The 1958 enactment of 43 U.S.C. § 156, like FLPMA itself nearly 20 years later, was prospective only and did not invalidate prior withdrawals by executive action. Mollohan v. Gray, 413 F.2d 349 (9th Cir. 1969).

The last significant body of federal land subject to disposal is in Alaska. Under several statutes,[5] much federal land in Alaska will ultimately be conveyed to the state of Alaska and to Alaska natives. A discussion of this process may be found in a GAO report entitled

[4]A brief summary of these developments may be found in Lujan v. National Wildlife Federation, 497 U.S. 871, 875-79 (1990). For a more detailed discussion, see David H. Getches, Managing the Public Lands: The Authority of the Executive to Withdraw Lands, 22 Natural Resources Journal 279 (1982).

Alaska Land Conveyance Program—A Slow, Complex, and Costly Process, GAO/RCED-84-14 (June 12, 1984).

Today, all federally owned land, regardless of the specificity with which it has been withdrawn and reserved, is under the jurisdiction of some federal agency.[6] Four agencies—the Departments of the Interior, Agriculture, Energy, and Defense—manage approximately 99 percent of federally owned land. Interior has jurisdiction of by far the greatest portion, approximately two-thirds. Within Interior, the bureaus with the greatest land responsibilities are the National Park Service (national parks and monuments), the Fish and Wildlife Service (National Wildlife Refuge System), the Bureau of Reclamation (reclamation water projects), and the Bureau of Land Management.

The lands managed by the Bureau of Land Management (BLM), comprising nearly half of all federal land, are the most difficult of all to describe. As the policy of disposal galloped along during the 19th century, much of the public domain that was best suited for uses such as farming and timber was quickly put to these uses. What was left was used mostly for grazing. Under the "benign neglect" of the time, use too often became overuse and abuse. The land was withdrawn from the public domain by a series of statutes and executive orders starting with the Taylor Grazing Act in 1934. When the BLM was established in 1946, it received jurisdiction over this land. For lack of a better designation, the lands are best referred to by the simple if nondescriptive term "BLM lands." Much of the emphasis of federal land management in the future will center around these "BLM lands."

The Forest Service, Department of Agriculture, has jurisdiction over the approximately 25 percent of federal land which comprises the National Forest System. The Department of Energy controls property acquired, mostly during the World War II and Cold War

[5]Alaska Statehood Act, 48 U.S.C. note prec. § 21; Alaska Native Claims Settlement Act, 43 U.S.C. ch. 33; Alaska National Interest Lands Conservation Act, 16 U.S.C. ch. 51.

[6]Real property management in the executive branch is outlined in capsule form in Exec. Order No. 12512 (April 29, 1985), 3 C.F.R. at 340 (1985), reprinted in 40 U.S.C. § 486 note.

eras, in connection with the development, production, and testing of nuclear weapons.

The Defense Department has jurisdiction over a small (approximately 3 percent) but important segment consisting of defense installations and civil water projects managed by the Army Corps of Engineers.

An agency with control over only a tiny percentage of federal land but with major responsibilities is the General Services Administration. GSA has a variety of functions under the Federal Property and Administrative Services Act of 1949 and the Public Buildings Act of 1959, some of which will be described later in this chapter. In terms of the work space in which federal agencies carry out the day-to-day functions of government, GSA is the "government's landlord."

A term we have already encountered on several occasions is the "public domain." Although the term is still commonly used, in the traditional sense of "open land"—federal land you could obtain for homesteading or upon which you could graze your cattle (and, in the grand tradition of classic American westerns, chase off those pesky farmers and sheepherders) free from regulation—the "public domain" no longer exists.

A related term is "public lands." There is a common-law definition and a statutory definition. The common-law definition is lands which are subject to sale or other disposal under the general land laws of the United States. Newhall v. Sanger, 92 U.S. 761, 763 (1875); Columbia Basin Land Protection Ass'n v. Schlesinger, 643 F.2d 585, 602 (9th Cir. 1981); United States v. Kipp, 369 F. Supp. 774, 775 (D. Mont. 1974); 19 Comp. Gen. 608, 611 (1939). The courts have tended to regard "public domain" as synonymous with "public lands" as defined by Sanger and its progeny. E.g., Barker v. Harvey, 181 U.S. 481, 490 (1901); United States v. Holliday, 24 F. Supp. 112, 114 (D. Mont. 1938). The statutory definition is found in section 103(e) of the FLPMA, 43 U.S.C. § 1702(e). For purposes of the FLPMA, "public lands" means, with certain exceptions, "any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior through the Bureau of Land Management, without regard to how the United States acquired ownership," in other words, what we earlier referred to as

the "BLM lands." The relationship between the statutory and common-law definitions is not without controversy. Compare Columbia Basin, 643 F.2d at 601-602 (FLPMA essentially incorporated the traditional definition) with Sierra Club v. Watt, 608 F. Supp. 305, 336-338 (E.D. Cal. 1985) (strongly suggesting that its governing circuit's Columbia Basin decision was incompatible with prevailing Supreme Court precedents).

Nothing in life is static. The federal government will continue to acquire land and it will continue to dispose of land. However, apart from the eventual transfer of the Alaska lands, the massive acquisitions and disposals of earlier times appear unlikely to recur. The emphasis is now, and will almost certainly remain, on the complex issues of classification, economic use, and conservation—in brief, on public land management.[7]

B. Acquisition of Real Property for Government Use

If the federal government needs private property, it will normally try to acquire it in the same manner as a private citizen, through negotiation and purchase. Purchase negotiations, however, do not always succeed. The parties may be unable to agree on the price, or perhaps the owner wants to impose conditions that the acquiring agency thinks are unacceptable. In such a situation, the government always holds the ultimate trump card—the power of eminent domain.

Eminent domain is one of the government's most far-reaching powers, and GAO has cautioned against its overzealous application. See The Federal Drive to Acquire Private Lands Should Be Reassessed, GAO/CED-80-14 (December 14, 1979). In reviews of particular programs, GAO has been critical of excessive and unnecessary land acquisition by the federal government and has recommended in such instances that the land be returned to private ownership. E.g., Lands in the Lake Chelan National Recreation Area Should Be Returned to Private Ownership, GAO/CED-81-10 (January 22, 1981); The National Park Service Should Improve Its

[7]Although GAO has been active in these areas from the audit perspective, they are beyond the scope of this publication. For a summary presentation of some of the issues and problem areas, see Land Use Issues: A GAO Perspective, GAO/CED-82-40 (February 25, 1982).

Land Acquisition and Management at the Fire Island National Seashore, GAO/CED-81-78 (May 8, 1981).

1. The Fifth Amendment

Any discussion of property acquisition by the United States must start with the "eminent domain clause" of the Fifth Amendment to the United States Constitution. As relevant here, the Fifth Amendment says that no person shall be deprived of life, liberty, or property without due process of law, "nor shall private property be taken for public use, without just compensation."

The Fifth Amendment is not an affirmative grant of the power to take private property. The Supreme Court has noted on many occasions that the power of eminent domain is inherent in the sovereign. It is a necessary incident or attribute of sovereignty and needs no specific grant in the Constitution or elsewhere. E.g., Hanson Lumber Co. v. United States, 261 U.S. 581, 587 (1923); United States v. Gettysburg Electric Ry. Co., 160 U.S. 668, 681 (1896); United States v. Jones, 109 U.S. 513, 518 (1883). More recently, the Court noted in United States v. Carmack, 329 U.S. 230, 241-242 (1946), that the Fifth Amendment tacitly recognizes a preexisting power to take private property for public use. Thus, the Fifth Amendment is not the source of the government's power of eminent domain. Rather, it is a limitation on the use of that power.[8]

While consent of the state in which the land is located may be relevant to the type of jurisdiction the federal government acquires (see discussion under the Federal Enclave heading later in this chapter), the acquisition of land requires no such consent unless Congress has expressly provided otherwise. North Dakota v. United States, 460 U.S. 300, 310 (1983); Kohl v. United States, 91 U.S. 367, 374 (1876). Examples of statutes requiring state consent are 16 U.S.C. §§ 515 (national forest system acquisitions under the Weeks Act) and 715f (Migratory Bird Conservation Act).[9]

[8]However, the fact that the United States has the inherent power of eminent domain does not mean that any federal agency can exercise it without further authority. The need for statutory authority will be discussed later.

[9]Cases discussing and applying the requirement of the Migratory Bird Conservation Act include United States v. 1,216.83 Acres, 573 F.2d 1054 (9th Cir. 1978); Swan Lake Hunting Club v. United States, 381 F.2d 238 (5th Cir. 1967).

Issues arising under the Eminent Domain Clause can be grouped under three major headings:

(1) What is a "taking" for purposes of the Fifth Amendment? The concept of "taking" is not limited to acts which result in the transfer of title or possession, but has been construed to embrace a wide variety of government actions. Examples noted, with case citations, in our discussion of inverse condemnation claims in Chapter 12 include permanent flooding, the taking of "air easements" (noise from overhead flights), and regulatory taking. Regardless of the type of taking involved, the purpose of the eminent domain clause of the Fifth Amendment is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960), quoted in Connolly v. Pension Benefit Guaranty Corporation, 475 U.S. 211, 227 (1986).

(2) What is a "public use"? Contrary to what the words may seem to imply, "public use" does not mean for use by, or accessible to, members of the general public. According to the Supreme Court, virtually anything the Congress is empowered to do is a "public use" sufficient to invoke the power of eminent domain. E.g., Berman v. Parker, 348 U.S. 26, 33 (1954).

(3) What constitutes "just compensation"? As a general proposition, just compensation is the fair market value of the property at the time of the taking. It is the price a willing and knowledgeable buyer would pay to a willing and knowledgeable seller, both free from mistake or coercion, without regard to increases or decreases attributable to the project for which the property is being acquired. E.g., United States v. Reynolds, 397 U.S. 14 (1970); United States v. Miller, 317 U.S. 369, 376-77 (1943). See also 18 Comp. Gen. 245 (1938); B-193234, December 8, 1978.

The federal power of eminent domain extends to Indian tribal lands. E.g., United States v. 21,250 Acres of Land in Cattaraugus County, 161 F. Supp. 376 (W.D. N.Y. 1957). It also extends to land owned by states. Oklahoma ex rel. Phillips v. Atkinson, 313 U.S. 508, 534 (1941). The Supreme Court has said that the term "private property" in the Fifth Amendment encompasses the property of state and local governments, and that the same principles of just compensation presumptively apply. United States v. 50 Acres, 469 U.S. 24, 31

(1984). The rules may differ, however, in the case of properties, such as roads, which are normally not bought and sold in the open market. Id. at 30.

Each of these issues has generated a raft of litigation, with the scope of the regulatory taking concept being particularly active. Further detail is beyond our present scope and our statements above are intended to do nothing more than suggest the applicable principles.[10]

2. Federal Land Acquisition Policy

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Public Law 91-646, became law on January 2, 1971, and was amended in 1987. The major portion of the law, Title II, deals with relocation assistance and will be covered later in this chapter. Title III, 42 U.S.C. §§ 4651-4655, is entitled "Uniform Real Property Acquisition Policy." The policy provisions of Title III are independent of the relocation provisions of Title II and apply regardless of whether anyone will be displaced by the acquisition. City of Columbia, South Carolina v. Costle, 710 F.2d 1009 (4th Cir. 1983).

The main section for our purposes is section 301, 42 U.S.C. § 4651. It begins by stating four congressional objectives: (1) to encourage and expedite acquisition by voluntary rather than involuntary means,
(2) to avoid litigation and thereby reduce congestion in the courts (ha!), (3) to assure consistent treatment of property owners, and (4) to promote public confidence in federal land acquisition practices.

Section 301 then goes on to state 10 congressional "policies," designated as subsections (1) through (10). They are:

(1) Agencies should make "every reasonable effort" to acquire property by negotiated sale before resorting to involuntary acquisition. This of course does not mean that the negotiations must succeed. What it means is that the agency is expected to negotiate reasonably and in good faith. See B-179059, October 11, 1973.

[10]A useful starting point for further exploration is Robert Meltz, Library of Congress, When the United States Takes Property: Legal Principles, CRS No. 91-339 A (1991).

A device the National Park Service has used to encourage voluntary sale when acquiring single-family residential property is to permit the owner to retain a "right of use and occupancy" for a specified term of years or for the life of the owner and spouse. The owner pays a fee for this retained interest, determined actuarially in the case of a life estate, which is deducted from the purchase price. The fee has traditionally been set below market as an additional inducement. The device, primarily from the valuation perspective, is discussed in B-125035-O.M., May 7, 1976.

(2) Property should be appraised before the negotiations start, and the owner should be given the opportunity to accompany the appraiser during the inspection. The agency may waive the appraisal for property with a "low fair market value," undefined in the statute but set at $2,500 or less in the governmentwide regulations published by the Department of Transportation.
49 C.F.R. § 24.102(c)(2).

To the extent appropriate, appraisals should follow the Uniform Appraisal Standards for Federal Land Acquisitions published by the Interagency Land Acquisition Conference (Washington, D.C. U.S. Government Printing Office, 1973). Id. § 24.103(a).

(3) Subsection (3), dealing with the amount of compensation, includes several distinct points:

- The acquiring agency should establish the "just compensation" amount before the negotiations start.
- This amount should not be less than the agency's approved appraisal.[11]
- The negotiations should start with an offer of this amount.
- The acquiring agency should provide the owner with a written statement summarizing the basis for the amount offered.
- Increases or decreases in fair market value attributable to the federal project or to the likelihood of acquisition are to be

[11]What if the agency thinks the appraisal is excessive? The House Public Works Committee cautioned: "If the amount of just compensation as determined by the head of the Federal agency is less than the agency's approved appraisal, it would appear that an in-depth review of the methods employed in determining the amount of just compensation or in making the appraisal is called for." H. R. No. 91-1656, at 23 (1970), reprinted in 1970 U.S.C.C.A.N. 5850, 5872.

disregarded. (This, as we have seen, was a codification of existing case law. See the discussion of what constitutes "just compensation," above.)

The legislative history emphasizes that genuine negotiations are expected rather than a "take it or leave it" (or perhaps more appropriately, "take it or we'll condemn it anyway") approach. H.R. No. 91-1656, at 22 (1970), reprinted at 1970 U.S.C.C.A.N. 5850, 5871-72.

Subsection (3) is designed to be fair both to the property owner and to the taxpayer. Thus, although the statute contemplates that the ultimate purchase price might end up higher than the agency's appraisal, the property owner should not receive a windfall. B-193234, December 8, 1978. Also, as long as there is no pressure or coercion, there is nothing to prevent an owner from agreeing to accept less than the government's initial offer. 58 Comp. Gen. 559, 566 (1979); B-148044, December 9, 1976.

Where the wrong amount is paid through mutual mistake, the negotiations may be reopened to effect an appropriate adjustment. The decision B-197623, June 4, 1980, involved acquisitions by the National Park Service under the Wild and Scenic Rivers Act of 1968. After some land had been acquired, it was discovered that two states in which the acquired lands were located had passed certain zoning restrictions which resulted in lowering property values. Since the zoning restrictions were viewed as a consequence of the federal project, the reduction in value should have been disregarded. The Comptroller General agreed that the Park Service could reopen the transactions and reappraise the property using the proper criteria.

If there is a substantial delay between the appraisal and the acquisition, the agency should consider updating the appraisal or getting a new one. H.R. No. 91-1656 at 23; B-193234, December 8, 1978.

The Uniform Relocation Act applies to the acquisition of easements as well as the acquisition of fee simple title. If the taking of an easement benefits the remainder of the landowner's property, the accruing benefit may be set off against the value of the property interest actually taken. If these accruing benefits exceed the value of the easement taken, there is no requirement for additional monetary

compensation. 58 Comp. Gen. 559 (1979). A case discussing application of several of the policy elements to the acquisition of scenic easements under the Wild and Scenic Rivers Act is B-179059, October 11, 1973.

(4) The owner should not be required to surrender possession until the agency has either (a) paid the agreed purchase price, in the case of a negotiated purchase, or (b) deposited the appropriate amount in with the court, in the case of a condemnation.

(5) Insofar as possible, no person lawfully occupying real property (residence, business, or farm) should be required to move without at least 90 days' written notice.

(6) If the acquiring agency permits an owner or tenant to remain on the premises on a rental basis, rent should not exceed the property's fair rental value.

(7) The acquiring agency should take no action (e.g., advance or defer the time of condemnation) to coerce or compel an agreement as to price.

(8) If involuntary acquisition becomes necessary, the agency should institute formal condemnation proceedings. An agency should never intentionally make it necessary for the property owner to go to court to establish the taking under an inverse condemnation theory.

(9) If the agency needs only part of the property but partial acquisition would leave the owner with an uneconomic remnant, the agency should offer to acquire the entire property. The statute defines "uneconomic remnant" as a remaining interest which the acquiring agency determines "has little or no value or utility to the owner."

(10) An owner who has been "fully informed of his right to receive just compensation" may choose to donate all or part of the property to the government.

These, then, are the elements of federal land acquisition policy. Always on the lookout for catchy phrases, we would be tempted to refer to 42 U.S.C. § 4651 as the "property owner's bill of rights,"

except for one thing—section 4651 does not create any rights. Another provision of the Uniform Relocation Act, section 102,

42 U.S.C. § 4602, provides:

"(a) The provisions of section 4651 of this title create no rights or liabilities and shall not affect the validity of any property acquisition by purchase or condemnation.

"(b) Nothing in this chapter shall be construed as creating in any condemnation proceedings brought under the power of eminent domain, any element of value or of damage not in existence immediately prior to January 2, 1971."

By virtue of 42 U.S.C. § 4602, the 10 policy elements of 42 U.S.C. § 4651 are guidelines only. There is a considerable body of case law to the effect that section 4651 does not create rights in favor of property owners which are enforceable in court. E.g., Rhodes v. City of Chicago, 516 F.2d 1373 (7th Cir. 1975); Boston v. United States, 424 F. Supp. 259 (E.D. Mo. 1976); Nall Motors, Inc. v. Iowa City, 410 F. Supp. 111 (S.D. Iowa 1975), aff'd, 533 F.2d 381 (8th Cir. 1976); Barnhart v. Brinegar, 362 F. Supp. 464 (W.D. Mo. 1973).[12] If the statute did not create rights enforceable in court, it followed that GAO could not consider monetary former claims for alleged violations of section 4651 under its former claims settlement authority. B-215591, September 5, 1984.

The policy elements of 42 U.S.C. § 4651 are intended to apply to federally funded state acquisitions as well as to direct federal acquisitions. Federal agencies are directed by 42 U.S.C. § 4655 not to approve any grant, contract, or agreement to or with a state agency under which federal money will be available for all or any part of any program or project which will result in the acquisition of real property, unless the state agency provides "satisfactory assurances"

[12]See also Paramount Farms, Inc. v. Morton, 527 F.2d 1301 (7th Cir. 1975); United States v. 416.81 Acres, 525 F.2d 450 (7th Cir. 1975); Bunker Properties, Inc. v. Kemp, 524 F. Supp. 109 (D. Kan. 1981); Nelson v. Brinegar, 420 F. Supp. 975 (E.D. Wis. 1976); Rubin v. HUD, 347 F. Supp. 555 (E.D. Pa. 1972); Will-Tex Plastics Manufacturing, Inc. v. HUD, 346 F. Supp. 654 (E.D. Pa. 1972), aff'd mem., 478 F.2d 1399 (3d Cir. 1973).

that it will "be guided, to the greatest extent practicable under State law," by the policies of section 4651.[13]

One court has found that, although the policy elements of 42 U.S.C. § 4651 are not binding in and of themselves, they may become binding if included in a contract. The Department of Housing and Urban Development entered into a "contract" with a county for a grant under the Housing Act. In the agreement, the county represented that it would follow the policies of 42 U.S.C. § 4651. Plaintiffs alleged that the county failed to follow several of the policy elements, for example, by not giving some owners the opportunity to accompany the appraisers during their inspection. The court found that the plaintiff-landowners were "donee third party beneficiaries" of the contract between HUD and the county. The court therefore enjoined the county from prosecuting condemnation proceedings, and enjoined HUD from providing any federal money, until the county complied with the items found to be in violation. Bethune v. United States, 376 F. Supp. 1074 (W.D. Mo. 1972).

We mention the Bethune case because it has never been overruled. It is, however, of doubtful precedential value. The same court (different judge) rejected the third-party beneficiary theory a year later, without mentioning Bethune, in Barnhart v. Brinegar, cited above. The Barnhart case, because of its exhaustive analysis of legislative history, has become one of the leading cases in the area. Courts which have considered both cases have rejected Bethune and followed Barnhart. E.g., Boston v. United States, 424 F. Supp. at 264-265; Nall Motors v. Iowa City, 410 F. Supp. at 114-115.

3. Need for Statutory Authority

Before any federal agency can purchase real property, it must have statutory authority. Congress originally enacted this requirement in 1820 (3 Stat. 568), and it is found today, unchanged, in 41 U.S.C. § 14:

> "No land shall be purchased on account of the United States, except under a law authorizing such purchase."

[13]Title II of the Uniform Relocation Act contains a similar provision with the "satisfactory assurances" language. That provision is noted later in this chapter with case citations to the effect that a satisfactory assurance does not mean a guarantee.

This is one of the oldest principles of our government. The Attorney General said well over a century ago that "[t]here never was a time in the history of this Government when the purchase of land on account of the United States without authority of law was a legal act on the part of the Executive." 11 Op. Att'y Gen. 201, 203 (1865). A similar requirement is found in 10 U.S.C. § 2676(a), applicable to the military departments.

As discussed below, not all acquisitions are subject to 41 U.S.C. § 14. Where the statute does not apply, the authority for the expenditure is determined "in accordance with the usual rules of appropriation law construction," that is, by applying the necessary expense theory of purpose availability. 38 Comp. Gen. 782, 785 (1959); B-12021, September 7, 1940.

a. Applicability

The requirement of 41 U.S.C. § 14 applies to acquisition by condemnation as well as acquisition by voluntary purchase. 41 Comp. Gen. 796 (1962). Condemnation is essentially an enforced sale; the government is still a "buyer." This does not mean that the authorizing statute must specify "condemnation." As we will see later, a statute authorizing purchase is sufficient. To restate, although the statute need not specify condemnation, there must be a statute.

Several decisions have established that 41 U.S.C. § 14 applies not only to the acquisition of fee simple title, but also to the acquisition of lesser estates or interests in land, such as permanent easements or rights-of-way. 17 Comp. Gen. 204 (1937); 21 Comp. Dec. 326 (1914); B-55105, February 26, 1946; A-88061, August 3, 1937; A-31494, May 8, 1930; A-24745, October 13, 1928. Looking at it from another angle, the purchase of a permanent easement or right-of-way over land constitutes the purchase of land for purposes of 41 U.S.C. § 14.

The statute applies as well to the acquisition of a leasehold. 39 Op. Att'y Gen. 56 (1937); 28 Op. Att'y Gen. 463 (1910). This includes acquisition for consideration other than money as long as the consideration is more than nominal. 35 Op. Att'y Gen. 183 (1927). A lease will normally place the lessee under an obligation, upon termination of the lease, to restore the property to the condition it was in when the lease began. A federal agency in temporary occupancy of real property under such an obligation cannot purchase (or condemn) the property unless 41 U.S.C. § 14 has been

satisfied, even though acquiring fee title would be cheaper than restoration. 24 Comp. Gen. 339 (1944). See also 26 Comp. Dec. 242 (1919).

The statute applies to the acquisition of new land, not to land already owned by the government. Thus, it does not apply to the transfer of excess property to another agency under the Federal Property and Administrative Services Act of 1949. 38 Comp. Gen. 782 (1959). See also B-71849, January 7, 1948, reaching the same conclusion under an earlier statute that was superseded by the 1949 act. The Attorney General has also concluded that 41 U.S.C. § 14 does not apply to authorized interagency transfers. 40 Op. Att'y Gen. 483 (1946).

The statute has also been held inapplicable to transactions in the nature of "unvouchered expenditures." 9 Comp. Dec. 805 (1903).

(1) Debt security

The statute does not prevent acquisition of land where acquired as security for a debt, nor does it apply to collecting debts by resort to security. In this connection, the Supreme Court has said:

> "[I]n our judgment [41 U.S.C. § 14] does not prohibit the acquisition by the United States of the legal title to land, without express legislative authority, when it is taken by way of security for a debt. . . . To deny [appropriate government officials] the power to take security for a debt on account of the United States, according to the usual methods provided by law for that end, would deprive the government of a means of obtaining payment, often useful, and sometimes indispensably necessary. That such power exists as an incident to the general right of sovereignty, and may be exercised by the proper department if not prohibited by legislation, we consider settled . . . ." Neilson v. Lagow, 53 U.S. (12 How.) 98, 107 (1851).

See also Van Brocklin v. Tennessee, 117 U.S. 151, 154 (1886); 35 Op. Att'y Gen. 474 (1928).

Citing Neilson v. Lagow, the Comptroller General held in 34 Comp. Gen. 47 (1954) that 41 U.S.C. § 14 did not preclude the Secretary of Agriculture from protecting the government's interests under a second mortgage, either by bidding at a prior lienholder's foreclosure sale, or, if the prior lienholder foreclosed, by redeeming the property under state law. Once it was determined that 41 U.S.C. § 14 did not stand in the way and that there was no other applicable prohibition, the question was simply one of applying the necessary

expense theory of purpose availability—the Secretary could make the expenditure if it was administratively determined to be in reasonable furtherance of the relevant appropriation. See also 36 Comp. Gen. 697 (1957).

(2) Donated property/funds

An early decision held that 41 U.S.C. § 14 does not apply to land donated to the United States, provided that the donation does not involve an expenditure of public funds. 19 Comp. Dec. 1 (1912). In reaching this conclusion, the Comptroller of the Treasury cited two 1910 opinions of the Attorney General reaching the same result, 28 Op. Att'y Gen. 413 and 28 Op. Att'y Gen. 463. In the former opinion, the Attorney General expressed the view that the phrase "on account of the United States" as used in 41 U.S.C. § 14 means the same thing as "at the expense of" or "to be paid for by" the United States. 28 Op. Att'y Gen. at 416.

If an agency has authority to accept donations of land and of money, it may use donated funds to purchase land, without regard to 41 U.S.C. § 14, if the funds were donated for the same general purpose for which the land is desired. 2 Comp. Gen. 198 (1922). In that case, the state of Colorado donated a sum of money to the Interior Department for "general park purposes" in the Rocky Mountain National Park. Interior has authority, now found at 16 U.S.C. § 6, to accept land or money donated for the purposes of the national park and monument system. GAO advised that Interior could use the donated funds to purchase a tract of land within the park boundaries which was needed as a site for park administration and maintenance buildings, without the need for further statutory authority. See also B-40087, February 28, 1944.

(3) Options

An option to purchase land is an agreement in which the owner of the land gives a prospective buyer the right to purchase the land at a fixed price within a stated time period. The party receiving the option is under no obligation to exercise it. If consideration is given, the option is binding. If there is no consideration, the owner may revoke the option at any time prior to its exercise. An option may be viewed as a "continuing offer" to sell. The offer is accepted by exercise of the option within the time period for which it was

granted. Purchase options may be advantageous to the government as a means of inhibiting price escalation.

A purchase option is not the purchase of land or an interest in land. Thus, 41 U.S.C. § 14 does not apply to the acquisition of an option, although it does apply to the exercise of the option. 38 Comp. Gen. 227 (1958); 36 Comp. Gen. 48 (1956).

Notwithstanding the nonapplicability of 41 U.S.C. § 14, other decisions have held that appropriated funds may not be used to acquire an option without statutory authority. A-17267, June 28, 1927; 9 Comp. Dec. 569 (1903).[14] The prohibition has not been applied to options given without monetary consideration. See, e.g., B-103967, July 7, 1972; A-59458, January 15, 1935.

When you combine these two concepts—the need for statutory authority and the nonapplicability of 41 U.S.C. § 14—the result is that you need statutory authorization to use appropriated funds to acquire an option on land, but it does not have to be tied in to the particular transaction. Several agencies have obtained statutory authority to acquire options. Examples are:

- 7 U.S.C. § 428a(b): The Department of Agriculture may acquire purchase options on land. Specific authority is needed if the cost of the option is more than $1.
- 10 U.S.C. § 2677: Military departments may acquire options on real property at a cost of not more than 12 percent of the property's appraised fair market value.
- 16 U.S.C. § 460l-10b: The Interior Department may acquire options on land to be included in the national park system, up to a maximum aggregate cost of $500,000 per year. The option must be for a minimum of two years, and the option cost must be credited toward the purchase price.
- The General Services Administration receives the authority in annual appropriation acts by virtue of language making the Federal Buildings Fund appropriation available for "acquisition of options to

[14]The rationale of the decisions is not consistent. The 1927 GAO decision was based on the purpose restriction of 31 U.S.C. § 1301(a). The 1903 decision of the Comptroller of the Treasury used as its rationale an interpretation of the advance payment statute, 31 U.S.C. § 3324.

purchase buildings and sites." E.g., Pub. L. No. 103-329, 108 Stat. 2382, 2397 (1994) (fiscal year 1995).

A purchase option may be acquired by itself or it may be included in a lease. The decisions in this area do not appear to have applied the statutory authority requirement to options included in leases, although we could find no clear statement. Where inclusion of an option is authorized, it may provide for its exercise at the end of the basic term of the lease, at the end of any renewal term, or at staggered periods during the basic term or any renewal term. B-137279, November 10, 1958, amplifying 38 Comp. Gen. 227 (1958). Lease transactions present their own complications and are treated separately later in this chapter.

(4) Indian tribal funds

Indian tribal funds are trust funds administered by the Bureau of Indian Affairs. The purchase of land from Indian tribal funds is not a purchase "on account of the United States." Thus, 41 U.S.C. § 14 does not apply, even where title to the land is to vest in the United States to be held in trust for the particular tribe. 19 Comp. Gen. 175 (1939); 5 Comp. Gen. 661 (1926). See also B-126095, March 7, 1956; A-51705, November 12, 1942.

b. Types of Statutory Authority

(1) Express versus implied authority

For the most part, land acquisition authority tends to be unmistakably explicit—that is, it will contain language such as "purchase land" or "acquire land." This is of course preferable, but it is not absolutely required. It is clear from the decisions, both administrative and judicial, that 41 U.S.C. § 14 may be satisfied by implication to a limited extent. The question seems to have arisen most often in connection with the construction of various facilities or public improvements. Given the existence of 41 U.S.C. § 14, deriving authority to purchase land by implication requires a somewhat more rigid test than the "reasonable relationship" standard used under the necessary expense theory. Responding to the question of whether congressional authorization for construction carries with it the implied authority to acquire land, the Comptroller General stated the test as follows in B-115456, July 16, 1953:

"[W]hile each individual case must of necessity be determined on the basis of the specific facts and circumstances pertaining thereto, an authorization for construction may be deemed to imply authority to acquire land therefor when such land is so necessary and essential for that construction that the acquisition thereof must have been contemplated by the Congress."

In determining whether authority to purchase land may be derived by implication, it is relevant to examine any pattern Congress may have developed in similar legislation. To illustrate, in 7 Comp. Dec. 524 (1901), something called the "Fish Commission" had an appropriation for the "erection of buildings" in connection with the establishment of a fishery station. The Commission wanted to know if it could use the appropriation to purchase land for the station. The Comptroller of the Treasury noted that a pretty good case could be made based on that appropriation standing alone. However, the Comptroller also noted that "the country is dotted with stations established by virtue of acts of Congress" (id. at 525), and that these other statutes almost invariably included the specific authority to purchase land. Viewing this particular appropriation in light of the established pattern in similar statutes, the Comptroller concluded that the purchase of land was not authorized. See also 2 Comp. Gen. 558, 560 (1923); B-115456, July 16, 1953.

Other authorities supporting the proposition that the authority required by 41 U.S.C. § 14 may be derived by implication in appropriate circumstances include United States v. Threlkeld, 72 F.2d 464 (10th Cir. 1934), cert. denied, 293 U.S. 620; Burns v. United States, 160 F. 631 (2d Cir. 1908); 21 Comp. Dec. 326, 328 (1914); 11 Comp. Dec. 132 (1904); B-34805, June 15, 1943; 40 Op. Att'y Gen. 69 (1941).

(2) Forms of express authority

It was long ago recognized that no "specific formula of language" is required to authorize land acquisition. 11 Comp. Dec. 132, 139 (1904). To meet the varying needs of different agencies and programs, Congress has used a number of different statutory configurations to confer land acquisition authority.

Some agencies have general land acquisition authority in the form of permanent provisions found in the U.S. Code which may be agencywide or limited to a particular bureau or program. Examples are:

- 38 U.S.C. § 2406: authorizes Department of Veterans Affairs to acquire land for national cemeteries;
- 38 U.S.C. § 8103(a)(1): authorizes Veterans Affairs to acquire land for medical facilities;
- 40 U.S.C. §§ 602, 603(a), 604(a): authorize General Services Administration to acquire land for purposes of Public Buildings Act of 1959;
- 42 U.S.C. § 1502(b): authorizes acquisition of land for defense housing by Departments of Army, Navy, Air Force, and Housing and Urban Development; and
- 42 U.S.C. § 2473(c)(3): general land acquisition authority for the National Aeronautics and Space Administration.

These statutes make no mention of funding. Since they do not authorize the incurring of obligations in advance of appropriations, specific acquisitions under them must be funded through the normal budget and appropriations process. While acquisitions under these statutes are dependent upon the availability of appropriations, there is no general legal requirement that there also be a specific authorization of appropriations. B-173832, July 16, 1976; B-173832, August 1, 1975. GAO stressed in both of these letters that it was venturing no opinion as to whether a point of order might lie, but was addressing only the legality of the appropriation if enacted.

A variant includes a general reference to the availability of appropriations. An example is 7 U.S.C. § 428a(a), which authorizes the Department of Agriculture to acquire land "as may be necessary to carry out its authorized work," but only when provided for "in the applicable appropriation or other law." As with 41 U.S.C. § 14 itself, this statute has been construed as not applying to land already owned by the government. 38 Comp. Gen. 782, 784-85 (1959).

Another example is 14 U.S.C. § 92(f), which provides general land acquisition authority for the Coast Guard "for which an appropriation has been made." This too requires an appropriation which is itself available for land acquisition. B-148989-O.M., June 18, 1962 (at the time of this opinion, section 92(f) read, "within the limits of appropriations made therefor"). A third example is 43 U.S.C. § 36b, which authorizes the Secretary of the Interior to purchase land for use by the Geological Survey in "gaging" streams "when funds have been appropriated by Congress." There is little substantive difference between this variant and the statutes

previously noted because a general reference to the availability of appropriations merely serves to emphasize what the law requires anyway.

Another variant includes an authorization of appropriations. These tend to be specific program statutes, and the authorization may include restrictions as well as monetary authorizations. Examples are:

- 16 U.S.C. § 1246(e): authorizes land acquisition by the Departments of Agriculture and the Interior to implement the National Trails System Act. The authorization of appropriations is found in 16 U.S.C. § 1249.
- 16 U.S.C. § 1277(a): authorizes land acquisition by the Departments of Agriculture and the Interior to implement the Wild and Scenic Rivers Act. The authorization of appropriations is found in 16 U.S.C. § 1287. The provision is discussed generally in B-125035-O.M., May 21, 1979.

Once again, an actual acquisition requires an available appropriation, in this case one made pursuant to the authorization.

Another form of legislative authority is a statute which authorizes land acquisition and identifies the appropriation to be charged. An example is 10 U.S.C. § 2672a. The land acquisition needs of the military departments are usually addressed in the annual Military Construction Authorization Acts. However, if land is needed in the interest of national defense and to maintain the "operation integrity" of a military installation, and the urgency of the situation does not permit inclusion in the next authorization act, 10 U.S.C. § 2672a authorizes military departments to use military construction appropriations to acquire the land, with advance written notice to the pertinent congressional oversight committees. The military departments also have authority to use appropriations available for maintenance or construction to acquire any interest in land needed for national defense purposes and which does not cost more than $200,000. 10 U.S.C. §§ 2672, 2673.

Another statute of this type is 16 U.S.C. § 555, which authorizes the Secretary of Agriculture to purchase land for national forest headquarters, ranger stations, and other sites required for authorized activities of the Forest Service, up to a maximum of

$50,000 a year, chargeable not to a specifically named appropriation but to "the appropriation applicable to the purpose for which the land is to be used." Decisions applying this statute are 6 Comp. Gen. 437 (1929) (an earlier version of the statute) and B-125390, October 6, 1955.

If you have one of these statutes, the only other thing you need is a sufficient amount of available funds in the appropriation to be charged.

A final category we may note consists of statutes which are essentially procedural and which GAO has viewed as not constituting sufficient authority for the purchase of land. Under these, you still need separate acquisition authority as well as an available appropriation. Examples are:

- 10 U.S.C. § 2663: gives the military departments what appears to be general condemnation and purchase authority. GAO's view is that "this provision is procedural in nature and merely provides the method whereby land may be acquired where there exists a separate authorization to acquire and pay for such land." B-115456, July, 16, 1953.
- 10 U.S.C. § 9773: GAO reached the same conclusion in the same decision with respect to this statute, which authorizes the Secretary of the Air Force to determine sites for establishment and enlargement of air bases, and to acquire fee simple title to any land deemed necessary for this purpose.
- 40 U.S.C. § 490(a)(12): land acquisition by the General Services Administration under the Federal Property and Administrative Services Act of 1949. GAO's view of this provision as merely procedural was based on legislative history and an established congressional pattern of providing specifically for acquisitions by GSA. Even if the provision were regarded as general authority, acquisitions would still require available appropriations. B-137755-O.M., December 30, 1958.

It is apparent from our survey that Congress has used a variety of approaches to satisfy the basic requirement of 41 U.S.C. § 14. Typically, there is some form of authorization, general or specific, which is then implemented, with few exceptions, through the normal budget and appropriations process. The one constant is the need for an available appropriation. See, e.g., 41 Comp. Gen. 796, 798

(1962); 38 Comp. Gen. 227, 229 (1958). Setting aside the question of whether such a provision would be subject to a point of order, authorization and appropriation could be combined in an appropriation act; that is, the appropriation itself could be the source of the acquisition authority. E.g., Polson Logging Co. v. United States, 160 F.2d 712, 714 (9th Cir. 1947). The appropriation does not have to specifically address the tract to be acquired. A lump-sum appropriation one of whose purposes is land acquisition will be sufficient if it can be demonstrated through legislative history, budget submission materials, etc., to be available for the specific acquisition in question. The case most often cited for this proposition is United States v. Kennedy, 278 F.2d 121 (9th Cir. 1960). See also United States v. Right to Use and Occupy 3.38 Acres, 484 F.2d 1140 (4th Cir. 1973) (Army research and development appropriation); Perati v. United States, 352 F.2d 788 (9th Cir. 1965), cert. denied, 383 U.S. 957 (1966) (National Park Service); Seneca Nation of Indians v. Bruckner, 262 F.2d 27 (D.C. Cir. 1958), cert. denied, 360 U.S. 909 (1959) (Corps of Engineers general construction appropriation); United States v. 0.37 Acres, 414 F. Supp. 470 (D. Mont. 1976) (Land and Water Conservation Fund).

An appropriation which itself provides for "purchase of land as authorized by law" will generally be ineffective without separate statutory authorization. 19 Comp. Gen. 758 (1940). However, authority sufficient to satisfy the basic requirement of 41 U.S.C. § 14, such as a lump-sum appropriation demonstrably available for the specific acquisition, will also satisfy the "authorized by law" language in the appropriation act. 3.38 Acres, 484 F.2d at 1142-43; 0.37 Acres, 414 F. Supp. at 471-472.

The terms of the legislation will define the extent of the agency's acquisition authority. Naturally, the authority will be circumscribed by any restrictions contained in the legislation. E.g., Maiatico v. United States, 302 F.2d 880 (D.C. Cir. 1962).

Similarly, depending on those terms, the agency may or may not be authorized to acquire less than fee title or fee title subject to various reservations or covenants. It has been held that the simple authority to purchase land does not include the authority to purchase that land subject to reservations or covenants restricting the use of the land (such as timber or mineral reservations) and which might impede subsequent sale or disposition by the government. 10 Comp.

Gen. 320 (1931); A-34970, February 20, 1931; A-25156, December 15, 1928. In addition, the Attorney General will probably not approve the title. See Justice Department regulations quoted at 6 Op. Off. Legal Counsel 431, 435-36 (1982) and 3 Op. Off. Legal Counsel 337, 339 (1979). Congress can, of course, authorize acquisition subject to reservations. See, e.g., 15 Comp. Gen. 910 (1936). The authority to acquire "lands, easements and rights-of-way" has been construed as such authority. 40 Op. Att'y Gen. 431 (1945). There are also nonstatutory exceptions based largely on common sense. Thus, where acquisition of land for a parkway would end up cutting a farmer's land in half, there could be no objection to his reserving the right to cross the parkway to get from one part of his farm to the other. A-34970, May 15, 1931. In another case, where the land to be acquired contained buildings which the government neither needed nor wanted, there was no objection to reserving title to the buildings in the vendor along with a requirement to remove them within a specified time. 22 Comp. Gen. 165 (1942).

In any event, care must be taken in this regard because acceptance of a deed subject to certain covenants may end up binding the government. E.g., Mississippi State Highway Commission v. Cohn, 217 So. 2d 528 (Miss. 1969) (covenant to construct cattle underpass); B-210361, August 30, 1983 (covenant to pay homeowners' association assessment).[15]

What the agency can or cannot do also depends on the scope of its acquisition appropriations, which in turn depends on the rules of statutory and appropriations law construction (purpose, time, and amount). For example, construction of the Bonneville Dam by the Army Corps of Engineers resulted in the flooding of certain Forest Service facilities. While the Army had appropriations to acquire land necessary for the Bonneville project, it could not use those funds to purchase land on which to relocate the Forest Service facility since those lands were not required for that project. 17 Comp. Gen. 791 (1938). The decision was based on two statutes: 31 U.S.C. § 1301(a), which restricts appropriations to their intended purposes, and

[15]This of course would not apply to illegal covenants like the infamous "white people only" covenant, an example of which is stated in 10 Comp. Gen. 320 (1931). The Justice Department advises that racial and religious covenants should simply be ignored because they are unenforceable. Regulations of the Attorney General Promulgated in Accordance With the Provisions of Public Law 91-393, § 5(d) (1970).

41 U.S.C. § 14 itself, since "such purchase"—purchase of land for use by another agency—had not been authorized. Similarly, the established rules regarding the exclusivity of specific appropriations apply equally to land acquisition appropriations. E.g., B-10122, July 28, 1950; B-10122, May 20, 1940.

c. Effect of Noncompliance

It will be apparent by now that our discussion of 41 U.S.C. § 14 has cited very few recent cases. The reason is that there are very few recent cases. Most issues under the statute are pretty well settled, and most agencies with significant land acquisition responsibilities have worked out the necessary legislative framework with their oversight committees. Perhaps at least in part because of this, there is very little authority on the question of what happens if an agency purchases or condemns land without having complied with 41 U.S.C. § 14.

One early case said that a purchase in contravention of 41 U.S.C. § 14 was void. United States v. Tichenor, 12 F. 415 (C.C.D. Ore. 1882). Tichenor cited an 1865 opinion of the Attorney General, 11 Op. Att'y Gen. 201 (which used the term "illegal," not "void"), and was in turn cited by the Comptroller of the Treasury in 6 Comp. Dec. 791, 793 (1900).

A 1908 case, Burns v. United States, 160 F. 631 (2d Cir. 1908), concluded, without citing Tichenor, that 41 U.S.C. § 14 "should not be construed to apply to executed contracts, and so the United States be prevented from claiming that for which it has paid." Id. at 634.

Our research has disclosed no indication that the issue has ever been addressed by the Comptroller General, by the Attorney General subsequent to the 1865 opinion, or by any court subsequent to Burns.[16]

[16]Burns was quoted for purposes of analogy in Nevada v. United States, 547 F. Supp. 776, 780 (D. Nev. 1982). While the decision was affirmed on appeal, 731 F.2d 633 (9th Cir. 1984), the court of appeals criticized that portion of the district court's opinion as unnecessary "dictum," and indicated that, had the district court gone much further, it would have vacated that portion of the opinion. Thus, the 1982 district court opinion cannot be viewed as especially helpful.

4. Title Considerations

a. Title Approval

When you as a private citizen bought your house, a major consideration, and one which you probably took pretty much for granted, was the assurance that the person you bought it from actually owned it. Suppose he didn't, or suppose there were "clouds" on the title you didn't know about, such as outstanding tax liens or judgment liens. You could very well be stuck. You might have a wonderful cause of action against the seller, assuming you could catch him and assuming he still had some money left. It should be obvious that this is an unacceptable risk. If you financed your house the way most of us do, with a mortgage, the bank did the worrying for you. Banks do not like to take unacceptable risks, and most of them aren't about to lend you money unless they're reasonably sure their investment is safe. This is why one of the things you paid for at closing was title insurance.

These same considerations are there when the government buys real estate. There is one important difference in that the government pays directly; it doesn't take out mortgages. Nevertheless, the government would indeed look stupid if it bought land from someone who didn't own it. More realistic possibilities are the acquisition of land which could not be used for the desired purposes, or the incurring of additional expenses to clear a defective title.

There is a statute designed to address this problem, 40 U.S.C. § 255. The statute consists of unnumbered paragraphs rather than subsections. The first two paragraphs are worth quoting:

> "Unless the Attorney General gives prior written approval of the sufficiency of the title to land for the purpose for which the property is being acquired by the United States, public money may not be expended for the purchase of the land or any interest therein.
>
> "The Attorney General may delegate his responsibility under this section to other departments and agencies, subject to his general supervision and in accordance with regulations promulgated by him."

The third paragraph provides that any agency which has been delegated title approval authority may still seek the assistance of, or request an opinion from, the Attorney General.

As with 41 U.S.C. § 14, the cases involving 40 U.S.C. § 255 tend to be older ones. There are few relevant GAO decisions from recent decades, and the statute is hardly mentioned in the published opinions of the Attorney General since 1940. This would tend to suggest that the operation of the statute is reasonably well settled.

The purpose of 40 U.S.C. § 255 is, quite simply, "to protect the United States against the expenditure of money in the purchase or improvement of land to which it acquired a doubtful or invalid title." 10 Op. Att'y Gen. 353, 354 (1862), quoted in 18 Comp. Gen. 727, 732 (1939). The statute assigns the responsibility to the Attorney General.[17] Thus, as far as the "accounting officers" are concerned, the Attorney General's opinion on the sufficiency of title under 40 U.S.C. § 255 is conclusive. 3 Comp. Dec. 195 (1896); B-78097, June 26, 1950. This would also be true with respect to the validity of mortgage releases upon which the Attorney General had conditioned his approval. 1 Comp. Dec. 348 (1895). For this reason, GAO has relied heavily on the opinions of the Attorney General when considering questions involving 40 U.S.C. § 255.

Prior to 1970, 40 U.S.C. § 255 was worded in terms of the purchase of land for the purpose of erecting public buildings. Thus, many early decisions centered around the use to which the land was to be put. E.g., 9 Comp. Gen. 75 (1929). However, the Attorney General, the Comptroller of the Treasury, and Comptroller General liberally construed the statute to apply to acquisitions for public works or public improvements of virtually any sort. Further, the fact that the acquiring agency did not intend to erect anything on the land was often viewed as irrelevant. See, e.g., 18 Comp. Gen. 727 (1939); 18 Comp. Gen. 372 (1938); 3 Comp. Dec. 530 (1897); B-80025, October 1, 1948; 39 Op. Att'y Gen. 73 (1937). So broad was this construction that early cases often stated the following general propositions:

[17]Within the Department of Justice, the implementation of 40 U.S.C. § 255 is the responsibility of the Environment and Natural Resources Division (formerly Land and Natural Resources Division). 28 C.F.R. § 0.66. That division has developed regulations (unpublished) outlining its standards for title approval, entitled Regulations of the Attorney General Promulgated in Accordance With the Provisions of Public Law 91-393 (1970). See 6 Op. Off. Legal Counsel 431 (1982); 3 Op. Off. Legal Counsel 337 (1979).

- 40 U.S.C. § 255 applies "to all land purchased by the United States for whatever purpose." 1 Comp. Gen. 625, 626 (1922); 9 Comp. Gen. 421, 422 (1930). Both decisions cite 28 Op. Att'y Gen. 413 (1910). See also 28 Op. Att'y Gen. 463 (1910).
- 40 U.S.C. § 255 "enters into, and forms part of" every contract for the purchase of land by the Government." 9 Op. Att'y Gen. 100, 101 (1857), cited in 1 Comp. Gen. 625, 626 and 9 Comp. Gen. 421, 422.

A 1970 revision of 40 U.S.C. § 255, Pub. L. No. 91-393, 84 Stat. 835 (1970), removed any doubt over the validity of these broad statements. The statute now refers simply to "the purchase of the land or any interest therein." The current view therefore remains that 40 U.S.C. § 255 applies in the absence of an express statutory exception. 6 Op. Off. Legal Counsel 431 (1982); 3 Op. Off. Legal Counsel 337 (1979).

As one might expect from the foregoing, 40 U.S.C. § 255 has been applied to a wide variety of situations. Examples are:

- Acquisitions under title III of the Bankhead-Jones Farm Tenant Act. 18 Comp. Gen. 727 (1939) (containing an extensive review of prior opinions of the Attorney General); 18 Comp. Gen. 372 (1938).
- Acquisitions under the Migratory Bird Conservation Act. 40 Comp. Gen. 153 (1960); 16 Comp. Gen. 856 (1937); 39 Op. Att'y Gen. 73 (1937).
- Land purchased for development into forest, grazing, and recreational areas and wildlife conservation refuges. 15 Comp. Gen. 539 (1935).
- Land acquired for public parks. See Cole v. United States, 28 Ct. Cl. 501, 511 (1893).
- Flowage easements acquired by the Corps of Engineers. B-139566, June 5, 1959.
- Acquisition by the Department of Energy of a "servitude" for the Strategic Petroleum Reserve under the Energy Policy and Conservation Act. 3 Op. Off. Legal Counsel 337 (1979).

The statute has been held applicable to purchases for nominal consideration,[18] to acquisition by donation,[19] and to acquisition by exercise of a purchase option.[20] One situation in which 40 U.S.C. § 255 has been found not applicable is monetary contributions by the Department of Defense for common-use NATO facilities financed under multilateral cost-sharing agreements. B-114107, April 27, 1953.

A number of early decisions concluded that 40 U.S.C. § 255 did not apply where an agency had specific authority to acquire land by purchase or condemnation. An example was the Reclamation Act of 1902. The theory was that such authority gave the acquiring agency discretion to either purchase or condemn, and incidentally to determine whether title was sufficiently clear to warrant purchase rather than condemnation. 10 Comp. Gen. 115 (1930); 5 Comp. Gen. 953 (1926); 12 Comp. Dec. 691 (1906); A-39589, December 30, 1931. The theory was discredited in 18 Comp. Gen. 727, 734-35 (1939) as not being "too strongly supported by reason." In case anybody missed the point, GAO, in agreement with the views of the Department of Justice, made it clear the following year that the old theory would no longer be applied. 19 Comp. Gen. 739 (1940). The reason, which we will cover later in this chapter, is that, since 1888, every agency with statutory authority to acquire land by purchase is also authorized to resort to condemnation. Id. at 744.[21] Subsequently, the Attorney General determined specifically that acquisitions under the Reclamation Act were subject to 40 U.S.C. § 255. See B-80025, October 1, 1948.

Prior to the 1970 revision, 40 U.S.C. § 255 included a provision authorizing the Attorney General to waive the approval requirement with regard to easements and rights-of-way upon determining that waiver would not jeopardize the interests of the United States. See,

[18]39 Op. Att'y Gen. 99 (1937); 15 Comp. Gen. 539 (1935).

[19]36 Comp. Gen. 616 (1957); 5 Comp. Dec. 682, 684 (1899).

[20]1 Comp. Gen. 752 (1922); 1 Comp. Gen. 625 (1922).

[21]A further reason to reject the old theory, which did not exist at the time of these decisions, is the strong federal policy in favor of purchase embodied in 42 U.S.C. § 4651. The decision whether to purchase or condemn is no longer supposed to be purely discretionary.

e.g., 21 Comp. Gen. 125 (1941). The 1970 revision dropped the waiver provision. However, the statute still provides flexibility in that it requires not that title be perfect in all instances, but that it be sufficient for the purpose for which the property is being acquired.[22]

The process of obtaining title approval naturally takes time, and until it is done, the statute prohibits payment of the purchase price. This does not necessarily mean that payment must await the Attorney General's final approval. For example, in 40 Comp. Gen. 153 (1960), GAO agreed that payment could be made for purchases under the Migratory Bird Conservation Act based on a "preliminary title opinion" in which the Attorney General stated that valid title would vest in the United States when specified requirements and objections had been met and a deed to the United States recorded, provided that the requirements and objections involved only routine questions of fact and not questions of law. Of course, should a question arise as to whether a particular condition had been properly satisfied, payment should await the Attorney General's final approval. Somewhat similarly, GAO agreed in an earlier case that payment could be made for purchases under the Reclamation Act prior to receipt of the Attorney General's formal opinion where the only objections disclosed by the title examination were those that would be satisfied out of the purchase price. B-80025, October 1, 1948. It should go without saying that in both of these cases the Justice Department had also agreed that the proposals could be considered as being in compliance with 40 U.S.C. § 255.

Congress in a few instances has provided exceptions from 40 U.S.C. § 255. See, for example, 42 U.S.C. § 1502(b) relating to defense housing. Where 40 U.S.C. § 255 does not apply, the acquiring agency should nevertheless determine, in the exercise of sound discretion, that the title being acquired is adequate to protect the interests of the government. Cf. 21 Comp. Gen. 125 (1941) (agency discretion under former waiver provision). To take the obvious illustration,

[22]There are two other obsolete provisions which should be disregarded when reading the older cases. First, a provision requiring consent of the state legislature was deleted in 1940. The successor to this provision is noted later in our discussion of federal enclaves. Second, a provision, formerly found at 40 U.S.C. § 256, requiring that legal services in connection with procuring title to public building sites be rendered by United States Attorneys, was repealed as part of the 1970 legislation.

payment would never be justified to "persons having no color of right, interest, or title in the land to convey." Id. at 131.

Congress may also authorize the acquiring agency to commence its use of the land prior to receipt of the Attorney General's approval. Such a provision is not an exemption from the basic requirement of the statute but merely a deviation from the otherwise applicable time sequence. 6 Op. Off. Legal Counsel 431 (1982).

b. Title Evidence

The traditional form of evidence upon which title opinions are based is the "abstract of title." This is a rather cumbersome document which summarizes each transaction and occurrence over a given time period which may affect title to the property. At one time, real estate lawyers spent much of their lives squirreled away in the local registry of deeds, charged with the boring task of making title searches. In the early decades of the 20th century, free enterprise came to the rescue of those poor, lost lawyers in the form of title companies. Title companies employ professional abstracters to prepare the abstract, on the basis of which the company issues a "certificate of title" certifying that title is free and clear except as shown on the certificate. Another development has been the growth of title insurance. This is exactly what it sounds like—a policy issued by an insurance company insuring against title defects.

In 1930, Congress amended 40 U.S.C. § 255 to authorize the Attorney General to accept certificates of title as satisfactory title evidence. The statute was amended again in 1940 to permit acceptance of any other evidence which the Attorney General deems satisfactory. When 40 U.S.C. § 255 was revised in 1970, the Justice Department reported that more than 93 percent of titles it approved were based on title certificates or title insurance. S. Rep. No. 91- 1111, at 5 (1970), reprinted in 1970 U.S.C.A.N. 3805, 3809. Thus, although the abstract of title is still the document from which other forms of title evidence spring, the typical government attorney these days seldom sees one.[23] The point to note is that older cases, to the extent they

[23]The Justice Department has published a booklet entitled "Standards for the Preparation of Title Evidence in Land Acquisitions by the United States" (1970), intended to apply both to the Justice Department and to agencies which have been delegated title approval responsibility. A 1992 supplement presents and discusses the title insurance policy adopted in 1991 by the Justice Department and the American Land Title Association.

mention only title abstracts, should now be read to include other forms of title evidence that the Attorney General deems acceptable.

Appropriations are available for other forms of title evidence to the same extent as for title abstracts. A-39589, December 30, 1931;[24] A-39589, January 29, 1932. See also 14 Comp. Gen. 318 (1934).

c. Title Evidence Expenses

(1) Purchase

The fourth paragraph of 40 U.S.C. § 255 provides:

> "Except where otherwise authorized by law or provided by contract, the expenses of procuring certificates of title or other evidences of title as the Attorney General may require may be paid out of the appropriations for the acquisition of land or out of the appropriations made for the contingencies of the acquiring department or agency."

Actually, this provision reflects what the decisions have held for 150 years: expenses of procuring title evidence incident to the purchase of real property are chargeable to the appropriation from which the purchase price is to be paid.

When the predecessor of 40 U.S.C. § 255 was originally enacted in 1841, it contained no mention of the use of land acquisition funds. It contained only the reference to "contingency appropriations," a type of appropriation common at the time. Nevertheless, the Comptroller of the Treasury held that the cost of procuring title evidence incident to purchase was chargeable to land acquisition appropriations, and commented that this had been "the established practice for many years—probably over fifty." 3 Comp. Dec. 216, 217 (1896).

The Comptroller went on to explain the statutory reference to contingency appropriations. The 1841 enactment, the first general requirement of its type, directed the Attorney General to examine the titles not only to land to be purchased in the future, but also to land which had already been purchased. With respect to previously purchased land, the purchase appropriations for the most part would have already lapsed. Thus, the reference to contingency

[24]As noted earlier under the Title Approval heading, this decision has been repudiated to the extent it found 40 U.S.C. § 255 not applicable. However, it remains valid for the point cited in the text.

appropriations was intended to provide a source of funds for title expenses relating to previously purchased land for which no other appropriations were currently available. 3 Comp. Dec. at 217.

The reference in 40 U.S.C. § 255 to land acquisition appropriations was added in 1940 (54 Stat. 1083, 1084). By then, the rule of 3 Comp. Dec. 216 had become established beyond dispute.[25] Thus, the 1940 amendment formalized the existing case law, and the reference to contingency appropriations should be viewed as obsolete. There has been little need to discuss the rule since 1940 because, in addition to the decisions, it now has a clear statutory basis. See 21 Comp. Gen. 744 (1942); B-142862, June 21, 1960. The rule applies equally in situations where 40 U.S.C. § 255 does not apply. 25 Comp. Dec. 195 (1918).

Land acquisition appropriations are available exclusively. General operating appropriations may not be used. A-33604, October 11, 1930; A-33604, November 14, 1930 (reconsideration).

Several of the early decisions mention a statute enacted in 1889 which required the seller to furnish title evidence, without expense to the government, if the land was to be used as the site for a public building. E.g., 8 Comp. Dec. 212 (1901). It was carried for many years as part of 40 U.S.C. § 256. It was repealed in 1961 (75 Stat. 577).

(2) Donation

Persons who donate land to the United States are often unwilling to bear the expense of furnishing proof of their title. If the receiving agency has an appropriation available for the purchase of land for the same purpose as that for which the donation is being made, the cost of title evidence is chargeable to that appropriation. A-97769, September 20, 1938; A-47693, March 31, 1933; A-26824, April 25, 1929. If the agency has no such appropriation available, the cost of title evidence may be charged to the current Salaries and Expenses appropriation. A-47693, cited above.

[25]Some of the cases are 8 Comp. Gen. 308 (1928); 3 Comp. Gen. 569 (1924); 9 Comp. Dec. 569 (1903); A-97769, September 20, 1938; A-47693, March 31, 1933; A-39589, December 30, 1931; A-26824, April 25, 1929.

We noted previously in our discussion of 41 U.S.C. § 14 that an agency with authority to accept donations of both land and money may use donated funds to purchase land if the funds were donated for the general purpose for which the land is desired. 2 Comp. Gen. 198 (1922). As a logical extension of this principle, the funds are also available for the procurement of necessary title evidence with respect to donated land. A-26824, April 25, 1929.

(3) Condemnation

An early line of GAO decisions addressed the use of Justice Department appropriations to pay the costs of condemnation proceedings. Although the decisions have never been overruled or modified, legislative developments have rendered them largely obsolete. Those early GAO decisions held that the cost of obtaining title evidence for use in condemnation proceedings is chargeable to appropriations of the Department of Justice. E.g., 8 Comp. Gen. 308 (1928).[26] In fact, almost every decision discussing title evidence incident to purchase points out that the rule for purchase does not apply in condemnation situations. When those decisions were rendered, the holding was viewed simply as an application of the general proposition that the Justice Department receives appropriations to conduct its litigation, and expenses necessarily incurred incident to that litigation are chargeable to those appropriations.

There were exceptions even under the early decisions. Thus, land acquisition appropriations of the acquiring agency were held available for procuring title evidence incident to condemnation proceedings where the governing legislation authorized the handling of condemnation proceedings jointly by the Justice Department and the acquiring agency (21 Comp. Gen. 744 (1942)); where 40 U.S.C. § 255 was not applicable (25 Comp. Dec. 195 (1918)); where the title evidence was to be used "primarily or in the first instance" to attempt to negotiate a settlement without proceeding to judgment (22 Comp. Gen. 20 (1942)); and where the land acquisition appropriation was expressly available for "expenses incidental" to

[26]See also 9 Comp. Dec. 569 (1903); 3 Comp. Dec. 216 (1896); B-142862, June 21, 1960; B-98346, October 9, 1950; A-47693, March 31, 1933; A-39589, December 30, 1931.

the acquisition (see B-55181, February 15, 1946). Justice Department appropriations were also held unavailable where the title evidence was needed for matters subsequent to the final judgment of condemnation. 23 Comp. Dec. 53 (1916).

The provision that is now the fourth paragraph of 40 U.S.C. § 255, quoted above in connection with purchase, was traditionally viewed as applicable to purchase and not to condemnation, both before and after the 1940 amendment which added the reference to land acquisition funds, notwithstanding that its language is broad enough to encompass condemnation. 23 Comp. Dec. 53, 56 (1916); 21 Comp. Gen. 744, 748 (1942). Thus, while there was an apparent willingness to find exceptions at the drop of a hat, the "general rule" remained that title evidence for use in condemnation proceedings was an expense of litigation chargeable to Justice Department funds.

Our research has disclosed no mention of this issue after 1960. However, a subsequent legislative development appears to have changed things. Earlier in this chapter, we reviewed federal land acquisition policy under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970. Under 42 U.S.C. § 4651(1), it is now the established federal policy that agencies are to make every reasonable effort to acquire real property by negotiation and purchase before resorting to condemnation.

When an agency is budgeting for its land acquisition needs, it must generally do so on the assumption that purchase negotiations will succeed. In other words, it must be prepared to meet the expenses it will have to bear incident to purchase. One of these, as we have seen, is the cost of obtaining title evidence. In the typical situation where an agency resorts to condemnation because purchase negotiations did not succeed, unless Congress has expressly deleted the relevant portion of the agency's budget request, it may be said that Congress has provided for title evidence expenses to be borne by the agency's land acquisition funds. In this situation, shifting the expense to the Justice Department could be viewed as augmenting the acquiring agency's appropriation.

With no decisions for guidance, it is impossible to define with any degree of certainty those situations in which the expenses might still be a proper charge to Justice Department appropriations. Nevertheless, the policy of the Uniform Relocation Act has largely

eliminated any basis for distinguishing between purchase and condemnation on this particular issue, and it seems safe to conclude that, at least with respect to acquisitions subject to the policy guidance of 42 U.S.C. § 4651, what was once the rule is now the exception.

5. Methods of Acquisition

a. Purchase

As we have seen, voluntary negotiation and purchase is the preferred method of federal land acquisition.[27] To do this, an agency needs statutory authority (41 U.S.C. § 14), an available appropriation, and title approval (40 U.S.C. § 255). The transaction itself follows the same steps as one between private parties—a Purchase-and-Sale Agreement followed by a closing at which the deed is delivered.

The Purchase-and-Sale Agreement, although certainly a contract, is not governed by the Contract Disputes Act because the Contract Disputes Act does not apply to "the procurement of . . . real property in being." 41 U.S.C. § 602(a)(1). This exemption does not extend to newly created lease agreements, which remain subject to the Contract Disputes Act. Forman v. United States, 767 F.2d 875 (Fed. Cir. 1985).

Nothing prohibits the government from purchasing property encumbered by liens. 12 Comp. Dec. 691, 697 (1906). However, at or before closing, the liens must either be fully satisfied or "adequate provision should be made therefor." Department of Justice, Regulations of the Attorney General Promulgated in Accordance With the Provisions of Public Law 91-393, § 6(a)(1970). One way to "adequately provide" is to withhold an appropriate amount from the purchase price. 10 Op. Att'y Gen. 353 (1862).

A question applicable to government acquisitions as well as private transactions is who bears the risk of loss if the property is damaged

[27]For step-by-step procedural guidance and an appendix of forms, see Land [now Environment] and Natural Resources Division, U.S. Department of Justice, A Procedural Guide for the Acquisition of Real Property by Government Agencies (1972).

or destroyed between the time the Purchase-and-Sale Agreement is signed and the deed delivered, where the loss or damage is not the fault of either party. This can result from such things as fire, soil erosion, or various forms of natural disaster. It is impossible to give a simple answer because the government's rights are determined by the law of the state in which the property is located. E.g., Foster v. United States, 607 F.2d 943, 948 (Ct. Cl. 1979); United States v. Fallbrook Public Utility District, 165 F. Supp. 806, 822 (S.D. Cal. 1958).

Several states have adopted the Uniform Vendor and Purchaser Risk Act, under which the party in possession bears the risk of loss. E.g., Long v. Keller, 163 Cal. Rptr. 532 (Cal. Ct. App. 1980). In states which still apply the common law, the majority rule places the risk of loss on the purchaser on the theory that "equitable title" passes when the contract of sale is executed. E.g., Zitzelberger v. Salvatore, 458 A.2d 1021 (Pa. Super. Ct. 1983). Other states place the risk on the seller. E.g., Laurin v. DeCarolis Construction Co., 363 N.E.2d 675 (Mass. 1977). In one GAO decision, the government had entered into a contract to acquire an easement, in a state which followed the majority rule, when erosion caused some of the land to cave into a river. Since the risk of loss had passed to the government, the government was liable under the contract. B-148823, July 24, 1962. In any jurisdiction, the parties can control the issue by specifically addressing it in the contract of sale.

Once the deed is recorded and legal title passes to the United States, the government owns the property and must bear any risk of loss even though it may not yet have taken possession or paid the purchase price. 23 Comp. Gen. 323 (1943).

The same risk-of-loss rules apply where the government is the seller. 37 Comp. Gen. 700 (1958); 36 Comp. Gen. 90 (1956); B-137673, October 31, 1958.

The consideration specified in the deed is prima facie evidence of the agreed-upon purchase price. However, this can be overcome by "clear and convincing" evidence to the contrary, in which event it may be possible to consider a claim for an additional amount. 7 Comp. Gen. 107 (1927). See also 4 Comp. Gen. 21 (1924).

b. Involuntary Acquisition

(1) Overview

We saw earlier in this chapter that the power of eminent domain is inherent in the United States. It has been termed "essential to a sovereign government." United States v. Carmack, 329 U.S. 230, 236 (1946). The reason should be obvious. If the power did not exist, private citizens could block urgent and necessary federal projects by simply refusing to sell. Kohl v. United States, 91 U.S. 367, 371 (1875).

The power of eminent domain is vested in the legislative branch. Congress may exercise it directly, or may delegate it to the executive branch to be exercised in any manner that does not violate the Constitution. E.g., 2,953.15 Acres v. United States, 350 F.2d 356 (5th Cir. 1965).

An executive agency exercises the delegated power of eminent domain by what is called "condemnation." There are two types of condemnation, direct and inverse. A direct condemnation is a judicial action brought by the condemning authority, such as the United States, in the exercise of its power of eminent domain. United States v. Clarke, 445 U.S. 253, 255 (1980). There are two major forms of direct condemnation, declaration of taking and "complaint only." Inverse condemnation refers to a wide variety of claims for "just compensation" under the Fifth Amendment. About the only thing that inverse condemnation claims necessarily have in common is that they reflect a determination that some action by the government has sufficiently infringed upon a private property right so as to create a right to "just compensation." It differs from direct condemnation in that the government did not intend to take the property. The concepts and case law for both types are discussed below in greater detail. Whichever form is used, condemnation always involves a court proceeding. There is no such thing as administrative condemnation.

Condemnation actions are brought in the United States district court for the district where the land is located. 28 U.S.C. §§ 1358, 1403. Procedures are contained in Rule 71A, Federal Rules of Civil Procedure. The United States is the plaintiff.

Whichever form of condemnation is used, cost limitations in the authorizing legislation or appropriation do not affect either the authority to condemn or the judicial determination of just

compensation. Albert Hanson Lumber Co. v. United States, 261 U.S. 581, 586 (1923); Shoemaker v. United States, 147 U.S. 282, 302 (1893); United States v. Certain Real Estate Lying on the South Side of Broad Street, 217 F.2d 920, 925 (6th Cir. 1954). (The 6th Circuit case involved a declaration of taking; Hanson Lumber and Shoemaker predated the Declaration of Taking Act.)

If land taken by eminent domain is no longer needed, the former owner stands in the same position as any other member of the public. There is no automatic right of repurchase. B-165511, March 21, 1978. Of course, Congress can always provide such a right in a particular context. Also, the deed conveying the property to the government may specify a right of repurchase. Id.

(2) Sources of authority

A question that was once open to some debate was whether statutory authority to acquire land by purchase was sufficient to trigger the government's inherent eminent domain power, or whether it had to specify condemnation as well as purchase. See, e.g., Kohl v. United States, 91 U.S. 367, 374 (1875). To remove any doubt, Congress enacted a statute in 1888, sometimes called the General Condemnation Act of 1888 and now found at 40 U.S.C. § 257, which authorizes any federal agency with authority to purchase land to use condemnation also. It provides:

> "In every case in which the Secretary of the Treasury or any other officer of the Government has been, or hereafter shall be, authorized to procure real estate for the erection of a public building or for other public uses, he may acquire the same for the United States by condemnation, under judicial process, whenever in his opinion it is necessary or advantageous to the Government to do so . . . ."

Note that 40 U.S.C. § 257 is not an independent grant of land acquisition authority. That must exist elsewhere. If you have statutory authority to purchase land, 40 U.S.C. § 257 supplements it and permits you to use condemnation. Carmack, 329 U.S. at 235; Hanson Lumber Co. v. United States, 261 U.S. 581, 587 (1923); 19 Comp. Gen. 739, 744 (1940). The constitutionality of 40 U.S.C. § 257 has long been settled. Chappell v. United States, 160 U.S. 499 (1896).

The significance of 40 U.S.C. § 257 is that it makes no difference whether the legislation authorizing a particular acquisition says

"purchase or condemnation" or merely "purchase" or "acquire." If the authorizing legislation does not specify condemnation, the authority exists anyway by virtue of 40 U.S.C. § 257. Of course, Congress is always free to limit an acquisition statute to voluntary purchase, in which event 40 U.S.C. § 257 would be subordinated. United States v. 16.92 Acres, 670 F.2d 1369, 1371-72 (7th Cir. 1982).

Some agencies have their own condemnation authority. Examples are 10 U.S.C. § 2663 (military departments), 33 U.S.C. §§ 591-594 (Army Corps of Engineers, river and harbor improvements), and 43 U.S.C. § 421 (Reclamation Act of 1902). Although there is little case law, these statutes stand side-by-side with 40 U.S.C. § 257. Hence, an agency with overlapping statutes can elect which one to proceed under in a given case. See Hanson Lumber Co. v. United States, 261 U.S. 581 (1923); Chappell v. United States, 81 F. 764 (4th Cir. 1897); United States v. 80 Acres, 26 F. Supp. 315, 321 (E.D. Ill. 1939); In re Military Training Camp in Prince George County, Va., 260 F. 986 (E.D. Va. 1919); B-98346, October 9, 1950. (Hanson and B-98346 involve the river and harbor legislation; Chappell and Training Camp involve the predecessor of what is now 10 U.S.C. § 2663.)

In sum, every federal agency which is authorized to acquire real property is authorized to resort to condemnation. The authority may be in the form of an agency-specific or program-specific grant of condemnation authority, or it may be in the form of purchase authority, with the condemnation authority derived from 40 U.S.C. § 257.

(3) Legislative taking

When Congress exercises the power of eminent domain directly, it is called a "legislative taking." Congress can accomplish legislative taking simply by enacting a statute which declares that title to the property will vest in the United States as of a specified date, usually the date of enactment. Kirby Forest Industries v. United States, 467 U.S. 1, 5 (1984). An example is the legislation establishing the Redwood National Park, 16 U.S.C. §§ 79c, 79c-1. Another example is the 1988 legislation which expanded the Manassas National Battlefield Park, 16 U.S.C. § 429b(b).

In a legislative taking, since the actual taking is accomplished by statute, the only thing for the court to do is determine the amount of compensation. Court action remains necessary even in a legislative taking because, in any Fifth Amendment taking situation, the determination of just compensation is a judicial function. Monongahela Navigation Co. v. United States, 148 U.S. 312, 327 (1893); 59 Comp. Gen. 380 (1980).

The legislative taking device is infrequently used. With respect to national parks, the Senate Committee on Interior and Insular Affairs has stated a policy that "legislative taking is an extraordinary measure which should be invoked only in those instances in which the qualities which render an area suitable for national park status are imminently threatened with destruction." S. Rep. No. 93-875, at 5 (1974), reprinted in 1974 U.S.C.C.A.N. 5554, 5558, and quoted in B-125035-O.M., April 21, 1976.

This "classic" use of the term "legislative taking" involves the actual acquisition of title by the United States. Courts have begun to use the term in a somewhat broader sense, to describe situations in which a statute, by its very enactment, deprives a private party of some lesser interest. An example is Whitney Benefits, Inc. v. United States, 926 F.2d 1169 (Fed. Cir. 1991), cert. denied, 502 U.S. 952, holding that the enactment of the Surface Mining Control and Reclamation Act of 1977, by prohibiting certain surface mining, effectively "took" the plaintiff's coal mining rights.

(4) Declaration of Taking Act

The Declaration of Taking Act, enacted in 1931 and found at 40 U.S.C. §§ 258a-258e,[28] provides a procedure whereby the United States can get immediate title to property it needs to condemn. Under the Act, the United States may file, either with the original petition or at any time before judgment, a "declaration of taking." The contents of the declaration are set out in 40 U.S.C. § 258a. Along with the declaration, the acquiring agency must deposit its estimated just compensation with the court. Under this statute, once

[28]The legislation was proposed by the Attorney General in a December 1930 letter, quoted in full in United States v. Parcel of Land, 100 F. Supp. 498, 502 n.5 (D.D.C. 1951).

the declaration is filed and the deposit made, two things happen: (1) title to the land, or lesser interest if specified in the declaration, vests in the United States, that is, the land is "taken"; and (2) the right to just compensation vests in the former owner and the United States becomes irrevocably committed to payment of the ultimate award.

The court may order the money on deposit paid over immediately or during the course of the proceedings, on application of the parties in interest. If the ultimate award exceeds the amount of the deposit, the court enters a deficiency judgment against the United States. Id. If the ultimate award is less than the amount paid over from the deposit, the United States is entitled to recover the overpayment, and a judgment to this effect may be entered in the same proceeding. United States v. Miller, 317 U.S. 369, 380-82 (1943); Rule 71A(j), Federal Rules of Civil Procedure.

Once the declaration has been filed and the court deposit made, the agency may proceed to demolish existing structures or erect new ones, provided that the Attorney General is of the opinion that title has vested in the United States or that all interested parties will be bound by the final judgment. 40 U.S.C. § 258e. Also, once title passes to the government, any rentals accruing from the property are payable to the United States, not to the former owner. 15 Comp. Gen. 740 (1936).

The purposes of the Declaration of Taking Act are (1) to permit the government to take immediate possession while simultaneously reducing costs by avoiding liability for interest on the amount of the deposit, and (2) to give the former owner with clear title immediate cash compensation to the extent of the government's estimate. Miller, 317 U.S. at 381.

The Declaration of Taking Act is not an independent grant of acquisition authority or condemnation authority. It merely provides procedures which may be used where the acquiring agency already has the requisite authority to acquire the land in the first place. United States v. Dow, 357 U.S. 17, 23 (1958); Catlin v. United States, 324 U.S. 229, 240 (1945). The constitutionality of the statute has been upheld in several cases. E.g., Travis v. United States, 287 F.2d 916 (Ct. Cl. 1961), cert. denied, 368 U.S. 824.

Apart from issues of just compensation, judicial review is limited to determining that the taking is for a statutorily authorized purpose and that it is for a public use. Catlin, 324 U.S. at 240-43; United States v. Acquisition of 0.3114 Cuerdas, 753 F. Supp. 50, 53 (D. P.R. 1990). In performing this review, the courts will not "second-guess governmental agencies on issues of necessity and expediency" but will essentially look only at "the bare issue of whether the limits of authority were exceeded." United States v. 162.20 Acres, 639 F.2d 299, 303 (5th Cir. 1981), cert. denied, 454 U.S. 828.

As a general proposition, when several tracts are being acquired in a single proceeding, the deposit with the court should be allocated by tract. United States v. 355.70 Acres, 327 F.2d 630 (3d Cir. 1964). The ultimate award may exceed the allocation for some parcels but be below it for others. As long as the money came from the same appropriation, the excess amounts may be used to pay the deficiencies. 19 Comp. Gen. 634 (1940). See also A-88947, December 7, 1937.

As the preceding paragraph suggests, the treatment of money deposited with the court but not needed for whatever reason for its original purpose is governed by the usual rules applicable to the obligation and availability of appropriated funds. Thus, for example, unused funds could not be re-obligated after expiration of the original period of availability to acquire a tract not encompassed by the original obligation. A-88947, October 2, 1937.

An area which appears not to have been explored to any great extent is the relationship of the Declaration of Taking Act to the Antideficiency Act, 31 U.S.C. § 1341, which prohibits making obligations or expenditures in excess or advance of appropriations. An important provision in this connection is 40 U.S.C. § 258c:

> "Action under section 258a of this title irrevocably committing the United States to the payment of the ultimate award shall not be taken unless the chief of the executive department or agency or bureau of the Government empowered to acquire the land shall be of the opinion that the ultimate award probably will be within any limits prescribed by Congress on the price to be paid."

Just months after the Declaration of Taking Act was enacted, an agency needed to acquire a piece of property and was authorized to do so by purchase or condemnation, subject to a monetary cost ceiling. The agency had obtained three appraisals, all of which were

within the cost ceiling. The property owner had demanded a price higher than the appraisals and in excess of the statutory ceiling. The agency thought the owner's asking price was excessive, and that a condemnation award would be more in line with the appraisals and within the appropriation limit. The agency asked whether the Antideficiency Act would preclude it from filing a declaration of taking, since there was no guarantee that the ultimate court award would not exceed the appropriation limit. Since the Declaration of Taking Act does not require absolute certainty (indeed it could not since the judicial determination is beyond the control of the acquiring agency), but merely requires that the agency be of the "opinion" that the award will "probably" be within applicable limits, the Comptroller General advised that the agency could proceed with the condemnation. A-37316, July 11, 1931. Thus, the mere fact that a final award exceeds an applicable limit does not produce an Antideficiency Act violation, and to this extent the Declaration of Taking Act may be said to authorize the over-obligation.[29]

This, however, should not be taken to mean that an agency can act indiscriminately. GAO and the Justice Department have both held that 40 U.S.C. § 258c prohibits the initiation of Declaration of Taking Act proceedings when the agency knows or believes that the award will exceed an applicable ceiling.[30] 57 Comp. Gen. 591 (1978); 2 Op. Off. Legal Counsel 96 (1978). While the specific limitation involved in these two cases no longer exists, the basic point remains valid. Accordingly, while we have found no cases precisely on point, it does not seem unreasonable to suggest that compliance with 40 U.S.C. § 258c, as was clearly the case in the 1931 decision discussed above, is an important factor in evaluating compliance with the Antideficiency Act. In other words, compliance with section 258c should insulate an agency against Antideficiency Act

[29]There are statements in two later decisions, one flatly stating and the other strongly implying, that the Antideficiency Act is violated by an over-obligation resulting from a Declaration of Taking Act proceeding. 54 Comp. Gen. 799, 801 (1975); 17 Comp. Gen. 664, 669 (1938). However, neither decision analyzes what the agency did as opposed to what the court did, and these statements would therefore seem of limited value as guidance.

[30]A monetary ceiling in a statute which specifies only purchase will apply to condemnation as well unless the statute provides otherwise. 10 Comp. Gen. 418 (1931); 6 Comp. Gen. 145 (1926).

violations, whereas an agency which violates section 258c should not be so insulated.

This in turn leads to the question of what constitutes compliance with 40 U.S.C. § 258c, and this too is not always clear. Courts have generally been unwilling to impose a good faith test on the amount of the agency's deposit. United States v. Cobb, 328 F.2d 115 (9th Cir. 1964); In re United States of America, 257 F.2d 844 (5th Cir. 1958), cert. denied, sub nom. Certain Interests in Property v. United States, 358 U.S. 908. One court has gone so far as to suggest that 40 U.S.C. § 258c is satisfied by virtue of the acquiring agency's request to the Attorney General to initiate condemnation proceedings. United States v. 40.75 Acres, 76 F. Supp. 239, 245-246 (N.D. Ill. 1948). However, the courts are not unanimous. The Second Circuit has assumed, for the sake of argument, that it can act when the government's estimate is made in bad faith. United States v. 44.00 Acres, 234 F.2d 410, 415 (2d Cir. 1956), cert. denied, sub nom. Odenbach v. United States, 352 U.S. 916. The Fourth Circuit was "puzzled" by the actions of an agency in depositing one dollar as its estimate of just compensation after offering $180,000 to purchase the land, but resolved the case without having to address the good faith issue. United States v. 45.33 Acres, 266 F.2d 741 (4th Cir. 1959).

Whether the enactment of the Uniform Relocation Act in 1970, which seems to require good faith (see Federal Land Acquisition Policy heading earlier in this chapter), would make any difference is perhaps debatable. In any event, the issue in all of these cases was whether a court could attack the validity of a declaration of taking, which is very different from an Antideficiency Act question. An Antideficiency Act violation could not invalidate a declaration of taking because, if for no other reason, a statute cannot impede the constitutional right to just compensation.

Condemnation "extinguishes all interests in a piece of property and vests absolute title in the government." Schoellkopf v. United States, 11 Cl. Ct. 447, 450 (1987) (emphasis omitted). The United States acquires title "free from all liens or claims whatsoever." United States v. 150.29 Acres, 135 F.2d 878, 880 (7th Cir. 1943). Previous interests "are obliterated." United States v. 25.936 Acres, 153 F.2d 277, 279 (3d Cir. 1946). This applies alike to outstanding mortgages (Schoellkopf), tax liens (150.29 Acres, 25.936 Acres), and judgment liens (10 Comp. Dec. 852 (1904)). While some jurisdictions may give

the creditor a right of action against the former property owner (see Schoellkopf, 11 Cl. Ct. at 450), the general rule is that the funds deposited with the court take the place of the property itself and any liens attach to the funds and not to the property. E.g., 150.29 Acres, 135 F.2d at 880; United States v. 17,380 Square Feet, 678 F. Supp. 443, 445 (S.D. N.Y. 1988); United States v. Certain Property, 225 F. Supp. 498, 504 (S.D. N.Y. 1963). Even where there is no declaration of taking, the recommended procedure if outstanding liens are known is to either make payment to the registry of the court or require the owner to satisfy the liens. 11 Comp. Gen. 498 (1932).

In view of the necessity for a judicial determination, there should be little, if any, occasion to consider administrative claims in connection with a Declaration of Taking Act condemnation. An exception occurred in B-79080, October 12, 1948, allowing a claim for the value of structures which had been removed prior to, and were not included in, the judicial award of just compensation. As a general proposition, however, there is no basis to administratively consider a claim which could have been raised before the court but was not. E.g., B-107841, April 18, 1952.[31]

(5) "Complaint only" condemnation

The second way a federal agency can condemn property directly is by filing a complaint without a declaration of taking. This is sometimes called a "complaint only" or "straight" condemnation. A "complaint only" condemnation is different from a Declaration of Taking Act proceeding in several essential respects: there is no deposit with the court, no immediate vesting of title, and no irrevocable commitment on the part of the United States to pay the award.

In a "complaint only" condemnation, the main purpose of the proceeding is to determine the amount the government will have to pay if it chooses to acquire the property. The government may abandon the proceeding, and is under no obligation to take the land or pay the award. The award amounts to an offer which the

[31]In that case, the government returned part of the condemned property to the former owner who then filed a claim for damages which allegedly occurred during government occupancy.

government may accept by tendering payment. Of course, title does not pass unless and until the compensation is paid. The proceeding also gives the landowner the opportunity to contest the taking. Once the award is made, the decision of whether or not to consummate the condemnation is solely in the government's hands.[32]

If the government abandons the proceeding or chooses not to consummate the condemnation, it must nevertheless compensate the landowner for any public use made of the property. E.g., United States v. 14,770.65 Acres, 616 F. Supp. 1235, 1251 (D. S.C. 1985).

It has been held that, in a "complaint only" proceeding under the General Condemnation Act (40 U.S.C. § 257), no officer of the United States has authority to consent to the entry of a money judgment against the United States, and a judgment purporting to obligate the government is "void and unenforceable." Moody v. Wickard, 136 F.2d 801, 803 (D.C. Cir. 1943). This follows from principles of sovereign immunity and the requirements of the appropriations clause. Thus, under section 254, "an award in condemnation is [merely] an offer subject to acceptance by the [United States]." Id.

It should be apparent that whether to use a declaration of taking or a "complaint only" procedure depends on two main factors: the urgency of the government's need for possession and the availability of funds. In view of the nature of the proceeding, the insufficiency of funds is not a bar to initiating a "complaint only" condemnation. A-5473, November 22, 1924. However, the status of funding is not wholly irrelevant. The United States does not have an indefinite amount of time to respond to the award. In order not to erode the concept of just compensation, the United States must act within a reasonable time or risk dismissal of the proceeding. Miller v. United States, 57 F.2d 424 (D.C. Cir. 1932). In the case cited, the proceeding was dismissed where there was no available appropriation at the

[32]The summary in the text has been distilled from a number of cases: Kirby Forest Industries v. United States, 467 U.S. 1 (1984); Danforth v. United States, 308 U.S. 271 (1939); Barnidge v. United States, 101 F.2d 295 (8th Cir. 1939); United States v. 6,667 Acres, 142 F. Supp. 198 (E.D. S.C. 1956); United States v. One Parcel of Land, 131 F. Supp. 443 (D.D.C. 1955); United States v. Certain Parcel of Land, 51 F. Supp. 726 (E.D. N.Y. 1943); United States v. Certain Lands, 46 F. Supp. 386 (S.D. N.Y. 1942).

time of the award and, a year later, no appropriation had been made nor was a bill pending.

(6) Inverse condemnation

The term "inverse condemnation" (sometimes called "reverse condemnation") encompasses a variety of situations with only one thing in common: they involve acts which the courts view as takings of some interest in private property for which just compensation is payable under the Fifth Amendment. The Supreme Court has called it "a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted." United States v. Clarke, 445 U.S. 253, 257 (1980).

The Court of Federal Claims has used the following definition:

> "Inverse condemnation, therefore, 'is a legal label for effective expropriation of private property, the sovereign acting indirectly without benefit of formal eminent domain proceedings in condemnation; thus, sovereign acts incompatible with an owner's present enjoyment of his property rights'." Schultz v. United States, 5 Cl. Ct. 412, 415 (1984), quoting Wilfong v. United States, 480 F.2d 1326, 1327 n.2 (Ct. Cl. 1973).

The concept is thus an umbrella which covers a wide variety of situations ranging from the actual physical seizure of property to various lesser forms of "invasion."

Inverse condemnation claims are based on the Fifth Amendment. Thus, the jurisdiction of the courts derives from the Tucker Act, under which claims not exceeding $10,000 may be brought either in the district courts or in the Court of Federal Claims, while claims in excess of $10,000 must be brought in the Court of Federal Claims. 28 U.S.C. §§ 1346(a)(2), 1491.

At one time, it was commonplace to say that the United States may exercise its power of eminent domain in either of two ways—by instituting formal condemnation proceedings, or by simply taking physical possession with the owner having a remedy under the Tucker Act. E.g., United States v. Dow, 357 U.S. 17, 21 (1958). As the Supreme Court noted in Kirby Forest Industries v. United States, 467 U.S. 1, 5 (1984), this is still true in the sense that land acquisition by inverse condemnation remains within the power of the United

States, and the parties end up in the same place either way. However, it has been federal policy since enactment of the Uniform Relocation Act that formal condemnation proceedings should be instituted if a voluntary purchase cannot be negotiated, and that an agency should never intentionally force a property owner to bring an inverse condemnation suit.[33] 42 U.S.C. § 4651(8). If agencies pay due regard to this established policy, inverse condemnation cases involving the intentional acquisition of title should largely disappear, and situations like the one described in Althaus v. United States, 7 Cl. Ct. 688 (1985), should no longer happen.[34]

In view of this, while one still encounters the statement that private property can be taken by inverse condemnation, it is more likely to be found in the context of some form of regulatory taking. E.g., Tabb Lakes, Ltd. v. United States, 10 F.3d 796, 800 (Fed. Cir. 1993). In this connection, Executive Order No. 12,630, March 15, 1988, instructs executive agencies to carefully evaluate their activities to prevent unnecessary takings.

6. Obligation of Appropriations for Land Acquisition

a. Voluntary Purchase

As we have noted, the typical transaction follows the same path as one between private parties. The government enters into a purchase contract with the seller, which is later followed by the execution of a

[33]An agency might be tempted to do this, for example, if it thought it could get a "free ride" by having the judgment paid from the permanent judgment appropriation, 31 U.S.C. § 1304. This is the policy basis for GAO's position, discussed in Chapter 14, that certain inverse condemnation judgments should be paid from agency land acquisition funds, the same as direct condemnations. Within the realm of direct condemnations, the Uniform Relocation Act does not purport to regulate whether to use a declaration of taking or "complaint only." Kirby, 467 U.S. at 6.

[34]In Althaus, a government representative allegedly threatened landowners to get them to sell cheaply. There was no recording of what was actually said, but the court summarized its findings at 7 Cl. Ct. 691-692. In effect, the agent told the landowners: "We are going to offer you 30 cents on the dollar and if you don't take it, we'll condemn the land anyway and you'll have to hire an expensive lawyer from the big city who'll take a third of what you get, plus you'll have to pay the court costs." Somehow, he forgot to add ". . . and your little dog, too!"

deed. When a formal purchase contract is used, the obligation occurs when the contract is executed. 17 Comp. Gen. 664, 668 (1938); A-76119, July 3, 1936; A-59458, January 15, 1935. Decision A-59458 stated the principle as follows:

> "Ordinarily, a contract for the purchase of real property to supply an existing need executed in good faith prior to the expiration date of an appropriation is considered sufficient to obligate the appropriation . . . ."

Since we are dealing with a contract, the obligation is recorded under 31 U.S.C. § 1501(a)(1).

If there is no formal purchase contract, the obligation occurs when the deed is executed. 17 Comp. Gen. 664, 668 (1938); 4 Comp. Gen. 371 (1924); A-76119, July 3, 1936.

Where a purchase option is involved, and the government accepts the option in accordance with its terms and within the option period, assuming it has not been sooner revoked, the obligation occurs upon acceptance of the option. The reason is that acceptance of the option in these circumstances constitutes a contract. 56 Comp. Gen. 351, 352 (1977); 17 Comp. Gen. 664, 668 (1938); A-76119, July 3, 1936; A-59458, January 15, 1935.

Once the money is properly obligated, as with any other obligation, it remains available to liquidate the obligation until the account is closed. Thus, in 56 Comp. Gen. 351, GAO advised that there was nothing objectionable in a proposal to spread payment out over four years, as long as the full amount of the purchase price was obligated in the year the purchase agreement was executed.[35]

b. Condemnation

A long line of decisions has established that, in a condemnation case, the obligation occurs when the acquiring agency makes the request to the Attorney General to institute the condemnation proceedings. E.g., 34 Comp. Gen. 418, 423 (1955); 34 Comp. Gen. 67 (1954); 17 Comp. Gen. 664, 668 (1938); 17 Comp. Gen. 631 (1938);

[35]At the time of 56 Comp. Gen. 351, obligated balances remained available, in one form or another, to liquidate the obligation indefinitely. While the result of that case remains the same, an agency should agree to an extended period of time to pay out the balance of the purchase price only after considering the provisions of 31 U.S.C. §§ 1551-1555.

17 Comp. Gen. 111 (1937).[36] The fact that the Attorney General may not actually initiate the proceedings until the following fiscal year is irrelevant. The reason is that an appropriation can be obligated only by the agency to which it was made. E.g., 4 Comp. Gen. 206, 207 (1924).

Where the land acquisition appropriation is available for "expenses incidental" to the acquisition, the obligation for the condemnation award may be viewed as also encompassing necessary expenses incident to the condemnation proceeding, even where the expense is not actually incurred until the following fiscal year. B-55181, February 15, 1946 (title evidence); A-88353, June 18, 1938 (technical studies, etc.).

The exercise of a purchase option followed by condemnation complicates the picture. This can happen, for example, if the seller's title turns out to be defective and must be cleared through condemnation. In this situation, the agency may retain the original obligation, recorded when the purchase option was accepted, or it may de-obligate and record a new obligation when the request for condemnation is made. If the agency retains the original obligation and the condemnation award exceeds the available appropriation, the excess may be charged to appropriations current when the condemnation proceedings were requested. 17 Comp. Gen. 664 (1938). This decision was "amplified" by 19 Comp. Gen. 944 (1940), to emphasize that the administrative choice is not absolute. The agency has the election outlined in 17 Comp. Gen. 664 only where "the condemnation proceedings reasonably may be viewed as a continuation of, and incident to, the land acquisition transaction initiated by the option acceptance." 19 Comp. Gen. at 947. In making this determination, the lapse of time between option acceptance and

[36]A couple of early decisions—1 Comp. Gen. 735 (1922) and 21 Comp. Dec. 870 (1915)—intimated that the obligation arises when the proceeding is actually commenced. Read in the context of later decisions, although not modified expressly by these decisions, these cases should not be construed as selecting actual commencement over the request for obligation purposes.

the condemnation request is relevant but not conclusive. Id. at 947-948.[37] Although there are no decisions, it would seem rather obvious that the principle of these two decisions should apply equally where the original obligation is a formal purchase contract rather than an option acceptance.

The preceding paragraph is best illustrated by a hypothetical example. Suppose an agency has $1,000,000 in fiscal year 2001 money to acquire a piece of property. Before the end of fiscal year 2001, the agency exercises an option or enters into a formal purchase contract for $1,000,000, and records the obligation against its fiscal year 2001 appropriation. In fiscal year 2002, the agency discovers that the seller's title is defective and promptly asks the Attorney General to initiate condemnation. At this point, the agency has a choice. It may retain the original obligation, or it may de-obligate the fiscal year 2001 money and record a new obligation against its fiscal year 2002 land acquisition appropriation (assuming it has one). If the agency retains the 2001 obligation and the condemnation award turns out to be $1,200,000, it may charge the $200,000 "deficiency" to its 2002 funds.

The basic rule for obligating in condemnation cases—that the obligation occurs when the Attorney General is asked to initiate the proceedings—clearly applies when a declaration of taking is used. 34 Comp. Gen. 418, 423 (1955); 34 Comp. Gen. 67 (1954). Indeed, the statutory basis for recording obligations in this context—31 U.S.C. § 1501(a)(6), liability resulting from pending litigation—was intended to address precisely this situation. 35 Comp. Gen. 185, 187 (1955). The rule also clearly applies where an agency is operating under condemnation authority, such as 33 U.S.C. § 594 (Army Corps of Engineers), which authorizes the taking of immediate possession contingent upon the making of adequate provision for the payment of just compensation. See 1 Comp. Gen. 735 (1922).

[37]Unreasonable delay may have other consequences as well. In one case, an agency accepted a purchase option and, after a largely unexplained 2-year delay, filed a condemnation complaint with declaration of taking. The court threw out the option price and permitted the landowner to establish a current (and higher) market value as of the declaration of taking. But for this delay, the option price would have been binding. United States v. 813.96 Acres, 45 F. Supp. 535 (W.D. Ark. 1942), aff'd sub nom. United States v. Stott, 140 F.2d 941 (8th Cir. 1944). See also United States v. 2,974.49 Acres, 308 F.2d 641 (4th Cir. 1962); United States v. 74.12 Acres, 81 F.R.D. 12 (D. Mass. 1978).

In a "complaint only" condemnation, however, the obligational aspects are different. To be sure, an agency whose acquisitions are funded by fiscal-year appropriations may well find itself in a bind. In many cases, the agency will already have received appropriations for the acquisition, and they may expire if they cannot be obligated until after the award is determined.[38] E.g., United States v. Oregon Ry. & Nav. Co., 16 F. 524, 530 (C.C.D. Ore. 1883) (recognizing that funds previously appropriated for the acquisition in question may already have lapsed). Be that as it may, while we have found no decision which directly addresses the distinction between declaration of taking and "complaint only" condemnation for obligational purposes, it seems apparent, consistent with the theory underlying 31 U.S.C. § 1501(a), that a recordable obligation in a "complaint only" condemnation does not arise until the government tenders payment because the United States is not obligated to pay the award.

7. Expenses Incident to Real Property Acquisition

a. Expenses Incident to Title Transfer

Various expenses in addition to the purchase price arise in connection with the acquisition of real property. We have previously discussed one—the cost of procuring evidence of title. The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 provides for several others. Section 303 of the URA, 42 U.S.C. § 4653, directs acquiring agencies to reimburse property owners, "to the extent the head of such agency deems fair and reasonable," for certain expenses which are "necessarily incurred."

Subsection (1) of 42 U.S.C. § 4653 authorizes "recording fees, transfer taxes, and similar expenses incidental to conveying such real property to the United States." Recording fees had long been recognized as an authorized expense, chargeable to the appropriation from which the purchase price is paid. A-33604, October 11, 1930. A state tax on gain from the sale of property, in the

[38]If, as 42 U.S.C. § 4651 directs, you must try to purchase before you resort to condemnation, the money must be available to obligate in case the purchase negotiations succeed. Of course, no-year appropriations, or multiple-year appropriations with an adequate period of availability, will solve the problem.

nature of a capital gains tax, is not reimbursable, either as a "transfer tax" or as a "similar expense." Collins v. United States, 946 F.2d 864 (Fed. Cir. 1991).

Subsection (2) authorizes "penalty costs for prepayment of any pre-existing recorded mortgage entered into in good faith encumbering such real property." This assumes an actual prepayment of a mortgage which provides a prepayment penalty. It does not apply to expenses incident to a "renegotiation" entered into as an alternative to prepaying a low-interest loan. Schoellkopf v. United States, 11 Cl. Ct. 447 (1987).

Subsection (3) authorizes the payment of:

> "the pro rata portion of real property taxes paid which are allocable to a period subsequent to the date of vesting title in the United States, or the effective date of possession of such real property by the United States, whichever is the earlier."

As a general proposition, land owned by the United States is exempt from state and local property taxes. Van Brocklin v. Tennessee, 117 U.S. 151 (1886). The inclusion of subsection (3) in 42 U.S.C. § 4653 evolved from the way most jurisdictions assess property taxes. Commonly, the process begins on a specified date, with a lien attaching as of that date, even though the precise amount of the assessment has not yet been determined. Thus, when the United States purchases real property, there may already be a tax lien covering some period beyond the date of title transfer.

In United States v. Alabama, 313 U.S. 274 (1941), the Supreme Court held that the lien could not be enforced against the United States, but that it nevertheless remained valid. The result was that the United States did not have clear title, a problem if the land was later to be sold. The Comptroller General held in a series of decisions, both before and after Alabama, that (1) the question of whether to discharge a prior lien in order to obtain a more marketable title was within the discretion of the acquiring agency, and (2) if the agency determined that discharge of the lien by payment of the taxes would further the purpose for which the land was acquired, the land acquisition appropriation was available. See 19 Comp. Gen. 768 (1940); B-108401, April 7, 1952; B-46548, January 26, 1945; B-21817, February 12, 1942.

The governmentwide regulations issued by the Department of Transportation instruct agencies to, whenever feasible, pay the items listed in 42 U.S.C. § 4653 directly rather than having the owner pay and then seek reimbursement. 49 C.F.R. § 24.106(b).

Taxes attributable to time periods prior to title transfer are the responsibility of the former owner, not the government. GAO has, however, approved a consensual arrangement whereby, in order to qualify the deed for recording, the acquiring agency would pay the outstanding taxes directly, deduct the amount paid from the purchase price, and then pay the balance to the seller. 10 Comp. Gen. 92 (1930). GAO has also approved outright payment of the taxes in a few situations where payment by the former owner was not a realistic option. 15 Comp. Gen. 179 (1935) (property, mortgaged to government to secure a loan, obtained by foreclosure); 6 Comp. Gen. 587 (1927) (property purchased at execution sale to satisfy judgment against former owner); B-65104, May 19, 1947 (donated property).

b. Expenses Incident to Litigation

(1) Attorney's fees

Attorney's fees and expenses are not viewed as an element of just compensation. E.g., Dohany v. Rogers, 281 U.S. 362 (1930). Thus, attorney's fees and expenses are recoverable from the United States in condemnation cases only to the extent authorized by statute. Compensation is "a matter of legislative grace rather than constitutional command." United States v. Bodcaw Co., 440 U.S. 202, 204 (1979). Currently, two statutes authorize fee recovery in condemnation cases in specified situations—section 304 of the Uniform Relocation Act, 42 U.S.C. § 4654, and the judicial portion of the Equal Access to Justice Act, 28 U.S.C. § 2412(d).

Under 42 U.S.C. § 4654(a), a property owner can recover reasonable costs actually incurred in condemnation proceedings, including reasonable attorney, appraisal, and engineering fees, in two situations: (1) if the final judgment is that the federal agency cannot acquire the property by condemnation (for example, if the court finds the condemnation unauthorized), or (2) if the United States abandons the proceedings. Awards made under 42 U.S.C. § 4654(a) are paid from the appropriations of the acquiring agency. 42 U.S.C. § 4654(b). The primary effect of 42 U.S.C. § 4654(a) is to assure that the landowner in a "complaint only" condemnation is not left

"holding the bag" if the award turns out to be more than the agency is willing or able to pay.

Under 42 U.S.C. § 4654(c), the successful plaintiff in an inverse condemnation suit, whether by judgment or settlement, can recover the same types of fees and expenses as under section 4654(a). Awards under section 4654(c) are generally payable from the permanent judgment appropriation (31 U.S.C. § 1304). The standards the Court of Federal Claims applies in making awards under subsection (c) are discussed in Foster v. United States, 3 Cl. Ct. 738 (1983). The court has been critical of subsection (c)'s potential for excessive and disproportionate awards, suggesting that another look by Congress might be in order. Cloverport Sand & Gravel Co. v. United States, 10 Cl. Ct. 121, 127 (1986).[39]

Subsection (a) of 42 U.S.C. § 4654 applies only to real property. Subsection (c) applies to personal property as well as real property. Pete v. United States, 569 F.2d 565 (Ct. Cl. 1978).

Fees and expenses under 42 U.S.C. § 4654 are not available in the case of a legislative taking. Rocca v. United States, 500 F.2d 492 (Ct. Cl. 1974); Georgia-Pacific Corp. v. United States, 640 F.2d 328, 367 (Ct. Cl. 1980); Miller v. United States, 620 F.2d 812, 840-841 (Ct. Cl. 1980); Hedstrom Lumber Co. v. United States, 7 Cl. Ct. 16, 34 (1984).

In direct condemnation cases where the United States gets the land, section 4654 does not apply, but fees may be awarded in certain cases under 28 U.S.C. § 2412(d), the "judicial half" of the Equal Access to Justice Act.

During the "first life" of the Equal Access to Justice Act (1981-1984), the courts were divided over whether condemnation cases were covered, with the majority holding that they were not. The "reincarnated" version enacted in 1985 makes it clear that condemnation cases are intended to be covered. For a landowner to

[39]Cloverport awarded $9,000 as just compensation and over $76,000 in fees and expenses. Foster is another example ($28,000 just compensation, $186,000 fees and expenses).

be entitled to fees and expenses under 28 U.S.C. § 2412(d), the following tests must be met:

- The landowner must meet the eligibility criteria of 28 U.S.C. § 2412(d)(2)(B).
- The landowner must be the prevailing party. The term "prevailing party" has a special definition for eminent domain cases—the party whose valuation testimony in court is closer to the amount of the ultimate award. 28 U.S.C. § 2412(d)(2)(H).
- The court must find that the position of the United States was not substantially justified. 28 U.S.C. § 2412(d)(1)(A).
- The case must proceed to final judgment. Settlements are expressly excluded. 28 U.S.C. § 2412(d)(2)(H).

Awards under 28 U.S.C. § 2412(d) are paid from the appropriations of the acquiring agency. 28 U.S.C. § 2412(d)(4).

(2) Litigation expenses

In Chapter 17, we discuss in more detail the treatment of "litigation expenses"—expenses incurred by the United States (as opposed to expenses incurred by the opposing party which may be assessed against the United States) in preparing and conducting litigation, such as expenses of witnesses, court fees, process serving expenses, document printing and reproduction expenses, cost of transcripts, etc. The general rule is that litigation expenses are chargeable to the agency conducting the litigation, which is usually the Department of Justice.

The rule applies equally to litigation relating to real property acquisition, such as condemnation proceedings[40] and actions to quiet title.[41] Where litigation expenses are chargeable to Justice Department appropriations under this rule, appropriations of the acquiring agency are not available. As noted earlier in this chapter, the rule no longer applies to the expenses of obtaining title evidence.

[40] E.g., 18 Comp. Gen. 592, 593-594 (1939); 12 Comp. Dec. 304 (1905); 10 Comp. Dec. 538 (1904); 9 Comp. Dec. 793 (1903).

[41] 32 Comp. Gen. 118 (1952); 18 Comp. Gen. 592 (1939).

The fees and expenses of expert witnesses in land condemnation cases appointed by the court under Rule 706, Federal Rules of Evidence, are regarded as litigation expenses payable by the Justice Department, or by the agency conducting the litigation where Justice is not involved. 58 Comp. Gen. 259 (1979). See also 59 Comp. Gen. 313 (1980); 1 Op. Off. Legal Counsel 175 (1977); 1 Op. Off. Legal Counsel 168 (1977).

Under Rule 71A(h), Federal Rules of Civil Procedure, the court in a condemnation case may direct that the issue of just compensation be determined by a panel of land commissioners. If the proceeding is recorded, attendance fees of the court reporter (see 28 U.S.C. § 753) are not litigation expenses but are payable by the Administrative Office of the United States Courts from judiciary appropriations. 55 Comp. Gen. 1172 (1976). The cost of transcripts furnished to the court or to the land commissioners is considered covered by the reporter's salary or, for contract reporters, is determined under the provisions of the governing contract. Id.

C. Relocation Assistance

1. Uniform Relocation Act: Introduction and Overview

In government usage, the term "relocation assistance" can mean two different things—(1) allowances payable to federal employees incident to change of duty station, or (2) assistance to persons forced to relocate as a result of federal or federally financed programs or projects. Our concern here is the second type.

When private property is taken by eminent domain, hardship often follows. Neighborhoods may be disassembled, businesses may be forced to close. At an absolute minimum, individuals and businesses may be uprooted against their will. The "just compensation" mandated by the Fifth Amendment often does not and cannot provide adequate redress. For example, a tenant renting a house or apartment from month to month would most likely get nothing except an eviction notice.

While relatively few government agencies conduct or finance programs which produce significant displacements, the

consequences of these activities by those which do are widespread. In fiscal year 1972, for example, a GAO study found that programs administered by the Federal Highway Administration, the Department of Housing and Urban Development, and the Army Corps of Engineers (which together accounted for 99 percent of federal and federally funded displacements for that year) resulted in the relocation of approximately 119,000 people. Differences in Administration of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, B-148044, June 7, 1973, at 6.

Congress has long recognized that the federal government has a major responsibility in the treatment of those displaced by federal programs or federal dollars. Prior to 1970, it approached the problem piecemeal by including relocation assistance provisions in a number of different program statutes. Although this was better than nothing, treatment under the various provisions was far from uniform. Uniformity is important because, from the perspective of the person or business being uprooted, it makes very little difference which federal agency or program is on the administering end of the boot.

In early 1971, after a decade of study, Congress enacted an important piece of legislation with an awkward but descriptive title: the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA), Pub. L. No. 91-646, 84 Stat. 1894 (1971). The law was amended substantially in 1987 by the Uniform Relocation Act Amendments of 1987, Pub. L. No. 100-17, title IV, 101 Stat. 132, 246, which went into effect in April 1989.

The URA consists of three titles. Title I (42 U.S.C. §§ 4601-4604) is entitled "General Provisions." Section 101, 42 U.S.C. § 4601, defines a number of terms used in the act. Several of the more important ones—"displaced person," "comparable replacement dwelling," "Federal financial assistance"—will be discussed in detail later. Title III (42 U.S.C. §§ 4651-4655), consisting primarily of federal real property acquisition policy and the authorization for the payment of various expenses, has been covered previously in this chapter.

Title II (42 U.S.C. §§ 4621-4638) is entitled "Uniform Relocation Assistance."[42] It starts with section 201, 42 U.S.C. § 4621, which sets forth congressional findings and establishes the underlying policy and purpose of the legislation. Subsection (b), 42 U.S.C. § 4621(b), provides:

> "This [title] establishes a uniform policy for the fair and equitable treatment of persons displaced as a direct result of programs or projects undertaken by a Federal agency or with Federal financial assistance. The primary purpose of this [title] is to ensure that such persons shall not suffer disproportionate injuries as a result of programs and projects designed for the benefit of the public as a whole and to minimize the hardship of displacement on such persons."

The stated intent is to provide equal treatment for persons similarly situated, while also taking into account their "unique circumstances." 42 U.S.C. § 4621(c)(2).

The remainder of Title II consists of the operational provisions, which outline the types of assistance authorized. The key "benefit provisions" are:

- Section 202 (42 U.S.C. § 4622)—moving and related expenses,
- Sections 203 and 204 (42 U.S.C. §§ 4623 and 4624)—replacement housing for homeowners and tenants, respectively,
- Section 205 (42 U.S.C. § 4625)—advisory services, and
- Section 206 (42 U.S.C. § 4626)—housing replacement by federal agency as "last resort."

Section 210, 42 U.S.C. § 4630, extends the provisions of 42 U.S.C. §§ 4622-4625 (but not 4626) to any nonfederal entity (state, local, private) operating with federal financial assistance. Section 216, 42 U.S.C. § 4636, provides that Title II payments are not to be considered income for purposes of federal income taxation or for determining eligibility for assistance under the Social Security Act or any other federal law except low-income housing assistance.

[42]Much of Title II was patterned after the relocation provisions of the Federal-Aid Highway Act of 1968, which the URA repealed. See 23 U.S.C. §§ 501-511 (1964 ed., Supp. V 1969). Interpretive case law arising during the brief life of these provisions may therefore still be useful. Lathan v. Volpe, 455 F.2d 1111, 1123 (9th Cir. 1971). See also Bourne v. Schlesinger, 426 F. Supp. 1025 (E.D. Pa. 1977); 52 Comp. Gen. 300 (1972).

The original law focused on displacements resulting from eminent domain acquisitions. Experience showed that, if the goal was to help displaced individuals, families, and businesses, this was too narrow. The 1987 amendments broadened the scope to embrace virtually all federal or federally assisted acquisitions, as well as certain non-acquisition displacements.

A significant weakness of the 1970 law was its failure to provide for centralized administration. Initially, the President assigned the role of providing some centralized guidance and coordination to the Office of Management and Budget, transferring this role to the General Services Administration in 1973, subject to OMB's policy oversight. Nevertheless, since no single agency had the legal authority to centrally direct and oversee governmentwide relocation procedures, each agency was free to develop its own regulations, and the uniformity which the 1970 legislation sought was not achieved.[43] In 1985, the President assigned lead responsibility to the Department of Transportation. However, there was still no legal basis for Transportation to regulate the other agencies so, the following year, the executive branch turned to a "common rule" (set of regulations published verbatim by 17 different agencies in 17 different places). 51 Fed. Reg. 7000 (February 27, 1986). Congress came to the rescue in the 1987 amendments by statutorily designating Transportation as "lead agency" (42 U.S.C. § 4601(12)) and by enacting a new 42 U.S.C. § 4633 directing Transportation to issue uniform implementing regulations. Those regulations are found at 49 C.F.R. Part 24. Within Transportation, the responsibility is assigned to the Federal Highway Administration. 49 C.F.R. § 24.2(l).

2. The Threshold Determination: Meaning of "Displaced Person"

Section 101(6) of the URA, 42 U.S.C. § 4601(6), defines "displaced person." This is the threshold test that must be met before applying any of the operational provisions. In other words, before you can determine whether you are entitled to moving expenses or replacement housing benefits, you must first qualify as a displaced person under the statutory definition. Of course you must be a

[43]See Changes Needed in the Relocation Act to Achieve More Uniform Treatment of Persons Displaced by Federal Programs, GAO/GGD-78-6 (March 8, 1978); Differences in Administration of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, B-148044, June 7, 1973.

"person" before you can be a "displaced person," so the statute first defines "person" to mean "any individual, partnership, corporation, or association." 42 U.S.C. § 4601(5).

Section 4601(6) then defines "displaced person" as "any person who moves from real property, or moves his personal property from real property" in two types of situation. First is "as a direct result of a written notice of intent to acquire or the acquisition of such real property in whole or in part for a program or project undertaken by a Federal agency or with Federal financial assistance." The second type of situation is permanent displacement of a person who is a residential tenant, operates a small business or a farm, or erects and maintains outdoor advertising billboards, "as a direct result of rehabilitation, demolition, or such other displacing activity as the lead agency may prescribe, under a program or project undertaken by a Federal agency or with Federal financial assistance." The original 1970 definition was limited to acquisitions, essentially the first part of the current definition. The 1987 amendments added the nonacquisition activities in recognition of the fact that the effect on the person forced to relocate is the same.

Note that there are several elements to the definition. First, you must either move from real property or move personal property from real property. Second, the move must result directly from a written notice of intent to acquire, or the actual acquisition of, the real property, or from an authorized nonacquisition activity. Third, the displacing activity must be in connection with a program or project undertaken or financially assisted by a federal agency. All of these elements must be present.

When the displacing activity is acquisition, this typically will mean the acquisition of fee simple title, that is, outright ownership. Routine leasing transactions are not included. Thus, where a building is leased to the government in an open market transaction without condemnation or the threat of condemnation, tenants whose leases are not renewed or whose tenancies are terminated by their landlord are not "displaced persons" for purposes of the URA. 54 Comp. Gen. 841 (1975). Restated, an open-market lease is not an "acquisition" within the scope of 42 U.S.C. § 4601(6). Similarly, if "acquisition" generally contemplates transfer of title, then the acquisition of easements normally will not produce "displaced persons." See, e.g., 58 Comp. Gen. 559 (1979).

Although a lease is normally not an acquisition for purposes of the URA, a lease-construction transaction may be. The legislative history of the 1970 enactment makes it clear that persons displaced by government lease-construction projects are intended to be covered. H.R. Rep. No. 91-1656, 4-5 (1970), reprinted in 1970 U.S.C.C.A.N. 5850.[44] The concept is illustrated in 51 Comp. Gen. 660 (1972). The General Services Administration had signed an agreement to lease a building to be constructed on a tract of land in Alexandria, Virginia. The land had been used as a trailer park. Shortly after the agreement was signed, the owner of the land notified the tenants to vacate. It was held that the transaction amounted to a government lease-construction project for URA purposes, and that tenants who vacated after the agreement was signed qualified as "displaced persons." The decision was discussed and explained further in B-173882, June 8, 1972. However, tenants who had moved from the trailer park before the agreement was signed could not qualify. 54 Comp. Gen. 819 (1975). They were not displaced by a written order to vacate,[45] nor were they displaced "as a result of the acquisition" of the property. URA benefits are not available to "persons who vacate property in the mere anticipation or expectation that there may be an acquisition by the United States." Id. at 822.

Section 4601(6) refers to acquisition "in whole or in part." The court in Beaird-Poulan, Div. v. Dept. of Highways, 441 F. Supp. 866 (W.D. La. 1977), aff'd per curiam, sub nom. Beaird-Poulan, Inc. v. Dept. of Highways, 616 F.2d 255 (5th Cir. 1980), cert. denied, 449 U.S. 971 (1981), found that this referred to spatial divisions rather than components of ownership. The state highway department had taken a portion of a tract of land owned by Beaird-Poulan, a chain saw manufacturer. The taking severed the property into two roughly equal tracts. Although no part of the existing manufacturing facility was located on the lands actually taken, the company was able to establish that it had previously made management decisions to

[44]This is the report of the House Public Works Committee on the bill which became the URA. It contains much useful explanatory material and has been cited frequently both by GAO and by the courts.

[45]Under the 1970 legislation, entitlement to benefits was triggered by actual acquisition or by a written order to vacate. The 1987 revision changed "written order to vacate" to "written notice of intent to acquire."

substantially expand its physical plant due to increased production needs, but that it was now forced to relocate in order to do so, as a result of the taking. In these circumstances, the court held that Beaird-Poulan was a "displaced person."

Under the statutory definition, when acquisition is the displacing activity, displacement must result from either the actual acquisition of the property or a written notice of intent to acquire. If displacement occurs as a result of a written notice of intent to acquire, failure to ultimately acquire the real property will not defeat the entitlement to benefits, as long as the notice was generated by a proposed acquisition. See Alexander v. HUD, 441 U.S. 39, 59 (1979); H.R. Rep. No. 91-1656, at 4.[46]

The acquisition or notice must be "for" a federal or federally funded program or project. In Alexander v. HUD, 441 U.S. 39 (1979), the Supreme Court held that, when HUD acquires property upon default on federally insured loans, tenants displaced by the acquisition are not displaced persons within the meaning of 42 U.S.C. § 4601(6). Random default acquisitions are not intended to further a federal program or project. Id. at 63 and 65. Similar lower court decisions are Caramico v. Secretary of Housing and Urban Development, 509 F.2d 694 (2d Cir. 1974), and Blount v. Harris, 593 F.2d 336 (8th Cir. 1979). As the Caramico court pointed out, default acquisitions represent the failure of the program rather than its desired result. 509 F.2d at 699. The URA, noted the court, "contemplates normal government acquisitions, which are the result of conscious decisions to build a highway here or a housing project or hospital there." Id. at 698.

As noted previously, persons who move without a written notice of intent to acquire and prior to actual acquisition, based on a mere expectation of acquisition, will not qualify as displaced persons. 54 Comp. Gen. 819 (1975). A case making essentially the same point is Messer v. Virgin Islands Urban Renewal Board, 623 F.2d 303 (3d Cir. 1980). However, there are situations in which a move without a written notice and prior to actual acquisition will qualify.

[46]These authorities address the issue in the context of the now obsolete "order to vacate" language. There is no reason why the 1987 change to "notice of intent to acquire" should produce a different result.

In a 1975 decision, for example, GAO concluded that a person who moves after the government has made a firm purchase offer may be said to have moved "as a result of the acquisition" of the property if the acquisition is subsequently completed by purchase or condemnation. 55 Comp. Gen. 595 (1975). Once the offer is made, there is more of a commitment by the United States to acquire the property. The decision pointed out, however, that the mere authorization and appropriation of funds for the acquisition is not sufficient "commitment" by the United States to justify a move under section 4601(6). Id. at 596-97. See also Lowell v. Secretary of Housing and Urban Development, 446 F. Supp. 859 (N.D. Cal. 1977) (agency regulation excluding from eligibility persons who moved prior to execution of federal contract or federal approval of project budget upheld). The DOT regulations recognize the concept of 55 Comp. Gen. 595 by including in the definition of displaced person one who moves as a direct result of the initiation of negotiations for acquisition of the property. When there is no written notice of intent to acquire, initiation of negotiations means delivery of the agency's initial written offer. 49 C.F.R. §§ 24.2(g)(1)(i), 24.2(k).

The case of Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1972), illustrates a different type of "acquisition." The Department of Transportation had provided by regulation for "hardship acquisitions" in highway projects. Under this procedure, once the state had selected a corridor, a property owner could request immediate purchase of his property by the state upon a showing that undue hardship would result from following the standard procedure of deferring acquisition until after federal approval of the design. Applying the agency's regulations, the court viewed the "hardship sale" as an acquisition for purposes of 42 U.S.C. § 4601(6), notwithstanding that the government had not yet committed itself to the project.

Under the original 1970 legislation, a long line of cases established that the displacement must be by a governmental entity (federal, state, or local); a person displaced by a nongovernmental entity (private party) was not a displaced person and therefore not entitled to URA benefits, even though the program or project was federally funded. E.g., Conway v. Harris, 586 F.2d 1137 (7th Cir. 1978); Moorer v. HUD, 561 F.2d 175 (8th Cir. 1977), cert. denied, 436 U.S. 919 (1978). The 1987 amendments changed the focus of the inquiry by adding the nonacquisition activities and by expanding the definition of "displacing agency" (42 U.S.C. § 4601(11)) to include anyone

carrying out a program or project with federal financial assistance, regardless of the presence or absence of the power of eminent domain. Thus, for acquisition-based displacements, the key question is no longer the identity of the party acquiring the property, but whether it received federal financial assistance.

In assessing the continued validity of cases decided under the pre-1987 law, it is therefore necessary to apply the revised definitions and the appropriate version of the DOT regulations. Conway v. Harris, for example, had found the URA inapplicable to residential tenants displaced from property acquired by a private party who intended to rehabilitate the property with HUD "section 8" financial assistance. Under the revised law, the acquisition itself still would not qualify as a displacing activity because it was privately funded. However, since rehabilitation is one of the authorized nonacquisition activities that can trigger entitlement to benefits, the Conway plaintiff would presumably now be covered. Other cases in this category include Isham v. Pierce, 694 F.2d 1196 (9th Cir. 1982) (tenant displaced by private owner for rehabilitation to be financed by loan from HUD), and Devines v. Maier, 665 F.2d 138 (7th Cir. 1981), cert. denied, 469 U.S. 836 (1984)(tenants evicted from housing found to be unfit for human habitation under federally assisted housing code enforcement program).

It is significant that the plaintiffs in the three cases cited in the preceding paragraph were tenants, not owners. The conference report on the 1987 amendments stressed that the expanded definitions are not intended to confer benefits on an owner who voluntarily sells in a noncoercive sale. In contrast, the tenant who is involuntarily evicted as a result of that sale is covered. H.R. Conf. Rep. No. 100-27, at 246 (1987), reprinted at 1987 U.S.C.C.A.N. 122, 230.

Two cases which appear to remain valid under the revised analysis are Austin v. Andrus, 638 F.2d 113 (9th Cir. 1981), and Parlane Sportswear Co. v. Weinberger, 381 F. Supp. 410 (D. Mass. 1974), aff'd, 513 F.2d 835 (1st Cir. 1975), cert. denied, 423 U.S. 925 (1975). Austin denied the claim of members of the Navajo Indian tribe who were forced to relocate when the tribe leased to a coal mining company mining rights on a portion of the reservation. In the Parlane case, Tufts University owned a building in Boston and had leased several floors to a clothing manufacturer. Upon expiration of the lease, Tufts

evicted its tenant in order to establish a Cancer Research Center funded by grants from the (then) Department of Health, Education, and Welfare. The clothing manufacturer was held not entitled to URA benefits. Even under the new analysis, there was neither an acquisition by anyone nor an authorized nonacquisition activity. As another court put it in a somewhat different context, there will always be some losses, and the URA is intended as a supplement, not a guarantee. Pietroniro v. Borough of Oceanport, 764 F.2d 976, 980 (3d Cir. 1985), cert. denied, 474 U.S. 1020 (1985).

The Comptroller General considered an unusual variation in B-213033, August 7, 1984. A private organization proposed to purchase some land and then donate it to the Veterans Administration to be used for the expansion of a VA cemetery. The organization would clear the land of all structures prior to transfer of title. The question was whether existing property owners and tenants would be entitled to claim relocation benefits from the VA. Based on the URA's legislative history and available precedents, GAO said yes, concluding that the transaction could be viewed as an acquisition of property for a federal program.

Thus far, we have been talking about being displaced from the actual property that is being acquired, rehabilitated, etc. The statute recognizes situations in which the property from which you move and the property which is being acquired or rehabilitated do not have to be the same. Under the statutory definition of displaced person, a person can qualify for two of the URA benefits—moving expenses and advisory services—if that person moves from real property, or moves his personal property from real property, as a direct result of the federal or federally funded acquisition of, or authorized nonacquisition activity on, some other real property on which that person conducts a business or farm operation. 42 U.S.C. § 4601(6)(A)(ii). An example from the 1970 legislative history is "the acquisition of right-of-way for a highway improvement in a remote locality [which] may include a general store and gas station, but exclude the operator's nearby dwelling or storage facility." H.R. Rep. No. 91-1656, at 5 (1970). Another example is Forman's Dairy Palm Nursery v. Florida Department of Transportation, 608 So. 2d 76 (Fla. Dist. Ct. App. 1992) (land used by tree nursery reclaimed by owner as result of taking for highway construction).

Finally, what about absentee landlords? If the absentee landlord has personal property to be moved from the acquired or otherwise affected real property, then he would be covered under the plain terms of 42 U.S.C. § 4601(6). However, the statute does not specify how much personal property there has to be. Thus, an absentee landlord who had left a garden rake on the acquired premises would presumably qualify. This being the case, GAO thought it inequitable to deny benefits to an absentee landlord who did not have some minimal amount of personal property to move, and found in B-148044, March 5, 1975, that the nonresident owner of an apartment building could be considered a "displaced person" even with no personal property located on the acquired real property. A state court reached a seemingly opposite conclusion in City of Mishawaka v. Knights of Columbus Home Association, 396 N.E.2d 948 (Ind. Ct. App. 1979). The DOT regulations also seem to require that there be some personal property to move, but they do not attempt to specify how much. 49 C.F.R. § 24.306(a)(1).

3. Types and Payment of Benefits

a. Moving and Related Expenses

Section 202 of the URA, 42 U.S.C. § 4622, authorizes the payment of moving and certain related expenses "[w]henever a program or project to be undertaken by a displacing agency will result in the displacement of any person." The types of benefits vary according to whether the displacement is residential or commercial.

(1) Residential displacements

A person displaced from a dwelling is entitled to receive "actual reasonable expenses" incurred in moving self, family, and personal property. 42 U.S.C. § 4622(a)(1). The types of expenses allowable are further spelled out in 49 C.F.R. § 24.301. Alternatively, the person may elect to receive a fixed "expense and dislocation allowance." 42 U.S.C. § 4622(b). The 1970 legislation prescribed the actual amounts payable. The 1987 amendment deleted the specific amounts, providing instead for the amount to be determined according to a schedule established by the Department of Transportation. Id. The DOT regulations provide for the allowance to be determined "according to the applicable schedule approved by

the Federal Highway Administration." 49 C.F.R. § 24.302. The Federal Highway Administration derives its schedule from data submitted by the various state highway agencies and publishes the schedule as a Notice in the Federal Register about once every three or four years. The most recent schedule (through the date of this chapter's publication) was published in 61 Fed. Reg. 65425 (December 12, 1996).

Neither the statute nor the DOT regulations specifically address persons who move themselves rather than hire commercial movers, but there is no reason they should be excluded. The self-mover presumably has the same election as anyone else.

A person who moves onto the property after its acquisition for a project is not eligible for benefits. 49 C.F.R. § 24.2(g)(2)(ii); B-148044, January 7, 1974. The reason is that the person cannot be said to have been displaced as the result of the acquisition. An agency regulation to this effect was upheld in Lewis v. Brinegar, 372 F. Supp. 424 (W.D. Mo. 1974). However, a regulation purporting to disqualify persons who began occupancy after the initiation of negotiations was invalidated as exceeding statutory authority in Tullock v. State Highway Commission, 507 F.2d 712 (8th Cir. 1974).

(2) Commercial displacements

A person displaced from a place of business or farm also has a choice. Under 42 U.S.C. § 4622(a), he can receive moving expenses including (1) actual reasonable moving expenses, (2) actual direct losses of tangible personal property, (3) actual reasonable expenses in searching for a replacement business or farm,[47] and (4) actual reasonable expenses, not to exceed $10,000, in reestablishing a farm, small business, or nonprofit organization. The specific items allowable are spelled out in 49 C.F.R. §§ 24.303 through 24.305. Payment for losses of personal property is authorized even where the property is not relocated or the business is discontinued, not to exceed the cost of actual relocation. 42 U.S.C. § 4622(a)(2). As the 1970 legislative history points out, there may be situations where the

[47]The regulations limit this item to $1,000. 49 C.F.R. § 24.303(a)(13). There is no comparable allowance in any amount for residential displacements. 49 C.F.R. § 24.305(i) (expressly excluding expenses of searching for a replacement dwelling).

property is not suitable at the new location, or where moving it would be impractical or uneconomical. H. R. Rep. No. 91-1656, 6-7 (1970), reprinted in 1970 U.S.C.C.A.N. 5850.

Alternatively, the person may elect to receive a fixed payment under 42 U.S.C. § 4622(c), determined in accordance with the DOT regulations, of not less than $1,000 nor more than $20,000. Under 49 C.F.R. § 24.306(a), in order for a business to receive a fixed payment under subsection (c) of the statute, the agency must determine, among other things, that:

- the business cannot be relocated without a substantial loss of its existing patronage;
- the business is not part of a commercial enterprise having at least three other entities not being acquired which are under the same ownership and engaged in the same or similar business; and
- the business contributed materially to the displaced person's income during the two taxable years prior to displacement.

The various administrative determinations are designed to keep the program from becoming a giveaway, and the courts will generally uphold an agency's decisions under them as long as they are not arbitrary or capricious. In Starke v. Secretary of Housing and Urban Development, 454 F. Supp. 477 (W.D. Okla. 1977), for example, the court upheld the denial of relocation benefits to a lawyer who had moved his office to a location only three blocks from his former office and in fact closer to the courthouses in which he practiced.

The fixed payment will be equal to the average annual net earnings of the business or farm, calculated as prescribed in 49 C.F.R. § 24.306(e), subject to the statutory maximum and minimum. For a nonprofit, the payment is based on "the average of two years annual gross revenues less administrative expenses." 49 C.F.R. § 24.306(d). (The net earnings formula, as with some of the administrative determinations, used to be specified in the statute; the detail was dropped from the statute in 1987 and is now carried in the regulations.)

The rental of real property is included in the definition of "business" in 42 U.S.C. § 4601(7) and, prior to the 1987 amendments, could qualify for a subsection (c) fixed payment as long as the required determinations could be made. B-148044, November 18, 1975. While

the amendments did not affect this portion of 42 U.S.C. § 4601(7), they added language to 42 U.S.C. § 4622(c) to expressly disqualify persons "whose sole business at the displacement dwelling is the rental of such property to others." The disqualification applies only to the fixed payment option and does not affect entitlement to actual expenses under 42 U.S.C. § 4622(a).

A displaced owner-occupant of a multi-family dwelling who receives income from the dwelling is displaced both from his dwelling and from his place of business for purposes of section 4622, and can receive appropriate benefits in both capacities (H.R. Rep. No. 91-1656, supra, at 8), subject to the fixed payment disqualification described above if applicable.

We have previously noted that an absentee landlord may be considered a displaced person. Naturally, if he does not move, he cannot claim actual moving expenses, but he could claim other authorized expenses as and to the extent applicable. See B-148044, March 5, 1975. (The landlord in that case was the absentee owner of an apartment building and would no longer be eligible for the fixed payment option, but the general proposition remains valid.)

b. Replacement Housing Benefits

In addition to the moving expenses authorized by 42 U.S.C. § 4622, the URA authorizes monetary payments to help displaced persons obtain adequate replacement housing. These replacement housing benefits are contained in 42 U.S.C. §§ 4623 and 4624, applicable to homeowners and tenants, respectively. As with the moving expense payments, replacement housing benefits are available only to those who qualify as displaced persons, and are in addition to any "fair market value" payments received under the eminent domain authority.

(1) Homeowners

Under 42 U.S.C. § 4623(a)(1), a person displaced from a dwelling which he owned and occupied for at least 180 days prior to the initiation of negotiations for acquisition of the property is eligible for a supplemental payment of up to $22,500. The payment consists of the following elements:

- The difference, if any, between the acquisition cost (the eminent domain "fair market value" payment) and the reasonable cost of a comparable replacement dwelling.
- An "interest differential" if the cost of new financing exceeds the interest rate on the homeowner's existing mortgage. To qualify for this payment, there must have been a valid mortgage on the acquired property for at least 180 days prior to the initiation of acquisition negotiations. The regulations provide guidance on computing the differential. See 49 C.F.R. § 24.401(d) and Appendix A to § 24.401.
- Reasonable expenses for evidence of title, recording fees, and other closing costs (but not including prepaid expenses) incident to purchase of the replacement dwelling.

Where displacement is based on an authorized nonacquisition activity, "initiation of negotiations" means the notice to the person that he or she will be displaced or, if there is no such notice, the date the person actually moves from the property. 49 C.F.R. § 24.2(k)(2).

In order to qualify for payment under section 4623(a)(1), the displaced person must purchase and occupy a replacement dwelling within one year from the date he received the final payment for acquisition, or the date the agency provided referrals to replacement housing, whichever is later. 42 U.S.C. § 4623(a)(2). The agency can extend the one-year deadline for good cause. Id. Good cause generally means some event beyond the displaced person's control. See 49 C.F.R. § 24.401(a)(2), Appendix A.

Section 4623 is based on the premise that "a displaced homeowner should not be left worse off economically than he was before displacement, and should be able to relocate in a comparable dwelling which is decent, safe and sanitary, and adequate to accommodate him." H.R. Rep. No. 91-1656, supra, at 8. An acquired dwelling is "owned" if the displaced person held fee title, a life estate, a land contract, a 99-year lease, or a lease including extension options with at least 50 years to run from the date of acquisition. 49 C.F.R. § 24.2(p)(1).

The cost of a comparable replacement dwelling establishes the upper limit of the benefit payment. 49 C.F.R. § 24.403(a). See also B-203827, October 8, 1981 (internal memorandum) (same point under prior version of regulations). To promote uniformity, the law defines "comparable replacement dwelling" as a dwelling that is:

"(A) decent, safe, and sanitary; (B) adequate in size to accommodate the occupants; (C) within the financial means of the displaced person; (D) functionally equivalent; (E) in an area not subject to unreasonable adverse environmental conditions; and (F) in a location generally not less desirable than the location of the displaced person's dwelling with respect to public utilities, facilities, services, and the displaced person's place of employment." 42 U.S.C. § 4601(10).

The "decent, safe, and sanitary" standard is defined in 49 C.F.R. § 24.2(f). Guidance on applying the "functionally equivalent" standard may be found in the conference report to the 1987 amendments, which added the definition. H.R. Conf. Rep. No. 100-27, at 247-248 (1987).

In order to qualify for the "interest differential," it is not necessary that the displaced person be required to obtain a mortgage on the replacement house, only that he in fact do so. In a Louisiana case, a person displaced from his dwelling for highway construction received enough from the eminent domain payment so that he could have paid cash for his replacement house. Instead, he chose to obtain a mortgage on the replacement house at an interest rate higher than that on his old mortgage. The court found that 42 U.S.C. § 4623 does not restrict eligibility to cases where there is not enough cash left over after the taking with which to purchase a replacement dwelling. The homeowner in this case was therefore entitled to an interest differential payment, subject of course to the statutory ceiling. Louisiana Department of Highways v. Coleman, 444 F. Supp. 151 (M.D. La. 1978).

The regulations recognize a "constructive occupancy" concept (49 C.F.R. § 24.403(d)), and the courts have strongly encouraged it. One court has gone so far as to suggest that the "fair and equitable treatment mandate" of the URA requires application of a constructive occupancy exception in appropriate cases. Nagi v. United States, 751 F.2d 826, 830 (6th Cir. 1985). An illustrative case is Ledesma v. Urban Renewal Agency, 432 F. Supp. 564 (S.D. Tex. 1977). The Ledesmas had built a house in their hometown of Edinburg, Texas, but Mr. Ledesma could not find sufficient work in Edinburg to enable them to pay for the house. They moved to a nearby town where Mr. Ledesma found work and rented a house. They always intended to return to the Edinburg house as soon as they could afford to do so. They retained sole control of the Edinburg house, left their furniture and household goods there, and permitted no one else to live or even stay briefly in that house. The

court found that the Ledesmas owned the house for the requisite 180-day period but, due to circumstances beyond their control, did not physically occupy it during that period. Under these facts, the court found them entitled to a replacement housing payment. The constructive occupancy concept is an attempt to "mitigate what might possibly be harsh and unfair results if the 180 day requirement were blindly or mechanically imposed." Id. at 567.

In Seeherman v. Lynn, 404 F. Supp. 1318 (M.D. Pa. 1975), the Department of Housing and Urban Development had applied a constructive occupancy exception in order to authorize the payment of replacement housing benefits to homeowners who did not physically occupy their homes immediately prior to acquisition because they had been displaced by a flood. The court upheld the refusal to apply the same exception to a husband and wife who had been building a house at the time of the flood but were not "displaced" from it because they had never occupied it in the first place. Id. at 1322.

(2) Tenants and "90-day homeowners"

In enacting the URA, Congress recognized that the lack of adequate and affordable rental housing for displaced lower income individuals and families "presents the most difficult of all relocation problems." H.R. Rep. No. 91-1656, 12 (1970), reprinted in 1970 U.S.C.C.A.N. 5850. These are the persons who would generally receive nothing from the eminent domain taking. Section 204 of the Act, 42 U.S.C. § 4624, attempts to address this problem.

Under 42 U.S.C. § 4624, benefits are payable to a displaced person who (1) is not eligible to receive payments under 42 U.S.C. § 4623, and (2) lawfully occupied the dwelling from which displaced for at least 90 days prior to the initiation of the acquisition negotiations. In the case of an authorized nonacquisition displacing activity, the initiation of negotiations has the same meaning as it does for purposes of 42 U.S.C. § 4623.

The amount payable is the amount necessary to enable the displaced person to lease or rent a comparable replacement dwelling for up to 42 months, not to exceed $5,250. Payment may be in a lump sum or in periodic installments, in the agency's discretion. The regulations, 49 C.F.R. § 24.402(b), prescribe the method of calculating the

amount of the benefit. The displaced person may, at his or her election, use the money as a down payment on the purchase of a "decent, safe, and sanitary replacement dwelling," in which event the agency may, again in its discretion, pay the maximum amount allowable without regard to any calculations. 42 U.S.C. § 4624(b); 49 C.F.R. 24.402(c). This latter option is designed to encourage home ownership. H.R. Rep. No. 91-1656, supra, at 12.

If a displaced tenant wishes to purchase a replacement home and seeks down payment assistance under 42 U.S.C. § 4624(b), eligibility is not affected by the fact that the tenant plans to purchase the home as co-owner with some other person who is not entitled to URA benefits. B-148044, June 18, 1975.

Benefits under 42 U.S.C. § 4624 are available not only to rental tenants but also to homeowners who cannot meet the 180-day test for benefits under 42 U.S.C. § 4623 but who have owned and occupied the displacement dwelling for at least 90 days prior to the initiation of negotiations. Ninety-day home owners who elect to purchase a replacement home cannot receive more than they would have received under 42 U.S.C. § 4623 if they had met the 180-day test. 42 U.S.C. § 4624(b).

Mobile homes present complications and are treated in 49 C.F.R. Part 24, Subpt. F. Mobile homes are considered real property in some states and personal property in others. Also, a person may own a mobile home and rent the land on which it sits, or vice-versa, and in choosing a replacement dwelling may buy one and rent the other. While there may thus be two different property interests involved, the displaced person should not receive greater benefits than the displaced owner of a stationary home in comparable circumstances. 57 Comp. Gen. 613 (1978). Under the regulations, you compute benefits separately for the dwelling and the site, applying to each the appropriate provisions of the law and regulations depending on which is owned and which is rented. However, the total replacement housing payment may not exceed the ceiling applicable to the dwelling. 49 C.F.R. § 24.505(a).

c. Advisory Services

Section 205 of the URA, 42 U.S.C. § 4625, requires agencies to provide a relocation assistance advisory program for displaced persons. The advisory services may extend to persons occupying property immediately adjacent to acquired property (42 U.S.C.

§ 4625(b)), and to short-term tenants who would not otherwise qualify as displaced persons (42 U.S.C. § 4625(f)). The advisory program was viewed as a "key element" of a successful relocation program. H.R. Rep. No. 91-1656, supra, at 13. Thus, the responsibility of an agency is not limited to merely paying appropriate benefits when claimed. There is an affirmative duty to help persons who have been or are going to be displaced, by developing and making available a variety of relocation information and assistance.

The statute lists the types of services to be included in the advisory program, and directs agencies to cooperate with one another and to coordinate their relocation activities. For example, the program should "provide current and continuing information on the availability, sales prices, and rental charges of comparable replacement dwellings for displaced homeowners and tenants and suitable locations for businesses and farm operations." 42 U.S.C. § 4625(c)(2).

There is relatively little case law construing the advisory service requirements of 42 U.S.C. § 4625. One of the required services is to "assist a person displaced from a business or farm operation in obtaining and becoming established in a suitable replacement location." 42 U.S.C. § 4625(c)(4). This, said one court, "requires only assistance, not assistance guaranteeing a successful result." American Dry Cleaners and Laundry, Inc. v. U.S. Department of Transportation, 722 F.2d 70, 73 (4th Cir. 1983). Another court has noted that the existence of a file folder on relocation assistance does not satisfy the statute. United Family Farmers, Inc. v. Kleppe, 418 F. Supp. 591, 602 (D. S.D. 1976), aff'd, 552 F.2d 823 (1977).

d. "Last Resort" Replacement Housing

The URA places considerable emphasis on adequate replacement housing. Under 42 U.S.C. § 4625(c)(3), one of the elements agencies are to address in their advisory programs is the assurance that people will not be forced to move without first being given a reasonable opportunity to relocate to comparable housing. However, as anyone who is less than wealthy well knows, providing adequate and affordable housing is easier said than done.

Section 206 of the URA, 42 U.S.C. § 4626, has rightly been termed an "innovative" provision. Catherine R. Lazuran, Annotation, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 33 A.L.R. Fed. 9, 30 (1977). Under subsection (a), if a federal or

federally assisted project "cannot proceed on a timely basis because comparable replacement dwellings are not available," the agency head is authorized to "take such action as is necessary or appropriate to provide such dwellings by use of funds authorized for such project." This may include the direct construction of new housing, the acquisition and rehabilitation of existing housing, the relocation of existing housing, and the stimulation of housing development through the use of "seed money" loans. H.R. Rep. No. 91-1656, supra, at 15; 49 C.F.R. § 24.404(c)(1). Subsection (a) also expressly authorizes agencies to exceed the payment ceilings of 42 U.S.C. §§ 4623 and 4624, but only on a case-by-case basis and for good cause in accordance with the DOT regulations. DOT has emphasized that "housing of last resort is not an independent program, but is merely an extension of the replacement housing function." 53 Fed. Reg. 27604 (July 21, 1988) (supplementary information statement on proposed uniform regulations).

An agency cannot require a displaced person to accept agency-provided housing in lieu of applicable monetary payments (just compensation payment, if any, and supplemental payment under 42 U.S.C. §§ 4623 or 4624). This can be done only if the displaced person agrees. H. R. Rep. No. 91-1656, supra, at 14-15; 49 C.F.R. § 24.404(b).

Subsection (b) of 42 U.S.C. § 4626 states:

> "No person shall be required to move from his dwelling on account of any program or project undertaken by a Federal agency or with Federal financial assistance, unless the head of the displacing agency is satisfied that comparable replacement housing is available to such person."

The statute itself is not an absolute guarantee of adequate replacement housing; it provides merely that the agency head must be "satisfied" that it is available, whatever that means. The regulations take it a step further, however. In a paragraph entitled "Basic rights of persons [being] displaced," the regulations state flatly that "no person shall be required to move from a displacement dwelling unless comparable replacement housing is available to such person." For emphasis, the next sentence states that "[n]o person may be deprived of any rights the person may have under the Uniform Act or this part." 49 C.F.R. § 24.404(b). Although its scope has yet to be judicially tested, this, especially in conjunction with the

statutory definition of "comparable replacement dwelling," appears to create a substantive right of major importance.

The URA does not require that comparable replacement housing be located in the immediate neighborhood of the displacement housing, Mejia v. U.S. Department of Housing and Urban Development, 518 F. Supp. 935, 938 (N.D. Ill. 1981), aff'd, 688 F.2d 529 (7th Cir. 1982), or even in the same county, Katsev v. Coleman, 530 F.2d 176, 180-181 n.7 (8th Cir. 1976). Thus, the lack of suitable replacement housing in the immediate neighborhood is not sufficient to trigger the "last resort" housing authority. Mejia, 518 F. Supp. at 938. In light of the 1987 addition of the statutory definition of "comparable replacement dwelling," one element of which is that the housing be in a location generally not less desirable with respect to the displaced person's place of employment, the outer boundaries of this concept remain to be determined.

Clearly, one effect of the replacement housing program can be to change the displaced person's status from tenant to homeowner. E.g., 42 U.S.C. § 4624(b); 49 C.F.R. § 24.404(c)(1)(viii). The reverse possibility raises a very thorny problem. In B-148044, July 18, 1977, GAO considered this question: Does 42 U.S.C. § 4626 amount to a guarantee of continued home ownership, or may rental housing be considered appropriate replacement housing for displaced homeowners? GAO surveyed agencies with the most relocation experience, and found considerable disagreement. GAO also found both the statute and the legislative history ambiguous. On balance, the decision concluded that the use of rental housing under 42 U.S.C. § 4626 when home ownership is not feasible is not legally precluded, although it is obviously an undesirable option and should not be encouraged.[48] Recognizing that there is room for legitimate disagreement, GAO recommended congressional clarification, and reiterated its recommendation in its report entitled Changes Needed in the Relocation Act to Achieve More Uniform Treatment of Persons Displaced by Federal Programs, GAO/GGD-78-6 (March 8, 1978).

[48]The decision also involved the question of whether 42 U.S.C. § 4626 is subject to the monetary ceiling of 42 U.S.C. § 4623, a question on which there also was considerable disagreement and which was resolved in the 1987 amendments to the statute.

e. Federally Assisted Programs and Projects

The relocation benefits we have been discussing apply not only to federal programs but also to nonfederal programs carried out with federal financial assistance. With respect to nonfederal programs, the federal agency providing the assistance has a limited oversight role. Under section 210 of the Uniform Relocation Act, 42 U.S.C. § 4630, a nonfederal displacing agency must provide "satisfactory assurances" that it will comply with 42 U.S.C. §§ 4622 (moving and related expenses), 4623 and 4624 (replacement housing benefits), and 4625 (advisory services) as a condition of any grant, contract, or agreement under which federal dollars will be available to pay all or any part of the cost of any program or project which will displace anyone. It must also provide "satisfactory assurances" that, except for certain emergency situations, comparable replacement housing will be available within a reasonable time prior to displacement.

A "satisfactory assurance" for purposes of this provision requires some reasonable factual basis, but it does not mean a guarantee that the housing in fact exists. Katsev v. Coleman, 530 F.2d 176, 181 (8th Cir. 1976); Battison v. City of Niles, 445 F. Supp. 1082, 1090-91 (N.D. Ohio 1977).

To trigger 42 U.S.C. § 4630, it is not necessary that federal dollars be used for the specific acquisition. It is sufficient that the displacing agency's program or project which will result in the acquisition (or authorized non-acquisition activity) is federally assisted. H.R. Rep. No. 91-1656, at 4 (1970) reprinted in 1970 U.S.C.C.A.N. 5850; Lake Park Home Owners Association v. U.S. Department of Housing and Urban Development, 443 F. Supp. 6 (S.D. Ohio 1976). As the same court explained a few years later, however, the mere existence of federal assistance is not enough. There must be "some present nexus" between the federally assisted program or project and the displacing activity. Day v. City of Dayton, 604 F. Supp. 191, 197 (S.D. Ohio 1984).

A 1976 decision, B-180812, March 25, 1976, discussed the application of 42 U.S.C. § 4630 to waste treatment facility grants by the Environmental Protection Agency. The decision made two important points:

- Section 4630 does not require that URA benefits be strictly limited to cases where displacement occurs after the commitment of federal financial assistance. Rather, the state or municipal grantee should be

required to provide relocation benefits to those displaced from any site which, at the time of acquisition (or at any time thereafter prior to actual displacement), was planned as the site of a federally assisted facility. GAO recognized the risk to the grantee in that relocation costs will not be reimbursed if the assistance is ultimately not granted. However, this approach was viewed as most consistent with the intent of the URA.

- If a grant application is received from a state or municipality which has already acquired property or displaced persons without providing relocation benefits, the applicant should be required to retroactively "cure" the noncompliance. If substantial compliance with the URA cannot be achieved in this manner, the application should be denied.

The 1987 amendments to the URA added an alternative to the "satisfactory assurance" approach of 42 U.S.C. § 4630. A state agency may certify that it will operate in accordance with state laws that accomplish the purpose and effect of the URA. A federal agency fulfills its responsibility under the URA by accepting this certification. The Department of Transportation, in coordination with the program agency, periodically monitors state compliance. If the state agency violates its certification, the program agency may withhold its approval of financial assistance, or may rescind its approval of the certification. 42 U.S.C. § 4604; 49 C.F.R. § 24.4(a)(3) and Part 24, Subpt. G.

"Federal financial assistance" for URA purposes is defined as "a grant, loan, or contribution provided by the United States" but expressly excludes (1) any federal guarantee or insurance, and (2) any interest reduction payment to an individual in connection with the purchase and occupancy of a residence by that individual. 42 U.S.C. § 4601(4); 49 C.F.R. § 24.2(j). Thus, if the only federal financial involvement is in the form of a guarantee or insurance, the URA does not apply regardless of who displaces whom from what. E.g., Dawson v. U.S. Department of Housing and Urban Development, 428 F. Supp. 328, 332 (N.D. Ga. 1976), aff'd, 592 F.2d 1292 (5th Cir. 1979) (assistance under section 236 of the National Housing Act is encompassed by the "guarantee or insurance" exclusion).

A question lurking in the bushes is the extent to which the term "federal financial assistance" does or does not include block grants.

The genesis of the question is a series of cases holding the URA inapplicable where the only federal funds involved were funds provided under the now defunct general revenue sharing program. The reason was that revenue sharing funds were intended to be provided with no "federal strings"; they were not associated with any particular project, but could be used by the states as they saw fit. Goolsby v. Blumenthal, 590 F.2d 1369 (5th Cir. 1979), cert. denied, 444 U.S. 970; B-148044, December 10, 1973; B-130515-G.94, March 7, 1979.

It is arguable that this analysis applies, at least to some extent, to block grant programs. For example, one court has found the URA inapplicable where the federal assistance consisted of Community Development Block Grant (CDBG) funds, stating that "the URA is only applicable when the federal financial assistance is provided . . . for a specific program or project." Isham v. Pierce, 694 F.2d 1196, 1204 (9th Cir. 1982). See also Young v. Harris, 599 F.2d 870, 878 (8th Cir. 1979). Other cases have involved CDBG funds without addressing the issue. E.g., Gomez v. Chody, 867 F.2d 395 (7th Cir. 1989).

Relocation costs incurred directly by a federal agency are treated simply as part of the cost of the program or project. Relocation costs incurred by a nonfederal displacing agency are reimbursable from the federal agency which is providing the financial assistance "in the same manner and to the same extent" as other program or project costs. 42 U.S.C. § 4631(a). Thus, for example, if the relevant program legislation has a matching fund requirement, it will apply to allowable relocation costs. H.R. Rep. No. 91-1656, supra, at 17. However, if state eminent domain law provides for payments which "have substantially the same purpose and effect" as URA benefits, those payments will not constitute allowable program or project costs. 42 U.S.C. § 4631(b). The 1987 amendments extended this anti-duplication provision to apply the "substantially the same purpose and effect" concept to other federal payments as well. Examples may be found in H.R. Conf. Rep. No. 100-27, at 255 (1987).

Subsection (c) of 42 U.S.C. § 4631 required that grants and contracts with state agencies executed prior to the effective date of the URA be amended to include URA benefits. In 51 Comp. Gen. 267 (1971), the Comptroller General advised the Department of Housing and Urban Development that contracts which provided for full federal

funding of certain relocation costs authorized by the Housing Act still had to be amended to reflect the new URA benefits, but did not have to include the cost-sharing requirements of 42 U.S.C. § 4631(a). However, where existing contracts did not include relocation payments, the amended contracts would have to reflect the subsection (a) cost-sharing requirements. B-173957, September 7, 1972.

f. Procedures and Payment

The payment of benefits under the URA is not automatic; the displaced person must apply to the proper agency. The regulations try to be user-friendly in this regard, placing the initial burden on the displacing agency. The agency is directed to give written notification to persons scheduled to be displaced, including a general description of the types of payments for which the person may be eligible and applicable procedures. 49 C.F.R. § 24.203(a). Agencies are also directed to provide reasonable assistance to help persons file their claims. 49 C.F.R. § 24.207(a). Since displaced persons often tend to be lower-income individuals and families, this is as it should be. Specific procedures are up to the individual agency.

Subject to waiver for good cause, claims should be filed within 18 months after the date of displacement or the date of the final payment for acquisition, if applicable, whichever is later. 49 C.F.R. § 24.207(d). The regulations further instruct agencies to review claims “in an expeditious manner” and to make payment “as soon as feasible” after receipt of sufficient documentation to support allowance. 49 C.F.R. § 24.207(b).

Any sound claims settlement system should include an administrative appeal process, the objective being to maximize administrative resolution and minimize the need to go to court. In the case of the URA, an appeal process is required. 42 U.S.C. § 4633(b)(3); 49 C.F.R. § 24.10. If a claim is denied in whole or in part for any reason, the agency must notify the claimant in writing, setting out the agency’s appeal procedures. 49 C.F.R. § 24.207(g). If the appeal is denied in whole or in part, the agency must again provide written notification, this time advising the claimant of his or her right to seek judicial review. 49 C.F.R. § 24.10(g).

The URA authorizes advance payments in two situations. First, a federal agency, upon determining that it is necessary for the expeditious completion of a program or project, may advance the

federal share of authorized relocation costs to a state agency. 42 U.S.C. § 4631(c). Second, a displaced person may, in hardship cases and upon proper application, receive advance payment of applicable relocation benefits. 42 U.S.C. § 4633(b)(2). Advance payment under section 4633(b)(2) should be "subject to such safeguards as are appropriate to ensure that the objective of the payment is accomplished." 49 C.F.R. § 24.207(c).

4. Public Utilities

A public utility will typically have two different types of facilities which it may be required to relocate. First, like any other business entity, it will have business offices—office space which it may own or lease, with desks, file cabinets, etc. With respect to these business offices, the URA applies to the utility the same as it applies to any other business entity. Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co., 464 U.S. 30, 35 (1983).

Unlike most other business entities, however, the utility has a second type of property—facilities for the transmission of telephone service, electric power, natural gas, etc., to the consumer. Perhaps the most familiar example is the ubiquitous telephone pole. With respect to these "utility facilities," the situation is more complicated. There is a common-law rule and several statutory exceptions, all of which exist side-by-side.

a. The Common Law

When a utility wishes to place transmission facilities on public property, it must first obtain permission to do so in the form of a grant of an appropriate right-of-way. A right-of-way may be in various forms, such as a license, a franchise, or an easement. The traditional form of right-of-way for utility lines has been a franchise, a form of special privilege which is more than a mere license but less than an easement. E.g., Artesian Water Co. v. Delaware Department of Highways & Transportation, 330 A.2d 432, 440 (Del. Super. Ct. 1974), modified and aff'd, 330 A.2d 441 (Del. 1974).

Under the common-law approach, the governmental entity which grants a special privilege can take it away when some paramount public need so requires. A utility receiving a franchise does so with this understanding. "[W]hen [the utility] located its pipes it was at the risk that they might be, at some future time, disturbed, when the State might require for a necessary public use that changes in

location be made." New Orleans Gas Light Co. v. Drainage Comm'n, 197 U.S. 453, 461 (1905). Permission to locate utility facilities on public property "does not create an irrevocable right to have such . . . facilities remain forever in the same place." Tennessee v. United States, 256 F.2d 244, 258 (6th Cir. 1958). Within this framework developed the "long-established common law principle that a utility forced to relocate from a public right-of-way must do so at its own expense." Norfolk Redevelopment and Housing Authority, 464 U.S. at 34 (citing and following New Orleans Gas Light Co.).

The earliest GAO decision applying this rule appears to be 10 Comp. Gen. 331 (1931). Underground construction of various distribution lines from the Capitol power plant to congressional office buildings necessitated the relocation of utility lines in the District of Columbia. The Comptroller General advised the Architect of the Capitol that relocation costs could not be charged to the construction appropriation, stating:

> "Rights of way or franchises granted by municipalities or by State or Federal authorities to public utility corporations, in public streets, etc., to operate their business are usually coupled with reservations that the public utility company will, upon demand of the granting authority, vacate the streets, etc., or relocate or divert its conduits, lines, etc., to meet the needs of the granting authority as they arise." Id. at 331.

Another early decision, A-38299, September 8, 1931, quoted in 44 Comp. Gen. 59, 60-61 (1964), stated the rule as follows:

> "The placing of [utility] lines on public lands must be understood as subject to the paramount needs of the United States, and when their removal becomes necessary because of interference therewith the expenses of such removal may not be charged to the United States in the absence of specific statutory authority to that effect."

A more recent decision advised the Architect of the Capitol that there was no authority to reimburse the local electric company for relocation costs incident to construction of a Library of Congress building. 51 Comp. Gen. 167 (1971). The Comptroller General discussed the rule in some detail in 18 Comp. Gen. 806 (1939), a case involving the relocation of telephone lines incident to the construction of a highway on government-owned land. The relocation of utility lines is the exercise by the United States of its inherent regulatory authority over its property. The United States

has the same "police power" over federal land that the states have over state land. The legitimate exercise of a police power, at least in this context, is not a taking of a property interest for purposes of the constitutional requirement of just compensation. Thus, as long as the relocation is required for a valid public purpose, the utility must bear the cost. The decision treated the distinction between a franchise and a license as essentially immaterial. Id. at 807.

If, under the common-law rule, the government can't pay for relocating utility lines, how about relocating or altering the government facility? As you may have guessed, there is a decision on that, too. If an agency's appropriations are not available to pay a utility's relocation costs in a particular situation, they are equally unavailable for relocating or altering the government facility as an alternative. B-33911, May 5, 1943. This point is little more than the application of common sense. The decision also points out that, for purposes of the rule, it makes no difference whether the government facility was in existence when the license or permit was originally granted, or was subsequently erected.

The common-law rule has been applied with respect to all types of public lands: land in a national park, A-36464, July 22, 1931; land in a national forest, A-38299, September 8, 1931; land acquired by a federal agency for a specific project, 18 Comp. Gen. 806, cited above; and unreserved public land, B-11161, August 21, 1940. However, in 19 Comp. Gen. 608 (1939), it was found inapplicable to certain Indian lands. The land in question was Pueblo land in New Mexico, title to which, unlike the more typical reservation, was held communally by the Indians. GAO found that the lands were not "public lands" as that term had been judicially defined. 19 Comp. Gen. at 611, citing, e.g., Lane v. Pueblo, 249 U.S. 110, 113 (1919). Therefore, the United States did not have a right paramount to that of the utility, and project appropriations were available to pay utility relocation costs.

A few not very recent decisions considered licenses granted by the Federal Power Commission (FPC) under the Federal Power Act of 1920, as amended, 16 U.S.C. ch. 12. Generally, the common-law rule regarding utility relocation expenses applies. The fact that the FPC charged the licensee a fee under the statute was not material. B-33911, May 5, 1943; A-44362, December 1, 1932. In a 1955 case, however, the FPC determined that, under the terms and conditions

of the specific license involved, the licensee was not obligated to bear the relocation expenses, and reimbursement was permitted under a "necessary expense" rationale. B-122171, April 5, 1955.

For purposes of determining whether an agency can pay utility relocation costs, the difference between a franchise and a license is largely immaterial. This is not true with respect to an easement, however, which, unlike a license or a franchise, is generally viewed as creating a compensable interest in land. E.g., Artesian Water Co., 330 A.2d at 440.[49] In 36 Comp. Gen. 23 (1956), GAO recognized the distinction and held that the United States could participate in utility relocation costs where the utility had been granted an easement under 43 U.S.C. § 961 over a specific location where there had been no preexisting government facility. Of course, the government can always condemn the easement. See B-13574, December 2, 1940. See also 42 Comp. Gen. 177 (1962) in which relocation costs were denied because the terms of a special use permit granted by the National Park Service were regarded as prevailing over an easement which had been granted to a utility by the party from whom the government acquired the property.

The Federal Land Policy and Management Act of 1976 has its own right-of-way provisions, found at 43 U.S.C. §§ 1761-1771. With certain exceptions, they apply generally to land and interests in land owned by the United States and administered by the Interior Department's Bureau of Land Management, and to land within the National Forest System under the jurisdiction of the Secretary of Agriculture. 43 U.S.C. §§ 1702(e), 1761(a). Along with the enactment of these provisions, the FLPMA repealed a number of pre-existing right-of-way statutes, including 43 U.S.C. § 961, insofar as they apply to lands covered by the FLPMA. Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793 (1976). The FLPMA defines right-of-way as including "an easement, lease, permit, or license" (43 U.S.C. § 1702(f)), a definition consistent with the consolidation of provisions addressing these various forms of right-of-way. Accordingly, cases like 36 Comp. Gen. 23, apart from the fact that they continue to apply to non-FLPMA lands, would appear to remain valid under FLPMA. In any

[49]An interest in land greater than an easement is of course also compensable. For a case distinguishing between a leasehold interest (compensable) and a license (non-compensable), see Potomac Electric Power Co. v. Fugate, 180 S.E.2d 657 (Va. 1971).

event, the essence of 36 Comp. Gen. 23 is the nature of the utility's property interest and not the statute under which it was granted.

A key factor in establishing the government's liability in 36 Comp. Gen. 23 was that the easement was for a specific location. The significance of this can be illustrated by a case involving the reverse situation—relocation of power lines owned by the government. The Bonneville Power Administration had acquired by condemnation an easement for power lines on land owned by a railway company. Expansion of the railway necessitated relocation of the power lines, and the question was whether Bonneville or the railway should pay for the relocation. The government's easement was a general easement to maintain the lines, not tied in to any specific location, and unconditional acquiescence by the railway could not be established. In these circumstances, the government—analogous to the public utility in the more typical case—had to bear the expense. United States v. Oregon Electric Railway Co., 195 F. Supp. 182 (D. Or. 1961).

b. Statutory Exceptions

(1) Uniform Relocation Act

The original enactment of the Uniform Relocation Act in 1970 did not address public utilities, and the Supreme Court held that, with respect to "utility facilities" as opposed to normal business offices, they were not covered. In Norfolk Redevelopment and Housing Authority v. Chesapeake and Potomac Telephone Co., 464 U.S. 30 (1983), the Court held that a public utility forced to relocate telephone transmission facilities as a result of a federally funded urban renewal project was not a "displaced person" under the URA. Applying the principle that a statute should not be construed to repeal or displace the common law unless the intent to do so is expressed in clear and explicit language, the Court said:

> "Our analysis of the statute and its legislative history convinces us that in passing the Relocation Act Congress addressed the needs of residential and business tenants and owners, and did not deal with the separate problem posed by the relocation of utility service lines. We hold, therefore, that the Relocation Act did not change the long-established common law principle that a utility forced to relocate from a public right-of-way must do so at its own expense; it is not a 'displaced person' as that term is defined in the Act." Id. at 34.

See also Consumers Power Co. v. Costle, 615 F.2d 1147 (6th Cir. 1980).

The 1987 amendments to the URA added a provision, 42 U.S.C. § 4622(d), to authorize limited relocation assistance to public utilities forced to relocate their facilities incident to a program or project undertaken by a displacing agency, as long as the program or project is not one whose purpose is to relocate or reconstruct the facility. The facility to be displaced may be publicly, privately, or cooperatively owned, but must be located on public property or property over which a state or local government has an easement or right-of-way, and must be operating under a franchise or similar agreement (or state statute which serves the same purpose). The authorized payment is limited to the amount of "extraordinary costs" incurred by the utility in connection with the relocation, "less any increase in the value of the new utility facility above the value of the old utility facility and less any salvage value derived from the old utility facility." 42 U.S.C. § 4622(d)(1). Extraordinary costs are nonroutine relocation expenses of the type that the owner "ordinarily does not include in its annual budget as an expense of operation." 42 U.S.C. § 4622(d)(2)(A).

There is an important difference between 42 U.S.C. § 4622(d) and the other benefit provisions of the URA: while the other provisions are cast in mandatory language, section 4622(d) is discretionary—the displacing agency "may" make the relocation payments. In preparing the uniform implementing regulations (49 C.F.R. § 24.307), the Department of Transportation was urged—probably by the utilities—to make the benefits of section 4622(d) mandatory. It expressly refused to do so, stating that "[i]t would not be appropriate to make mandatory by regulation that which was left clearly permissive by statute." 54 Fed. Reg. 8923 (March 2, 1989) (Supplementary Information statement).

The regulations direct agencies which choose to make payment under section 4622(d) to reach a prior agreement with the utility owner on the nature of the relocation work to be done, the allocation of responsibilities, and the method of determining costs and making payment. 49 C.F.R. § 24.307(c). For guidance in reaching agreement, agencies should follow the utility relocation regulations of the Federal Highway Administration, 23 C.F.R. Part 645, Subpt. A. See 49 C.F.R. App. A to § 24.307.

The conference report on the 1987 amendments emphasized that the new section 4622(d) should "not be construed to supersede 23 U.S.C. § 123 or any other Federal law." H.R. Conf. Rep. No. 100-27, at 251 (1987), reprinted at 1987 U.S.C.C.A.N. 122, 235.

(2) 23 U.S.C. § 123

Highway construction is one of the most common causes of utility displacement. Under 23 U.S.C. § 123, originally enacted in 1958, states may be reimbursed for utility relocation expenses paid in connection with federally aided highway construction, if those payments are authorized under state law. Reimbursement is to be in the same proportion as other project costs. The availability of 23 U.S.C. § 123 to a given state depends on the extent to which that state follows or has departed from the common-law rule.

The statute is not self-executing and does not itself create an obligation to reimburse. A state's right to reimbursement depends on project approval by the Federal Highway Administration in accordance with 23 U.S.C. § 106 and applicable regulations. Approval creates a contractual obligation. Arizona v. United States, 494 F.2d 1285 (Ct. Cl. 1974).

In determining the cost of relocation for purposes of section 123, any increase in the value of the new facility and any salvage value derived from the old facility must be deducted. 23 U.S.C. § 123(c). (As noted above, the discretionary authority of 42 U.S.C. § 4622(d) incorporates this concept.) Cost determinations under section 123 must be made on the basis of a specific project. Statewide determinations do not satisfy the statute. B-149833, January 2, 1964; B-149833-O.M., June 24, 1963; B-149833-O.M., November 9, 1962.

The purpose of reimbursement under 23 U.S.C. § 123 is to make the utility whole, not to confer a profit. Thus, where a parent corporation owned two subsidiaries, one of which earned a profit for the parent on purchases from it by the other, GAO concluded that the "intercompany profit" should not be a reimbursable item of cost under section 123. However, reimbursement would be

permissible if it could adequately be shown that the sales for relocation purposes displaced a substantially equivalent amount of regular sales which would otherwise have been made. B-154937, December 16, 1964, modified by B-154937, May 25, 1965.[50]

(3) Other statutory provisions

Several other statutes scattered throughout the United States Code address utility relocation in various specific contexts, some of which are quite narrow in scope. Others may exist in addition to those noted below. These statutes, as with 23 U.S.C. § 123, were unaffected by the 1987 enactment of 42 U.S.C. § 4622(d).

One example is section 2 of the Flood Control Act of 1938, as amended, 33 U.S.C. § 701c-1. This statute authorizes the Secretary of the Army to acquire, and to reimburse states and municipalities for the acquisition of, lands, easements, and rights-of-way, expressly including "utility relocation," deemed necessary in connection with authorized flood control projects. The statute has been construed as authorizing the Army to pay utility relocation expenses wholly independent of any right-of-way acquisition. B-134242, December 24, 1957.

Another example is section 14 of the Reclamation Project Act of 1939, 43 U.S.C. § 389, which provides comparable authority to the Secretary of the Interior "in connection with the construction or operation and maintenance of any project." The measure of compensation for utility relocation is the replacement cost of the facility less an allowance for depreciation of the old facility. See B-125045-O.M., September 21, 1959.

Still another is 16 U.S.C. § 580b, enacted in 1949, under which the Forest Service may use its appropriations to correct inductive

[50]These decisions concerned the American Telephone and Telegraph Company and its subsidiaries prior to the divestiture of the 1980s. While the decisions may no longer have direct application to "Mother Bell" and her family, the underlying concepts would appear to remain nonetheless valid.

interference on Forest Service telephone lines caused by transmission lines constructed by organizations financed by Rural Electrification Administration loans. GAO had previously advised that statutory authority was generally necessary to overcome the common-law prohibition in this context. B-33911, May 5, 1943;[51] B-33911/B-62187, July 15, 1948. See also B-62187, December 3, 1946 (exception recognized where the work "was prompted by reasons of expediency wholly unconnected with the prevention or correction of inductive interference from electric power transmission lines").

Finally, whenever construction of a project administered through the International Boundary and Water Commission (United States and Mexico) necessitates the alteration or relocation of structures or other property "belonging to any municipal or private corporation, company, association, or individual," the Secretary of State may pick up the tab. 22 U.S.C. § 277e. This provision has been held sufficient to overcome the common-law prohibition. B-129757, November 29, 1956; B-5441, August 29, 1939. Conspicuously absent from the statutory listing of owners are "states." Therefore, the statute does not encompass agreements with the state of Texas comparable to the types of agreements authorized under statutes such as 33 U.S.C. § 701c-1 or 43 U.S.C. § 389. B-76531, September 13, 1948.

In sum, when considering whether a federal agency may use its appropriated funds to pay all or part of the costs of utility relocation, the first question to ask is whether the situation is covered by some specific relocation statute such as 23 U.S.C. § 123 or one of those noted directly above. If so, then the authorities and limitations of that specific statute, and any regulations under it, will govern. If not, the next thing to consider is the availability of the discretionary authority of the Uniform Relocation Act, 42 U.S.C. § 4622(d). If that authority is not available or if the displacing agency declines to

[51]This decision dealt with both revocable licenses and easements. With respect to licenses, the application of the common-law rule and the concomitant need for statutory authority are still valid. As to easements, however, the decision relied on 20 Comp. Gen. 379 (1941), which was effectively, although not explicitly, modified in this respect by 36 Comp. Gen. 23 (1956), discussed earlier in the text.

exercise its discretion in favor of the utility, the matter is governed by the common-law principles discussed.

D. Jurisdiction Over Federal Land: The Federal Enclave

1. Acquisition of Federal Jurisdiction

Almost all federally owned land is within the boundaries of one of the 50 states. This leads logically to the question: who controls what? When we talk about jurisdiction over federal land, we are talking about the federal-state relationship. The first point is that, whether the United States has acquired real property voluntarily (purchase, donation) or involuntarily (condemnation), the mere fact of federal ownership does not withdraw the land from the jurisdiction of the state in which it is located. E.g., Silas Mason Co. v. Tax Comm'n, 302 U.S. 186, 197 (1937). Acquisition of land and acquisition of federal jurisdiction over that land are two different things.

Federal jurisdiction can range from "exclusive jurisdiction" at one extreme, in which the federal government in essence displaces the state as governing authority, to "proprietorial jurisdiction" at the other extreme, in which the United States has basically the same authority as it does with respect to other nonfederal land in that state. In between, as one study has reported, federal control "can and does vary to an almost infinite number of degrees."[52] During the last half of the 19th century and first half of the 20th, most land acquired by the United States was acquired with exclusive federal jurisdiction.[53]

[52]Jurisdiction Over Federal Areas Within the States, Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Part I, at 2 (1956).

[53]Id. at 8-10.

There are two ways in which the United States can acquire exclusive federal jurisdiction: consent and cession. The first method, consent, is provided in Article I, section 8, clause 17 of the Constitution, the so-called Jurisdiction Clause:

> "The Congress shall have power . . . to exercise exclusive legislation in all cases whatsoever, over [the District of Columbia], and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings."

The term "exclusive legislation" means "exclusive jurisdiction." James v. Dravo Contracting Co., 302 U.S. 134, 141 (1937); Surplus Trading Co. v. Cook, 281 U.S. 647, 652 (1930). Or perhaps more clearly, "exclusive jurisdiction to legislate." The term "other needful buildings" includes "whatever structures are found to be necessary in the performance of the functions of the Federal Government." Dravo, 302 U.S. at 143; Silas Mason, 302 U.S. at 203. Legislative consent to the purchase may be given before, at the time of, or after the purchase. 13 Op. Att'y Gen. 411 (1871). Consent may be in the form of a general consent statute or consent to a particular acquisition. United States v. State Tax Commission of Mississippi, 412 U.S. 363, 372 n.15 (1973). The Jurisdiction Clause has not been strictly construed, and Justice Frankfurter once commented that its "course of construction . . . cannot be said to have run smooth." Offutt Housing Co. v. County of Sarpy, 351 U.S. 253, 256 (1956).

The second method, cession, is also accomplished by an enactment of the state legislature and was recognized by the Supreme Court over a century ago in the leading case of Fort Leavenworth RR. Co. v. Lowe, 114 U.S. 525 (1885). Some years later, the Court emphasized that Clause 17 "is not the sole authority for the acquisition of jurisdiction. There is no question about the power of the United States to exercise jurisdiction secured by cession, though this is not provided for by Clause 17." Collins v. Yosemite Park & Curry Co., 304 U.S. 518, 529 (1938). For similar statements, see Kleppe v. New Mexico, 426 U.S. 529, 542 (1976); Paul v. United States, 371 U.S. 245,

264 (1963); and United States v. Gliatta, 580 F.2d 156, 158 (5th Cir. 1978), cert. denied, 439 U.S. 1048.[54]

Apart from procedural distinctions, the differences between consent and cession are slight, and there appears to be little practical difference resulting from which method is used. At one time, cession was viewed as useful primarily in cases where Clause 17 was thought inapplicable, for example, acquisition by condemnation. See generally Fort Leavenworth RR. Co. v. Lowe, cited above. In more recent cases, however, the Supreme Court has said that "purchase" for purposes of Clause 17 includes condemnation. United States v. State Tax Commission of Mississippi, 412 U.S. at 372 n.14. The Court has also held that donation is a "purchase" for purposes of Clause 17. Humble Pipe Line Co. v. Waggonner, 376 U.S. 369 (1964). Thus, no practical distinction seems to flow from the method of acquisition of the land or the timing of the state's "consent."

The applicability or nonapplicability of Clause 17 is still relevant in determining which method must be used in some situations. For example, Clause 17 comes into play only where the land is being acquired for one of the purposes specified in Clause 17. Thus, Clause 17 would generally not apply to land acquired for a national park, and cession would therefore be the only method of acquiring federal jurisdiction. In another leading case, Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938), the Supreme Court established that jurisdiction by cession is not limited to the purposes specified in Clause 17. Thus, the United States can acquire the same jurisdiction over, say, a national park by cession that it could acquire over a military installation by a Clause 17 consent.

Another area in which distinctions once thought important have become blurred is the extent to which a state may qualify its consent or cession. Even in the early days, "exclusive jurisdiction" was rarely absolute. For example, the states, with the express approval of the Supreme Court, typically reserved the power to serve civil and criminal process. This was necessary in order to avoid having

[54]There is a third method, but it is unlikely to be used with any frequency in the future. Congress can reserve federal jurisdiction over federal land within a state at the time the state is admitted to the Union. Fort Leavenworth RR. Co. v. Lowe, 114 U.S. 525, 526 (1885); State v. Galvan-Cardenas, 799 P.2d 19, 21 (Ariz. Ct. App. 1990).

federal land become a sanctuary for fugitives, and does not diminish the "exclusiveness." Fort Leavenworth RR. Co., 114 U.S. at 533. See also Cornman v. Dawson, 295 F. Supp. 654, 657 n.5 (D. Md. 1969), aff'd sub nom. Evans v. Cornman, 398 U.S. 419 (1970); 39 Op. Att'y Gen. 155 (1938); 38 Op. Att'y Gen. 341, 347-348 (1935).[55] However, for several decades, it was thought that a state's power to qualify its consent was broader under a cession than under a Clause 17 consent. By the exercise of simple logic, the Supreme Court laid this thought to rest in still another leading case, James v. Dravo Contracting Co., 302 U.S. 134 (1937). There was no question that a state could refuse consent at the time of acquisition, and then later cede jurisdiction subject to qualifications. Why then, reasoned the Court, couldn't the state consent to the acquisition with the same qualifications in the first place? Id. at 147-149.

It has become settled since Dravo that a state can qualify either a Clause 17 consent or a cession, as long as the qualifications are not inconsistent with federal law or federal use. The theory is clearly stated in Collins v. Yosemite Park & Curry Co., 304 U.S. at 528:

> "The States of the Union and the National Government may make mutually satisfactory arrangements as to jurisdiction of territory within their borders and thus in a most effective way, cooperatively adjust problems flowing from our dual system of government. Jurisdiction obtained by consent or cession may be qualified by agreement or through offer and acceptance or ratification. It is a matter of arrangement. These arrangements the courts will recognize and respect." (Footnotes omitted.)

Thus, acquisition of federal jurisdiction is not an "all or nothing" proposition. It has become commonplace to define federal jurisdiction in terms of four categories:

> "[T]here are four general kinds of federal jurisdiction over federal lands: exclusive legislative jurisdiction, concurrent legislative jurisdiction, partial legislative jurisdiction and proprietorial legislative jurisdiction." State ex rel. Cox v. Hibbard, 570 P.2d 1190, 1192 (Or. Ct. App. 1977).

[55]Examples of the operation of this principle at the state level include State v. Lane, 771 P.2d 1150 (Wash. 1989), and People v. Dowdell, 440 N.Y.S.2d 528 (Onondaga Cty. Ct. 1981).

See also Cornman v. Dawson, 295 F. Supp. at 656 n.4. The terms "concurrent" and "partial" in this context are self-explanatory and mean exactly what they imply.[56]

To summarize what we have said so far:

- The United States can acquire exclusive federal jurisdiction over land either by consent of the state legislature under the Jurisdiction Clause, or by cession from the state. Both methods get you essentially to the same place.
- Whichever method is used, the state may retain partial or concurrent jurisdiction as long as the powers retained are not inconsistent with federal law or use.

As noted earlier in this chapter, the state consent we have been talking about relates to jurisdiction rather than the acquisition itself. For many years prior to 1940, there was in addition a statutory requirement for consent of the state legislature when land was acquired by the United States for certain purposes. This provision was eliminated in 1940 and replaced by what is now the last (unnumbered) paragraph of 40 U.S.C. § 255, which says several important things:

- The obtaining of exclusive jurisdiction is not required.
- If the United States obtains exclusive or partial jurisdiction by consent or cession, there must be a formal acceptance by the United States, either by filing a notice of acceptance with the state governor or as otherwise provided under state law.
- If the United States has not formally accepted jurisdiction as prescribed, it is "conclusively presumed" that the jurisdiction does not exist.

Although the statute mentions only exclusive and partial jurisdiction, it applies to concurrent jurisdiction as well. Adams v. United States, 319 U.S. 312 (1943). As Adams also established, the statute means exactly what it says—formal acceptance of federal jurisdiction as prescribed in 40 U.S.C. § 255 is a legal prerequisite to the exercise of that jurisdiction. See also Hankins v. Delo, 977 F.2d

[56]Jurisdiction Over Federal Areas Within the States, supra note 52, at 14.

396 (8th Cir. 1992); DeKalb County v. Henry C. Beck Co., 382 F.2d 992 (5th Cir. 1967).

A state may not unilaterally revoke its consent once it has been given and accepted. North Dakota v. United States, 460 U.S. 300, 313 n.16 (1983), citing United States v. Unzeuta, 281 U.S. 138, 142-143 (1930).

Based on the concepts discussed above, a working definition of "federal enclave" may be framed as follows:

A "federal enclave" is an area of land owned by the United States, with respect to which the United States has obtained exclusive, partial, or concurrent jurisdiction from the state in which the land is located, either by consent under the Jurisdiction Clause or by cession.[57]

Regardless of the existence or type of federal jurisdiction, some state law may apply in a federal enclave even without either a specific reservation or a federal statute making it applicable. The Supreme Court has recognized that every area within the United States should have a developed legal system. Thus, state law protecting private rights which is in existence at the time of the consent or cession remains applicable in the enclave as long as it does not interfere with the federal use and is not inconsistent with federal law, unless and until Congress acts to make it inapplicable. This principle is called "assimilation." The opposite is true for state laws enacted after the consent or cession: they do not apply in the enclave unless Congress acts to make them applicable. James Stewart & Co. v. Sadrakula, 309 U.S. 94 (1940).[58]

[57]Some judicial definitions limit the term to exclusive jurisdiction. E.g., Cooper v. General Dynamics, 378 F. Supp. 1258, 1261 (N.D. Tex. 1974), rev'd on other grounds, 533 F.2d 163 (5th Cir. 1976), cert. denied, 433 U.S. 908 (1977); Thiele v. City of Chicago, 145 N.E.2d 637, 638 (Ill. 1957). However, the Supreme Court has used the term in the broader sense. E.g., North Dakota v. United States, 495 U.S. 423 (1990). In addition, the United States may obtain federal jurisdiction over leased property as well as property it owns. Jurisdiction Over Federal Areas Within the States, supra note 52, at 2.

[58]This assimilated state law is sometimes referred to as "federalized state law." E.g., Board of Supervisors of Fairfax County v. United States, 408 F. Supp. 556, 563 (E.D. Va. 1976), appeal dismissed mem., 551 F.2d 305 (4th Cir. 1977). The concept has no application to a concurrent jurisdiction enclave. Sylvane v. Whelan, 506 F. Supp. 1355, 1361 (E.D. N.Y. 1981).

One example, involved the applicability of the Florida right-to-work law on two exclusive jurisdiction enclaves in Florida, Patrick Air Force Base and Cape Canaveral Air Force Station. Finding that the Florida law was enacted before the transfer of sovereignty for Cape Canaveral AFB but after the transfer of sovereignty for Patrick AFB, the district court held the Florida law applicable on the former but not the latter. On appeal, the Court of Appeals for the Fifth Circuit affirmed as to Patrick but reversed as to Canaveral, finding that the Florida law was in conflict with the National Labor Relations Act. Lord v. Local Union No. 2088, IBEW, 481 F. Supp. 419 (M.D. Fla. 1979), aff'd in part, rev'd in part, 646 F.2d 1057 (5th Cir. 1981), cert. denied, 458 U.S. 1106 (1982). Another example is Snow v. Bechtel Construction Inc., 647 F. Supp. 1514, 1521 (C.D. Cal. 1986), finding that an employee of a government contractor working on an exclusive jurisdiction enclave did not have a cause of action for wrongful termination because the state wrongful termination law "was enacted well after the land became a federal enclave." See also Pacific Coast Dairy, Inc. v. Department of Agriculture, 318 U.S. 285, 294 (1943); Macomber v. Rose, 401 F.2d 545 (9th Cir. 1968); Economic Development and Industrial Corp. of Boston v. United States, 546 F. Supp. 1204 (D. Mass. 1982), rev'd on other grounds, 720 F.2d 1 (1st Cir. 1983); Vincent v. General Dynamics Corp., 427 F. Supp. 786, 794-795 (N.D. Tex. 1977).

Sometimes the United States does not acquire all land within the exterior boundaries of a project because it is not needed. When this happens, there may be privately owned tracts within and surrounded by federal land, in what may be termed a "checkerboard" pattern. By analogy from cases dealing with federal land, the courts have held that the United States can acquire by cession the same types of exclusive, partial, or concurrent jurisdiction over these privately owned tracts. E.g., Macomber, 401 F.2d 545; Petersen v. United States, 191 F.2d 154 (9th Cir. 1951), cert. denied, 342 U.S. 885; United States v. 319.88 Acres, 498 F. Supp. 763 (D. Nev. 1980).

Today, only a small portion of federal land is held in enclave status. According to one authority,[59] approximately 36.5 million acres are

[59]George C. Coggins and Charles F. Wilkinson, Federal Public Land and Resources Law 146 (1981).

held under partial or concurrent jurisdiction, and another 6 million under exclusive jurisdiction. While these figures may seem large, they represent only 5 percent and less than 1 percent, respectively, of federal land. Exclusive jurisdiction enclaves tend to be military installations or national parks, although not all military installations or national parks are enclaves.

As a general proposition, if the United States disposes of enclave property, legislative jurisdiction reverts to the state (also called "re-vesting" or "retrocession"), although the situation can become complicated by the nature of the particular transaction. See S.R.A., Inc. v. Minnesota, 327 U.S. 558 (1946) (retention by United States of legal title as security interest does not prevent reverter); Humble Pipe Line Co. v. Wagoner, 376 U.S. 369 (1964) (lease by United States to commercial interests not sufficient to produce reverter); United States v. Goings, 504 F.2d 809 (8th Cir. 1974) (retention by United States of right of emergency use does not prevent reverter). The military departments have specific statutory authority to "retrocede" federal legislative jurisdiction, in whole or in part, to the state, if considered desirable. 10 U.S.C. § 2683.

One of the conditions a state may attach to its consent or cession is that legislative jurisdiction (title too, if the land was donated) revert to the state if the property ceases to be used for the purpose for which jurisdiction was ceded. Illustrative cases are United States v. Johnson, 994 F.2d 980 (2d Cir. 1993), cert. denied, 510 U.S. 959; and Economic Development and Industrial Corp. v. United States, 13 Cl. Ct. 590 (1987). Absent such reservation or condition, federal jurisdiction is not diminished by the fact that a portion of the land is put to some use different from that for which it was acquired. Benson v. United States, 146 U.S. 325, 331 (1892); United States v. Fallbrook Public Utility District, 108 F. Supp. 72, 85 (S.D. Cal. 1952).

Totally apart from the question of reservation of state powers, it is fair to say that exclusive federal jurisdiction isn't nearly as exclusive as it used to be. Congress has enacted a number of statutes, which may be characterized as "partial retrocessions," which have the effect of returning portions of jurisdiction to the states or incorporating state law in particular subject areas. Two of the more important ones, the Buck Act and the Assimilative Crimes Act, will be noted later in this discussion. Some others are:

(a) In cases of wrongful death on federal enclaves, the right of action provided by state law exists as if the enclave were under state jurisdiction. 16 U.S.C. § 457. This includes changes in applicable state law as they may occur from time to time. E.g., Ferebee v. Chevron Chemical Co., 736 F.2d 1529 (D.C. Cir. 1984), cert. denied, 469 U.S. 1062; Vasina v. Grumman Corp., 644 F.2d 112 (2d Cir. 1981). Of course, this statute does not affect the operation of the Federal Tort Claims Act in cases where it is applicable. E.g., Morgan v. United States, 709 F.2d 580, 582 (9th Cir. 1983).

(b) State unemployment compensation laws apply on federal enclaves. 26 U.S.C. § 3305(d).

(c) State workers' compensation laws apply on federal enclaves. 40 U.S.C. § 290. The statute merely makes state law applicable to private employers on federal land; it does not create any federal liability. Peak v. Small Business Administration, 660 F.2d 375, 376 n.1 (8th Cir. 1981). The constitutionality of 40 U.S.C. § 290 was upheld in Wallach v. Lieberman, 366 F.2d 254 (2d Cir. 1966).[60] Section 290 applies equally to federal facilities that are not enclaves. Goodyear Atomic Corp. v. Miller, 486 U.S. 174, 182 n.4 (1988).

2. Specific Areas of Concern

a. Taxation

As a general proposition, a state cannot tax private property in a federal enclave unless it has reserved the power to do so at the time of consent or cession. Humble Pipe Line v. Wagoner, 376 U.S. 369 (1964); Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938); James v. Dravo Contracting Co., 302 U.S. 134 (1937); Surplus Trading Co. v. Cook, 281 U.S. 647 (1930); Fort Leavenworth RR. Co. v. Lowe, 114 U.S. 525 (1885).

Congress has modified this rule somewhat by statute. Under the Buck Act of 1940, 4 U.S.C. §§ 105-110, states may levy sales, use, and income taxes within federal enclaves. The Buck Act has generated its share of litigation. One type of question that has arisen is whether

[60]It would appear that the question wasn't especially close, as the district judge, referred to the case as "worthless litigation." Wallach v. Lieberman, 219 F. Supp. 247, 249 (S.D. N.Y. 1963).

various forms of state and local taxation are sales, use, or income taxes for purposes of the Buck Act. E.g., United States v. State Tax Commission of Mississippi, 412 U.S. 363, 378-379 (1973); Howard v. Commissioners of The Sinking Fund, 344 U.S. 624 (1953). See also 30 Comp. Gen. 28 (1950) (permit fee charged by city for construction on exclusive jurisdiction enclave not a "tax" within scope of state's reservation of jurisdiction in deed of cession). One court has held a local occupation tax to be an "income tax" for Buck Act purposes. United States v. Lewisburg Area School District, 398 F. Supp. 948 (M.D. Pa. 1975).

The Buck Act permits sales, use, and income taxes, but not property taxes. Thus, in B-159835, February 2, 1976, the Comptroller General advised that a county in Utah had no power to impose an ad valorem tax on private property within the United States Defense Depot, a federal enclave in Ogden, Utah, where there had been no reservation of taxing power at the time of cession.

Another statute, 4 U.S.C. § 104, authorizes the imposition of state motor fuel taxes on fuel sold on "United States military or other reservations" if the fuel is not for the exclusive use of the United States. This includes national parks. 38 Op. Att'y Gen. 522 (1936). The purpose of this statute was to enhance highway improvement by increasing state revenues which could be used as matching funds under the federal-aid highway program. Minnesota v. Keeley, 126 F.2d 863 (8th Cir. 1942); Sanders v. Oklahoma Tax Comm'n, 169 P.2d 748 (Okla. 1946).

Still another statute, 10 U.S.C. § 2667(e), permits state and local taxation of the interests of lessees of property leased by a military department under the authority of 10 U.S.C. § 2667.

The preceding paragraphs address the power of a state to reach into a federal enclave to tax private property, private instrumentalities, or the income of federal employees. Neither the concept of reservation of powers nor the Buck Act affects the immunity of the United States from state and local taxation, covered in Chapter 4. In fact, the Buck Act expressly preserves the immunity of the United States. 4 U.S.C. § 107. A case applying section 107 is United States v. Tax Comm'n, 421 U.S. 599 (1975).

b. Criminal Law

The punishment of crimes committed on federal enclaves has been a subject of congressional attention since the First Congress.[61] At the present time, the criminal law structure for federal enclaves consists of several specific statutes and one general one.

Congress has enacted a number of criminal statutes, found in Title 18 of the United States Code, dealing with criminal offenses on federal enclaves. These are generally the "major" crimes such as murder, rape, arson, etc. About a dozen are listed in United States v. Sharpnack, 355 U.S. 286, 289 n.5 (1958). The statutes use the phrase "special maritime and territorial jurisdiction of the United States," which is defined in 18 U.S.C. § 7 as including federal enclaves. These specific statutes naturally take precedence over state law.

Offenses not covered by one of these specific statutes are covered by the Assimilative Crimes Act, 18 U.S.C. § 13, under which offenses committed on federal enclaves which are not otherwise provided for by Congress are punishable as federal crimes if and to the extent that they are punishable by the laws of the state in which the enclave is situated.

The state law applicable under the Assimilative Crimes Act is the law in effect at the time of the offense, which includes laws enacted after consent or cession. The constitutionality of the Assimilative Crimes Act was upheld in the Sharpnack case, cited above.

A defendant accused of a crime on a federal enclave may be tried before a magistrate. There is no requirement that trial be before an Article III court. United States v. Jenkins, 734 F.2d 1322 (9th Cir. 1983), cert. denied, 469 U.S. 1217 (1985).

Indian reservations are not federal enclaves. However, under 18 U.S.C. § 1152, the federal enclave criminal statutes apply to "Indian country" except as otherwise provided by law and except for offenses committed by one Indian against another Indian. The

[61]As a bit of historical trivia, murder on federal enclaves was made a federal crime as early as 1790 by the Act of April 30, 1790, Ch. IX, §§ 3-4, 1 Stat. 112, 113. Punishment was death, and if that wasn't enough, the court could order that the body of the offender, presumably already executed, "be delivered to a surgeon for dissection." Sort of "death plus."

historical development of this statute is discussed in United States v. Cowboy, 694 F.2d 1228 (10th Cir. 1982).

c. State Regulation

Another area of potential conflict is the extent to which a state can extend its regulatory arm into a federal enclave. Older cases tend to involve economic regulation such as licensing laws, permit requirements, price-fixing laws, etc. Many of the more recent cases involve environmental regulation. Depending on the interplay of certain key rules, the state regulatory action may be invalid on all federal property, non-enclave as well as enclave, valid on both, or valid on some but not all.

State regulatory action will be invalid across the board if it violates the Supremacy Clause of the Constitution (Art. VI, clause 2), which provides that laws of the United States which are within the constitutional power of the federal government are the "supreme law of the land" and prevail over inconsistent state laws. State law can violate the Supremacy Clause by directly regulating the federal government, discriminating against it or against those with whom it does business, or conflicting with valid enactments of Congress. North Dakota v. United States, 495 U.S. 423, 434 (1990). If a given action is found to violate the Supremacy Clause, it is irrelevant whether the federal land or installation in question has enclave status.

An illustration is Leslie Miller, Inc. v. Arkansas, 352 U.S. 187 (1956). The Air Force entered into a contract for construction work on a base which was not a federal enclave. The contractor was charged and convicted in state court for failure to obtain a license under state law. The Supreme Court reversed the conviction, finding the state licensing law inconsistent with the procuring agency's duty under federal procurement law to determine the responsibility of bidders. Similarly, in Paul v. United States, 371 U.S. 245 (1963), the Court found that California price control regulations on milk conflicted with federal procurement policy in that "the federal procurement policy demands competition [while] the California policy . . . effectively eliminates competition." Id. at 253. In neither case was the status of the particular federal installations a relevant factor.

Two GAO decisions involved contracts for mortuary services at Dover Air Force Base, Delaware. In both cases, a disappointed

bidder protested that the firm receiving the award, the low bidder, did not have a Delaware mortuary license. Based primarily on Leslie Miller, GAO upheld the contract awards in both cases. B-161723, August 1, 1967; B-159723, September 28, 1966. Both decisions note that Dover was an exclusive jurisdiction enclave, but this factor was not crucial to the result.

The Supreme Court distinguishes between direct and indirect regulation for purposes of Supremacy Clause analysis. As the plain meaning of the term suggests, "direct regulation" involves attempts to regulate federal entities themselves. "Indirect regulation" is the regulation of private parties (who may be government contractors or suppliers) which has an incidental effect on the government by, for example, causing it to pay higher prices. North Dakota v. United States, 495 U.S. 423, 434-435 (1990).[62] Like direct regulation, indirect regulation must be neutral (non-discriminatory) in order to survive the Supremacy Clause. North Dakota, 495 U.S. at 435. From this point on, the analysis differs. States can directly regulate federal installations and activities only pursuant to clear and unambiguous congressional (statutory) authorization. Goodyear Atomic Corp. v. Miller 486 U.S. 174, 180 (1988); EPA v. State Water Resources Control Board, 426 U.S. 200, 211 (1976); Hancock v. Train, 426 U.S. 167, 179 (1976). The validity of indirect regulation is a question of congressional pre-emption. North Dakota, 495 U.S. at 435; Goodyear Atomic Corp., 486 U.S. at 180 n.1. The pre-emption rules are summarized in English v. General Electric Co., 496 U.S. 72, 78-79 (1990). The mere existence of federal law in a given field does not automatically pre-empt state law in that field. There must be a conflict or a clear indication of congressional intent to pre-empt. Id.; California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 593 (1987).[63]

[62]Other cases recognizing the distinction include Hancock v. Train, 426 U.S. 167, 179-180 (1976); Mayo v. United States, 319 U.S. 441, 447 (1943); Penn Dairies, Inc. v. Pennsylvania Milk Control Commission, 318 U.S. 261, 270 (1943).

[63]The direct-indirect distinction, firmly imbedded though it may be, is easier to state than it is to apply. Compare, for example, the plurality and dissenting opinions in North Dakota to see how two groups of four United States Supreme Court justices each can read the same cases very differently.

Once you get by the Supremacy Clause hurdle—that is, once it is established that the state law or regulation does not conflict with valid federal law and does not attempt to impermissibly tax or regulate the federal government—the jurisdictional status of the federal property becomes relevant.[64] The state law or regulation will then apply to non-enclave property (there is no longer a reason why it shouldn't), and may or may not apply to enclaves, depending on factors previously discussed such as the types of jurisdiction the state may have reserved at the time of consent or cession and whether the law was in existence when the property achieved enclave status.

For example, in Pacific Coast Dairy, Inc. v. California Department of Agriculture, 318 U.S. 285 (1943), the Supreme Court held that a California statute requiring the licensing of milk distributors and establishing uniform prices for the sale of milk did not apply to sales on a federal enclave because the statute was enacted after the transfer of sovereignty. By the time the Court again had occasion to consider the California milk laws in Paul v. United States, cited above, the intervening enactment of the Armed Services Procurement Act of 1947 and the promulgation of implementing regulations brought the state law into direct conflict, with the result that Paul was decided on the basis of the Supremacy Clause rather than the enclave status of the military installations.

The Supremacy Clause resolved purchases to be made from appropriated funds. However, some of the milk in Paul was to be purchased with nonappropriated funds (military clubs and post exchanges). Since the federal procurement statutes and regulations did not apply to nonappropriated funds, there was no conflict with respect to these purchases. Accordingly, the applicability of the state law to nonappropriated fund purchases on exclusive jurisdiction enclaves depended on whether the state law was in effect when the United States acquired jurisdiction, a result "on all fours" with Pacific Coast. 371 U.S. at 268-269.

[64]Some courts reverse the analytical sequence and look first at the enclave issue and then invoke the Supremacy Clause if necessary. Either approach should get you to the same place.

GAO has considered problems in this area on several occasions. The questions usually arise incident to the award of federal procurement contracts. In 42 Comp. Gen. 704 (1963), the question was whether a contract for furnishing dairy products on a federal enclave could be awarded to the low bidder who had not complied with certain aspects of the state "fair trade" law. GAO found that the state law had been enacted after the transfer of jurisdiction. Therefore, based largely on the Supreme Court's decisions in Paul and Pacific Coast, GAO found the contract award to be proper. Similar cases are 27 Comp. Gen. 782 (1948) and B-151686, July 2, 1965.

If none of these approaches applies—that is, you are dealing with an exclusive jurisdiction enclave and state law enacted after the acquisition of federal jurisdiction—the state law can apply only pursuant to "specific congressional action." Paul, 371 U.S. at 263; Black Hills Power and Light Co. v. Heartland Consumers Power District, 808 F.2d 665, 668 (8th Cir. 1987), cert. denied, 484 U.S. 818. For an example where state law did not apply, compare Miller v. Wackenhut, 808 F. Supp. 697 (W.D. Mo. 1992).

Precisely how specific the congressional authority must be is somewhat unsettled. To rephrase the question: Is a statute which is sufficiently specific to survive a Supremacy Clause challenge also sufficiently specific to permit the application of state law on an enclave or must it explicitly address enclaves? Offutt v. Sarpy, 351 U.S. 253, 260 (1956), is capable of being read to suggest that it does not have to explicitly mention enclaves. But again, compare Black Hills, 808 F.2d. at 673; West River Electric Ass'n v. Black Hills Power & Light, 918 F.2d. 713, 717-20 (8th Cir. 1990); Tacoma Dept. of Pub. Util. v. United States, 28 Fed. Cl. 637, 646 (1993), aff'd 31 F.3d 1130 (Fed. Cir. 1994).

For an example of this plays out in GAO case law, see 64 Comp. Gen. 813 (1985). This was a bid protest in which a statute required federal agencies to comply with local requirements on the control and abatement of solid waste "in the same manner and to the same extent as any person subject to such requirements." Id. at 815. That language, the Comptroller General held, "expressly requires federal agencies to obtain waste disposal services from local governments" when such is required of others. Id. In this case, two military facilities were directed to cancel their competitive solicitations in favor of sole source contracts with local governments and their

franchisees. A competitive procurement by another base was allowed to stand because the enclave was outside of the local government's jurisdiction and others so situated were not required to contract with the local authorities. Id. at 816. GAO's conclusions in this case were later tested in federal court and upheld. Parola v. Weinberger, 848 F.2d. 956 (9th Cir. 1988). See also Solano Garbage v. Cheney, 779 F. Supp. 477 (E.D. Cal. 1991); 72 Comp. Gen. 225, 228 (1993).

Another way state regulatory laws may apply on federal enclaves is pursuant to congressional sanction. The legislative authorization must be "clear and unambiguous." EPA v. State Water Resources Control Board, 426 U.S. 200, 211 (1976). An example is the Solid Waste Disposal Act, which directs federal agencies to comply with state and local requirements regarding the control and abatement of solid waste. 42 U.S.C. § 6961. Under this law, it has been held that federal installations must comply with local law granting an exclusive garbage collection franchise, and thus cannot solicit competitive bids. 64 Comp. Gen. 813 (1985); Parola v. Weinberger, 848 F.2d 956 (9th Cir. 1988). (While both of these cases involved federal enclaves, the result would apply equally to non-enclave property.) In contrast, no comparable federal legislation was applicable in Black Hills Power and Light Co. v. Weinberger, 808 F.2d 665 (8th Cir. 1987), cert. denied, 484 U.S. 818, holding that an exclusive jurisdiction military installation in South Dakota was not required to procure its electrical service from a utility holding an exclusive franchise under state law.

A common battleground for these principles is the area of state liquor control. In United States v. South Carolina, 578 F. Supp. 549 (D. S.C. 1983), based on an essentially straightforward application of Paul and Leslie Miller, the court enjoined the state from implementing a state law requiring federal military installations to purchase alcoholic beverages from wholesalers licensed by the state. Although the installations in question were exclusive jurisdiction enclaves (578 F. Supp. at 550), the result presumably would have been the same if they were not. In North Dakota v. United States, 495 U.S. 423 (1990), the Supreme Court upheld a state requirement that out-of-state liquor vendors affix labels to each item to be delivered to a federal enclave in the state. The Court distinguished this type of indirect regulation, which was permissible even though it incidentally raised costs to the military, from the

types of direct regulation encountered in cases like Paul and Leslie Miller.

In cases involving direct regulation of a federal activity where there is no conflict with a specific piece of federal legislation, the result turns on a balancing of the state's interest in applying its regulation against the federal government's interest in being free from it. Examples are United States v. Town of Windsor, 765 F.2d 16 (2d Cir. 1985), and B-199838, March 24, 1986. Both cases found local building permit requirements inapplicable to government contractors doing construction on non-enclave property.

3. Proprietorial Jurisdiction

A central theme of our discussion is that a federal enclave is essentially a consensual arrangement. Whether federal jurisdiction is obtained by Clause 17 consent or by cession, a federal enclave cannot come into being without the consent of the state and acceptance by the United States. Thus, enclave status can be neither coerced from the state nor forced upon the United States.

As we have seen, federal enclaves comprise less than ten percent of all federally owned land. For the remainder—land over which the United States has not obtained exclusive, partial, or concurrent jurisdiction by consent or cession—federal jurisdiction is said to be "proprietorial." This term originated from language in some of the cases to the effect that, absent consent or cession, the United States has "only the rights of an ordinary proprietor." E.g., Fort Leavenworth v. Lowe, 114 U.S. 525, 527 (1885).

While the term "proprietorial" implies that the United States is in the same position as any private owner, this is not the case. The United States may exercise authority over federal land, enclave or non-enclave, under Article IV, section 3, clause 2 of the Constitution, the Property Clause:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."

The full significance of the Property Clause as an alternative to the Jurisdiction Clause does not appear to have been realized until the landmark case of Kleppe v. New Mexico, 426 U.S. 529 (1976). A New

Mexico rancher had obtained a permit from the Bureau of Land Management under the Taylor Grazing Act to graze cattle on certain "BLM land" in New Mexico. The rancher complained to a state agency that wild burros on the BLM land were interfering with his cattle. The state agency rounded up 19 of the wild burros and sold them at auction. The BLM demanded that the state recover and return the burros, claiming that the state's action violated the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331-1340. New Mexico brought suit, alleging that the statute was unconstitutional.

The Supreme Court held that the wild burro statute was a valid exercise of congressional power under the Property Clause, and that it overrode any inconsistent state law. Congress, said the Court, has the power of a legislature as well as a proprietor over federal land. 426 U.S. at 540. That power is "without limitations" (id. at 539) and "complete" (id. at 540). The Court then squarely addressed the relationship of federal enclaves to the Property Clause:

> "Congress may acquire derivative legislative power from a State pursuant to Art. I, § 8, cl. 17, of the Constitution by consensual acquisition of land, or by nonconsensual acquisition followed by the State's subsequent cession of legislative authority over the land. . . . In either case, the legislative jurisdiction acquired may range from exclusive federal jurisdiction with no residual state police power . . . to concurrent, or partial, federal legislative jurisdiction, which may allow the State to exercise certain authority. . . .
>
> "But while Congress can acquire exclusive or partial jurisdiction over lands within a State by the State's consent or cession, the presence or absence of such jurisdiction has nothing to do with Congress' powers under the Property Clause. Absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. . . . And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause." Id. at 542-543.

The Supreme Court's opinion was unanimous. Concurrence of the burros may be presumed.[65]

[65]It was subsequently established that damage to private land caused by the wild horses and burros does not amount to a compensable "taking." Mountain States Legal Foundation v. Hodel, 799 F.2d 1423 (10th Cir. 1986), cert. denied, 480 U.S. 951 (1987).

Both the courts and the Comptroller General have recognized and reflected the significance of the Kleppe decision. One illustration is the selection of nuclear waste repository sites. GAO considered the issue in the late 1970s and concluded that a state could not block the establishment of a nuclear waste repository merely by withholding or qualifying consent under the Jurisdiction Clause. Exclusive federal jurisdiction is not a necessary prerequisite to establishing the repository, and Congress has adequate power under the Property Clause. Accordingly, an agreement by the Secretary of Energy purporting to give a state "veto power" over site selection would be unenforceable. B-192999, May 22, 1979. See also B-164105, June 19, 1978, reaching the same conclusion based on the Department of Energy's organic legislation. Several years later, Congress enacted amendments to the Nuclear Waste Policy Act designating a site in Nevada for possible development as a repository. The state went to court, and the Ninth Circuit held that the legislation was within congressional power under the Property Clause, and that there was no requirement that the site be located on a federal enclave (in which event, of course, state consent would become necessary). Nevada v. Watkins, 914 F.2d 1545 (9th Cir. 1990), cert. denied, 499 U.S. 906 (1991).

Some other examples follow:

- An individual was fined for hunting ducks in a national park in Minnesota, in violation of National Park Service regulations prohibiting hunting or the possession of loaded firearms in national parks. The regulations had been issued pursuant to a statutory delegation. Even if the state had not ceded jurisdiction to the United States, the regulation was nevertheless valid under the Property Clause and took precedence over conflicting state law. This was equally true with respect to nonfederal waters within the park. United States v. Brown, 552 F.2d 817 (8th Cir. 1977), cert. denied, 431 U.S. 949.
- National Park Service could, under a statutory delegation, issue regulation requiring use of seat belts in national parks. Defense Department, although it does not have statutory authority to regulate federal land comparable to that of the Park Service, could also require seat belt use by regulation, at least on land under exclusive federal jurisdiction. B-216218, November 30, 1984.
- Regulations for traffic control on Postal Service property are valid under the Property Clause, regardless of presence or absence of

enclave jurisdiction. United States v. Gliatta, 580 F.2d 156, 160 (5th Cir. 1978), cert. denied, 439 U.S. 1048.

- Federal legislation which authorizes Secretary of Agriculture to regulate grazing in the national forests overrides state open range law. Bilderback v. United States, 558 F. Supp. 903 (D. Ore. 1982).

Notwithstanding the very broad language it used in the Kleppe decision, the Supreme Court also noted in that case that "the furthest reaches of the power granted by the Property Clause have not yet been definitively resolved." 426 U.S. at 539. It thus seems likely that litigation in this area will continue and that the law will continue to evolve.[66]

E. Leasing

If the government needs a building, there are several ways it can go about getting it. It can purchase an existing structure, making payment directly from appropriations available for that purpose; it can have the building constructed to order, again making payment directly from appropriations available for that purpose; it can lease an existing building; or it can use some form of lease-purchase or lease-construction arrangement. This section will address the leasing options.

1. Some General Principles

a. Acquisition

A lease in the real property context may be defined as "[a]ny agreement which gives rise to [a] relationship of landlord and tenant." Black's Law Dictionary 889 (6th ed. 1990); B-96826-O.M., February 8, 1967. General Services Administration regulations define the term to mean "a conveyance to the Government of the right of exclusive possession of real property for a definite period of time by a landlord." 48 C.F.R. § 570.102.

[66]As a final note, the federal government may, through legislation under the "necessary and proper" clause of the Constitution (Art. I, § 8, cl. 18), exercise specific types of jurisdiction over property which it merely leases. E.g., United States v. Burton, 888 F. 2d 682 (10th Cir. 1989) (upholding General Services Administration's authority to enforce anti-handbill regulation in leased building).

It is generally recognized that, except for depressed real estate markets, leasing is less cost-effective than ownership. See generally Federal Office Space: Increased Ownership Would Result in Significant Savings, GAO/GGD-90-11 (December 1989).[67] Nevertheless, there are situations in which leasing is clearly the desirable option, such as where the government needs the space only for a short term or where it needs only a small amount of space. Id. at 14-15. Too often, however, the decision whether to lease or buy is driven by budgetary considerations rather than the nature of the government's need. The problem is that budget authority for purchase or direct construction must be provided "up front," whereas budget authority for leasing is provided year by year. Not surprisingly, large chunks of money for purchase or construction have traditionally been prime targets for budget-cutting by a Congress under constant pressure to reduce spending. Eliminating tens of millions of dollars to construct or acquire a building produces an immediately visible result, albeit only a short-term one, without angering any program's constituents. Congress has struggled with this problem for many years. In the Public Buildings Amendments of 1972, Congress recognized that direct construction was "the most efficient and economical means of meeting Government building needs," but essentially conceded "the futility of seeking a billion dollars for direct Federal construction . . . in competition with the present spending priorities." H.R. Rep. No. 92-989, (1972), reprinted in 1972 U.S.C.C.A.N. 2370, 2373. In any event and whatever the reasons, nearly half (48 percent) the space controlled by the General Services Administration as of 1994 was leased, costing over $2 billion a year. Federal Office Space: More Businesslike Leasing Approach Could Reduce Costs and Improve Performance, GAO/GGD-95-48 (February 1995), at 10.

As with the acquisition of fee title, the government can acquire a lease voluntarily, or it can acquire it involuntarily. Voluntary acquisition is the preferred method. As we will discuss later in this section, most leasing for the federal government is done by, or under delegation from, the General Services Administration. GSA's stated policy in the Federal Property Management Regulations is to lease privately owned space "only when needs cannot be satisfactorily

[67] United States v. Bedford Assoc., 657 F.2d 1300, 1309 (2d Cir. 1981), cert. denied, 456 U.S. 914 (1982).

met in Government-controlled space" and leasing is more advantageous than construction or alteration. 41 C.F.R. § 101-18.100(a). As noted above, GSA will also lease when it cannot obtain sufficient budget authority to do anything else.

A lease of real property is subject to the Competition in Contracting Act's requirement for full and open competition. B-225954, March 30, 1987. The GSA regulations provide as follows:

> "Acquisition of space by lease will be by negotiation except where the sealed bid procedure is required by 41 U.S.C. 253(a). Except as otherwise provided in 41 U.S.C. 253, full and open competition will be obtained among suitable available locations meeting minimum Government requirements." 41 C.F.R. § 101-18.100(d).

The regulations further provide that acquisition by lease "will be on the basis most favorable to the Government . . . and only at charges consistent with prevailing scales for comparable facilities in the community." 41 C.F.R. § 101-18.100(c). Specific contracting procedures are found in the General Services Administration Acquisition Regulations, 48 C.F.R. Part 570.

The evaluation factors in a lease invitation should be as clear and exact as possible, although a high level of precision is not required. "It is sufficient, in [GAO's] opinion, to prescribe general guidelines of acceptability which necessarily must be applied as equitably as possible to the locations of the office spaces tendered." 43 Comp. Gen. 663, 667 (1964).

While the term "government-controlled space" as used in the GSA regulations includes leased space, the regulations do not give an incumbent lessor an exclusive right to negotiate extensions of the lease. See B-251337.2, April 23, 1993; 48 Comp. Gen. 722, 724-725 (1969). Indeed, there are situations in which the government is not even required to include the incumbent lessor in the solicitation for the new lease. B-251288, March 18, 1993.[68]

[68]As a general proposition, however, unless a market survey shows that the incumbent lessor will be unable to meet the government's needs for the new lease, full and open competition requires that the incumbent be included. E.g., B-247910.3, June 8, 1993; B-225954, March 30, 1987. See also 48 Comp. Gen. at 725.

While a lease is the conveyance of a possessory interest in real property, it is also a contract. E.g., Keydata Corp. v. United States, 504 F.2d 1115, 1123 (Ct. Cl. 1974). Therefore, it does not come into existence unless and until both parties execute the required formalities, i.e., sign the lease contract. B-228279/B-228280, January 15, 1988.

Unless required by statute, it is not essential that the lease be recorded in the jurisdiction in which the property is located. A-19681, September 28, 1927. Many states, however, have statutes which require the recording of leases for more than a stated term. The precise effect of these laws is subject to variation from state to state, but they are generally regarded as protecting the rights of the tenant by providing legal notice of the tenancy to subsequent purchasers or lessees. Id.; 26 Comp. Gen. 331 (1946).[69] In determining whether a lease exceeds the minimum term specified in a recording statute, the period covered by renewal options should be added to the basic lease term. 26 Comp. Gen. 335 (1946). While the government's policy has been that the cost of recording a lease should be borne by the lessor, recording fees may be charged to operating appropriations if there is a legitimate reason for the government to pay. 26 Comp. Gen. 331.

If the government is unable to meet its leasing needs voluntarily, it can fall back on the power of eminent domain. It has long been settled that the takings clause of the Fifth Amendment applies to "temporary takings" as well as the taking of full title. E.g., Phelps v. United States, 274 U.S. 341 (1927). See also 22 Comp. Gen. 1112, 1114 (1943), regarding it as "settled law that the use of property can be taken as well as the title to property."

Involuntary acquisition of a leasehold can take various forms. If there is already an existing lease, the government can simply condemn the entire leasehold. E.g., Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973); United States v. Petty Motor Co., 327 U.S. 372 (1946). If the government needs the property for a shorter term than that of an existing lease, it can

[69]This is not always the case. In some states, recording, although required by state law, may not be necessary to protect the tenant's rights. See B-27717, August 12, 1942.

condemn only part of the existing lease. E.g., United States v. General Motors Corp., 323 U.S. 373 (1945). Or, if there is no existing lease, the government can employ condemnation to impose one on the property owner. E.g., Kimball Laundry Co. v. United States, 338 U.S. 1 (1949). The elements of just compensation vary somewhat depending on which of these scenarios applies. Some of the issues are discussed in the Supreme Court decisions cited in this paragraph.

If the determination of just compensation can be resolved administratively, the government is not required to institute formal condemnation proceedings but should adhere as closely as possible to the just compensation principles laid down by the Supreme Court. 25 Comp. Gen. 1 (1945).

Private leases may include a clause, known as an "eminent domain" clause or a "termination on condemnation" clause, which provides that the lease shall terminate if the property is taken by governmental authority. If the government condemns an existing leasehold which is subject to such a provision, the lessee gets nothing. United States v. Petty Motor Co., 327 U.S. 372, 376 (1946); United States v. Advertising Checking Bureau, 204 F.2d 770, 772-73 (7th Cir. 1953); 35 Comp. Gen. 85, 87 (1955); 22 Comp. Gen. 1112, 1114 (1943). The theory is that tenants who enter into leases with such clauses contract away any rights they otherwise might have had. Petty Motor, 327 U.S. at 376; Checking Bureau, 204 F.2d at 772. (These cases illustrate two variations of the clause.)

As with any other acquisition of real property, condemnation of a leasehold requires statutory authority. The general condemnation statute, 40 U.S.C. § 257, discussed earlier in this chapter, operates in exactly the same manner with respect to leaseholds as it does for fee acquisitions. By virtue of this statute, the authority to condemn is co-extensive with the authority to purchase. Thus, the authority in the Federal Property and Administrative Services Act for the General Services Administration to enter into leases (40 U.S.C. § 490(h)), in conjunction with 40 U.S.C. § 257, gives GSA the authority to acquire a leasehold by condemnation. United States v. Checking Bureau, 204 F. 2d 770; United States v. Fisk Building,

99 F. Supp. 592 (S.D. N.Y. 1951); United States v. Midland Nat. Bank of Billings, 67 F. Supp. 268 (D. Mont. 1946).[70]

In our discussion of 41 U.S.C. § 14 in Section B of this chapter, we noted a line of cases establishing the proposition that the authority necessary to satisfy that statute can be found in an appropriation, if it can be shown that the appropriation was intended to be available for the acquisition in question. If that type of authority is sufficient, in conjunction with 40 U.S.C. § 257, to authorize condemnation of the fee, it should also be sufficient to authorize condemnation of a leasehold, a lesser interest. One case, which appears to stand alone, went so far as to find the basic acquisition authority in a general operation (salaries and expenses) appropriation, with no apparent demonstration that Congress was aware of, much less had approved, the lease in question. United States v. Hibernia Bank Bldg., 76 F. Supp. 18 (E.D. La. 1948). While Hibernia does not appear to have been expressly repudiated, it is important to note that it, as well as Midland Bank and its progeny, was decided prior to the statutory requirement for prospectus approval which we will cover later in this discussion. Thus, Hibernia could not be followed today, at least with respect to a lease within the scope of the prospectus requirement. See Maiatico v. United States, 302 F.2d 880 (D.C. Cir. 1962).

Another principle which is the same as for fee acquisitions is the principle that statutory cost limitations on voluntary acquisition do not apply to condemnations. 22 Comp. Gen. 1112 (1943). The reason is that just compensation is a constitutional right and cannot be limited by statute. Id. at 1114. (The particular limitation in that case no longer exists, but the principle remains valid.)

b. Application of Fiscal Law Principles

A lease, as a contract requiring the obligation and expenditure of appropriated funds, is subject to the various fiscal statutes and principles discussed throughout this publication the same as any other contract. One area meriting some note is the Antideficiency Act. There are few areas of government contracting in which the desirability of multi-year commitments is stronger than in the case

[70]While these cases dealt with the leasing authority in effect prior to the Federal Property and Administrative Services Act, there is no reason why the point should not apply with equal force to GSA's current authority.

of real property leases. For the most part, Congress has provided multi-year leasing authority. This is fortunate because it has long been settled that, without either such authority or a no-year appropriation, a multi-year lease would violate the Antideficiency Act by purporting to obligate the government for future years, in advance of appropriations for those years.

The story of one such lease will illustrate. A government agency leased space in an office building in 1921, purportedly for 5 years, without statutory authority. At the end of the second year, the government notified the lessor of its intention to terminate the lease and vacate the premises. However, the government's new space was not yet ready, so the agency remained in the leased building and told the lessor that it would continue to pay rent for the period of actual occupancy. The lessor argued that, under state law, it was entitled to rent for at least the full third year. The claim first came to GAO and the answer was no. Since the multi-year lease was unauthorized in the first place, terminating it at the end of the second year could not be a breach. 5 Comp. Gen. 172 (1925). The lessor didn't like this answer and went to court, by now conceding that it could not establish the lease's validity for the full 5-year period, but still trying to recover for the entire third year. The Court of Claims threw the case out on the grounds that it failed to state a cause of action. Goodyear Tire & Rubber Co. v. United States, 62 Ct. Cl. 370 (1926).

The lessor, not overly excited with this result either, took it to the Supreme Court. Unfortunately for the lessor, the Supreme Court had just decided a similar case, Leiter v. United States, 271 U.S. 204 (1926), clearly establishing that a multi-year lease without statutory authority could bind the government only to the end of the fiscal year in which it was made (or, of course, longer period under a multiple-year appropriation). It could be binding in a subsequent year only if there was an available appropriation and if the government took affirmative action—as opposed to mere automatic renewal—to continue the lease. Id. at 207.[71] The disposal of Goodyear's appeal was a straightforward application of Leiter.

[71]Although Leiter has come to be cited as the leading case, it broke little new ground. The principle had already become established by the courts and the accounting officers. E.g., Chase v. United States, 155 U.S. 489 (1894); Smoot v. United States, 38 Ct. Cl. 418 (1903); McCollum v. United States, 17 Ct. Cl. 92 (1881); 5 Comp. Gen. 522 (1926); 5 Comp. Gen. 355 (1925); 1 Comp. Gen. 10 (1921).

Goodyear Tire & Rubber Co. v. United States, 276 U.S. 287 (1928). "Not having affirmatively continued the lease beyond the actual period of occupancy, the Government cannot, under the doctrine of the Leiter case, be bound for a longer term." Id. at 293.

Later GAO decisions applying these principles include 24 Comp. Gen. 195 (1944); 20 Comp. Gen. 30 (1940); 19 Comp. Gen. 758 (1940); and B-7785, March 28, 1940. The sheer number of cases both before and after Leiter suggests the strength of the need that ultimately generated the multi-year leasing statutes we will discuss later. Of course, the case law comes back into play in any situation not covered by one of the statutes, or if the government were to attempt to enter into a lease for a time period in excess of that authorized by statute.

The objection, based on the Antideficiency Act, to indefinite or open-ended indemnification agreements by the government applies fully to indemnity provisions included in a lease. 35 Comp. Gen. 85 (1955).

The existence of multi-year leasing authority by itself does not necessarily tell you how to record obligations under a lease. Some agencies have specific statutory direction. For example, the General Services Administration is authorized to obligate funds for its multi-year leases one year at a time. 40 U.S.C. § 490e. So are the military departments with respect to leases in foreign countries. 10 U.S.C. §§ 2675 (leases for military purposes other than family housing) and 2828(d) (military family housing). Absent such authority, you fall back on the general rule that obligations are chargeable in full to appropriations current at the time they are incurred. Thus, in B-195260, July 11, 1979, GAO advised the Federal Emergency Management Agency, which had no-year appropriations but no authority comparable to 40 U.S.C. § 490e or 10 U.S.C. § 2675, that it could enter into a multi-year lease under its no-year appropriation, but that it had to obligate the full amount of its obligations under the lease at the time the lease was signed. Actual payments, of course, would be made periodically over the term of the lease.

The constitutional immunity of the United States from state and local taxes imposed on property which the government owns does not extend to property which the government leases. Taxes imposed on the owner are simply part of the consideration or rent which the

government, as tenant, agrees to pay. 24 Comp. Dec. 705 (1918). A government lease, especially a long-term one, may include a "tax adjustment" clause under which the government agrees to share proportionately in any increases or decreases in applicable real estate taxes. See 48 C.F.R. §§ 570.702-15 and 552.270-24 (sample clause). Without such a clause, there is no authority for the government to increase its rent payments to compensate for tax increases unless there is also some other modification or amendment to constitute legal consideration. B-169004, March 6, 1970.

c. Rights and Obligations

While the Contract Disputes Act does not apply to contracts for "the procurement of . . . real property in being" (41 U.S.C. § 602(a)(1)), this exemption has not been construed as applying to leases. Therefore, claims and disputes arising under a lease are governed by the requirements and procedures of the Contract Disputes Act. Forman v. United States, 767 F.2d 875 (Fed. Cir. 1985) (the leading case); Jackson v. USPS, 799 F.2d 1018 (5th Cir. 1986); United States v. Black Hawk Masonic Temple Ass'n, 798 F. Supp. 646 (D. Colo. 1992); Goodfellow Bros., Inc., AGBCA No. 80-189-3, 81-1 B.C.A. ¶ 14,917 (1981); Robert J. DiDomenico, GSBCA No. 5539, 80-1 B.C.A. ¶ 14,412 (1980). However, as with other types of government contracts, the Contract Disputes Act does not extend to protests against the award of, or failure to award, a lease. Arthur S. Curtis, GSBCA No. 8867-P-R, 88-1 B.C.A. ¶ 20,517 (1988) (government in that case was lessor).

The traditional view among the courts, boards of contract appeals, and GAO has been that rights and obligations under a lease to which the federal government is a party are questions of federal, rather than state, law. E.g., Forman v. United States, 767 F. 2d 875; Girard Trust Co. v. United States, 161 F.2d 159 (3d Cir. 1947); Keydata Corp. v. United States, 504 F.2d 1115 (Ct. Cl. 1974); Brooklyn Waterfront Terminal Corp. v. United States, 90 F. Supp. 943 (Ct. Cl. 1950); Goodfellow Bros., Inc., 81-1 B.C.A. ¶ 14,917; 49 Comp. Gen. 532, 533 (1970); B-174588, May 17, 1972, aff'd on recons., B-174588, September 6, 1972. The same is true with respect to lease formation. E.g., United States v. Bedford Assoc., 657 F.2d 1300, 1309-10 (2d Cir. 1981), cert. denied, 456 U.S. 914 (1982). Under this approach, the decision maker is free to choose what it regards as the better view when state laws are not uniform. E.g., Keydata, 504 F.2d at 1122-24.

There is also a line of cases involving United States Postal Service leases which, while recognizing their power to apply federal law, decline to do so and instead apply state landlord-tenant law. Powers v. USPS, 671 F.2d 1041 (7th Cir. 1982); Reed v. USPS, 660 F. Supp. 178 (D. Mass. 1987); Jackson v. USPS, 611 F. Supp. 456 (N.D. Tex. 1985). The advantage of using state law is that every state has an established body of landlord-tenant law whereas federal courts deal with these issues infrequently. It is no coincidence that these cases, from the district courts and numbered circuits, all involve Postal Service leases because federal lease cases involving agencies other than the Postal Service would mostly go on appeal to the Court of Appeals for the Federal Circuit. Forman, 767 F.2d at 880 n.6; Reed, 660 F. Supp. at 181. Indeed, since appeals under the Contract Disputes Act go to the Federal Circuit, the Postal Service Board of Contract Appeals follows its governing circuit (the Forman case) and applies federal law. N.J. Hastetter, Trustee, PSBCA No. 3064, 92-3 B.C.A. ¶ 25,189 (1992).

As with contracts in general, rights and obligations under a lease are determined primarily by reference to the terms the parties agreed upon, as embodied in the lease agreement. E.g., Girard Trust Co., 161 F.2d at 161. A number of contract clauses used in General Services Administration leases are described in 48 C.F.R. Subpt. 570.7. In addition, there are certain "implied covenants" that the courts will read in unless the lease expressly provides otherwise.

For example, the landlord is frequently obligated to keep the premises in good repair. See 48 C.F.R. §§ 570.702-3 and 552.270-12 (clause). If the landlord violates this provision, the government can make the repairs and deduct their cost from rent payments. 48 C.F.R. §§ 570.702-8 and 552.270-17. In addition, every lease includes an "implied covenant of quiet enjoyment." United States v. Bedford Assoc., 548 F. Supp. 732, 740 (S.D.N.Y. 1982), modified on other grounds and aff'd, 713 F.2d 895 (2d Cir. 1983). Significant breach of the repair clause or the implied covenant can trigger the government's right to terminate the lease under a default clause if the lease contains one or, if the lease does not contain a default clause, under the common-law concept of "constructive eviction."

A constructive eviction is wrongful conduct by the lessor which (1) renders the premises unfit for the purpose leased, or (2) deprives the tenant of the beneficial use and enjoyment of the premises.

David Kwok, GSBCA No. 7933, 90-1 B.C.A. ¶ 22,292 (1989), aff'd mem., 918 F.2d 187 (Fed. Cir. 1990); Hugh L. Nathurst III, GSBCA No. 9284, 89-3 B.C.A. ¶ 22,164 (1989); J.H. Millstein and Fanny Millstein, GSBCA Nos. 7665 and 7904, 86-3 B.C.A. ¶ 19,025 (1986). A construction eviction requires more than some minor deviation. For a vivid example of facts supporting a constructive eviction, see Kwok, 90-1 B.C.A. at 111,959. Under a constructive eviction, the government's obligation to pay rent ceases, but the government, as tenant, must vacate the premises within a reasonable time. Bedford Assoc., 548 F. Supp. at 741; Richardson v. United States, 17 Cl. Ct. 355, 357 (1989). Disruption incident to the making of repairs is not a constructive eviction. Millstein, 86-3 B.C.A. at 96,084. Conversely, continued occupancy in reliance on the lessor's promise of repair does not waive the government's right to assert a constructive eviction. Nathurst, 89-3 B.C.A. at 111,541.

A lease may require the lessee to restore the premises to the condition they were in at the beginning of the lease, reasonable wear and tear excepted. Claims under provisions of this sort are discussed in Chapter 12. As with the "good repair" clause, even in the absence of an express provision in the lease, there is an implied covenant which may produce much the same result. Unless the lease expressly provides otherwise, every lease includes an implied covenant against voluntary waste, under which the government can be held liable for negligent damage to the premises. United States v. Bostwick, 94 U.S. 53 (1876); New Rawson Corp. v. United States, 55 F. Supp. 291 (D. Mass. 1943); Mount Manresa v. United States, 70 Ct. Cl. 144 (1930); Italian National Rifle Shooting Soc'y v. United States, 66 Ct. Cl. 418 (1928). This covenant, "construed with reference to the intended use of the property by the lessee," "also requires restoration of the premises to the lessor in the same condition as received, reasonable wear and tear excepted." Brooklyn Waterfront Terminal Corp. v. United States, 90 F. Supp. 943, 949 (Ct. Cl. 1950). See also United States v. Jordan, 186 F.2d 803, 806 (6th Cir. 1951), aff'd per curiam, 342 U.S. 911 (1952). By virtue of the covenant against voluntary waste, appropriate restoration costs are a proper charge to appropriated funds. 26 Comp. Gen. 585 (1947); 25 Comp. Gen. 349 (1945).

A provision whose status is somewhat clouded is the Termination for Convenience clause required in government procurement contracts generally. The government has regarded the "T for C"

clause as inappropriate in leases of real property, and General Services Administration leases do not include a "T for C" clause. The reason, the GSA Board of Contract Appeals has suggested, is that the clause:

> "would enable the Government to cancel the lease at any time without liability for future rent, and would therefore so vitiate the agreement on a fixed lease term that it might render the apparent lease agreement nugatory." Yucca, A Joint Venture, GSBCA Nos. 6768, 7319, 85-3 B.C.A. ¶ 18,511 (1985) at 92,969.

One practical consequence of this is the inability to recommend termination where a lease is found to have been improperly awarded. E.g., 72 Comp. Gen. 335, 339 (1993); B-214648, December 26, 1984. However, one court has stated that a termination for convenience clause is incorporated in a lease of real property by operation of law. Aerolease Long Beach v. United States, 31 Fed. Cl. 342, order on stay pending appeal, 31 Fed. Cl. 372, 374 (1994). Whether a lease could expressly disclaim the "T for C" authority does not yet appear to have been addressed.

Wholly apart from the presence or absence of a termination for convenience clause, paragraph 4 of the U.S. Government Lease for Real Property, Standard Form 2, provides that:

> "The Government may terminate this lease at any time by giving at least ___ days' notice in writing to the Lessor and no rental shall accrue after the effective date of termination."

The parties then insert the desired notification period. This provision has occasionally been stricken from the lease, essentially for the same reason there is no "T for C" clause—the apparent inconsistency with the fixed term of the lease. E.g., David Kwok, GSBCA No. 7933, 90-1 B.C.A. ¶ 22,292 (1989) at 111,960. However, where the provision is used, it becomes part of the contract and is enforced as such. Darrel Stebbins, AGBCA No. 91-164-1, 93-1 B.C.A. ¶ 25,236 (1992); Capricorn Enterprises, Inc., AGBCA No. 89-125-1, 90-1 B.C.A. ¶ 22,587 (1990).

d. Payment of Rent

"The primary obligation of a tenant is to pay rent." Jackson v. United States Postal Service, 611 F. Supp. 456, 460 (N.D. Tex. 1985). Rent has been defined as "compensation for the use, enjoyment and occupation of real estate." B-106578, August 29, 1952. The lease (paragraph 3 of the Standard Form 2) will state the amount of rent

and the intervals at which it is to be paid. Where rent is paid monthly, the monthly amount, unless the lease specifies differently, is one-twelfth of the annual rental regardless of variations in the number of days from month to month. 24 Comp. Gen. 838 (1945).

The government pays either by check or, at the lessor's option, electronic funds transfer. See 48 C.F.R. §§ 532.908(c) and 552.232-73. The Prompt Payment Act applies to leases. 31 U.S.C. § 3901(a)(6). GSA's regulations incorporating this requirement are 48 C.F.R. §§ 532.908(b) and 552.232-71.

(1) Advance payment

By virtue of the prohibition on advance payments found in 31 U.S.C. § 3324(b), the United States cannot make rental payments in advance but must pay in arrears. The prohibition applies to the lease of "naked lands" as well as buildings. 23 Comp. Dec. 653 (1917). GSA's regulations provide that rent is due on the first workday of each month (48 C.F.R. § 552.232-71, subpara. (a)(1)), but the payment covers the month that has just ended rather than the month that is beginning.

The same nonstatutory exceptions apply in the case of leases as apply to advance payments in general. Thus, where the lessor is a state, rent may be paid in advance because the possibility of loss is regarded as sufficiently remote. 57 Comp. Gen. 399 (1978). See also B-207215, March 1, 1983, applying the exception to a National Park Service lease from a statutorily created nonprofit foundation whose governing board included the Secretary of the Interior and the Director of the Park Service. That decision also emphasized that, in view of the bona fide needs rule, payment in advance means advance for the fiscal year (or other fixed term of the paying appropriation). Rent being paid pursuant to a condemnation award may be paid in advance to the extent necessary to satisfy the award. 22 Comp. Gen. 1112 (1943).

In addition, Congress may legislate exceptions to the advance payment prohibition and has done so in a number of instances. Examples are 22 U.S.C. § 2670(h) (State Department leases for the use of the Foreign Service abroad) and 10 U.S.C. § 2661(b)(1) (certain military leases).

(2) Payment to legal representative

The common-law rule is that rent which has accrued prior to the lessor's death is payable to the executor or administrator; rent which accrues after the lessor's death vests in the heir (intestate succession) or devisee (person named in will), unless otherwise provided by statute or will or unless the property has been formally brought into administration proceedings prior to accrual of the rent. B-116413, August 19, 1953. For an example of a state statute which modifies the common-law rule by requiring payment of posthumous rent to the legal representative, see B-36636, September 14, 1943. Of course, the common-law rule does not apply in the case of property held jointly with right of survivorship, such as property owned by a husband and wife as tenants by the entirety, in which case rent is payable to the surviving co-owner. B-140816, October 27, 1959.

Where rent is being paid to an executor or administrator, the voucher should include a statement to the effect that the payee is continuing to serve in that capacity. 9 Comp. Gen. 154 (1929); B-127362, April 13, 1956. The purpose is to safeguard against making payment to someone who has been discharged as legal representative, an improper payment which could put a certifying officer at risk. This does not mean that the certifying officer has to run to the courthouse every month before certifying the payment voucher. While this would not eliminate the potential for personal liability, the lessor can be required to submit a statement to be attached to the voucher. B-57612, June 18, 1946.

Before entering into a new lease with an executor or administrator, the agency must be careful to determine that the executor or administrator is authorized to lease the decedent's property. This usually requires the permission of the probate court. In 16 Comp. Gen. 820 (1937), an executor leased property to the government at a rent lower than that authorized by the court. Since the executor had exceeded his authority, no binding lease resulted and the government was liable for the fair rental value of the property.

(3) Assignment of Claims Act

As discussed in detail in Chapter 12, the Assignment of Claims Act—31 U.S.C. § 3727 and 41 U.S.C. § 15—(1) prohibits the assignment of claims against the United States except under fairly restrictive

conditions, (2) prohibits the transfer of government contracts, and (3) authorizes the assignment of contract proceeds to financing institutions. This legislation impacts the payment of rent under leases in several ways. Starting with 31 U.S.C. § 3727, the prohibition on assignments applies to a lessor's right to receive rent. The government is not bound to recognize an assignment not in compliance with the statute. E.g., Webster Factors, Inc. v. United States, 436 F.2d 425 (Ct. Cl. 1971); B-204237, October 13, 1981.

To avoid problems under the anti-assignment legislation, early decisions[72] developed the following guidelines for payment:

- If an agent executes the lease on behalf of the principal under a proper power of attorney, rent may be paid to the agent.
- Rent may be paid to an agent if the lease itself so specifies.
- If neither of the above applies, the check for rent must be drawn payable to the principal, although it may be delivered to an agent.

If payment to an agent is authorized to begin with, it may be made to a successor agent. 6 Comp. Gen. 737 (1927); B-36636, September 14, 1943.

Application of the Assignment of Claims Act to leases is essentially the same as in other contexts. Thus, the prohibition applies to voluntary assignments and not to assignments by operation of law. E.g., Keydata Corp. v. United States, 504 F.2d 1115 (Ct. Cl. 1974) (assignment under court order). Also, since the prohibition is for the government's protection, the government can choose to waive the statute and recognize an assignment. Freedman's Saving and Trust Co. v. Shepherd, 127 U.S. 494 (1888). See also 11 Comp. Gen. 278 (1932). As with government contracts in general, the government can include a provision authorizing the assignment of rent payments to a financing institution, and will then be bound by a proper assignment. See Webster Factors, Inc. v. United States, cited above.

The prohibition in 41 U.S.C. § 15 on the transfer of contracts comes into play when the lessor of property leased to the government sells

[72]16 Comp. Gen. 867 (1937); 10 Comp. Gen. 31 (1930); 5 Comp. Gen. 749 (1926); 9 Comp. Dec. 611 (1903). (Each case does not include every point.)

the property. An early Supreme Court case, Freedman's Saving and Trust Co. v. Shepherd, cited above, held that the prohibition

"does not embrace a lease of real estate to be used for public purposes, under which the lessor is not required to perform any service for the government, and has nothing to do, in respect to the lease, except to receive from time to time the rent agreed to be paid. The assignment of such a lease is not within the mischief which Congress intended to prevent." 127 U.S. at 505.

There is no reason this holding would not remain valid under the stated conditions. Especially with respect to buildings, however, many modern leases are different. The General Services Administration Board of Contract Appeals has held that the principle of the Shepherd case does not apply to:

"a contemporary GSA lease, involving a host of services and supplies to be provided by the lessor. The transfer of this lease without the consent of the Government might not only subject the Government to multiple litigation with unknown parties, but might, at each turn, subject the Government to detrimental alteration in the performance of contractual services." Broadlake Partners, GSBCA No. 10713, 92-1 B.C.A. ¶ 24,699 (1991), at 123,270.

Of course, as with assignments under 31 U.S.C. § 3727, the government can consent to the transfer. See Albert Ginsberg, GSBCA No. 9911, 91-2 B.C.A. ¶ 23,784 (1991).

In 1992, subsequent to the Broadlake Partners decision, GSA amended its "successors bound" clause to read as follows:

"This lease shall bind, and inure to the benefit of, the parties and their respective heirs, executors, administrators, successors and assigns." 48 C.F.R. § 552.270-18 (emphasis added).

This clause is required in larger leases and optional in smaller ones. 48 C.F.R. § 570.702-9. The 1992 amendment added the underscored language. While there appear to be no published decisions interpreting the amendment, it is at least arguable that the clause amounts to a blanket consent. See United States v. Jordan, 186 F.2d 803, 808 (6th Cir. 1951), aff'd per curiam, 342 U.S. 911 (1952).

2. Statutory Authorities and Limitations

a. Federal Property and Administrative Services Act

The major portion of the federal government's leasing is done by the General Services Administration, which serves as the government's chief "leasing agent."[73] As a general proposition, an agency which needs space must get it through GSA. The agency may do its own leasing only if it has specific statutory authority to do so, or upon a delegation from GSA.

GSA's leasing authority is the combined product of several provisions of law. The primary source is the Federal Property and Administrative Services Act of 1949, as amended, which authorizes GSA to enter into leases for terms of up to 20 years. Specifically, section 210(h)(1) of the Act, 40 U.S.C. § 490(h)(1), authorizes the Administrator of GSA to

> "enter into lease agreements with any person, copartnership, corporation, or other public or private entity, which do not bind the Government for periods in excess of twenty years for each such lease agreement, on such terms as he deems to be in the interest of the United States and necessary for the accommodation of Federal agencies in buildings and improvements which are in existence or to be erected by the lessor for such purposes and to assign and reassign space therein to Federal agencies."

Around the same time, section 1 of Reorganization Plan No. 18 of 1950, 40 U.S.C. § 490 note, promulgated pursuant to the Reorganization Act of 1949 (5 U.S.C. §§ 901-912), transferred "[a]ll functions with respect to acquiring space in buildings by lease . . . from the respective agencies in which such functions are now vested" to GSA, except for (1) buildings in foreign countries, (2) buildings on military facilities, (3) post office buildings, and (4) "special purpose" space not generally suitable for the use of other agencies, such as hospitals, jails, and laboratories. Still another provision of the Federal Property and Administrative Services Act, 40 U.S.C. § 490(d), gives the Office of Management and Budget permanent authority to transfer to GSA functions "vested in any other Federal agency with respect to the operation,

[73]Before GSA was created, many of the government's real property functions were performed by the Federal Works Agency. See 40 U.S.C.§ 753; 65 Comp. Gen. 722, 725 (1986).

maintenance, and custody of any office building" owned or leased by the government, with exceptions similar to those found in the 1950 reorganization plan.

GSA's leasing authority under 40 U.S.C. § 490(h) is not limited to the executive branch. This is because the authority applies with respect to "Federal agencies," which term is defined in 40 U.S.C. § 472(b) to mean

> "any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction."

Thus, legislative branch entities except those specified must lease office space through GSA absent authority to do otherwise by statute or delegation. B-202206, June 16, 1981. So must the Administrative Office of the United States Courts. 54 Comp. Gen. 944 (1975). The Supreme Court building is exempt from GSA's authority, however, because 40 U.S.C. § 13a places it under the control of the Architect of the Capitol. 54 Comp. Gen. at 947.

The statute further defines "executive agency" as including wholly owned government corporations. 40 U.S.C. § 472(a). Therefore, by its terms, it does not apply to mixed-ownership government corporations. Similarly, Reorganization Plan No. 18 is regarded as applicable to wholly owned, but not mixed ownership, government corporations. 38 Comp. Gen. 565 (1959).

The 20-year term authorized by 40 U.S.C. § 490(h) refers to the length of time that the government is obligated to pay rent. Thus, a lease-construction agreement which provides for a two to three year lead time for construction of the building, with the 20-year term of occupancy and the government's obligation to pay rent to begin upon completion of construction, does not violate the statute. B-191888, May 26, 1978.

GSA finances its leasing operations from the Federal Buildings Fund, a revolving fund established by 40 U.S.C. § 490(f). Money in the Fund is available for expenditure as specified in annual appropriation acts. 40 U.S.C. § 490(f)(2). A recurring general provision authorizes any department or agency to use its operating appropriations to pay GSA's charges for space and services furnished by law. E.g., Treasury, Postal Service, and General

Government Appropriations Act, 1994, Pub. L. No. 103-123, § 607, 107 Stat. 1226, 1260. Funds for multi-year leases under 40 U.S.C. § 490(h) are obligated one fiscal year at a time. 40 U.S.C. § 490e.

This funding scheme does not give the tenant agency the same rights against GSA that a commercial tenant would have against a commercial landlord. Thus, GSA is not liable to the tenant agency for damage to the agency's property caused by building defects, although GSA should of course try to recover from the lessor. 57 Comp. Gen. 130 (1977).

There is still another funding provision on the books, 40 U.S.C. § 304c, which predates the Federal Property and Administrative Services Act. It provides:

> "To the extent that the appropriations of the General Services Administration not otherwise required are inadequate therefor, [GSA] may require each Federal agency to which leased space has been assigned to pay promptly by check to [GSA] out of its available appropriations, either in advance or during the occupancy of such space, all or part of the estimated cost of rent, repairs, alterations, maintenance, operation, and moving. . . ."

While the creation of the Federal Buildings Fund has diminished the significance of 40 U.S.C. § 304c, it remains as a backup. It does not, however, alter or expand the availability of the tenant agency's appropriations. B-62051, January 17, 1947.

If GSA enters into a lease under its statutory authorities, GSA, not the tenant agency, must make any necessary amendments or modifications. A lease executed by GSA may not be amended or modified by an agreement between the tenant agency and the lessor. 38 Comp. Gen. 803 (1959); 32 Comp. Gen. 342 (1953).

It is possible that the tenant agency's needs might change such that it no longer needs the leased premises for the full term of the lease. Should this happen, the unexpired term of the lease can be declared "excess," in which event other government agencies should be canvassed, the same as with other forms of excess property, to see if any other agency needs the premises. If not, GSA can declare the unexpired term "surplus" and sublet the premises, depositing rental receipts to the Federal Buildings Fund to be used to provide services to the new tenant or to pay rent to the original lessor. 40 U.S.C. § 490(h)(2). Alternatively, depending on a variety of circumstances,

it may be in the government's interest to invoke whatever cancellation terms the lease provides. See B-119782, July 9, 1954, in which cancellation was the cheapest alternative.

GSA implements its leasing authority in the Federal Property Management Regulations, specifically 41 C.F.R. Subpt. 101-18.1. Section 101-18.101(a) reflects GSA's broad authority:

> "GSA will perform all functions of leasing building space, and land incidental thereto, for Federal agencies except as provided in this subpart."

Subject to certain exceptions, the Federal Property and Administrative Services Act authorizes GSA to delegate, and to authorize successive redelegation of, any function transferred to or vested in GSA by that act. 40 U.S.C. §§ 486(c) and (d). This includes leasing. The GSA regulations provide for a wide variety of delegations:

- Agencies may do their own leasing, for terms of not more than one year, when space is leased for no rental or a nominal rental of $1 a year. 41 C.F.R. § 101-18.104(a)(1).[74]
- GSA may grant specific delegations upon request. 41 C.F.R. § 101-18.104(a)(2).
- GSA may grant categorical delegations, under which any agency may do its own leasing for specified purposes. 41 C.F.R. § 101-18.104(a)(3). Existing categorical delegations are listed in 41 C.F.R. § 101-18.104-2 and include such things as greenhouses, hangars, hospitals, housing, and ranger stations.
- GSA may grant "special purpose" delegations for space not generally suitable for use by other agencies. 41 C.F.R. § 101-18.104(a)(4). Existing special purpose delegations are listed in 41 C.F.R. § 101-18.104-3.
- The Departments of Agriculture, Commerce, and Defense may lease their own building space, and incidental land, for terms not to exceed 5 years, when the space is situated outside any of the "urban centers" listed in the regulations. 41 C.F.R. § 101-18.104(b).

[74]GAO has defined "nominal rental" somewhat more broadly, as denoting "a consideration wholly unrelated to the actual or fair market value of the leased premises, such as $1 per annum." 35 Comp. Gen. 713, 714 (1956). Naturally, for purposes of the property management regulations, GSA's definition controls.

Since what is being delegated is the authority GSA possesses under 40 U.S.C. § 490(h), the delegation includes the authority to enter into multi-year leases for terms of up to 20 years. 41 C.F.R. § 101-18.104-1(b).

b. Prospectus Requirement

The acquisition of real property, including leaseholds, requires legislative authorization. For major leases, a component of this authorization is the prospectus approval requirement of 40 U.S.C. § 606(a). This is not part of the Federal Property and Administrative Services Act but rather is the amended version of section 7(a) of the Public Buildings Act of 1959. As relevant to leases, it provides:

> "No appropriation shall be made to lease any space at an average annual rental in excess of $1,500,000 for use for public purposes if such lease has not been approved by resolutions adopted by the Committee on Environment and Public Works of the Senate and the Committee on [Transportation and Infrastructure] of the House of Representatives. . . . For the purpose of securing consideration for such approval, the Administrator [of GSA] shall transmit to the Congress a prospectus of the proposed facility . . . ."

Section 606(a) then goes on to specify the contents of the prospectus, to include, among other things: a brief description of the space to be leased, the location of the space, an estimate of the maximum cost to the United States, a comprehensive plan addressing the space needs of all government employees in the locality, and a statement of how much the government is already spending to accommodate the employees who will occupy the space to be leased.[75]

The application of section 606(a) to leases was not in the original Public Buildings Act. Enacted as part of the Public Buildings Amendments of 1972, it was the outgrowth of appropriation act provisions used throughout most of the 1960s to control lease-construction arrangements. See Merriam v. Kunzig, 476 F.2d 1233, 1237-39 (3d Cir. 1973), cert. denied, 414 U.S. 911. As enacted, however, the requirement applies "to all leases, and not merely to

[75]Section 606(a) includes three distinct prospectus requirements: (1) construction, acquisition, or alteration of public buildings, (2) leasing, and (3) alteration of leased space. The first and third appear elsewhere in this chapter. To minimize duplication, we have consolidated our coverage of material which applies equally to all three types, including the effect of noncompliance, later under the Public Buildings Act heading.

leases for buildings to be erected by the lessor." Id. at 1239. The threshold, originally $500,000, was raised to $1,500,000 by the Public Buildings Amendments of 1988, Pub. L. No. 100-678, § 2, 102 Stat. 4049. GSA can adjust the amount annually in the manner and to the extent authorized in 40 U.S.C. § 606(f).

The monetary threshold applies to the "average annual rental." GSA and GAO agree that "rental" in this context means the amount of consideration for use of the land and buildings, or portions of buildings, during the firm term of the lease, excluding the cost of any services such as heat, light, water, and janitorial services. 52 Comp. Gen. 230 (1972). When leasing on a "single rate" basis, in which charges for services and utilities are included in the per square foot rental rate, GSA requires the lessor to submit a statement of the estimated annual cost of services and utilities, which GSA uses to determine the net rental. If it believes the lessor's figures are inaccurate, GSA may adjust the estimate. Id. at 232.

Apart from 40 U.S.C. § 606(c) which authorizes the rescission of approval if an appropriation has not been enacted within one year, the statute does not impose time limits on the approval process. However, delay may have adverse consequences. One court has held that delay by GSA in obtaining prospectus approval, during a time when construction costs were increasing rapidly, excused the lessor from any duty to renovate the premises. United States v. Bedford Assoc., 548 F. Supp. 732, 737 (S.D.N.Y. 1982), modified on other grounds and aff'd, 713 F.2d 895 (2d Cir. 1983).

Since the statute requires GSA to submit the prospectus, an agency which is doing its own leasing under a delegation from GSA must submit its prospectus to GSA who will in turn submit it to the Congress. 41 C.F.R. § 101-18.104-1(c).

c. Site Selection

It is, as it should be, up to the leasing agency to determine where those premises should be located, and that determination should not be second-guessed as long as it has a rational basis. 59 Comp. Gen. 474, 480 (1980); B-190730, September 26, 1978. For example, GAO regards geographical restrictions, such as "city limits" restrictions, based on considerations of employee travel time, as reasonable. B-230660, May 26, 1988; B-227849, September 28, 1987.

Of course, nothing is that simple. Section 101-17.205(a) of 41 C.F.R. ch. 101, subch. D, App. states the truism that the agency's determination must be "in accordance with all applicable statutes, regulations and policies." This is alluding to the fact that the leasing of real property, like virtually every other form of federal contract, is designed to serve various social and economic purposes in addition to meeting the government's needs.

One such purpose is the preservation of historic properties. The National Historic Preservation Act directs agencies to seek out and use "historic properties available to the agency" before leasing other buildings. 16 U.S.C. § 470h-2(a). Another provision of law directs GSA to "acquire and utilize space in suitable buildings of historic, architectural, or cultural significance, unless use of such space would not prove feasible and prudent compared with available alternatives." 40 U.S.C. § 601a(a)(1). "Historic, architectural, or cultural significance" for the most part means buildings listed or eligible to be listed on the National Register established under the Historic Preservation Act. 40 U.S.C. § 612a(4). While one court has held that 40 U.S.C. § 601a(a)(1) does not apply to properties which GSA is leasing for other agencies, the policy has been incorporated into Executive Order No. 12072 (1978), reprinted at 40 U.S.C. § 490 note, which does apply. Birmingham Realty Co. v. GSA, 497 F. Supp. 1377, 1384-86 (N.D. Ala. 1980).

A solicitation of offers for a lease should state how the historic building preference will be applied. 62 Comp. Gen. 50 (1982). Under a clause prescribed for major leases, the historic building will get the award if it meets the terms and conditions of the solicitation, and if the rental is no more than 10 percent higher than the lowest otherwise acceptable offer. 48 C.F.R. §§ 570.701-4 and 552.270-4.

None of the authorities thus far noted purport to address the consequences of disregarding the historic building preference. In the Birmingham Realty case cited above, the court found that GSA had failed to comply with the executive order, but that the unsuitability of the historic building for the purposes for which the space was needed outweighed the noncompliance. 497 F. Supp. at 1386-87.

The choice between urban and rural locations introduces additional requirements. A provision enacted as part of the Rural Development

Act of 1972, now found at 42 U.S.C. § 3122(b), designed to improve rural economic and living conditions, requires federal agencies to give "first priority to the location of new offices and other facilities in rural areas." Section 1-103 of Executive Order No. 12072, designed to strengthen cities, requires federal agencies to "give first consideration to a centralized community business area and adjacent areas of similar character" when meeting space needs in urban areas. "First consideration" means preference. City of Reading v. Austin, 816 F. Supp. 351, 362 (E.D. Pa. 1993).

While these preferences may seem incompatible, they are not. Because it is statutory, the rural preference must be considered first. The central business area preference comes into play only after it is determined that the need must be met in an urban area. 59 Comp. Gen. 474, 480 (1980); 59 Comp. Gen. 409, 414 (1980). Also, the applicable definitions of "urban area" and "rural area" produce an overlap such that a community with a population between 10,000 and 50,000 is both. 59 Comp. Gen. at 414; B-95136, March 10, 1980.

The City of Reading court noted that Executive Order No. 12072 "provides no meaningful benchmarks for a court to effectively evaluate GSA's ultimate decision," and that the decision involves "managerial and economic choices dependent on GSA's special expertise . . . not readily subject to judicial review." Therefore, the review should not be a review of the merits of the decision, but should seek "to ensure a fully informed and well-considered decision." 816 F. Supp. at 360.

A final area which may affect the location decision, at least for major leases, is environmental impact. The National Environmental Policy Act does not, by express terms, either include or exclude leasing actions. The case of S.W. Neighborhood Assembly v. Eckard, 445 F. Supp. 1195 (D.D.C. 1978), held that a congressionally approved 5-year $11 million lease of a 9-story office building to be built in an industrial/residential neighborhood and which would involve the relocation of over 2,000 federal employees was a "major federal action" for purposes of 42 U.S.C. § 4332, and that the government therefore was required to prepare an environmental impact statement. In Birmingham Realty Co. v. GSA, 497 F. Supp. at 1383-84, on the other hand, the court found reasonable a GSA policy to categorically exclude leases of less than 20,000 square feet from environmental impact statement requirements.

d. Parking

As discussed in Chapter 4, a government employee does not have a right to a parking space, with or without charge, and an agency is under no obligation to furnish one. See American Federation of Government Employees v. Freeman, 498 F. Supp. 651, 654-655 (D.D.C. 1980) (government employee does not have a "property interest in free parking"); B-168096, December 6, 1975 (furnishing of parking is not a right but a privilege). Nevertheless, the government may choose to provide parking facilities as an aid to operating efficiency, employee morale and retention. E.g., 63 Comp. Gen. 270, 271 (1984); B-168096, January 5, 1973. From the availability of appropriations perspective, it makes no difference whether the employees work in government-owned space or in leased space. B-152020, July 28, 1970.

When GSA is leasing office space pursuant to its authority under the Federal Property and Administrative Services Act, it may include parking facilities, and the tenant agency's appropriations are available to reimburse GSA for the parking space to the same extent as for the office space itself. 72 Comp. Gen. 139 (1993); 55 Comp. Gen. 897 (1976). See also 49 Comp. Gen. 476 (1970); B-168946, February 26, 1970 (same point prior to establishment of Federal Buildings Fund).

GSA will not require an agency to accept and pay for parking space it does not need. 55 Comp. Gen. at 901. If an agency has parking space which is excess to its needs, it may relinquish that space in accordance with procedures in GSA's Federal Property Management Regulations. Id.

In some cases, the office space lease may not include parking, or the agency's needs may change over time. As with leasing in general, an agency otherwise subject to the Federal Property and Administrative Services Act may not lease its own parking facilities unless it has specific statutory authority (an example relating to NASA is discussed in B-155372-O.M., November 6, 1964) or a delegation of authority from GSA. B-162021, July 6, 1977. At one time, an agency which needed parking accommodations not included in the basic office space lease would simply make the request to GSA and GSA would lease the space on behalf of the agency subject to reimbursement. See 55 Comp. Gen. 1197, 1200 (1976); B-162021, supra. Under current procedures, the agency must first make a request to GSA to determine if any government-

controlled space (owned or leased) is available. If such space is not available, the agency may then, without any further authorization from GSA, "use its own procurement authority to acquire parking by service contract." 41 C.F.R. ch. 101, Subch. D. App., § 101-17.202-2(a) (1994). This operates as a blanket delegation.

The agency is no longer required to certify to GSA that the parking is needed for purposes of employee morale or operating efficiency, although it is still expected to use the same standard. 72 Comp. Gen. 139, 141 (1993); 63 Comp. Gen. 270, 271 (1984).

The government has the discretionary authority under the Federal Property and Administrative Services Act to charge employees for parking space furnished for their use. American Federation of Government Employees v. Carmen, 669 F.2d 815 (D.C. Cir. 1981). See also 55 Comp. Gen. 897 (1976); 52 Comp. Gen. 957, 960-61 (1973); B-155817, March 11, 1966. The Carmen case involved a plan, subsequently withdrawn, to phase out free parking as an energy conservation measure.

An airport parking permit, renewable annually, procured for use by staff on official travel as a cost savings measure, which does not reserve any particular space or in fact guarantee any space at all if the parking lot is full, is not a lease for purposes of the Federal Property Act and regulations. B-259718, August 25, 1995. The purchase is permissible under the "necessary expense" doctrine. Id.

e. Repairs and Alterations

The following definitions are taken from 20 Comp. Gen. 105, 109 (1940) and the specific examples from 20 Comp. Dec. 73, 74 (1913):

- Repair means "to mend, to restore to a sound state whatever has been partially destroyed, to make good an existing thing, restoration after decay, injury, or partial destruction," in plain English, to fix something that needs to be fixed. Examples are replacing a broken pane of glass in a window or fixing broken stairs.
- Alteration means "a change or substitution in a substantial particular of one part of a building for another part of a building different in that particular" or "an installation that becomes an integral part of the building and changes its structural quality." Examples are erecting a partition dividing one room from another, closing up a door or window, or cutting a new door or window.

In addition, the cited decisions define a third term, "improvement," to mean "a valuable and useful addition, something more than a mere repair or restoration to the original condition," for example, strengthening the foundation or walls or putting on a new roof. It should be apparent that these are merely working definitions, not rigid demarcations. Many alterations, for example, are also "improvements."[76]

Before funding comes into play, the first question to ask is whether the given item of work is the responsibility of the lessor or the lessee. The guiding principle is the rather obvious one that the government should not be paying for something which is the landlord's obligation under the lease. E.g., 17 Comp. Gen. 739, 740 (1938). See also B-198629, July 28, 1980.

The terms of the lease should allocate responsibilities, at least in general terms. For example, under one clause commonly found in government leases, the lessor agrees, except for damage resulting from the government's negligence, to maintain the premises in good repair and condition suitable for the government's use and capable of supplying heat, air conditioning, light, and ventilation. 48 C.F.R. § 552.270-12. A provision of this type imposes a continuing obligation on the lessor to make needed repairs or provide the specified services throughout the life of the lease in connection with the purpose for which the space was rented. United Post Offices Corp. v. United States, 80 Ct. Cl. 785 (1935); United Post Offices Corp. v. United States, 79 Ct. Cl. 173 (1934); 38 Comp. Gen. 803 (1959); 20 Comp. Gen. 327 (1940); 15 Comp. Gen. 483 (1935); 6 Comp. Gen. 250 (1926). As noted earlier under the Rights and Obligations heading, if the lessor fails or refuses to meet this obligation, the government can have the necessary work done and deduct the cost from future rent. E.g., 80 Ct. Cl. at 792; 6 Comp. Gen. at 251-252.

Alterations are of two general types: those necessary at the outset of the lease to make the space suitable for the government's needs

[76]Any discussion of repairs and alterations must necessarily implicate the general rule against using appropriated funds to make permanent improvements to private property. That rule, and its application to leased property, are discussed later in this chapter. The remainder of this section presupposes that, for whatever reason, the rule does not pose an impediment.

(such as converting space from one use to another) and those which may become necessary from time to time over the course of the lease to meet changing needs. As with repairs, appropriated funds are not available to make alterations if and to the extent the lessor has assumed the obligation under the lease. 17 Comp. Gen. 739 (1938). More often, however, the cost of alterations will be the government's responsibility. A clause GSA uses to give the government the right to make alterations during the course of the lease is found at 48 C.F.R. § 552.270-19. The clause addresses alterations and should not be used to assume the cost of items which are more properly classed as repairs which are the lessor's responsibility. 1 Comp. Gen. 723 (1922). Conversely, alterations are not an obligation of the lessor under the "good repair" clause. 39 Comp. Gen. 304, 307 (1959).

Alterations which are the responsibility of the General Services Administration are financed from the Federal Buildings Fund, a revolving fund established by 40 U.S.C. § 490(f). See 41 C.F.R. § 101-21.501. Money in the Fund is available as and to the extent specified in annual appropriation acts. 40 U.S.C. § 490(f)(2). The Federal Buildings Fund appropriation typically includes several distinct line items, two of which are "repairs and alterations" and "rental of space." See, e.g., the Treasury, Postal Service, and General Government Appropriations Act, 2000, Pub. L. No. 106-58, 113 Stat. 430, 451 (1999). Lump-sum payments for initial space alterations, whether done by the landlord or some other contractor, are payable from the "repairs and alterations" appropriation; alterations made by the landlord and amortized over the life of the lease are payable from the "rental of space" appropriation. B-95136, August 8, 1979. In addition, as with GSA's leasing operations in general, 40 U.S.C. § 304c exists as backup authority for GSA to charge the cost of alterations to the tenant agency. See B-141560, January 15, 1960.

Major alteration projects require congressional approval under 40 U.S.C. § 606(a). When this provision was originally enacted as part of the Public Buildings Act of 1959, it applied to alterations to government-owned buildings but not to leased buildings. 65 Comp. Gen. 722 (1986). Congress amended section 606(a) in the Public Buildings Amendments of 1988 to add the following requirement:

"No appropriation shall be made to alter any building, or part thereof, which is under lease by the United States for use for a public purpose if the cost of such alteration would exceed $750,000 unless such alteration has been approved by

resolutions adopted by the Committee on Environment and Public Works of the Senate and the Committee on [Transportation and Infrastructure] of the House of Representatives." Pub. L. No. 100-678, § 3(a), 102 Stat. 4049 (1988).

Approval is secured by submitting a prospectus to the appropriate committees.[77]

Alterations within the general scope of the lease will normally be acquired through a modification to the lease. Beyond-scope alterations may be acquired through a separate contract, a supplemental lease agreement, or by having the work performed by government employees. 48 C.F.R. § 570.601. As noted earlier, if the lease is within GSA's responsibility, the tenant agency has no authority to modify the lease without prior authorization from GSA. 38 Comp. Gen. 803, 805 (1959). Where the tenant agency violates this principle, it may nevertheless be possible to pay for the alterations on a quantum meruit basis. See B-155200-O.M., November 24, 1964. GSA's current procedures for obtaining reimbursable space alterations are contained in 41 C.F.R. §§ 101-20.106-1, 101-20.106-2.

f. Rental 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."

Early decisions viewed this provision as "too plain to need interpretation." 4 Comp. Dec. 139, 141 (1897). See also 9 Comp. Dec. 551, 552 (1903). The accounting officers and the Attorney General uniformly held in holding that space rentals in the District of Columbia without explicit statutory authority were illegal.[78]

The enactment of the Federal Property and Administrative Services Act in 1949 considerably diminished the impact of 40 U.S.C. § 34. GAO commented as follows in B-159633, May 20, 1974:

[77]See Public Buildings Act heading for further detail.

[78]E.g., 2 Comp. Gen. 722 (1923); 2 Comp. Gen. 214 (1922); 26 Comp. Dec. 155 (1919); 17 Op. Att'y Gen. 87 (1881); 15 Op. Att'y Gen. 274 (1877).

"[T]he Federal Property and Administrative Services Act of 1949 . . . authorizes GSA to enter into leasing agreements for the benefit and accommodation of Federal agencies. . . . We consider the language of [40 U.S.C. § 490(h)] together with its legislative history as authorizing the Administrator of GSA to lease buildings and parts of buildings in the District of Columbia . . . . [I]f the Administrator of GSA had authorized the formation of this rental agreement, the statutory requirement of 40 U.S.C. § 34 . . . would have been satisfied."[79]

Thus, the rule has developed that 40 U.S.C. § 34 is satisfied where GSA arranges for the space under authority of the Federal Property and Administrative Services Act or delegates the authority to the renting agency. Id. See also 56 Comp. Gen. 572 (1977); B-114827, October 2, 1974; B-159633, September 10, 1974; B-157512-O.M., September 1, 1972.

GSA's Federal Property Management Regulations, issued under authority of the Federal Property and Administrative Services Act, provide the basis for another significant clarification. Earlier decisions had construed 40 U.S.C. § 34 as a comprehensive ban applicable to all space rentals for government use, no matter how temporary, and therefore fully applicable to the rental of short-term meeting or conference facilities. E.g., 46 Comp. Gen. 379 (1966); 35 Comp. Gen. 314 (1955);[80] 11 Comp. Dec. 678 (1905). GSA subsequently issued a regulation, now found at 41 C.F.R. § 101-17.101-4, which treats the procurement of short-term conference facilities as a service contract rather than a rental contract. GAO considered this regulation in 54 Comp. Gen. 1055 (1975) and, based on it, modified the prior decisions. "Federal agencies may now procure the short-term use of conference and meeting facilities [without regard to 40 U.S.C. § 34] providing they comply with the requirement of [the GSA regulations]." Id. at 1058.

[79]B-159633 was overruled in part by 54 Comp. Gen. 1055 (1975), but the partial overruling involves a separate issue and has no effect on the point discussed in the text.

[80]This case illustrates what used to be a somewhat bizarre, although probably intended, consequence of 40 U.S.C. § 34. The statute had been construed as applicable to the District of Columbia government. See also 34 Comp. Gen. 593 (1955); 17 Comp. Gen. 424 (1937); 10 Comp. Dec. 117 (1903). Therefore, prior to home rule, the government of the District of Columbia could not rent space in the District of Columbia without specific congressional authorization.

For situations not governed by the Federal Property and Administrative Services Act, or where an agency subject to the Act attempts to contract directly rather than through or under delegation from GSA, 40 U.S.C. § 34 remains in force. Payment in violation of the statute can put a certifying officer at risk. See 46 Comp. Gen. 135 (1966). Many of the earlier interpretations, therefore, are still valid although they now apply to a smaller universe.

The first point to note is that the statute is expressly limited to rentals in the District of Columbia. It has no effect on, nor is there any similar restriction to, rentals elsewhere, even a few minutes away in the suburbs of Maryland or Virginia. B-140744, October 1, 1959; B-204730-O.M., July 26, 1982. It applies to all space rentals for governmental purposes. This includes space for storage. 6 Comp. Gen. 685 (1927); 27 Op. Att'y Gen. 270 (1909). Although, as noted above, it is no longer regarded as applicable to short-term conference facilities, the "service contract" concept cannot be extended to include lodging accommodations, which remain subject to 40 U.S.C. § 34. 56 Comp. Gen. 572 (1977).

The statute requires an appropriation "in terms." This means "express provision for the rent of a building, or language equivalent thereto." 10 Comp. Dec. 178, 180 (1903). Obviously, express language in an appropriation act authorizing renting or leasing in the District of Columbia will do the job. E.g., 13 Comp. Dec. 644 (1907). Just as clearly, burying the item in budget justification materials is not sufficient. 46 Comp. Gen. 379, 381 (1966). In 9 Comp. Dec. 831 (1903), an appropriation for "every other necessary expense" in connection with the storage of certain records was, given the context of the appropriation, viewed as sufficiently specific. However, 11 Comp. Dec. 678 (1905) reached the opposite result where similar language was used in a context which did not clearly imply the need for space acquisition. The requisite authority need not be in an appropriation act. It may be contained in the agency's enabling or program legislation. 23 Comp. Gen. 859 (1944). For example, the Federal Emergency Management Agency's authority to lease property "wherever situated" is sufficient. B-195260, July 11, 1979.

An interesting "common sense" exception occurred in 6 Comp. Dec. 75 (1899). The building which housed the Department of

Justice had become "unsafe, overcrowded, and dangerously overloaded." Congress made an appropriation to construct a new building on the site of the old building, but there was no mention of interim facilities. Reasoning that rental of temporary quarters was "absolutely necessary" to fulfilling the purpose of the appropriation, and that Congress could not possibly have intended for the Department to cease operations during the construction period, the Comptroller of the Treasury held that the construction appropriation was available for the rental of temporary quarters while the new building was being erected. "This statute [40 U.S.C. § 34] will well be fulfilled by any appropriation for a purpose which necessarily implies renting a building." Id. at 78-79. However, as the Comptroller explained a few years later, the necessary implication theory requires more than mere inconvenience. A rigid interpretation in 6 Comp. Dec. 75 "would have put the Department of Justice, with its records, in the street." 9 Comp. Dec. 551, 552 (1903). A similar holding is Rives v. United States, 28 Ct. Cl. 249 (1893), finding 40 U.S.C. § 34 inapplicable where the Public Printer purchased certain material under statutory direction but, having insufficient storage space available, simply left it where it was until more space could be obtained.

The statute similarly does not apply in situations which amount to inverse condemnations. Semmes and Barbour v. United States, 26 Ct. Cl. 119 (1891) (government continued to occupy property after expiration of lease).

An agency may not avoid 40 U.S.C. § 34 by entering into a cost reimbursement contract with someone else to procure space that it could not do by a direct leasing arrangement. 49 Comp. Gen. 305, 308 (1969). This is nothing more than an application of the fundamental tenet that an agency may not do indirectly that which it is prohibited from doing directly. However, GAO advised the National Science Foundation in 46 Comp. Gen. 379 (1966) that it could use donated funds, without regard to 40 U.S.C. § 34, as long as the rental was in furtherance of an authorized agency purpose.

A related statute is 40 U.S.C. § 35:

"Where buildings are rented for public use in the District of Columbia, the executive departments are authorized, whenever it shall be advantageous to the public interest, to rent others in their stead: Provided, That, except as otherwise provided,

no increase in the number of buildings in use, nor in the amounts paid for rents, shall result therefrom."

Our research has disclosed no cases interpreting or applying this provision.

g. Economy Act

It is necessary to make brief mention of a statute which no longer exists because it is found in virtually every case involving a government lease for a period of over 50 years. Section 322 of the Economy Act of 1932, codified prior to 1988 at 40 U.S.C. § 278a, prohibited the obligation or expenditure of appropriated funds (1) for rent in excess of 15 percent of the fair market value of the rented premises as of the date of the lease,[81] and (2) for repairs, alterations, or improvements to the rented premises in excess of 25 percent of the first year's rent.[82]

This statute generated literally dozens of decisions. The 15 percent limitation, the General Services Administration Board of Contract Appeals stated in a 1984 case, "is a blunt instrument at best, . . . is totally out of harmony with the economic situation" of the times, and had become "a fruitful source of litigation in its own right." Northwestern Development Co., GSBCA Nos. 6821, 7433, 84-3 B.C.A. ¶ 17,613 (1984), at 87,749. The 25 percent limitation for alterations and repairs, GAO reported in 1978, was ineffective and should be repealed. General Services Administration's Practices for Altering Leased Buildings Should Be Improved, GAO/LCD-78-338, 19-22 (September 14, 1978).

The demise of section 322 came about in somewhat byzantine fashion. In a series of continuing resolutions, Congress suspended the 15 percent limitation for fiscal year 1982, renewed the suspension for the following year, made it permanent in 1984, and confirmed the permanency of the suspension in 1987. See Ralden Partnership v. United States, 891 F.2d 1575, 1576-77 and 1579 n.5 (Fed. Cir. 1989); 65 Comp. Gen. 302 (1986). Then, in 1988, section 322 was repealed outright. Public Buildings Amendments

[81]E.g., 57 Comp. Gen. 591 (1978); 21 Comp. Gen. 906 (1942); 12 Comp. Gen. 546 (1933); 12 Comp. Gen. 440 (1932).

[82]E.g., 30 Comp. Gen. 122 (1950); 30 Comp. Gen. 58 (1950); 29 Comp. Gen. 279 (1949); 20 Comp. Gen. 30 (1940).

of 1988, Pub. L. No. 100-678, § 7, 102 Stat. 4049, 4052. Virtually every pre-1988 leasing case cited throughout this discussion includes at least some mention of the Economy Act, and while those cases remain valid for the propositions for which they are cited, the portions dealing with Economy Act issues are now obsolete.

h. Some Agency-Specific Authorities

The General Services Administration does the major portion of the government's space leasing, but it does not do all of it. A number of other agencies have their own statutory leasing authority, either agencywide or in specific contexts. We note here a sampling of those authorities.

The defense establishment has several provisions. The Secretary of Defense and the Secretary of each military department may provide for "[t]he leasing of buildings and facilities." 10 U.S.C. § 2661(b)(1). Another provision gives the military departments authority to "acquire any interest in land" that does not cost more than $200,000 exclusive of administrative costs and the amounts of any deficiency judgments. 10 U.S.C. § 2672(a). Before entering into a lease of real property in the United States whose estimated annual rental is more than $200,000, military departments must report the transaction to the Senate and House Armed Services Committees and allow a 30-day waiting period. 10 U.S.C. § 2662(a)(2).

Other provisions address military leases overseas. The military departments are authorized by 10 U.S.C. § 2675 to lease real property in foreign countries that is "needed for military purposes other than for military family housing," and by 10 U.S.C. § 2828(c) to lease housing facilities in foreign countries in specified circumstances. Both sections authorize multi-year leases—up to 5 years under section 2675 and up to 10 years under section 2828(c)—and permit the leases to be obligated year-by-year against annual appropriations. 10 U.S.C. §§ 2675, 2828(d). Appropriations available for "maintenance or construction" may be used for leases under sections 2672 or 2675. 10 U.S.C. § 2673.

Some examples from the civilian side of the government are:

- 15 U.S.C. § 78d(b)(2): Securities and Exchange Commission "is authorized to enter directly into leases for real property" and is exempt from GSA's space management regulations.

- 15 U.S.C. § 2218(b)(3): Federal Emergency Management Agency may lease any property or interest in property "wherever situated" needed for activities under the Federal Fire Prevention and Control Act.
- 22 U.S.C. § 2514(d)(9): Funds available to the Peace Corps may be used for leases abroad not to exceed 5 years.
- 22 U.S.C. § 2670(h): State Department may lease, for terms of up to 10 years, real property in foreign countries for the use of the Foreign Service.
- 38 U.S.C. § 8122(b): Department of Veterans Affairs may lease "necessary space for administrative purposes" in connection with "extending benefits to veterans and dependents."
- 39 U.S.C. § 401(6): general leasing authority for United States Postal Service.
- 42 U.S.C. § 7256(a): general leasing authority for the Department of Energy.

3. Foreign Leases

Because of differences in law and custom, leases of real property in foreign countries often present problems not found in domestic leases. The first point to emphasize is that the fiscal laws of the United States apply in full force just as they apply to domestic leases. An agency may not disregard the fiscal laws just because the money is being spent in a foreign country.

One example is the Antideficiency Act. As just noted in the preceding section, agencies with significant presence in foreign countries (military departments, State Department, Peace Corps) have been given specific authority to enter into multi-year leases of real property. Absent such authority, leasing activities are subject to the rule that leases are construed as binding only to the end of the fiscal year in which made or to the end of the period of any available no-year or multi-year authority, and require affirmative renewal by the government to extend beyond that point. 5 Comp. Gen. 355 (1925); A-91697, March 3, 1938.

Rental escalation clauses purporting to obligate the United States to indeterminate or indefinite liability, or which may cause the rent to exceed a statutory ceiling (see, e.g., 10 U.S.C. § 2828(e)), have also been found to violate the Antideficiency Act. Leased Military Housing Costs in Europe Can Be Reduced by Improving Acquisition Practices and Using Purchase Contracts, GAO/NSIAD-85-113, 7-8

(July 24, 1985). In one such case involving a lease in Italy which did not contain a termination clause, the Navy unilaterally modified the lease so as to keep the rent within the statutory ceiling. GAO advised that if the landlord were able to recover by lawsuit, the amount of any judgment or settlement would not be added to the rent payments for purposes of assessing Antideficiency Act violations. B-227527/B-227325, October 21, 1987.

In a 1986 case, the Air Force was having difficulty inserting in a German lease a provision limiting expenditures to the statutory ceiling. In that case, however, since bona fide cost estimates were well within the ceiling, the rent itself was fixed, the only exposure to escalation being maintenance and utility charges, and the lease included a termination for convenience clause, Antideficiency Act considerations did not impede entering into the lease. 66 Comp. Gen. 176 (1986).

Another fiscal statute which rears its head in the foreign lease context is 31 U.S.C. § 3324(b), which prohibits advance payments unless specifically authorized. The same agencies with multi-year leasing authority generally also have authority to pay rent in advance. 10 U.S.C. § 2396(a) (military departments); 22 U.S.C. § 2514(d)(9) (Peace Corps); 22 U.S.C. § 2670(h) (State Department). Absent such authority, rent could not be paid in advance. 19 Comp. Gen. 758 (1940); 3 Comp. Gen. 542 (1924). The authority for the military departments applies only in accordance with local custom. See B-194353, June 14, 1979. The rental of a grave site in perpetuity, in apparent accord with local custom, is not regarded as an advance payment. 11 Comp. Gen. 498 (1932).

The standards for recording obligations, as prescribed by 31 U.S.C. § 1501(a), are the same for foreign leases. See B-192282, April 18, 1979, described more fully in Chapter 7, for an unusual application based on custom in South Korea. The same is true for the Assignment of Claims Act. E.g., 11 Comp. Gen. 278 (1932) (illustrating the point that the United States can choose to recognize an assignment); 10 Comp. Gen. 31 (1930) (rent can be paid to agent bank in United States if specified in lease).

To restate the point, a government agency entering into a lease of real property in a foreign country must adhere to the statutes governing the obligation and expenditure of public funds; deviations

require legislative authorization. When it comes to determining rights and liabilities under the lease, however, the situation is somewhat different. Rights and liabilities are governed by the laws of the place where the premises are located and the lease was executed. B-120286, July 12, 1954. As that decision pointed out, the considerations which subordinate state law to federal law in the case of a domestic lease do not apply to a foreign lease.

In B-120286, to illustrate, the government of the Netherlands passed a law permitting all landlords to raise rents up to a specified percentage. The question was whether it was appropriate for a federal agency, as tenant under a lease in the Netherlands, to pay the lessor's demand for the increased rent. If the landlord sued, he would sue in a Dutch court which would apply Dutch law and award the rent increase. Therefore, GAO advised that the voucher should be paid. Applying the same rule in a 1957 case, GAO allowed the claim of a Greek landlord for half the fire insurance premium on property leased in Athens. B-132152-O.M., June 13, 1957.

In 3 Comp. Gen. 864 (1924), GAO applied the law of the Province of Quebec to construe the repair clause in a lease of space in Montreal. Under provincial law, repairing an interior wall was a "tenant's repair" unless otherwise specified in the lease. A similar case is 16 Comp. Gen. 639 (1937), using Dutch law to allocate repair responsibilities under a lease of property in The Hague.

Currency fluctuations are another source of problems. The lease will specify whether payment is to be made in U.S. dollars or in foreign currency. In a 1946 case, a lease in China stipulated payment in yuan. Extreme inflation in China following World War II so devaluated the yuan that the monthly rental was worth approximately $2, under which the landlord could not meet his repair and maintenance responsibilities. The State Department wanted to amend the lease to provide for payment in U.S. dollars equivalent to the amount originally bargained for. Concluding that Chinese law would almost certainly grant the landlord equitable relief, GAO concurred with the proposal, as long as sufficient appropriations were available for the increased rent. B-55649, February 19, 1946.

The extreme case occurred in B-189121, November 30, 1977, recons. denied, B-189121, April 15, 1983. A lease in former Cambodia

provided for payment in Cambodian riels. For reasons not apparent, the landlord failed or refused to collect the rent checks when they were tendered. By the time the landlord filed a claim, the riel had been abolished and was worthless and there was no basis to direct payment in U.S. dollars.

Providing for payment in U.S. dollars does not guarantee a claim-free existence. In B-185960, August 19, 1976, an Italian landlord claimed additional rent, alleging financial loss resulting from devaluation of the dollar. Devaluation per se, as a sovereign act, could not form the basis of relief. However, the claimant also cited a provision of the Italian Civil Code, the application of which to leases was not clear. GAO advised the agency in that case, the Navy, that it could pay the claim if it determined that the provision of Italian law could be applied. The Armed Services Board of Contract Appeals denied a similar claim in Alka, S.A., ASBCA No. 38005, 91-3 B.C.A. ¶ 24,107 (1991), involving a lease in Athens, Greece, which specified that it would be governed by the laws of the United States, under which the lessor had to bear the risk.

If foreign law is to be considered and applied, the claimant has the burden of "proving" what that law is. It is not the responsibility of the adjudicating tribunal to chase it down. B-189121, April 15, 1983.

4. Lease-Purchase Transactions

In the context of government real property, the term "lease-purchase" refers to a transaction in which a building is constructed to government specifications and then leased to the government under a long-term lease during which construction costs are amortized, at the end of which time title passes to the United States. Lease-purchases are also known as "purchase contracts." Putting things in budgetary perspective, a Senate committee made the following observation in connection with 1954 lease-purchase legislation:

"It should be made clear that there are generally three methods available for providing space for the permanent activities of the Federal Government. These are (1) by direct construction with appropriated funds, (2) by lease-purchase contracts with annual payments applied to the amortization of the initial cost over a period of years at the end of which title to the property would pass to the United States, and (3) by straight annual or term leasing under which no capital equity would accrue to the Government. Of these three methods, the overall cost of the first would be the

lowest, the second would be the next lowest in cost, and the third would be the most costly method."[83]

A variation is "lease-construction," which is similar to lease-purchase except that, at the end of the lease, title does not pass to the government. Lease-construction is the most expensive method of all.[84]

The reason the government resorts to lease-purchase or lease-construction arrangements is the same reason we noted earlier that the government often leases space when ownership would be more cost-effective: budgetary constraints. As far back as the 1954 Purchase Contract Act, the Senate Public Works Committee, after making the observation quoted above, was forced to say that "no reliable forecast can be made of the time when budgetary considerations would permit the appropriation of the huge sums required to meet these space needs by direct construction."[85] Thus, while Congress has repeatedly resorted to lease-purchase over the second half of the 20th century, it has done so with ambivalence.

The first major lease-purchase program was the Public Buildings Purchase Contract Act of 1954, 68 Stat. 518, 40 U.S.C. § 356—seemingly temporary, stopgap legislation designed to meet the needs of an expanding government in the post-World War II era. The legislation authorized the General Services Administration to enter into lease-purchase contracts with terms of at least 10 but not more than 25 years, with title to the property to vest in the United States not later than the expiration of the contract term. 40 U.S.C. § 356(a). The "temporary" nature of this legislation was revealed by a limitation that "no appropriations shall be made" for lease-purchase contracts not congressionally approved within three years of the legislation's enactment. Section 411(e) of the Public Buildings

[83]S. Rep. No. 83-1084, at 2 (1954), reprinted in 1954 U.S.C.C.A.N. 2637, 2638. This is the report of the Senate Committee on Public Works on what became the Public Buildings Purchase Contract Act of 1954.

[84]See H.R. Rep. No. 87-2050, at 13 (1962), quoted in Merriam v. Kunzig, 476 F.2d 1233, 1237 n.3 (3d Cir. 1973), and in 51 Comp. Gen. 573, 575 (1972). This is the report of the House Committee on Appropriations on the Independent Offices Appropriation Act for 1963.

[85]S. Rep. No. 83-1084, supra note 83, at 2.

Purchase Contract Act, as added by section 101, 68 Stat. 519. (We will return to subsection (e) below.) The contracts were to provide for equal annual payments to amortize principal and interest, not to exceed limitations specified in appropriation acts. Id. GSA's practice under this legislation was to first enter into contracts for site acquisition and preparation of plans and specifications, and then enter into either a single three-party contract (government, builder, investor) or separate construction and financing contracts. See B-144680, November 7, 1961; B-130934, June 26, 1957.

Several aspects of the 1954 legislation became prototypes for future lease-purchase programs, and many of the decisions therefore remain valid. One provision of the law directed reimbursement to the contractor of certain expenses, including "costs of carrying appropriate insurance." 40 U.S.C. § 356(d)(3). This does not authorize the government to insure the property in its own right, or to require the contractor to carry insurance for the government's protection. 35 Comp. Gen. 391 (1956). An important element of the program is 40 U.S.C. § 356(h), providing for the property to remain on state and local tax rolls until title passes to the government. The statute does not expressly authorize the government to recover improperly assessed state or local taxes, but the government has this right without the need for statutory authority. United States v. Dekalb County, 729 F.2d 738 (11th Cir. 1984).

As noted above, subsection (e) of the 1954 law (68 Stat. 519), required prospectus approval by congressional oversight committees as a prerequisite to the appropriation of funds. If actual costs exceeded the approved estimate, GAO had advised that there was no need to go back to the committees as long as the variation was "reasonable." 37 Comp. Gen. 613 (1958); B-129326, October 5, 1956. Of course, what is "reasonable" requires a case-by-case evaluation. In 37 Comp. Gen. 613, for example, GAO did not regard a 15 percent increase in construction costs as a "reasonable variation." As also noted above, subsection (e) limited the time for prospectus approval to 3 years after the date of enactment (July 22, 1954). Congressional discomfort with the program is also evident in another provision of the 1954 law, 40 U.S.C. § 357, stating the congressional intent that the program not "constitute a substitute for or a replacement of any program for the construction by the United States of such structures as may be required from time to time by the Federal Government."

When the 3-year period elapsed, Congress declined to renew the program.[86] In considering what was to become the Independent Offices Appropriation Act of 1959, the House Appropriations Committee cited a GAO study which found that "it costs at least $1.64 under lease-purchase to buy the same amount of building as $1.00 does by direct appropriation." H.R. Rep. No. 85-1543, at 3 (1958). Consequently, that act included a permanent prohibition on the use of funds "in this or any other Act . . . for payment for sites, planning or construction of any buildings by lease-purchase contracts." Pub. L. No. 85-844, 72 Stat. 1063, 1067 (1958). Public Law 85-844 exempted 29 projects started or planned under the 1954 law and authorized one new project. See B-160929, April 20, 1967.

The prohibition did not, and of course could not, prevent legislating the occasional exception. E.g., B-139524, June 1, 1959. It also did not prevent GSA from soliciting bids on alternate bases, one of which was lease with option to purchase. 38 Comp. Gen. 703 (1959). GSA had found in that case that, without the purchase option, bidders were amortizing construction costs over the first few years of the proposed lease term, so that the government would be paying those costs in any event. In addition, the military departments asserted the authority to use lease-purchase under what is now 10 U.S.C. § 2663(c), which authorizes them to "contract for or buy any interest in land" needed for specified purposes. GAO agreed, especially for projects which had been reported to Congress under 10 U.S.C. § 2662. B-154420-O.M., July 7, 1964.

The prohibition of the Independent Offices Appropriation Act of 1959 applied by its terms to "lease-purchase." It therefore did not touch "lease-construction" which, as we have noted, is even more costly to the taxpayer. Congress filled this gap by enacting an appropriation rider for 9 consecutive years starting with 1963, which prohibited the use of funds for lease-construction projects whose estimated cost exceeded $200,000 without prospectus approval by the appropriate congressional committees. The provision is quoted in full in several decisions, e.g., 45 Comp. Gen. 27, 29 (1965) and 44 Comp. Gen. 491, 492 (1965). Even though it was one of GSA's

[86]Subsection(e) has been dropped from the U.S. Code as fully executed. Nevertheless, the limitation continues to apply (see 40 U.S.C. § 356 note), subject, of course, to explicit legislative exceptions, as discussed in the text.

general provisions, it applied to all agencies funded under the act in which it appeared. 44 Comp. Gen. 491 (1965). It was not governmentwide, however.

The prohibition was not limited to "total or substantially total occupancy" by the government but applied as well to shared occupancy situations. 45 Comp. Gen. 27 (1965). However, the fact that an offered building was not actually in existence was not, in and of itself, sufficient to invoke the prohibition. The prohibition was regarded as inapplicable if there was a "bona fide intention on the part of the offeror to construct the building offered for lease irrespective of its securing a lease with GSA," 51 Comp. Gen. 573, 576 (1972), or if it was clear that the offeror was acting at its own risk with no promise or commitment by the government to lease the space, 45 Comp. Gen. 506 (1966).

The last such prohibition appeared in the Independent Offices Appropriation Act for 1971, Pub. L. No. 91-556, 84 Stat. 1442, 1449 (1970). Two years later, Congress amended 40 U.S.C. § 606 to add the prospectus approval requirement for leases discussed previously in this section. This evolution is described in Merriam v. Kunzig, 476 F.2d 1233, 1237-39 (3d Cir. 1973), cert. denied, sub nom. Gateway Center Corp. v. Meriam, 414 U.S. 911 (1973).

In considering the 1972 public buildings legislation, Congress faced the same problem it had faced in 1954—a backlog of needed federal construction with no foreseeable prospects of being able to appropriate the necessary amounts. Therefore, it again turned to the "stop-gap expedient"[87] of lease-purchase and enacted section 5 of the Public Buildings Amendments of 1972, 40 U.S.C. § 602a. The 1972 law authorized GSA to enter into lease-purchase contracts with up to 30-year terms, with title to the property to vest in the United States at or before the expiration of the contract term. 40 U.S.C. § 602a(a).

Many of the 1972 provisions were patterned after the 1954 Purchase Contract Act. Payments to the contractor include reimbursement for "costs of carrying appropriate insurance," and the property is to

[87]H.R. Rep. No. 92-989, (1972), reprinted in 1972 U.S.C.C.A.N. 2370, 2373 (report of the House Committee on Public Works).

remain on state and local tax rolls until title passes to the United States. 40 U.S.C. §§ 602a(b)(3), 602a(d). Also similar to the 1954 law, the 1972 act gave GSA a 3-year time limit on entering into the contracts. 40 U.S.C. § 602a(g). Projects were subject to the prospectus approval requirements of 40 U.S.C. § 606(a). 40 U.S.C. § 602a(f).

GSA devised what it called a "dual system" of contracting to implement 40 U.S.C. § 602a. GSA would enter into either a single contract or a series of phased contracts for construction of each project. GSA would then enter into a financing contract for a group of projects with a "trustee," who would obtain the necessary funds by selling "Participation Certificates" to private investors. GAO concurred that this scheme was within GSA's authority under section 602a. 52 Comp. Gen. 517 (1973); 52 Comp. Gen. 226 (1972). GAO also agreed that the statutory 3-year cutoff (June 30, 1975) did not apply to revisions of projects whose basic purchase contract had been entered into prior to the cutoff, as long as the modification did not result in so substantial a change in the project from the one originally approved as to amount to a "new" project. B-177610, April 26, 1976.

GSA has considered refinancing purchase contracts entered into under 40 U.S.C. § 602a by paying off the existing debt with funds obtained from the Federal Financing Bank. Since the refinancing would not involve any other project modifications, GAO found the proposal legally unobjectionable. B-250236, September 9, 1992.

Although the authority of 40 U.S.C. § 602a, like its 1954 predecessor, is now closed to the initiation of new projects, lease-purchase activity goes on under a variety of other authorities. Congress can always legislate new projects, and has done so in a number of instances. Some examples are:

- Section 103 of the Energy and Water Development Appropriation Act, 1984, Pub. L. No. 98-50, 97 Stat. 247, 249 (1983), authorized the Army Corps of Engineers to use lease-purchase to acquire an office building in New Orleans, Louisiana. GAO summarized some of the financial aspects in Lease-Purchase: Corps of Engineers Acquisition of Building in New Orleans District, GAO/AFMD-88-56FS (June 1988).

- The 1988 continuing resolution, Pub. L. No. 100-202, 101 Stat. 1329 (1987), authorized several lease-purchase projects. See 101 Stat. at 1329-405 through 1329-407.
- Another 1987 statute, the Federal Triangle Development Act, 40 U.S.C. §§ 1101-1109, authorizes development of a federal building complex in Washington, D.C., using lease-purchase, with planning and construction under the supervision of the Pennsylvania Avenue Development Corporation. Financing, discussed in B-248647.2, April 24, 1995, and B-248647, December 28, 1992, is being provided by the Federal Financing Bank.
- Legislation enacted in 1989 authorizes the Department of Veterans Affairs to use lease-purchase to provide for the collocation of certain regional offices with medical centers (38 U.S.C. § 316) and to acquire up to three medical facilities (38 U.S.C. § 8103(d)). Both provisions require that obligations be "subject to the availability of appropriations for that purpose," and therefore do not constitute contract authority. B-239435, August 24, 1990.

GSA's authority is now found in 40 U.S.C. §§ 490(h) and 490d, in conjunction with the prospectus approval requirement of 40 U.S.C. § 606(a). Subsection 490(h)(1), GSA's general leasing authority in the Federal Property and Administrative Services Act, authorizes leases of up to 20 years "in buildings and improvements which are in existence or to be erected by the lessor for such purposes." This provision, although the result is probably not what Congress had in mind (see 38 Comp. Gen. 703 (1959)), has been regarded as sufficient authority for lease-purchase or lease-construction arrangements, and was in fact used during the time period between the 1954 and 1972 programs. E.g., 38 Comp. Gen. 703; B-166868, July 15, 1969; B-157423-O.M., September 14, 1965; B-156917-O.M., June 24, 1965.

Section 490d, which first made its appearance as section 6 of 5101(m) of the 1987 continuing resolution, Pub. L. No. 99-500, 100 Stat. 1783-321, provides:

> "Funds hereafter made available to the General Services Administration for the payment of rent shall be available for the purpose of leasing, for periods not to exceed thirty years, space in buildings erected on land owned by the United States."

This reflects a continuation of the long-standing policy of the Congress that "no public building shall be erected on land not owned by the United States." 6 Comp. Dec. 877, 878 (1900).

An aspect of lease-purchase financing that produced controversy in the 1990s is scorekeeping. Scorekeeping may be defined as "the process of tracking the status and fiscal impact of congressional budgetary actions." B-239435, August 24, 1990. See also A Glossary of Terms Used in the Federal Budget Process (Exposure Draft), GAO/AFMD-2.1.1 at 71-72 (January 1993). It is necessary in order to comply with various aspects of the Congressional Budget Act. The problems are discussed in Budget Issues: Budget Scorekeeping for Acquisition of Federal Buildings, GAO/T-AIMD-94-189 (September 20, 1994), and The Budget for Fiscal Year 1991: Scoring of GSA Lease-Purchases, GAO/AFMD-91-44 (January 1991). The scorekeeping issue is largely another facet of the budgetary concerns to which we have alluded throughout this discussion.

Prior to 1991, lease-purchase was scored the same as a straight lease—spread over the period of the lease, one year's budget authority at a time. This produced a budgetary bias in favor of the more expensive lease-purchase option. Scoring rules were changed in 1990 to require scoring the full costs of a lease-purchase up front. While this had the benefit of "eliminating the artificial advantage previously given to lease-purchases," it introduced a new bias in favor of operating leases, still scored one year at a time. T-AIMD-94-189, supra, at 3.

The 1999 edition of Office of Management and Budget Circular No. A-11 addresses the scoring of lease-purchases in some detail. It provides that, for scorekeeping purposes:

> "The up-front budget authority required [in the year in which the authority is first made available] for both lease-purchases and capital leases . . . equals the present value of the minimum lease payments excluding payments for identifiable annual operating expenses . . . discounted . . . using the appropriate interest rate. . . . Additional budget authority equal to Treasury's cost of financing plus any annual operating expenses will be recorded on an annual basis over the lease term." OMB Cir. No. A-11, App. B. para 2(b).[88]

However, 40 U.S.C. § 490e provides:

[88]OMB's instructions for reporting obligations say essentially the same thing. OMB Cir. No. A-34, sec. 11(e) (1999).

"Notwithstanding any provisions of this Act or any other Act in any fiscal year, obligations of funds for lease, entered into in accordance with section 490(h)(1) of this title [section 210(h)(1) of the Federal Property and Administrative Services Act of 1949, as amended], shall be limited to the current fiscal year for which payments are due without regard to [the Antideficiency Act, 31 U.S.C. § 1341].

F. Public Buildings and Improvements

1. Construction

a. General Funding Provisions

(1) 41 U.S.C. § 12

Originally enacted in 1868 (15 Stat. 177), 41 U.S.C. § 12 provides:

"No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose."

This is one of the permanent funding statutes through which Congress implements its control of the public purse, and has often been cited in tandem with other funding statutes such as the purpose statute (31 U.S.C. § 1301(a)) or the Antideficiency Act (31 U.S.C. § 1341). E.g., 42 Comp. Gen. 226, 227 (1962); 41 Comp. Gen. 255, 257-58 (1961); 21 Op. Att'y Gen. 244, 247-48 (1895). Its purpose, as with the other funding statutes, is to prevent the executive from creating obligations beyond those contemplated and authorized by Congress. 38 Comp. Gen. 758, 761 (1959), citing 21 Op. Att'y Gen. at 248. A contractor who does work in excess of the amount appropriated can recover only up to the limit of the appropriation, even though the "over obligation" may have been induced by government error. Sutton v. United States, 256 U.S. 575 (1921).

In addition, a government officer or employee who knowingly acts in a way that would violate 41 U.S.C. § 12 "shall be fined under this

title or imprisoned [not more than a year]," or both. 18 U.S.C. § 435 (enacted as part of the same 1868 legislation as 41 U.S.C. § 12).[89]

For construction within the District of Columbia, 41 U.S.C. § 12 is reinforced by another statute, 40 U.S.C. § 68, which provides that "there shall not be erected on any reservation, park, or public grounds, of the United States within the District of Columbia, any building or structure without express authority of Congress." While 41 U.S.C. § 12 has spawned numerous decisions, one finds little mention of 40 U.S.C. § 68 apart from the occasional passing reference such as 20 Comp. Gen. 272, 275 (1940).

Much ink has been spilled trying to decide just what is or is not a "public building" for purposes of 41 U.S.C. § 12. GAO has never attempted a precise definition, but has used more of what one might call a "we know one when we see one" approach. Not that difficult, one decision suggested. "[T]he term 'building' . . . instantly calls to mind a structure of some kind having walls and a roof." 45 Comp. Gen. 525, 526 (1966). See also B-119846, July 23, 1954 ("structure of brick enclosing a space within its walls and covered with a roof," which "any average person" would recognize as a building); B-165289-O.M., August 26, 1969 (structure with a foundation, walls, separate rooms, and a roof fits the ordinary meaning of the term).[90] Clearly, the statute applies to public buildings which are more or less permanent, the term "permanent" referring not so much to the mode of construction as to contemplated use. Thus, the following have been treated as "public buildings" for purposes of 41 U.S.C. § 12:

- Industrial type building with railroad siding for hydrostatic testing, painting, and maintaining specially designed tank cars used for transporting helium. 38 Comp. Gen. 392 (1958).

[89]The revision notes for this section state that penalties for such violations were reduced many years ago to avoid having to classify the offender as a felon. 18 U.S.C. § 435 note. Nevertheless, inflation being what it is, the fine for a violation of this provision (a "class A misdemeanor") now can be up to $100,000. 18 U.S.C. §§ 3559(a)(6), 3571(b)(5).

[90]Such wisdom is not the exclusive province of the General Accounting Office. E.g., In re Amber S., 39 Cal. Rptr. 2d 672 (Cal. Ct. App. 1995) (building for purposes of state burglary statute is "any structure which has walls on all sides and is covered by a roof").

- Quonset hut attached to a poured concrete base to be used for storage purposes. 30 Comp. Gen. 487 (1951).
- Frame buildings with cement foundations, cement floors, and shingled roofs, to be used for storage and repair of tools and equipment. 5 Comp. Gen. 575 (1926).
- Hangars, shops, and storehouses on landing fields. 2 Comp. Gen. 14 (1922), modified, 2 Comp. Gen. 133 (1922).
- Pontoon storage shed. 16 Comp. Dec. 685 (1910).

An extension or addition to a public building is also covered. A-59252, December 28, 1934; A-40231, January 11, 1932.

Some examples of structures which have been held not to be "buildings" within the scope of 41 U.S.C. § 12, regardless of permanency, are:

- Automated self-service unit covered by canopy and containing various postal vending machines, weight scales, and a parcel depository unit, to be placed in shopping center. 45 Comp. Gen. 525 (1966).
- Large testing chamber with 50-inch concrete walls for use in a research project. 39 Comp. Gen. 822 (1960). See also B-50958, August 9, 1945 (heavy concrete chamber partly above and partly below ground intended for temporary use in testing explosives).
- Greenhouses. B-141793-O.M., February 17, 1960. Earlier decisions had exempted temporary greenhouses. E.g., 7 Comp. Gen. 629 (1928). The 1960 case extended the proposition to greenhouses that were more or less permanent.

With respect to temporary structures, the demarcation between the permissible and the impermissible is not as bright as one might wish. The statement found in numerous decisions over the decades is that 41 U.S.C. § 12 applies to "any structure in the form of a building not clearly of a temporary character." E.g., 42 Comp. Gen. 212, 214 (1962); 9 Comp. Gen. 75, 76 (1929); 2 Comp. Gen. 14 (1922), modified, 2 Comp. Gen. 133 (1922). See also 26 Comp. Dec. 829 (1920). The decisions thus attempt to strike a balance between the language of the statute, which does not distinguish between permanent and temporary structures (e.g., 10 Comp. Gen. 140, 142 (1930)), and a result which could in some cases border on the ridiculous.

As one example, the statute has been found applicable to a temporary shed or storehouse of frame construction with sheet metal siding, to be used to house motor vehicles. 6 Comp. Gen. 619 (1927). Other examples include:

> "temporary sheds for the shelter of farm animals; portable houses for temporary use of employees; temporary portable buildings for use in the detention and treatment of aliens; barns, sheds, cottages, etc., of frame construction of a temporary nature with dirt floors and contemplated to be destroyed; . . . ."
> 42 Comp. Gen. 212, 214 (1962).[91]

The fact that a structure is prefabricated and movable is not dispositive. Id. at 215.

On the other hand, 41 U.S.C. § 12 has been found inapplicable in the following cases, summarized in 7 Comp. Gen. 629, 630 (1928):

- Wood frame shed to house a fumigation tank used in fumigating cotton against the pink Mexican bollworm. A-17265, March 16, 1927.
- A cabinet 30 feet square with glass sides, for use in studying light in relation to certain diseases. A-18335, May 16, 1927.

While these examples do not lend themselves to the formulation of a black-letter rule, it will be easier to find an exception in the case of a structure to be used for a clearly temporary experiment or research project, and correspondingly more difficult to find one where the structure is to be used for either residential or office space for employees. See 10 Comp. Gen. 140 (1930); B-50958, August 9, 1945. Also, a structure is not temporary merely because the agency calls it temporary. 63 Comp. Gen. 422, 436 (1984) (airfields and other military facilities in Honduras); 21 Comp. Dec. 420 (1914) (various residential structures).

The "specific purpose" requirement of 41 U.S.C. § 12 applies not only to public buildings but to "public improvements" as well. The term in this context refers to improvements to real property. 45 Comp.

[91]The alien case, which somewhat inexplicably does not cite 41 U.S.C. § 12, is 13 Comp. Dec. 355 (1906). The other examples in the quoted passage appear to be from unpublished decisions of the Comptroller of the Treasury. See 6 Comp. Gen. at 621. Unfortunately, the actual texts of these are no longer available as a practical matter.

Gen. 525, 526 (1966). Thus, major alterations or renovations to a public building are public improvements for purposes of 41 U.S.C. § 12. E.g., 39 Comp. Gen. 723 (1960). Several cases in this category have involved the conversion of a building to a different use. 38 Comp. Gen. 758 (1959) and 38 Comp. Gen. 588 (1959) (conversion of hospital building for occupancy by federal agency); 37 Comp. Gen. 767 (1958) and B-135411, March 24, 1958 (conversion of buildings into schools); B-76841, August 23, 1948 (conversion of school building to clinic); B-170587-O.M., October 21, 1970 (conversion of office space into laboratories); B-151369-O.M., November 15, 1963, and B-151369-O.M., September 10, 1964 (conversion of former bull barn to research laboratory). The work in all of these cases was held subject to 41 U.S.C. § 12.

Similarly, the term "public improvement" as used in 41 U.S.C. § 12 has been held to include the installation of an elevator in a government building (8 Comp. Gen. 335 (1929)); the enlargement and modernization of a cafeteria (27 Comp. Gen. 634 (1948)); and the installation of central air conditioning in a library building (B-118779, November 14, 1969).

Another line of cases holds that minor structural alterations necessary to accommodate specialized equipment needed in the performance of an authorized function may be funded from general operating appropriations. 16 Comp. Gen. 816 (1937); 16 Comp. Gen. 160 (1936); 5 Comp. Gen. 1014 (1926); 3 Comp. Gen. 812 (1924). While these cases do not mention 41 U.S.C. § 12, the clear implication is that the minor alterations do not rise to the level of public improvements for purposes of the statute. See B-170587-O.M., October 21, 1970. The "exception" of 3 Comp. Gen. 812 and its progeny is limited to specialized work or equipment, and does not extend to alterations designed to improve a building for office purposes generally. 17 Comp. Gen. 1050 (1938).

The temporary versus permanent distinction discussed above in the context of public buildings can also be relevant in the case of improvements. If an agency would be authorized to construct a temporary facility without having to comply with 41 U.S.C. § 12, the statute would be equally inapplicable to the repair of an existing government-owned facility for the same temporary use. B-117124, October 1, 1953.

The requirement of 41 U.S.C. § 12 also applies to public improvements which do not involve buildings, such as roads and airfields. 63 Comp. Gen. 422, 435-36 (1984); 41 Comp. Gen. 255 (1961); 29 Comp. Gen. 235 (1949).

Once it is determined that a given building or improvement is within the scope of 41 U.S.C. § 12, the clearest way to satisfy the statute is, naturally, for the item to be explicitly addressed in the relevant appropriation act. However, this degree of explicitness is not absolutely required. E.g., B-8816, March 9, 1940 (appropriation for construction of public works project is available to construct buildings necessary to the project even though not specified in the appropriation). The essence of 41 U.S.C. § 12 is not that public buildings and improvements are in any way bad or undesirable, but merely that they are sufficiently important—and sufficiently costly—that agencies should not undertake them without congressional sanction. Thus, for example, where (1) the Federal Civil Defense Act authorized an agency to renovate facilities, (2) the relevant appropriation provided a lump sum to "[carry out] the provisions of the Federal Civil Defense Act," and (3) the agency had included the desired renovations in its budget submission, this was enough to satisfy 41 U.S.C. § 12. 39 Comp. Gen. 723 (1960). In a case which included elements (1) and (2) of this formula but not (3), GAO concluded that 41 U.S.C. § 12 was not satisfied and the appropriation was not available, because "it is clear that the [improvement] is an entirely different project or purpose from any made known to the Congress and for which the Congress appropriated funds." 37 Comp. Gen. 767, 771 (1958). Merely burying an item in a budget submission without the required nexus in the appropriation act (item (3) without item (2)) is equally insufficient. B-76841, August 23, 1948.

Short of the "formula" of 39 Comp. Gen. 723, or some comparable set of circumstances from which congressional approval can be necessarily implied, general operating appropriations are not available for items within the scope of 41 U.S.C. § 12. The term "necessary expenses" in an appropriation is not enough. 38 Comp. Gen. 758 (1959); 4 Comp. Gen. 1063 (1925). Similarly, a "necessary expense" justification as described in Chapter 4, however legitimate, is not enough to overcome the statutory hurdle of 41 U.S.C. § 12. 42 Comp. Gen. 212, 215 (1962); 5 Comp. Gen. 575, 577 (1926). Exceptions have occurred in a very few cases in which failure to

construct the building or improvement would literally "render it impossible to accomplish the purpose for which the appropriation was made." 10 Comp. Gen. 140, 141 (1930). One example is 2 Comp. Gen. 133 (1922). Use of a general operating appropriation in disregard of 41 U.S.C. § 12 can result in violation of the Antideficiency Act. E.g., B-118779, November 14, 1969.

The requirement of 41 U.S.C. § 12 attaches not only to a direct payment to a contractor, but as well to an advance or reimbursement to a working capital (or other revolving) fund. 30 Comp. Gen. 453 (1951); B-119846, May 27, 1954. In other words, the device of a revolving fund cannot be used to circumvent the statute. However, the statute does not apply to the expenditure of grant funds by a grantee unless so provided in the applicable program legislation, regulations, or terms of the grant agreement. B-173589, September 30, 1971.

A common-sense exception is found in 7 Comp. Gen. 472 (1928). Legislation authorized the appropriation of $150,000 toward the erection of a memorial building to be built with a mix of appropriated funds and private donations. The legislation further provided that the appropriation could constitute no more than half of the total cost. The Comptroller General advised that once the appropriation was made and the donations in hand, a contract for the total cost of the building would not violate 41 U.S.C. § 12, even though it would obviously involve "a larger sum of money than that appropriated for the specific purpose." Id. at 474.

(2) Contract authority under partial appropriations

A statute enacted in 1908, 40 U.S.C. § 261, recognizes that, for any number of reasons, Congress may not wish to fully fund the construction of a public building up front. It provides:

> "[I]n all cases where appropriations are made in part only for carrying into effect the provisions of legislation authorizing the acquisition of land for sites or for the enlargement of sites for public buildings, or for the erection or remodeling, extension, alteration, and repairs of public buildings, the Administrator of General Services, unless otherwise specifically directed, may enter into contracts within the full limit of cost fixed by Congress therefor."

Thus, if Congress has established the total cost of the construction or renovation of a public building, or of related site acquisition, and

subsequently appropriates only part of the money, GSA may enter into a legally binding contract for the full project, not to exceed the total authorized cost.

There is surprisingly little discussion of this statute in the decisions. Our research has disclosed only 20 Comp. Gen. 272, 274 (1940), noting almost in passing that 40 U.S.C. § 261 effectively modifies 41 U.S.C. § 12 to the extent of its terms. What is clear is that, to that extent, 40 U.S.C. § 261 authorizes GSA to enter into contracts in excess or advance of appropriations, and therefore is an exception to the Antideficiency Act. A contract authorized by 40 U.S.C. § 261 is "authorized by law" for purposes of 31 U.S.C. § 1341(a). See 28 Comp. Gen. 163 (1948) (construing similar authority appearing in an appropriation act). Without such authority, the contract would have to be made subject to future appropriations and could confer no rights beyond the amount of the partial appropriation. 14 Comp. Dec. 755 (1908); 13 Comp. Dec. 478 (1907).

(3) Duration of construction appropriations

Two provisions of law authorize appropriations for the construction of public buildings to remain available beyond the end of the fiscal year in which they are appropriated. First, 31 U.S.C. § 1307 provides:

> "Amounts appropriated to construct public buildings remain available until completion of the work. When a building is completed and outstanding liabilities for the construction are paid, balances remaining shall revert immediately to the Treasury."

The second statute is 31 U.S.C. § 1301(c), which prohibits an appropriation contained in a regular, annual appropriation act from being construed to be permanent or available beyond the fiscal year unless it expressly so states or unless it is for one of four specifically named categories—rivers and harbors, lighthouses, public buildings, or the pay of the Navy and Marine Corps.[92]

[92]There are also some agency-specific statutes which authorize construction appropriations to remain available beyond the end of the fiscal year. E.g., 10 U.S.C. § 2860 (military construction); 7 U.S.C. § 2209b (certain Department of Agriculture appropriations); 14 U.S.C. § 656(a) (Coast Guard). Their effect is similar to the general provisions discussed in the text.

Since approximately 1970, most if not all appropriation acts have included a general provision, the origin of which is discussed in some detail in Chapter 2, which states that "[n]o part of any appropriation contained in this Act shall remain available for obligation beyond the current fiscal year unless expressly so provided herein." The key phrase is "unless expressly so provided herein." The effect of this general provision is to override statutes like 31 U.S.C. § 1307 and to render them little more than authorizations which require specific language in the appropriation if they are to be implemented. 58 Comp. Gen. 321 (1979); 50 Comp. Gen. 857 (1971). Consequently, in an appropriation act which contains this general provision, a construction appropriation is no different from any other appropriation with respect to duration; it is a one-year appropriation unless it expressly specifies otherwise.

Prior to the advent of the general provision quoted above, 31 U.S.C. § 1307 had been construed—and given a fairly narrow application—in somewhat over a dozen decisions. If an appropriation act were to be enacted which did not contain the "current fiscal year" general provision or something comparable, 31 U.S.C. §§ 1301(c) and 1307, and the related case law, would come into more direct play.

Essentially, the early decisions found 31 U.S.C. §§ 1301(c) and 1307 applicable only to appropriations which provide for the original construction of public buildings, rejecting attempts to apply the authority broadly to any appropriation somehow related to a construction project. 36 Comp. Gen. 790, 793 (1957); 8 Comp. Gen. 519, 520 (1929). Thus, the authority does not apply to appropriations for the following because they are not appropriations for the construction of a public building:

- Purchase of land. 17 Comp. Gen. 631 (1938).
- Clearance of a site upon which a building would later be constructed. 8 Comp. Gen. 519 (1929).
- Preparation of plans or designs. 36 Comp. Gen. 790 (1957); 19 Comp. Gen. 702 (1940).
- Repairs or improvements. 1 Comp. Gen. 435 (1922), aff'd upon reconsid., 1 Comp. Gen. 532 (1922).
- Remodeling and/or enlarging. 10 Comp. Gen. 454 (1931); 7 Comp. Gen. 619 (1928).

The no-year authorization of 31 U.S.C. § 1307 also does not apply, regardless of whether the appropriation is one for public building construction, if the appropriation contains other language restricting it to some definite time period. 24 Comp. Gen. 942 (1945); 23 Comp. Gen. 150 (1943); 18 Comp. Gen. 969 (1939); 6 Comp. Gen. 783 (1927). Nor does it apply to an amount earmarked for construction in a lump-sum Salaries and Expenses appropriation. 37 Comp. Gen. 246 (1957). The earmark has the same obligational availability as the parent appropriation unless expressly provided otherwise. Id. at 248; A-25480, December 18, 1928.

In sum, an appropriation (1) for the original construction of a public building, (2) which does not specify any other period of availability, and (3) which is contained in an appropriation act which does not include the "current fiscal year" general provision or some comparable limitation, may be regarded as a no-year appropriation without the need for the traditional "to be available until expended" language. 36 Comp. Gen. at 793-94; B-154459, December 9, 1964.[93]

(4) Design fees

Before a shovel ever touches the ground, somebody has to design the building. Just about every construction project includes the services of professional architects and engineers ("A&E"). Those services range from the preparation of plans and specifications to inspection and supervisory services during actual construction. At one time, there was no authority to hire a private architect to prepare plans for a public building. 21 Comp. Dec. 336 (1914). Today, the United States Code is dotted with statutes authorizing the government to contract for A&E services. Among the more important provisions are 40 U.S.C. § 609(a) (General Services Administration), 10 U.S.C. §§ 4540(a), 7212(a), and 9540(a) (Army, Navy, and Air Force, respectively); and 38 U.S.C. §8106(b) (Veterans Affairs medical facilities).

Contracting for A&E services is governed by the Brooks Architect-Engineers Act, 40 U.S.C. §§ 541-544, which prescribes a negotiation

[93]Although there was no need for the decisions to so specify at the time, the appropriation acts in these two cases did not include the "current fiscal year" provision.

procedure based primarily on competence rather than price. The Act's policy is:

> "to publicly announce all requirements for architectural and engineering services, and to negotiate contracts for architectural and engineering services on the basis of demonstrated competence and qualification for the type of professional services required and at fair and reasonable prices." 40 U.S.C. § 542.

The Brooks A&E Act does not apply merely because part of the contract work will be done by architects or engineers; rather, it applies to a procurement which "uniquely or to a substantial or dominant extent requires performance by an A-E firm." 61 Comp. Gen. 377 (1982). It also applies to small business set-asides, including those under section 8(a) of the Small Business Act. 59 Comp. Gen. 20 (1979); B-129709, October 14, 1976. GAO will not question an agency's decision to compete an A&E contract rather than negotiate unless the agency's actions demonstrate a clear intent to circumvent the Act. 62 Comp. Gen. 297 (1983). For projects within the definition of "public building" in the Public Buildings Act of 1959, 40 U.S.C. § 612(1), the A&E procurement is done by the General Services Administration unless delegated to another agency in accordance with 41 C.F.R. §§ 101-19.402(c) and 101-19.501. 40 U.S.C. §§ 609, 614.

The Clinger-Cohen Act of 1996, Pub. L. No. 104-106, Div. D, sec. 4105 (often referred to as the "Federal Acquisition Reform Act"), authorized "two-phase" selection procedures for "design-build" acquisitions. These procedures, codified at 10 U.S.C. § 2305a and 41 U.S.C. § 253m, authorize the use of two-phase selection procedures for entering into a contract for the design and construction of a public building, facility, or work. The conference report on the Act indicates that this provision was "not intended to modify the Brooks Architect-Engineers Act." H.R. Rep. No. 104-450, at 966 (1996). Consequently, the two-phase approach represents an alternative to the "design-bid-build" procedures of the Brooks A&E Act.

The two-phase selection approach may be used when three or more offers will likely be received, design work must be completed before a price proposal can be submitted, substantial costs will be incurred by the prospective offerors in preparing their proposals, and certain other specific criteria have been considered. The agency solicits phase-one proposals that describe the offerors' technical

approaches and technical qualifications. The agency then solicits phase-two proposals from the most qualified offerors, normally not more than five. Final consideration is based on technical merit and price.

Architects and engineers, like the rest of us, expect to be paid for their services. They should be paid, says the Brooks Act provision quoted above, "at fair and reasonable prices." In order to keep "fair and reasonable" from becoming excessive, a series of statutes, all of which actually predate the Brooks Act, imposes a percentage ceiling on A&E fees. Civilian procurements are governed by 41 U.S.C. § 254(b), enacted as part of the Federal Property and Administrative Services Act of 1949, which provides in relevant part that—

> "a fee inclusive of the contractor's costs and not in excess of 6 percent of the estimated cost, exclusive of fees, as determined by the agency head at the time of entering into the contract, of the project to which such fee is applicable is authorized in contracts for architectural or engineering services relating to any public works or utility project."

A very similar provision, originating in the Armed Services Procurement Act of 1947, is found in 10 U.S.C. § 2306(d). The fee limitation of 41 U.S.C. § 254(b) applies to all civilian A&E procurements unless expressly exempted. E.g., 46 Comp. Gen. 183, 189-190 (1966) (ceiling applies to A&E services procured under authority of what is now 38 U.S.C. § 513); B-152306, January 5, 1967 (limited exemption under 22 U.S.C. § 296). The limitation in 10 U.S.C. § 2306(d) applies to the Coast Guard and the National Aeronautics and Space Administration as well as the military departments. 10 U.S.C. § 2303.

In addition, the Department of the Army is authorized to procure A&E services "for producing and delivering designs, plans, drawings, and specifications needed for any public works or utilities project of the Department." 10 U.S.C. § 4540(a). Subsection (b) then provides:

> "The fee for any service under this section may not be more than 6 percent of the estimated cost, as determined by the Secretary, of the project to which it applies."

Nearly identical limitations exist for the Navy (10 U.S.C. § 7212(b)) and the Air Force (10 U.S.C. § 9540(b)). These provisions originated in 1939. See 46 Comp. Gen. 556, 559 (1966).

Certain terminology is common to all of the statutes. Thus, the fee is to be based on the estimated cost of a project relating to public works or utilities. GAO has offered the following guidance with respect to "estimated costs":

> "[I]n the absence of definitive legislative expression otherwise, the term 'estimated cost' of a project may be said to comprehend the reasonable cost of a project erected in accordance with the plans and specifications, and that the inclusion of cost elements generally not covered by the plans and specifications such as furniture and equipment installed for the occupancy and use of a project would appear to be questionable." B-146312-O.M., November 28, 1961.

"Project" means the structure or public work "for which the architect-engineer undertakes in his contract to prepare the plans, etc., and not any larger budgetary or other project of which it may form a part." 40 Comp. Gen. 188, 191 (1960). Thus, if the overall project is to erect a complex of three buildings, the "project" for purposes of an A&E contract covering one of the buildings is that one building, not all three. A broader definition "would allow the architect-engineer's fee to be based on the cost of work for which he rendered no service." Id. See also 47 Comp. Gen. 61, 67 (1967); B-152306, January 24, 1967; B-115013-O.M., April 28, 1953.

The term "public works" has been addressed under a variety of statutes. The term generally relates to construction work. 17 Comp. Gen. 545 (1938), modified, A-90922, February 23, 1938. It has been broadly defined as fixed works or movable property the title to which is vested in the United States. 35 Comp. Gen. 454, 455 (1956); 19 Comp. Gen. 467, 470 (1939). A similarly broad definition is "all fixed works contracted for public use." 35 Comp. Gen. at 455; 19 Comp. Gen. at 469; 38 Op. Att'y Gen. 418, 422 (1936). The term "utilities" in the construction context "is commonly understood to have reference to such items as sewer and water facilities, heating devices, electric wires and fixtures, etc." 21 Comp. Gen. 167, 170 (1941). While these cases did not involve the A&E fee limitation, the same definitions should nevertheless be applied. B-146312-O.M., November 28, 1961. The Navy statute also includes construction of vessels or aircraft. 10 U.S.C. § 7212(a).

The A&E fee limitation statutes—41 U.S.C. § 254(b), 10 U.S.C. § 2306(b), and the three 1939 statutes—apply to all contracts regardless of type, cost-plus as well as fixed-price. 46 Comp.

Gen. 556 (1966); 46 Comp. Gen. 183 (1966); B-115013-O.M., April 28, 1953.

Differences in the statutory language have produced some controversy over precisely what to include when assessing compliance with the fee limitation, i.e., what amounts are included in the total subject to the 6 percent limit. The 1939 statutes authorize the procurement of A&E services for the production and delivery of plans and designs, and the fee limitation in each of the 1939 statutes applies to services "under this section." Thus, it is clearly the case that, under 10 U.S.C. §§ 4540, 7212, and 9540, the 6 percent limitation relates only to the production and delivery of plans and designs. 22 Comp. Gen. 464 (1942); 46 Comp. Gen. 556, 564 (1966). If the A&E contract includes supervisory services as well as production and delivery, the 6 percent does not apply to those amounts paid to the contractor for the supervisory services. 22 Comp. Gen. at 466. To take a simplified illustration, the 6 percent ceiling on a $100 construction contract is $6. If the A&E contract includes $5 for production and delivery and another $5 for supervisory services, there is no violation.

The remaining A&E statutes—10 U.S.C. § 2306(d) and 41 U.S.C. § 254(b)—do not include the specific "production and delivery" language. At one time, GAO was inclined to view the limitation under these statutes as applicable to the total contract price under the A&E contract for whatever services it may have included, not just production and delivery. 46 Comp. Gen. 573 (1966) (41 U.S.C. § 254(b)); 46 Comp. Gen. 556, 564-65 (1966) (10 U.S.C. § 2306(d)). However, the conclusions were not free from doubt and GAO was in the process of conducting a governmentwide review of A&E contracting, so both decisions said, in effect, to disregard the conclusions pending further developments. In 1982, GAO reviewed those developments and concluded that Congress had effectively affirmed "that the fee limitation relates only to the production of plans, drawings, and specifications." B-205793, January 18, 1982. Accordingly, all of the A&E fee limitation statutes now have a uniform interpretation—the 6 percent ceiling applies only to costs relating to the production and delivery of plans and designs. This of course would include the proportionate share of administrative costs attributable to support of production and delivery services. B-258058, May 8, 1995.

The view expressed in B-205793, January 18, 1982, is consistent with the Federal Acquisition Regulation, which provides:

> "For architect-engineering services for public works or utilities, the contract price or the estimated cost and fee for production and delivery of designs, plans, drawings, and specifications shall not exceed 6 percent of the estimated cost of construction of the public work or utility, excluding fees." 48 C.F.R. § 15.404(c)(4)(i)(B).

Once it is determined which services under the A&E contract "count" against the fee limitation, the total payment to the A&E contractor for those covered services may not exceed 6 percent of the estimated cost of the construction contract, regardless of the type of contract used for the A&E procurement. Thus, if the A&E contract is a cost-plus-fixed-fee contract, the 6 percent relates to the total payment for covered services, not just the fixed fee portion. 21 Comp. Gen. 580 (1941), aff'd, B-18126, March 19, 1942. It follows that an A&E contract in the form of a cost-plus-fixed-fee, with the total payment including the fixed fee not to exceed a specified dollar amount calculated to remain within the statutory limitation, is legally unobjectionable. B-106325, November 15, 1951.

Unless the contract provides otherwise, a mere increase in the cost of the construction contract—for example, if the lowest bid received exceeds the estimated cost on which the A&E fee was based—does not entitle the A&E contractor to an increase in fee. Hengel Associates, P.C., VABCA No. 3921, 94-3 B.C.A. ¶ 27,080 (1994); R.M. Otto Co., Inc. & Associates, VABCA No. 1526, 82-2 B.C.A. ¶ 15,889 (1982); Shaw Metz & Associates, VACAB No. 774, 71-1 B.C.A. ¶ 8679 (1971); William Cramp Scheetz, Jr., ASBCA No. 9501, 1964 B.C.A. ¶ 4340 (1964). As the Hengel board in particular emphasized, the 6 percent is a ceiling, not an entitlement, and does not prohibit the parties from contracting for a lower amount. 94-3 B.C.A. at ¶ 134,965.

Of course, there are situations in which the fee may be increased. If the A&E contract is modified under the "Changes" clause to increase the scope of the work, a fee increase is proper, still subject to the 6 percent ceiling. B-152306, January 24, 1967. See also Skidmore, Owings & Merrill, ASBCA No. 6062, 1962 B.C.A. ¶ 3332 (1962). It is also possible to increase the fee without regard to the 6 percent limit, as discussed in the following passage from 47 Comp. Gen. 61, 67 (1967):

"The project to which an architect-engineer fee is applicable is the project for which the architect-engineer undertakes in his contract to prepare plans, etc. [Citation omitted.] Where the site and nature of a project are so changed as to render virtually useless any [A&E] work done prior to administrative determination to effect such change, it would be unreasonable, in light of the statutory purpose, to carry forward against the new project any charges against the fee limitation incurred under the original project. Although the purpose to be served by a building project may remain unchanged, that is not to say that the conceptual design of the building and its location may be substantially altered without at some point giving rise to a new project for the purpose of applying the fee limitations in question."

b. Some Agency-Specific Authorities

If construction were governed solely by 41 U.S.C. § 12, the funding process would be cumbersome and would afford little flexibility. While 41 U.S.C. § 12 remains the cornerstone of congressional control of major construction projects, Congress has enacted various supplemental provisions for agencies with ongoing construction responsibilities,[94] all of which can be viewed as exceptions to 41 U.S.C. § 12.

(1) Military construction

Not surprisingly,[95] the most detailed and comprehensive scheme is that applicable to the Defense Department and the military departments.[96] Typically, construction funds are appropriated to each department in a lump sum to be used "as authorized by law," which means in accordance with authorization acts required by 10 U.S.C. § 114(a)(6).[97] Most of the funds are authorized by installation, in line-item format. In addition, each department

[94]For example, consider the VA's authority to build medical facilities under 38 U.S.C. §§ 8103, 8104, 8106 (which includes a provision roughly analogous to 41 U.S.C. § 12).

[95]The reason it is not surprising is that, as we will see later, the Public Buildings Act does not apply to construction on military installations.

[96]The funding structure for Coast Guard construction projects is based on the same key elements as that for military construction—a requirement for prior authorization combined with flexibility for smaller projects. See S. Rep. No. 88-205, reprinted at 1963 U.S.C.C.A.N. 699-704.

[97]Examples for 1994 are the Military Construction Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, Div. B, 107 Stat. 1547, 1856, (1993) and the Military Construction Appropriations Act, 1994, Pub. L. No. 103-110, 107 Stat. 1037 (1993). As these examples illustrate, the authorization and appropriation acts are occasionally enacted in reverse order.

receives a lump-sum authorization for "unspecified minor military construction projects."

Substantive provisions are found in the Military Construction Codification Act, codified chiefly in 10 U.S.C. chapter 169.[98] "Military construction" is defined broadly as "any construction, development, conversion, or extension of any kind carried out with respect to a military installation." 10 U.S.C. § 2801(a). A "military construction project" is all military construction "necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility" or authorized portion thereof. 10 U.S.C. § 2801(b). "Minor military construction" is military construction "(1) that is for a single undertaking at a military installation, and (2) that has an approved cost equal to or less than $1,500,000." 10 U.S.C. § 2805(a)(1).

It is provided in 10 U.S.C. § 2805(a)(1) that, "within an amount equal to 125 percent of the amount authorized by law for such purpose"—i.e., the lump-sum minor military construction authorization—each department may carry out minor military construction projects as defined above which are "not otherwise authorized by law." Projects costing more than $500,000 must first be reported to Congress. 10 U.S.C. § 2805(b)(2). Subsection (c)(1) further enhances flexibility by permitting unspecified minor military construction projects costing not more than $300,000 to be charged to Operation and Maintenance (O&M), rather than military construction, appropriations. In addition, cost variations are authorized in unusual and unanticipated situations, up to limits specified in 10 U.S.C. § 2853. The "minor milcon" provisions are simultaneously authorizations and limitations. See B-159451, March 20, 1967. Subject to authorized variations, GAO regards the cost of a "minor milcon" project as the cost at the time it is approved by the appropriate departmental official, regardless of subsequent increases in the statutory ceiling. B-175215, April 20, 1972.

As noted above, a construction project is defined in terms of a "complete and usable facility" unless something less is specifically

[98]The Act, which is constantly being reviewed and amended, addresses a variety of construction activities, although our coverage here is limited to an outline of the provisions governing "minor military construction."

authorized. It is not permissible to split a single project into smaller projects (sometimes given the fancy name "incremental construction") in order to stay below the ceiling for using O&M funds. B-234326.15, December 24, 1991; B-213137, January 30, 1986; B-159451, September 3, 1969; B-133316-O.M., August 27, 1962. As most of these references point out, directives of the military departments also prohibit splitting.

The military departments have traditionally distinguished between "funded costs" and "unfunded costs," including only the former in calculating costs for purposes of 10 U.S.C. § 2805. Funded costs consist primarily of the costs of labor (other than troop labor), materials, and equipment. Unfunded costs include such things as troop labor and equipment depreciation. GAO has accepted the legitimacy of the distinction. B-237137, January 30, 1986; B-133316, October 12, 1962.

Charging a construction project to O&M funds in excess of the statutory ceiling violates 31 U.S.C. § 1301(a) which prohibits using appropriated funds for other than their intended purpose. It also violates the Antideficiency Act unless unobligated construction funds are available to make an appropriate account adjustment. 63 Comp. Gen. 422, 423-24, 437-38 (1984).

(2) Continuing contracts: two variations

Construction projects often must extend beyond a single fiscal year. A device Congress has provided some agencies is the "continuing contract." For example, the Army Corps of Engineers engages in extensive public works construction activity. A significant authority available to the Corps is 33 U.S.C. § 621:

> "Any public work on canals, rivers, and harbors adopted by Congress may be prosecuted by direct appropriations, by continuing contracts, or by both direct appropriations and continuing contracts."

Under a continuing contract, as the term is used in this context, the Corps enters into a multi-year contract for the completion of a construction project, although funds are sought and appropriated only in annual increments to cover work planned for the particular year. See C.H. Leavell and Co. v. United States, 530 F.2d 878, 886 (Ct. Cl. 1976). This statute is an exception to both 41 U.S.C. § 12 and the Antideficiency Act. It authorizes the Corps to record the full

contract price as an obligation at the time the contract is entered into, even though appropriations to liquidate the obligation have not yet been made. 56 Comp. Gen. 437 (1977). The authority of 33 U.S.C. § 621 applies equally to contracts financed by the Civil Works Revolving Fund (33 U.S.C. § 576). B-242974.6, November 26, 1991 (internal memorandum).

To the extent applicable, the laws relating to river and harbor improvements—including the "continuing contract" authority of 33 U.S.C. § 621—apply also to the Corps' shore protection and flood control projects. 33 U.S.C. §§ 426b, 701.[99]

A different type of continuing contract is authorized by a provision found in the Reclamation Act, 43 U.S.C. § 388:

> "When appropriations have been made for the commencement or continuation of construction or operation and maintenance of any project, the Secretary may . . . enter into contracts . . . for construction, which may cover such periods of time as the Secretary may consider necessary but in which the liability of the United States shall be contingent upon appropriations being made therefor."

While to an extent 43 U.S.C. § 388 can also be viewed as an exception to the Antideficiency Act (B-72020, January 9, 1948), it is a much more limited one than 33 U.S.C. § 621. Under 33 U.S.C. § 621, actual payment must await an appropriation, but the legal obligation arises, and is recordable, when the contract is entered into. Under 43 U.S.C. § 388, legal liability does not come into existence until the appropriation is made and, therefore, the full contract price cannot be recorded as an obligation at the time the contract is entered into.

The distinction is highlighted in 28 Comp. Gen. 163 (1948), which compared 43 U.S.C. § 388 with a provision appearing in an appropriation act which appropriated $1 million for a construction project and, in addition, authorized the Bureau of Reclamation to enter into contracts up to $1.6 million. The appropriation act provision—analogous to 33 U.S.C. § 621 as construed in 56 Comp. Gen. 437—authorized:

[99]In addition, the Corps is authorized to allocate funds from its annual appropriations, up to specified limits, for the construction of small projects which have not been specifically authorized. 33 U.S.C. §§ 426g (shore protection), 577 (rivers and harbors), 701s (flood control).

"the entering into of a firm contract which fully will obligate the faith and credit of the United States to its payment. The liability of the United States, on proper contracts entered into under its authority, is fixed and clear. It is not contingent in any way on the appropriation necessary to its fulfillment and the Government is fully obligated to satisfy its conditions." 28 Comp. Gen. at 165.

This is the classic concept of "contract authority." A contract under 43 U.S.C. § 388 is different, however. The decision continued:

"The liability of the United States on contracts entered into pursuant to [43 U.S.C. § 388], on the other hand, 'shall be contingent upon appropriations being made therefor.' Under such contracts, no legal obligation exists to pay their amounts unless and until appropriation is made therefor." 28 Comp. Gen. at 165-66.

See also B-72020, January 9, 1948.

The rights and obligations of the parties in the event of a funding shortfall will also vary depending on which type of continuing contract is in effect. Under the type of contract which amounts to "contract authority" such as 33 U.S.C. § 621, the contractor has a legal right to recover and can sue to enforce it. 56 Comp. Gen. at 442. While a court can never order Congress to appropriate money, a failure or refusal to appropriate funds to satisfy an obligation authorized by statute will not preclude a court from rendering a judgment. E.g., New York Airways, Inc. v. United States, 369 F.2d 743 (Ct. Cl. 1966).[100]

Under the type of contingent contract authorized by 43 U.S.C. § 388, the situation is different. In a case where the contracting agency had requested sufficient funds to finance the contract but Congress appropriated a much smaller amount, the Court of Claims held that as long as the agency allocates the funds on a rational and non-discriminatory basis, the contractor has no right to recover damages incurred as a result of the funding shortage. Winston Bros. Co. v. United States, 130 F. Supp. 374 (Ct. Cl. 1955). A similar holding is Granite Construction Co., IBCA No. 947-1-72, 72-2 B. C. A. ¶ 9762 (1972), denying recovery where the exhaustion of funds was due to a presidential impoundment.

[100]For further relevant discussion, see "Full faith and credit" heading in Chapter 14.

In S.A. Healy Co. v. United States, 576 F.2d 299 (Ct. Cl. 1978), however, the court granted an equitable adjustment where the contracting agency's budget request was "grossly inadequate" to support the funding level it had previously approved under the contract. The difference between Healy on the one hand and Winston and Granite on the other is that the funding shortfall in Healy was at least partly the agency's fault. Id. at 305.

While there are few cases, it seems fair to say that the extent of the agency's duty to at least ask for the money is still being formed and defined. The Healy court was careful to point out that it was not holding that the agency has an absolute contractual obligation to seek adequate funding. More precisely, said the court, if the agency chooses not to seek adequate funding, it can escape liability only if the contract unambiguously places the entire risk on the contractor, and if the agency provides "timely and candid" notification to help the contractor mitigate its loss. Id. at 307. See also San Carlos Irrigation and Drainage District v. United States, 23 Cl. Ct. 276, 283 (1991). Of course, the question will be foreclosed if the contract explicitly creates the duty. E.g., Municipal Leasing Corp. v. United States, 1 Cl. Ct. 771, 774 (1983) (contract clause obligating agency "to use its best efforts to obtain appropriations of the necessary funds to meet its obligations and to continue this contract in force"). Precisely what constitutes "best efforts" has yet to be determined.

(3) 7 U.S.C. § 2250

A Department of Agriculture provision, 7 U.S.C. § 2250, illustrates a different approach:

> "The Department of Agriculture is authorized to erect, alter, and repair such buildings and other public improvements as may be necessary to carry out its authorized work: Provided, That no building or improvement shall be erected or altered under this authority unless provision is made therefor in the applicable appropriation and the cost thereof is not in excess of limitations prescribed therein."

The purpose of this permanent authorization is to avoid the need for specific authorizations which 41 U.S.C. § 12 would otherwise require. Provision can thus be made in annual appropriation acts without being susceptible to a point of order. The origin and intent of 7 U.S.C. § 2250 are discussed in B-79640, October 18, 1948, and B-151369-O.M., November 15, 1963.

To implement 7 U.S.C. § 2250, the relevant appropriation will typically specify monetary limits on construction activities, plus whatever exemptions from those limits Congress may desire. See, for example, the appropriation under the heading Agricultural Research Service in the Agriculture Department's 1994 Appropriations Act, Pub. L. No. 103-111, 107 Stat. 1046, 1050 (1993). Exceeding an applicable limitation violates 41 U.S.C. § 12. B-151369-O.M., November 15, 1963.

(4) 15 U.S.C. § 278d

Another permanent authorization is 15 U.S.C. § 278d, applicable to the National Institute of Standards and Technology:

"Within the limits of funds which are appropriated for the Institute, the Secretary of Commerce is authorized to undertake such construction of buildings and other facilities, and to make such improvements to existing buildings, grounds, and other facilities occupied or used by the Institute as are necessary for the proper and efficient conduct of the activities authorized herein."

This statute at one time included language, dropped in 1992, requiring specific provision in the relevant appropriation in order to construct a building costing over a specified amount. As the statute now stands, it is similar to 7 U.S.C. § 2250 in that it will insulate an appropriation from a point of order under congressional rules requiring prior authorization. It is also similar in that it, standing alone, does not satisfy 41 U.S.C. § 12. There would need to be at least the elements described in 39 Comp. Gen. 723 (1960), previously discussed in our coverage of 41 U.S.C. § 12. (Section 278d is the first element in the 39 Comp. Gen. 723 formula.)

The Institute finances its construction from a reimbursable Working Capital Fund pursuant to 15 U.S.C. § 278b. In order to use the Working Capital Fund, however, the appropriation to be charged with the reimbursement must itself be available for construction, that is, it must satisfy 41 U.S.C. § 12. 30 Comp. Gen. 453 (1951); 15 U.S.C. § 278b(b). Reimbursement should include indirect as well as direct costs. See B-117622, July 13, 1955; 15 U.S.C. § 278b(e).

Section 278d has been construed as applicable only to construction on government-owned land and not to leased property. B-130564, March 18, 1957; B-124596-O.M., August 26, 1955. A separate provision of law now authorizes, in the performance of Institute

functions, "the erection on leased property of specialized facilities and working and living quarters when the Secretary of Commerce determines that this will best serve the interests of the Government." 15 U.S.C. § 278e(g).

c. Public Buildings Act

In 1949, the Federal Property and Administrative Services Act centralized a number of the government's housekeeping functions in the General Services Administration. Ten years later, Congress enacted the Public Buildings Act of 1959, Pub. L. No. 86-249, 73 Stat. 479, to do essentially the same thing for public buildings acquisition and construction. Amended significantly in 1972, 1976, and again in 1988,[101] the Act is found at 40 U.S.C. chapter 12.

The statute gives a fairly complicated definition of "public building." The term means—

> "any building, whether for single or multitenant occupancy, its grounds, approaches, and appurtenances, which is generally suitable for office or storage space or both for the use of one or more Federal agencies or mixed ownership corporations, [specifically including such structures as office buildings, courthouses, warehouses, and similar Federal facilities]." 40 U.S.C. § 612(1).

The definition then goes on to list several exemptions, including buildings which are on the public domain; on military installations; on United States property in foreign countries; on Indian and Eskimo properties held in trust by the United States; on lands used in federal agricultural, recreational, and conservation programs, including related research; on or used in connection with river, harbor, flood control, reclamation, or power projects; used for nuclear production, research, or development projects; on or used in connection with housing or residential projects; on Department of Veterans Affairs installations used for hospital or domiciliary purposes. Id.; 41 C.F.R. § 101-19.003-6(a). Thus, wholly apart from specific exemptions Congress may from time to time legislate, the Public Buildings Act itself carves out several large exemptions from the definition. What's left is a "public building" governed by the Act.

[101]Public Buildings Amendments of 1972, Pub. L. No. 92-313, 86 Stat. 216; Public Buildings Cooperative Use Act of 1976, Pub. L. No. 94-541, 90 Stat. 2505; Public Buildings Amendments of 1988, Pub. L. No. 100-678, 102 Stat. 4049.

In addition, leased buildings are not "public buildings." 41 C.F.R. § 101-19.003-6(b); 65 Comp. Gen. 722, 727-729 (1986).[102]

The first section of the statute, 40 U.S.C. § 601, sets the policy by declaring that "[n]o public building shall be constructed except by" GSA. "Construct" means simply "to build a public building," including related plans, specifications, studies and surveys. 41 C.F.R. § 101-19.003-3.

Section 604 of Title 40 of the United States Code deals with site acquisition. GSA is authorized to acquire sites needed for public buildings "by purchase, condemnation, donation, exchange, or otherwise." 40 U.S.C. § 604(a). GSA may solicit proposals but is not required to follow the competition requirements of the Federal Property and Administrative Services Act or the Federal Acquisition Regulation. 40 U.S.C. § 604(c); 71 Comp. Gen. 333 (1992). The site selected should be the one "most advantageous to the United States, all factors considered." 40 U.S.C. § 604(c). Meeting this standard requires "intelligent competition" which includes informing offerors of the evaluation factors to be applied and their relative importance. B-256017.4/B-256017.5, June 27, 1994. There is nothing improper under section 604 in soliciting expressions of interest and then, if the parties cannot agree to acceptable terms, instituting condemnation proceedings. 71 Comp. Gen. 511 (1992). It is similarly within GSA's discretion to reach agreement with the owner after requesting the Attorney General to initiate the condemnation. B-249131.4, June 24, 1993. Condemnation of a site for a public building is "obviously for a public use" for Fifth Amendment purposes. Certain Land in the City of Washington, D.C. v. United States, 355 F.2d 825, 826 (D.C. Cir. 1965).

The requirement in Executive Order No. 12072 to give preference to central business areas, discussed previously in connection with leasing, applies to site selection under 40 U.S.C. § 604. Therefore, it is within GSA's discretion when soliciting sites for public building

[102]Just because a leased building is not a "public building" for purposes of the Public Buildings Act does not mean that it is not a public building for purposes of other statutes. It is necessary to examine the particular statute and context. E.g., 34 Comp. Gen. 697 (1955) (Miller Act, Davis-Bacon Act, etc.); 30 Comp. Gen. 117 (1950) (Randolph-Sheppard Act); 17 Comp. Gen. 283 (1937).

construction to limit consideration to a central business area. B-251581.2, July 13, 1993.

As noted earlier, any construction project requires architectural and engineering services, and 40 U.S.C. § 609(a) authorizes GSA to procure those services. However, GSA must retain responsibility for all construction, including interpreting construction contracts, approving contract changes, certifying payment vouchers, and making final contract settlement. 40 U.S.C. § 609(c). To the maximum extent feasible, construction should comply with one of the nationally recognized model building codes, and should take into consideration state and local zoning laws and laws imposing landscaping, open space, minimum distance, and maximum height requirements. 40 U.S.C. §§ 619(a), (b).

Artistic concerns are also relevant. GSA regulations provide:

> "Fine arts, as appropriate, will be incorporated in the design of selected new public buildings. Fine arts, including painting, sculpture, and artistic work in other mediums, will reflect the national cultural heritage and emphasize the work of living American artists." 41 C.F.R. § 101-19.002(m).

This provision does not have an explicit statutory basis, but has long been in the regulations. See B-95136, March 26, 1976.

The Public Buildings Act also authorizes GSA to alter public buildings. 40 U.S.C. § 603(a). "Alter" includes "repairing, remodeling, improving, or extending or other changes in a public building." 40 U.S.C. § 612(5). As with construction, the term includes related plans, designs, surveys, etc. 41 C.F.R. § 101-19.003-1. GSA may do the work itself or may carry out any authorized construction or alteration by contract if deemed to be "most advantageous to the United States." 40 U.S.C. § 608. It may also contract with other agencies, such as the Army Corps of Engineers, under the Economy Act, 31 U.S.C. § 1535. See B-172186, April 5, 1971.

GSA may delegate most of its functions under the Public Buildings Act. 40 U.S.C. § 614. For projects whose estimated cost does not exceed $100,000, delegation is mandatory upon request. Id.; 41 C.F.R. § 101-19.501.

An important provision of the Public Buildings Act is the prospectus approval requirement of 40 U.S.C. § 606(a):

"In order to insure the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings, except as provided in section 603 of this title, no appropriation shall be made to construct, alter, purchase, or to acquire any building to be used as a public building which involves a total expenditure in excess of $1,500,000 if such construction, alteration, purchase, or acquisition has not been approved by resolutions adopted by the Committee on Environment and Public Works of the Senate and the Committee on [Transportation and Infrastructure] of the House of Representatives."[103]

The "except as provided in section 603" refers to 40 U.S.C. § 603, which authorizes GSA to alter public buildings and to acquire land necessary to carry out the alterations, and then provides:

"No approval under section 606 of this title shall be required for any alteration and acquisition authorized by this section the estimated maximum cost of which does not exceed $1,500,000."

Approval is obtained by submitting a prospectus to the specified committees. The contents of the prospectus, set forth in 40 U.S.C. § 606(a), include (1) a brief description of the building to be constructed, altered, purchased, or acquired; (2) the location of the building and an estimate of the maximum cost to the United States; (3) a comprehensive plan addressing the space needs of all government employees in the locality; (4) if construction is involved, a statement that other suitable space is not available either in government-owned buildings or at comparable cost; (5) justification for not using buildings identified pursuant to the National Historic Preservation Act; and (6) a statement of how much the government is already spending to accommodate the employees who will occupy the building to be constructed, altered, purchased, or acquired.

The project cost may be increased by up to 10 percent of the prospectus estimate without having to submit a revised prospectus. 40 U.S.C. § 606(b). Either committee may rescind its approval in the case of a project for construction, alteration, or acquisition if an appropriation has not been made within one year after the date of approval. 40 U.S.C. § 606(c). GSA may adjust any dollar amount specified in sections 606 and 603(b) annually "to reflect a percentage

[103]Section 606(a) also includes approval requirements for leases and for alterations to leased buildings, covered elsewhere in this chapter. The discussion in the text, unless the context clearly indicates differently, applies equally to all three.

increase or decrease in construction costs during the preceding calendar year, as determined by the composite index of construction costs of the Department of Commerce," promptly reporting any such adjustments to the committees. 40 U.S.C. § 606(f).

Nothing in the statute precludes a situation in which GSA secures the required approval with the appropriation to be made to some other agency. 46 Comp. Gen. 427 (1966). Since the approval requirement is a restriction on the appropriation of funds, it does not apply to the construction of a building where appropriated funds will not be involved, even where the building is clearly a "public building" and will be constructed by GSA. B-143167-O.M., September 27, 1960 (office building for Federal Deposit Insurance Corporation). It also does not apply to projects involving the United States Capitol. B-148004, October 20, 1969.

Prospectus approval may precede or follow enactment of the relevant appropriation. B-95136, October 11, 1979. Limiting language in the approval is not legally binding unless incorporated in the appropriation providing funds for the project. B-95136, February 7, 1977. If GSA does not comply with the prospectus approval requirement and Congress chooses to appropriate the money anyway, the appropriation might be subject to a point of order, but it would be a perfectly valid appropriation if enacted. Id.; B-95136, September 27, 1978; B-95136-O.M., December 23, 1975. Funds will be available for the project, with or without compliance with 40 U.S.C. § 606(a), if Congress specifically appropriates funds for the project, or if it can be clearly established that Congress knowingly included those funds in a lump-sum appropriation. Merely burying the project in budget justification material, however, is not enough. B-95136, October 11, 1979; B-95136-O.M., December 23, 1975.

In accord with these principles is Maiatico v. United States, 302 F.2d 880 (D.C. Cir. 1962), in which the court held that GSA had no authority to condemn an office building where GSA (1) had not obtained prospectus approval as required by 40 U.S.C. § 606(a), and (2) purported to act under authority of a lump-sum appropriation which could not be demonstrated to include the building in question.

d. Scope of Construction Appropriations

Apart from obvious differences in factual context, determining the scope of a construction appropriation is not fundamentally different

than for other types of appropriations. The process requires analyzing the language of the appropriation, the statutes and principles governing the use of appropriations in general, and the relationship of the construction appropriation to other appropriations available to the agency or for the project.

The first and most important determinant is the precise application of the language of the appropriation. For example, where language which would have appropriated funds for "beginning construction" was changed to "preparing for construction," the appropriation was not available for any of the costs of actual construction. B-122221, January 14, 1955. If there is any inconsistency between the language of the enacted appropriation and legislative history or prior bills, the enacted language must prevail. Id. The statutory language alone will not always provide the answer, however. Words like "facilities" and "appurtenances," for example, do not have obvious meanings and, absent clear instructions in legislative history, it is necessary to resort to other principles and precedents for guidance. See B-133148-O.M./B-132109-O.M., January 20, 1959.

The next element in our approach is the application of the statutes and principles governing the availability of appropriations generally with respect to purpose, time, and amount. Purpose availability is governed by the "necessary expense" doctrine discussed in Chapter 4. One illustration is the treatment of expenses of preparation of plans and specifications, or what we have previously referred to as "design fees." Congress may choose to provide separately for these expenses. E.g., 36 Comp. Gen. 790 (1957). If there is no separate appropriation, design fees are chargeable to the construction appropriation. As stated in B-71067, December 9, 1947:

> "[W]hen Congress appropriates funds for the construction of a building and does not otherwise appropriate funds for plans or supervision of its construction, it is not to be presumed that its intention was that the building be erected without either plans or supervision, but that the expenses of planning and superintendence being reasonably necessary and incident to the construction they are for payment out of the funds made available for such construction."

This being the case, design fees should not be charged to general operating appropriations. 18 Comp. Gen. 122 (1938), aff'g 18 Comp. Gen. 71 (1938); 15 Comp. Gen. 389 (1935). The same principle applies to work which is preliminary to the design work. Unless specifically provided for, it is chargeable to appropriations available

for construction and not general operating appropriations. 11 Comp. Gen. 313 (1932) (site tests). Of course, the existence of a specific appropriation will preclude use of construction funds. B-9240, May 2, 1940 (specific appropriation for preliminary surveys). Where inspection or supervision of construction is performed by regular government employees, their salaries and related expenses are chargeable not to the construction appropriation but to the general Salaries & Expenses appropriation, or its equivalent, for the fiscal year in which the services are performed. 38 Comp. Gen. 316 (1958); 16 Comp. Gen. 1055 (1937), modified, A-86612, August 16, 1937.

The amount charged by a municipality for the "privilege" of connecting the sewer line of a government building to the municipal sewer system is a necessary cost of construction and therefore chargeable to construction appropriations. 19 Comp. Gen. 778 (1940); 9 Comp. Gen. 41 (1929); B-22714, March 19, 1942. This is true whether the connection is part of the original construction or subsequent remodeling or improvement. 39 Comp. Gen. 363 (1959).

We noted in Chapter 4 that reasonable expenses incident to dedication or cornerstone ceremonies for public buildings are regarded as a proper charge to appropriated funds. 53 Comp. Gen. 119 (1973) (engraving a ceremonial shovel); B-158831, June 8, 1966 (flowers for use as centerpieces); B-11884, August 26, 1940 (printing of programs and invitations); A-88307, August 21, 1937 (group photograph and recording of presidential speech). In each case, the proper appropriation to charge was the construction appropriation, not a general operating appropriation, the principle being stated in A-88307, and quoted in 53 Comp. Gen. at 120, as follows:

> "[T]he laying of cornerstones has been connected with the construction of public buildings from time immemorial and any expenses necessarily incident thereto are generally chargeable to the appropriation for construction of the building."

Availability as to time has been noted earlier under the "duration of construction appropriations" heading. With respect to amount, again, a construction appropriation is no different from any other appropriation. The appropriation of a specific amount for a construction project is a ceiling on the amount that can be obligated; it is the exclusive source of funds for the project and may not be augmented with funds from some other appropriation without

congressional sanction. 20 Comp. Gen. 272 (1940); 19 Comp. Gen. 892 (1940), modified, B-9460, June 11, 1940; B-122221, January 14, 1955. If you cannot build what you want with the money Congress has provided, you must either go back to Congress and ask for more or reduce the scope of your project.

The third basic determinant is the relationship of the construction appropriation to other appropriations. What Congress has or has not provided for elsewhere often helps determine what it has or has not provided as part of the construction appropriation. One line of cases involves construction appropriations and appropriations available for repairs and maintenance. For expenses connected with original construction, the test is stated as follows:

> "Costs necessary to the completion of a construction project are, essentially, construction costs, and not costs of maintenance, operation, repair, alteration, or improvements, which costs ordinarily arise only after completion of the project." 19 Comp. Gen. 778, 781 (1940).

That case found sewer connection charges a proper cost of construction. In contrast, items such as acoustical ceilings, venetian blinds, partitioning, shrubbery and other plants, not acquired until after GSA had designated the building as substantially complete and occupancy had begun, could not be said to be "necessary for completion of the project," and were therefore properly chargeable to a repairs and improvements appropriation rather than construction. B-165152-O.M., October 15, 1968.

For expenses arising after completion of the original construction, the question is whether they can be legitimately regarded as within the scope of an appropriation for repairs and maintenance or improvements, or whether they must be treated as construction items. The Comptroller General has offered the following broad definitions:

> "It has been held that the term 'repair' includes anything that is reasonably necessary to keep up the premises. . . .
>
> . . . .
>
> "To 'maintain' means to preserve or keep in an existing state or condition, and embraces acts of repair and other acts to prevent a decline, lapse, or cessation from that state or condition, and has been taken to be synonymous with repair." 21 Comp. Gen. 90, 91-92 (1941).

Thus, an extension or addition to a public building cannot be charged to an appropriation for repairs. 4 Comp. Gen. 1063 (1925); 20 Comp. Dec. 73 (1913); 7 Comp. Dec. 684 (1901); 1 Comp. Dec. 33 (1894);[104] A-40231, January 11, 1932; A-1876, July 10, 1924. It is construction and, as the two unpublished decisions point out, must be handled as such, which means in compliance with 41 U.S.C. § 12. Similarly, appropriations for repairs and improvements are not available for extensive structural changes and replacement of worn-out equipment in a cafeteria (27 Comp. Gen. 634 (1948)), and certainly not for replacing a building entirely destroyed by fire (39 Comp. Gen. 784 (1960)). Treatment of walls and ceilings for soundproofing would qualify as an improvement, but it is not a "repair." 2 Comp. Gen. 301 (1922). If an item cannot be charged to a repair appropriation because it is more properly regarded as construction, it follows that charging a general operating appropriation is equally improper. E.g., 10 Comp. Dec. 633 (1904); B-132109, July 18, 1958.

Another line of cases addresses the relationship between construction appropriations and appropriations for equipment and furnishings. The "well-settled rule" is:

> "[A]n appropriation for the construction of a building is available only for the cost of construction proper and for equipment and/or fixtures permanently attached to the building and so essentially a part thereof that the removal of the same might cause substantial damage to the building." 12 Comp. Gen. 488, 489 (1933).

An item of equipment qualifies as a "fixture" for purposes of this rule if (1) it is permanently attached to the realty, or (2) if not permanently attached, (a) it is necessary and indispensable to the completion and operation of the building, or (b) the structure was designed and built for the purpose of housing the equipment. B-133148-O.M./B-132109-O.M., August 18, 1959.

Use of construction funds rather than an appropriation for equipment and furnishings was proper in 9 Comp. Gen. 217 (1929) (installation of cafeteria and associated equipment), and B-118779, November 14, 1969 (duct work, acoustical work, sprinklers, electrical fixtures, heating and cooling equipment). Cases holding

[104]Regarding 1 Comp. Dec. 33, did someone wager we could not find a case on "erecting an outhouse"? You lose.

construction appropriations to be the improper source of funds include 12 Comp. Gen. 488 (1933) (portable fire extinguishers); 7 Comp. Gen. 474 (1928) (window shades); and 26 Comp. Dec. 111 (1919) (linoleum which could be removed or replaced without material damage to the floor). All of these cases assume the existence of a separate appropriation for equipment and furnishings. Absent a separate appropriation, use of the construction appropriation would be proper if necessary to make the building usable for its intended purpose (A-43075-O.M., August 27, 1932), but would not be proper for furniture or equipment not required for the construction (B-123240, June 9, 1955). Also, there is of course no problem if the construction appropriation is expressly made available for the purchase and installation of furniture. 7 Comp. Gen. 619 (1928).

2. Operation and Control

a. Who's in Charge?

As with construction and leasing, the operation and control of public buildings is centralized in the General Services Administration. GSA derives its authority from several sources:

- Various provisions of the Federal Property and Administrative Services Act of 1949 and the Public Buildings Act of 1958, noted later in this discussion, which assign specific responsibilities to GSA.
- Miscellaneous provisions of title 40 which are not part of the Federal Property or Public Buildings Acts. Examples are 40 U.S.C. §§ 19 (GSA "shall have charge of the public buildings and grounds in the District of Columbia"); 283 (furniture for new public buildings must be procured in accordance with plans and specifications approved by GSA); 285 (GSA has exclusive control over public buildings outside of the District of Columbia purchased or constructed from appropriations under GSA's control); and 298d (GSA authorized to name or rename buildings under its control, even if previously named by statute).
- Section 103 of the 1949 Act, 40 U.S.C. § 753, which transferred to GSA all functions of its predecessor, the Federal Works Agency.
- Reorganization Plan No. 18 of 1950, sections 1 and 2, 40 U.S.C. § 490 note, which transferred to GSA, respectively, "all functions with respect to assigning and reassigning space" in buildings owned or leased by the government and "[a]ll functions with respect to the

operation, maintenance, and custody of office buildings" owned or leased by the government.

While GSA's authority is thus broad and comprehensive, there are significant exceptions.[105] However, unless an agency falls within one of these exceptions, has its own specific statutory authority,[106] or has a delegation from GSA, GSA's authority is exclusive and the agency has no authority to procure building services directly. 61 Comp. Gen. 658 (1982).

b. Allocation of Space

One of GSA's functions under the Federal Property and Administrative Services Act is "to assign and reassign space of all executive agencies in Government-owned and leased buildings in and outside the District of Columbia." 40 U.S.C. § 490(e). See also 40 U.S.C. § 304a. Space assignments should be advantageous in terms of economy, efficiency, or national security. 40 U.S.C. § 490(e). GSA's procedures, as well as instructions on when and how to submit requests for space and how to appeal unfavorable determinations, are contained in the Federal Property Management Regulations, 41 C.F.R. Subpart 101-17.1.

Space assignment is one of the functions GSA inherited from its predecessor, the Public Buildings Administration of the Federal Works Agency. Determinations under this authority, the Attorney General has noted, as with all discretionary authority, "should not be made abstractly, or in an arbitrary manner, or without ascertainment and due consideration of the true needs of an affected department or agency." 40 Op. Att'y Gen. 140, 143 (1941).

Incident to the assignment of space is the determination—within some bounds of reason—of how much space to assign. A

[105]Some exceptions are found in the definition of "public building," noted under the Public Buildings Act heading earlier in this section. The 1950 reorganization plan includes others, several of which are noted in our discussion of the Federal Property and Administrative Services Act under the Leasing heading. Exceptions from GSA's authority under the Federal Property Act are found in 40 U.S.C. §§ 472(d) (definition of "property") and 474. Still others may be contained in various agency-specific or program-specific statutes.

[106]GAO, for example, has "exclusive custody and control" over its main headquarters building in Washington, "including operation, maintenance, protection, alteration, repair, and assignment of space therein." 31 U.S.C. § 781(a).

bankruptcy judge sued to force GSA to provide more space for the performance of his duties. He lost. Votolato v. Freeman, 8 B.R. 766 (D.N.H. 1981).

An agency's space needs are subject to change over time as the agency grows or shrinks or acquires or sheds functions. A recurring question has been who must bear the expense when substantial growth by one agency requires the relocation of another agency which shares the building. GAO originally took the position that the moving agency must bear its own expenses. E.g., 35 Comp. Gen. 701 (1956); 34 Comp. Gen. 454 (1955). Subsequently, GSA adopted 41 C.F.R. § 101-21.601(b), which provides:

> "Federal agencies that require relocation of other agencies because of expanding space needs are responsible for funding."

GAO revisited the issue in 56 Comp. Gen. 928 (1977), agreed with GSA, and overruled the prior line of cases. The 1977 decision was based on two primary considerations. First, in issuing the regulation, GSA was exercising its authority under the Federal Property Act, an exercise which merited deference unless it exceeded the bounds of GSA's statutory authority. Second, the prior decisions had employed a somewhat strained application of 31 U.S.C. § 1301(a), which restricts appropriations to their intended purposes. While it is true that agency A does not receive appropriations to pay for agency B's move, it is equally true that agency B is not moving for its own benefit. Thus, GAO concluded:

> "[W]e are now of the view that when one agency requires the relocation of another to meet its own space requirements, the relocation is done for the benefit of the requesting agency. . . . [T]he costs of the move must be considered necessary or incident to meeting the space needs of the requesting agency. Use of the requesting agency's appropriations would not, therefore, augment the appropriations of the displaced agency. In fact, to the extent the move and related renovations to accommodate the displaced agency are made due to the request of another agency, the costs thereof cannot be considered necessary to further the purposes of the displaced agency's appropriations." 56 Comp. Gen. at 933.

c. Alterations and Repairs

A provision of the Public Buildings Act, 40 U.S.C. § 603(a), gives GSA the authority to alter public buildings. If the total estimated expenditure exceeds $1,500,000, the alteration is subject to the prospectus approval requirement of 40 U.S.C. § 606(a). If the alteration requires the acquisition of land, the $1,500,000 applies to the combined cost of the alteration and acquisition. 40 U.S.C.

§ 603(b). Of course, an agency which is exempt from GSA's authority or which receives its own specific statutory authority may proceed accordingly. E.g., B-131887, August 27, 1957 (specific authority for Army to remodel military warehouse for an office building). The application of the prospectus requirement, or the existence of a comparable requirement, depends on the terms of the exempting legislation. For example, GAO's main headquarters building, although exempt from GSA's custody and control, remains subject to 40 U.S.C. § 606, although GAO rather than GSA would submit the prospectus. 31 U.S.C. § 781(a).

As a general proposition, GSA is responsible for providing normal space needs, including "space alterations, repairs, and improvements sufficient to meet the mission requirements of occupant agencies." 41 C.F.R. § 101-20.002-1. In addition, GSA is authorized to provide "special services not included in the standard level user charge on a reimbursable basis." 40 U.S.C. § 490(f)(6). These special services or "tenant changes" may include such things as alterations necessary for the installation of agency program equipment, or space adjustments requested by the tenant agency for its own convenience within already assigned space. 41 C.F.R. §§ 101-20.106(d), (e). Both types of alterations, normal space needs and special services, are financed from the Federal Buildings Fund established by 40 U.S.C. § 490(f). 41 C.F.R. § 101-21.501. GAO has been critical of "augmenting" the Fund by seeking reimbursement for items which should have been treated as normal space needs. The General Services Administration Should Improve the Management of Its Alterations and Major Repairs Program, GAO/LCD-79-310, 26-29 (July 17, 1979). Examples cited include such things as resurfacing a driveway entrance, installing sprinklers, and conducting a survey to confirm complaints of inadequate ventilation.

The distinction between normal space needs and special services is recognized in several decisions. E.g., 38 Comp. Gen. 758 (1959); 38 Comp. Gen. 588 (1959); 38 Comp. Gen. 193 (1958); B-122723, March 10, 1955. With respect to "special services," as these cases point out, it is not enough that GSA is authorized to do the work on a reimbursable basis. The tenant agency's appropriations must be legally available to make the reimbursement. See also 39 Comp. Gen. 723 (1960). In addition, as these cases also address, if the work

amounts to a "public improvement," it is also necessary to satisfy the specific authorization requirement of 41 U.S.C. § 12.

Since the 1970s, Congress has made the reimbursement question easier by enacting a general provision annually along these lines:

> "Appropriations available to any department or agency during the current fiscal year for necessary expenses, including maintenance or operating expenses, shall also be available for payment to the General Services Administration for charges for space or services and those expenses of renovation and alteration of buildings and facilities which constitute public improvements performed in accordance with the Public Buildings Act of 1959 (73 Stat. 749), the Public Buildings Amendments of 1972 (87 Stat. 216), or other applicable law." Treasury, Postal Service, and General Government Appropriations Act, 1995, Pub. L. No. 103-329, § 607, 108 Stat. 2382, 2417 (1994).

GSA does not seek prospectus approval on reimbursable alteration projects if the requesting agency certifies that its appropriations are available without regard to 40 U.S.C. § 606. 41 C.F.R. § 101-19.302. This permits some large projects to escape the oversight of the public works committees, but Congress has long been aware of GSA's practice. See Repairs and Alterations of Public Buildings by General Services Administration—Better Congressional Oversight and Control Is Possible, GAO/LCD-78-335, 23-25 (March 21, 1979).

d. Maintenance and Protective Services

Every government building requires custodial services and, in varying degrees, protective services. The Federal Buildings Fund is available "for real property management and related activities." 40 U.S.C. § 490(f)(2). GSA's annual appropriations language under the Federal Buildings Fund heading is more descriptive, providing funds, quoting from GSA's 1995 appropriation—

> "for necessary expenses of real property management and related activities not otherwise provided for, including operation, maintenance, and protection of Federally owned and leased buildings; . . . contractual services incident to cleaning or servicing buildings . . . ." Pub. L. No. 103-329, 108 Stat. at 2397 (1994).

GSA provides a standard level of cleaning services as part of the package for which the tenant agency pays rent. 41 C.F.R. § 101-21.301. Section 101-20.102 of the regulations details the cleaning and maintenance services included in the standard level. The objective is to provide service "equivalent to that normally furnished commercially in similar space." 41 C.F.R. § 101-20.002-1(c).

Prior to establishment of the Federal Buildings Fund, agencies could not reimburse GSA for security services because the funds were appropriated to GSA. 34 Comp. Gen. 42 (1954); B-139678, August 31, 1959. Now, the standard level package also includes protective and security services to the extent described in 41 C.F.R. § 101-20.103-1. Protective services above this standard level may be provided on a reimbursable basis under the "special services" authority of 40 U.S.C. § 490(f)(6). 41 C.F.R. § 101-20.103-2. Other aspects of GSA's authority to protect federal property are found in 40 U.S.C. §§ 318, 318b, and 318d. See generally B-105291, November 30, 1976 (internal memorandum).

Additional restrictions on the procurement of guard and custodial services may appear in the annual Treasury, Postal Service, and General Government Appropriation Acts, and they may vary from year to year. A provision in the 1995 act prohibits the obligation or expenditure of funds from the Federal Buildings Fund "for the procurement by contract of any guard, elevator operator, messenger or custodial services" if the procurement would result in the displacement of any GSA veterans preference employee, except for contracts with sheltered workshops employing the severely handicapped. Pub. L. No. 103-329, § 505, 108 Stat. at 2409.[107]

e. Utilities

Another indispensable element of building management is the provision of utility services such as electricity, natural gas, water, and telecommunications. The Federal Property and Administrative Services Act authorizes GSA to prescribe policies for the management of public utility services, subject to Office of Federal Procurement Policy regulations (40 U.S.C. § 481(a)(1)); procure and supply nonpersonal services for executive agencies (40 U.S.C. § 481(a)(3)); and represent its client agencies in negotiations with public utilities and in utility regulatory proceedings (40 U.S.C. § 481(a)(4)). Section 481(a) permits exemptions for the Defense Department when determined to be "in the best interests of national security." Another provision, not part of the Federal Property Act, authorizes GSA to "provide and operate public utility communications services serving one or more governmental activities, in and outside the District of Columbia, where . . . economical and in the interest of the Government." 40 U.S.C. § 295.

[107]The U.S. Code carries the current version as 40 U.S.C. § 490c.

This has been interpreted to include telecommunication services. See 66 Comp. Gen. 58 (1986); B-190142, February 22, 1978. In addition, utility services would certainly seem to be included in "real property management and related activities" for purposes of 40 U.S.C. § 490(f)(2).

Absent specific statutory authority[108] or a delegation from GSA, an agency is not authorized to procure utility services directly, especially in an area covered by a GSA contract. B-152142-O.M., September 17, 1963.

Multi-year utility contracts are authorized by 40 U.S.C. § 481(a)(3), which provides that "contracts for public utility services may be made for periods not exceeding ten years." This provision was designed to save the government money by enabling it to take advantage of discounts available under long-term contracts. 62 Comp. Gen. 569, 572 (1983); 35 Comp. Gen. 220, 222-223 (1955).

Although the statute uses the term "public utility services," it is not limited to the "traditional" regulated public utility. 62 Comp. Gen. 569 (statute applies to installment purchase contract with a non-tariffed supplier of telephone equipment); 45 Comp. Gen. 59 (1965). The governing factor is the "nature of the product or service provided and not the nature of the provider of the product or services." 62 Comp. Gen. at 575. "[T]he Congress in its judgment determined to categorize the service rather than the contractor;" the statute applies to "services having public utility aspects." 45 Comp. Gen. at 64. In any event, the statute clearly applies to the commonly understood types of "utility services"—telecommunications (62 Comp. Gen. 569), natural gas (45 Comp. Gen. 59),[109] and electric power (44 Comp. Gen. 683 (1965)).

While the multi-year authority of 40 U.S.C. § 481(a)(3) has been liberally applied, it is not unlimited. The statute is intended to

[108] E.g., 31 U.S.C. § 781(c)(2), authorizing GAO to contract for utility services for periods not to exceed 10 years "[t]o the extent that funds are otherwise available for obligation."

[109] A 1990 decision, 70 Comp. Gen. 44, held that a procurement of natural gas was not a contract for utility services for purposes of the Walsh-Healey Act. That case distinguished 45 Comp. Gen. 59 on several grounds. 70 Comp. Gen. at 49.

address "incidental utility services needed in connection with authorized Government business," not any project that happens to involve utility services. 35 Comp. Gen. 220, 223 (1955). Thus, GAO has found it inapplicable to an Air Force early warning system (35 Comp. Gen. 220), and to a proposal to finance construction of power facilities on the Ryukyu Islands (B-159559, July 29, 1966).

GAO subsequently approved a proposal in the Ryukyu case for privately financed construction, with the government entering into a 10-year requirements contract with a renewal option and a guarantee provision. B-159559, June 19, 1967. The obvious purpose of the guarantee feature was to enable the utility to recover its capital cost. See also 37 Comp. Gen. 155, 159-160 (1957); 17 Comp. Gen. 126 (1937); 16 Comp. Gen. 136 (1936); 8 Comp. Gen. 654 (1929). While this type of arrangement is acceptable, a scheme which obligates the government to pay the contractor's entire capital cost at the outset violates the advance payment prohibition in 31 U.S.C. § 3324(b). 57 Comp. Gen. 89 (1977); 58 Comp. Gen. 29 (1978).

Contracts under 40 U.S.C. § 481(a)(3) are incrementally funded. The contracting agency is not required to obligate the total estimated contract cost in the first year. It needs only sufficient budget authority at the time the contract is made to obligate the first year's costs, with subsequent years obligated annually thereafter. 62 Comp. Gen. 569, 572 (1983). See also 44 Comp. Gen. 683, 688 (1965); 35 Comp. Gen. 220, 223 (1955). GSA pays utility invoices by using a combination of statistical sampling and fast pay procedures. See 67 Comp. Gen. 194 (1988) and 68 Comp. Gen. 618 (1989) for a detailed discussion.

A contract for a term of 10 years with an option to renew for an additional 5 years is within the authority of 40 U.S.C. § 481(a)(3) because the government is not obligated beyond the initial 10-year period. B-227850, October 21, 1987, aff'd on recons., B-227850.2, March 22, 1988.

Except for telecommunication services, utilities are financed from the Federal Buildings Fund and are part of the "space and services" package for which federal agencies pay rent. Telecommunication services are financed from a separate fund established by 40 U.S.C. § 757. Originally designated the Federal Telecommunications Fund, it was merged in 1987 with an automatic data processing fund and

redesignated as the Information Technology Fund. See 69 Comp. Gen. 112, 113 (1989). The Fund is available for

> "expenses . . . and for procurement (by lease, purchase, transfer, or otherwise) for efficiently providing information technology resources to Federal agencies and for the efficient management, coordination, operation, and utilization of such resources." 40 U.S.C. § 757(b)(2).[110]

This, like the Federal Buildings Fund, is a revolving fund.

Prior to enactment of the Clinger-Cohen Act of 1996,[111] Pub. L. No. 104-106, Div. D,E, 110 Stat. 186 (1996), GSA had exclusive authority to provide "Automatic Data Processing" equipment and services (including telecommunications services) under the Brooks Automatic Data Processing Act. 40 U.S.C. § 759 (1994). Pursuant to this authority, GSA promulgated the Federal Information Resources Management Regulation (FIRMR), which governed "the umbrella of local and long distance telecommunications services . . . provided, operated, managed, or maintained by GSA for the common use of all Federal agencies and other authorized users." 41 C.F.R. § 201-4.001 (1995). The Comptroller General had several occasions to interpret GSA's authority under the Brooks ADP Act. See, e.g., 65 Comp. Gen. 380 (1986) (FIRMR applicability); 69 Comp. Gen. 112 (1989) (statistical sampling cost recovery); 70 Comp. Gen. 238 (1991) (termination charges).

The Clinger-Cohen Act of 1996 repealed the Brooks ADP Act. Pub. L. No. 104-106, § 5101, 110 Stat. 680. GSA abolished the FIRMR in August 1996. The regulatory scheme of the FIRMR was replaced with directives and guidance governing "Information Technology," which includes telecommunications services. See, e.g., OMB Circular A-130, "Management of Federal Information Resources"; Exec. Order No. 13011, "Federal Information Technology," July 16, 1996; 48 C.F.R. Part 39, "Acquisition of Information Technology" (1999) (FAR). GSA, however, continues to provide governmentwide telecommunications services through contracts which federal

[110]It is perhaps not intuitively obvious that the term "information technology resources" includes telephone services, but the origin and evolution of 40 U.S.C. § 757 remove any doubt.

[111]So renamed by the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, Tit. 8, 5808, 110 Stat. 3009 (1996).

agencies, on a nonmandatory basis, may use to satisfy their telecommunications needs. Examples include GSA's FTS 2001 contracts and the Metropolitan Area Acquisitions (MAA) program.

f. Use Restrictions

The Property Clause of the Constitution (art. IV, § 3) empowers Congress to "make all needful Rules and regulations" with respect to government-owned property. Congress has delegated that authority to GSA in 40 U.S.C. § 318a. Many of GSA's regulations address issues of access to, and personal conduct on government property. For example, they specify when government property will be open and closed to the public (41 C.F.R. § 101-20.302), and ban certain activities while on federal property—such as gambling (41 C.F.R. § 101-20.306) and consumption of alcoholic beverages (41 C.F.R. § 101-20.307), etc.

Congress also has the authority to control what use is made of government property. In addition to the general purpose restrictions which permeate appropriations law (see chap. 4 above), a few restrictions on the use of government property appear in various parts of title 40 and are not reflected elsewhere. One example is 40 U.S.C. § 31, which prohibits the use of any public building in the District of Columbia, except the Capitol Building and the White House, for any "public function" unless expressly authorized by law. Another is 40 U.S.C. § 286:

> "[N]o building owned, or used for public purposes, by the Government of the United States, shall be draped in mourning and no part of the public fund shall be used for such purpose."

This prohibition applies to buildings abroad as well as to buildings in the United States, and applies regardless of who owns the building. 8 Comp. Dec. 317 (1901-A.D.); 7876, September 20, 1923.

g. Payment of Rent by Federal Agencies

In 1972, Congress made fundamental changes in the way the government budgets for and finances its space needs. Prior to that time, the system was fairly simple: Congress, for the most part, appropriated the money to GSA and GSA paid the bills. Under this system, there was little incentive for agencies to be conservative in their space needs. Also, as we have seen, coming up with appropriations to fund needed construction work proved to be extremely difficult.

The Public Buildings Amendments of 1972 made several important revisions to the Federal Property and Administrative Services Act. First, the 1972 law created a new revolving fund, later named the Federal Buildings Fund, to be available to the extent provided in annual appropriation acts, for GSA to use to finance its real property management functions. Next, it required agencies to pay rent to GSA, to be deposited in the revolving fund. Finally, it authorized any executive agency other than GSA which provides space and services to charge for the space and services.[112] While the concept of charging rent was not wholly unknown prior to 1972 (see, e.g., 28 Comp. Gen. 221 (1948)), this was the first governmentwide requirement.

The pertinent portions of 40 U.S.C. §§ 490(j) and (k) are quoted below:

> "[(j)] The Administrator is authorized and directed to charge anyone furnished services, space, quarters, maintenance, repair, or other facilities (hereinafter referred to as space and services), at rates to be determined by the Administrator from time to time and provided for in regulations issued by him. Such rates and charges shall approximate commercial charges for comparable space and services . . . . The Administrator may exempt anyone from the charges required by this subsection if he determines that such charges would be infeasible or impractical. . . ."

> "[(k)] Any executive agency, other than [GSA], which provides to anyone space and services set forth in subsection (j) of this section, is authorized to charge the occupant for such space and services at rates approved by the Administrator. . . ."

Subsection (f)(1)(A) of 40 U.S.C. § 490 directs that user charges under subsection (j) be deposited in the Federal Buildings Fund. The unquoted portion of subsection (k) authorizes the agency to credit the receipts to its own appropriations to the extent of recovering the cost of providing the services. Section 7 of the Public Buildings Amendments of 1972, uncodified but found as a note following 40 U.S.C. § 603, requires that rates established under 40 U.S.C. §§ 490(j) and (k) be approved by the Office of Management and Budget. Agency operating appropriations are available to pay the rent by virtue of a recurring general provision appearing in

[112]Pub. L. No. 92-313, §§ 3 and 4, 86 Stat. 216, 218-219 (1972), 40 U.S.C. §§ 490(f) (Federal Buildings Fund); 490(j) (payment of rent to GSA); and 490(k) (authority of other agencies to charge for space and services).

Treasury-Postal Service appropriation acts, quoted in full under the Alterations and Repairs heading earlier in this chapter.

At first, the space-and-service charges were known as the "standard level user charge" or "SLUC." They are now simply called "rent." The rent requirement is intended to reduce cost and encourage more efficient space utilization by making agencies accountable for the space they use. H.R. Rep. No. 92-989, reprinted in 1972 U.S.C.C.A.N. 2370, 2373. Rent under subsection (j) is to be based on "approximate commercial charges for comparable space and services." This method was chosen over a cost-recovery basis in order to produce more income so that the revolving fund could finance construction and major repairs. See B-95136, May 18, 1971, GAO's comments on the legislation. This hope has gone largely unmaterialized.[113] Under the commercial charge formulation, it is not inconceivable that an agency occupying space in a leased building could pay more rent to GSA than GSA is paying to the lessor. This does not entitle the lessor to a rent increase. See B-95136-O.M., March 29, 1976.

GSA defines "rent" in simple terms as "the rate charged for GSA-controlled space." 41 C.F.R. § 101-21.003-2. Rent is based on appraisals performed at 5-year intervals and updated in the intervening years by changes in the Consumer Price Index. 41 C.F.R. § 101-21.201(a). According to an early GSA statement, rent is designed to cover

> "the value of the space itself plus cleaning, utilities, operation and maintenance of elevators and electric heating, air-conditioning, ventilating, refrigeration, plumbing and sewage systems, repairs and maintenance, including approaches, sidewalks and roads; the furnishing and maintenance of building equipment such as directory and bulletin boards, electrical outlets, door keys, and window shades or venetian blinds; and overhead (i.e., the total cost of GSA's Public Buildings Service . . . except costs covered by reimbursements)." 52 Comp. Gen. 957, 958-959 (1973).

The services GSA provides as part of the rent do not mean any and all services the tenant agency may need or want. GSA provides what it determines to be a "standard level" of service. 41 C.F.R. § 101-21.003-3. Over and above that standard level, services are

[113]See Chapter 1 of The General Services Administration's Rental Rates (Standard Level User Charge) for Federal Agencies, GAO/LCD-78-329 (May 25, 1978) and Chapter 3 of Federal Office Space: Increased Ownership Would Result in Significant Savings, GAO/GGD-90-11 (December 1989).

provided on a reimbursable basis to the extent that GSA is authorized to do the work or provide the service and the tenant agency's appropriations are available to pay.

The law authorizes GSA to charge rent to "anyone" furnished space or services, not just other federal agencies. Thus, for example, GSA was authorized to charge rent to the National Association of Regulatory Utility Commissioners, to which 49 U.S.C. § 10344(f) then required GSA to furnish space. B-95136, November 17, 1978. As the result of some apparently skillful lobbying, the law was changed in 1980 to require the Interstate Commerce Commission (i.e., the taxpayers) to pick up the tab. Pub. L. No. 96-296, § 36, 94 Stat. 793, 826 (1980).

A federal office building may house a variety of support concessions such as blind vending stands operated under the Randolph-Sheppard Act, Federal Credit Unions, cafeterias, dry cleaning and laundry facilities, etc. Since GSA can charge "anyone," GSA could presumably charge rent directly to the concessioners. Instead, however, GSA assigns the space for these support concessions to the tenant agency for purposes of rent assessment, on the theory that the agency's presence in the building generated the need for the space. GAO has agreed that this method is authorized. 52 Comp. Gen. 957 (1973); B-114820-O.M., December 14, 1977. GSA has "wide discretionary powers consistent with the purposes of the statute, in the manner of defining and charging for space occupied by Federal agencies and others." 52 Comp. Gen. at 961. If the building houses more than one government agency, GSA allocates the joint-use space (and the rent for it) on a pro rata basis. 41 C.F.R. § 101-21.202.

GSA's rental charge also covers assigned parking spaces. Once again, since GSA can charge "anyone," it could assign spaces directly to individuals and charge rent to those individuals. In the exercise of its discretion, however, GSA simply includes the parking space in the total space charged to the tenant agency or agencies. See 52 Comp. Gen. at 960-961; 55 Comp. Gen. 897 (1976). See also American Federation of Government Employees v. Freeman, 498 F. Supp. 651, 656-657 (D.D.C. 1980) (40 U.S.C. § 490(j) authorizes, but does not require, GSA to charge parking fees). We noted above that

40 U.S.C. § 490(j) uses the term "anyone." So does 40 U.S.C. § 490(k).[114] Therefore, the tenant agency could charge its employees for parking space, but the rates would have to be approved by GSA and OMB. 55 Comp. Gen. at 899-900. However, subsection (k) does not authorize an agency to collect (and retain) fees from non-agency participants in an agency-sponsored conference held in procured space. The agency is the "occupant" within the meaning of 40 U.S.C. § 490(k), not the participants. B-190244, November 28, 1977. (This does not mean that the agency cannot charge a fee, merely that it cannot rely on 40 U.S.C. § 490(k) as authority to credit the money to its own appropriation.)

The purpose of 40 U.S.C. § 490(j) is to raise revenue for GSA, not to create the full equivalent of a commercial landlord-tenant relationship. Accordingly, a tenant agency may not reduce its rental payments to recover the cost of property damaged by building failures. 59 Comp. Gen. 515 (1980); 57 Comp. Gen. 130 (1977).

Congress often uses appropriation act provisions to address either GSA's authority under 40 U.S.C. § 490(j) or the extent of an agency's liability to pay GSA's charges. Thus, to understand the operation of the statute for any given year, it is necessary to examine both the Treasury-Postal Service appropriation act for any provisions directed at GSA and the appropriation act covering the tenant agency in question. For example, a provision in GSA's 1995 appropriation directs GSA to reflect in its rent rates the reductions contained in a particular budget amendment. Pub. L. No. 103-329, GSA General Provisions § 5, 108 Stat. 2382, 2404 (1994).

Restrictions directed at tenant agencies may take various forms. A provision imposing a specific dollar limit is discussed in B-204270, October 13, 1981. A provision imposing a percentage limitation is noted in 55 Comp. Gen. 897 (1976). Two additional types appear in the 1995 Labor-Health and Human Services Appropriations Act, Pub. L. No. 103-333, 108 Stat. 2539 (1994). Section 207 of the HHS general provisions, 108 Stat. at 2561, permanently cancels a specific dollar amount of "budgetary resources available . . . for space rental charges" in 1995, and directs HHS to allocate the reduction among

[114]There is one significant difference. Subsection (j) requires GSA to charge rent; subsection (k) merely authorizes other agencies to do so.

its various accounts with certain exceptions. The operating appropriation for the Railroad Retirement Board, 108 Stat. at 2571, specifies that none of the funds shall be available to pay charges under 40 U.S.C. § 490(j). The precise language of the limitation will determine whether it applies only to rent or to other reimbursements as well. B-186818, September 22, 1976. Regardless of the type of limitation, it must appear in the statute, and not merely in committee reports, in order to be legally binding. Id.; B-177610, September 3, 1976.

G. Improvements to Property Not Owned By the Government

1. The Rules

The topic of this section is the rule that, unless authorized by statute, appropriated funds may not be used to make permanent improvements to property not owned by the federal government. As numerous decisions have pointed out, the rule is based on the fundamental tenet, noted in various places throughout this book, that no government official is authorized to give away government property—tangible property, money, legal rights—without specific statutory authority. E.g., 53 Comp. Gen. 351, 352 (1973); 42 Comp. Gen. 480, 481 (1963); 35 Comp. Gen. 715, 716 (1956).

Although derived from the constitutional principle that disposal of government property is a function of Congress, the rule itself is decisional rather than statutory, or, to quote a phrase used regularly in the decisions, the rule "is one of policy and not of positive law." 53 Comp. Gen. at 352; 42 Comp. Gen. at 483. Stated somewhat more accurately in 65 Comp. Gen. 722, 724 (1986), the rule is "one of public policy, not statutory prohibition." The public policy which the rule reflects—that it is ordinarily not a particularly good idea for government officials to give away the taxpayers' money—can be traced back at least to the early decisions of the Comptroller of the Treasury. E.g., 6 Comp. Dec. 295 (1899).

Due at least in part to the lack of an explicit statutory foundation, the rule is not and never has been particularly rigid. A considerable

body of exceptions has evolved, in recognition of the fact that there are situations in which making improvements to nongovernment property is appropriate to the circumstances and can be justified. Viewing the body of case law as a whole, it seems fair to say that there is a set of standards to determine when the expenditure may be authorized, with the prohibitory rule remaining for those cases in which the expenditure would amount to giving away government property.

To start with, the rule applies to permanent improvements. It does not prohibit temporary improvements as long as they remain the property of the government and the government reserves the right to remove them at the expiration of the lease or other government use. 43 Comp. Gen. 738 (1964); 20 Comp. Gen. 927 (1941); 15 Comp. Gen. 761 (1936). For example, the 1964 decision concerned nonpermanent servicing facilities which the General Services Administration needed to install in commercial space leased for motor pool activities. The propriety of temporary improvements is determined by applying the standard rules of purpose availability—you look first to see if the expenditure is expressly authorized by law; if it is neither expressly authorized nor expressly prohibited, you then apply the "necessary expense" doctrine discussed in Chapter 4.

If the contemplated improvement is permanent, the first step is still to look for specific statutory authority. If it does not exist, the expenditure may nevertheless be authorized if the following tests are met:

- The improvement must be incident to and essential for the effective accomplishment of an authorized purpose of the appropriation sought to be charged.
- The amount of the expenditure must be reasonable.
- The improvement must be for the principal benefit of the government.
- The interests of the government in the improvement must be protected.

These standards appear to have been first enunciated in 42 Comp. Gen. 480, 484 (1963), and have been reiterated in many cases since. E.g., 71 Comp. Gen. 4, 5 (1991); 69 Comp. Gen. 673, 675 (1990); 53 Comp. Gen. 351, 352 (1973); 46 Comp. Gen. 25, 27 (1966).

The first test—incident and essential to an authorized purpose of the appropriation—is a relative concept, like the "necessary expense" doctrine from which it is derived. It is applied by evaluating the proposed expenditure against the authorized purposes of the appropriation. Thus, incidental improvements to private property, chargeable to project funds, are unobjectionable if necessary to the completion of an authorized federal project. B-37747, November 19, 1943; A-65186, October 19, 1935.

As with the necessary expense doctrine itself, an item may relate clearly to one appropriation but be totally foreign to another. A good illustration is the improvement involved in 42 Comp. Gen. 480—monkey cages in the San Diego zoo. It's hard to see how the construction of monkey cages in a private zoo would further the purposes of a federal agency's appropriation.[115] However, where the appropriation is for Public Health research and the expenditure stems from a cost-reimbursable contract for the experimental breeding of primates, the relationship of the monkey cages to the appropriation takes on a new perspective. This element shares the common-sense logic of the necessary expense doctrine. However wonderful an item may appear, if it does not bear a sufficient relationship to carrying out one of the agency's authorized programs or functions or to fulfilling the purposes for which Congress appropriated money to the agency, the agency has no business doing it.

The second element—reasonableness of cost—is also relative. It is not enough to just look at the dollar amount in a vacuum. You must evaluate the cost against such factors as the type of improvement involved, the uses to which it is to be put, and the length of the government's contemplated use measured against the residual value, if any, to the owner. This element has been stated in various ways. The cost of the improvements must not be "extravagant or disproportionate to the needs to which the facilities are intended to be put." 35 Comp. Gen. 715, 716 (1956). If a lease or contract is

[115]It should be apparent that we are talking about expenditures which are incident to some other government program or project, as distinguished from grant programs where making the improvement may be the very purpose of the federal assistance. Since the grant programs are statutorily authorized, this analysis would not apply, although the underlying rationale would bar the expenditure, but for the statute.

involved, the cost of the improvements must be "in reasonable proportion to the overall cost of the lease or contract price." 53 Comp. Gen. 351, 352 (1973). The monkey cages in 42 Comp. Gen. 480, for example, cost approximately 10 percent of the total price of the research contract. Of course, this formulation is useless where land is being leased to the government for a nominal rent, in which case other factors must be used to assess reasonableness. Thus, spending approximately $1,000 to improve an access road was "relatively small and not disproportionate to the needs of the Government," and therefore acceptable, in 38 Comp. Gen. 143, 146 (1958), whereas in 47 Comp. Gen. 61, 65 (1967), constructing a $25 million building on land leased to the government was a different story, hardly qualifying as "some minor item incidental to a larger purpose."

For at least the last half century, the amount formula included a statutory element. As noted previously under the Leasing heading, section 322 of the Economy Act of 1932 prohibited the obligation or expenditure of appropriated funds for "alterations, improvements, and repairs" of rented premises in excess of 25 percent of the first year's rent. The statute was repealed in 1988 and the cases must therefore be regarded as modified to the extent they either impose a percentage limitation on the amount of otherwise authorized expenditures or treat the Economy Act as an independent source of authority.

The third element—principal benefit of government—is largely self-explanatory and is necessary to prevent giveaways. Of course, words like "principal" or "primary" do not mean "exclusive," and in many cases there will be some residual, if not contemporaneous, benefit to the owner. Thus, an otherwise authorized expenditure does not become objectionable merely because the facility will have an estimated life of 15 years and the government plans to use it for only 10 years. See B-130515(3), May 8, 1969. Or, turning again to the monkey cages in 42 Comp. Gen. 480, nothing would prevent the zoo from cleaning them out and using them to house other monkeys upon completion of the government research contract. Nevertheless, the United States must be the primary beneficiary of the improvements. E.g., B-213379, October 29, 1984 (no authority to pay railroad in Germany for track improvements where benefit to United States was merely "the unavoidable result of improvements made to the German rail system as a whole").

The fourth and final element—protection of the government's interests—will again vary with the facts and circumstances of the particular case. For example, in a case where the Immigration and Naturalization Service wanted to erect or repair fences on private land to help deter the entry of illegal aliens, it would be necessary for the INS to gain "substantial control" over the land by some device such as an easement or lease covering the useful life of the fence. 55 Comp. Gen. 872, 874 (1976). See also A-65186, October 19, 1935, specifying the same condition. Similarly, where the Department of Agriculture wanted to construct a dam, part of which would have to be located on Canadian soil, GAO advised that a right in perpetuity for the construction and maintenance of the dam should first be obtained from the property owner, as well as, of course, the consent of the Canadian government. 18 Comp. Gen. 463 (1938). In some cases, the appropriate device for protecting the government's interests may be the insertion of appropriate provisions in a contract. E.g., B-187482, February 17, 1977. In other cases, it may be necessary to work out an ad hoc agreement with the owner tailored to the circumstances. See 71 Comp. Gen. 4, 6 (1991).

If these tests cannot be satisfied, then the expenditure is unauthorized unless the agency obtains statutory authority. For example, in B-194031, May 1, 1979, GAO agreed with the former Veterans Administration that it could not use its funds for the repair and maintenance of the Congressional Cemetery in Washington, D.C., a 30-acre cemetery of which the government owned only half an acre. The expenditure would primarily benefit the private owners and would be disproportionately large in relation to the government-owned portion. Significantly, on a few occasions in the past when Congress had authorized repairs, it did so explicitly. The VA could, of course, repair and maintain the government-owned plots.

2. Some Specific Applications

a. Leased Premises/Property

The rule prohibiting permanent improvements to nonfederal property without statutory authority applies to leased property, both

unimproved property[116] and buildings.[117] However, the rule has evolved somewhat differently in the case of leases because of the contractual nature of the transaction. It has long been held that appropriated funds are available for improvements to property being leased by the government if provided for as part of the consideration under the lease. 65 Comp. Gen. 722, 723-724 (1986); 18 Comp. Dec. 70 (1911); 6 Comp. Dec. 943 (1900); A-33513, October 10, 1930. Any other rule would make little sense because alterations are often necessary to make premises suitable for the government's proposed use, and if the government couldn't pay directly, the landlord could make the alterations and factor the cost into the rent, and the government would end up paying anyway. Of course, there is a common-sense point beyond which this concept cannot be stretched. It would not, for example, permit the construction of a $25 million building on land being leased for a dollar a year. See 47 Comp. Gen. 61 (1967).

As noted in our general discussion, the prohibition does not apply with respect to alterations or improvements to the leased premises which are not permanent and which are removable. 43 Comp. Gen. 738 (1964); 5 Comp. Gen. 696 (1926); B-127807, May 14, 1956; A-55493, June 21, 1934; A-54725, April 13, 1934. In the case of a lease, however, before applying the purpose analysis, it is first necessary to ask whether the repair or improvement is one which the landlord is obligated to supply under the terms of the lease. 5 Comp. Gen. at 697. If it is, then the government is not authorized to, in effect, pay twice to get what it is entitled to get under the lease. 2 Comp. Gen. 606, 607 (1923); A-50554, August 28, 1933.[118]

The General Services Administration has its own statutory authority, discussed generally in 65 Comp. Gen. 722 (1986). Under section 210(a)(8) of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. § 490(a)(8), with respect to any

[116]47 Comp. Gen. 61 (1967); 38 Comp. Gen. 143 (1958); 35 Comp. Gen. 715 (1956).

[117]18 Comp. Gen. 144 (1938); 14 Comp. Gen. 97 (1934); 10 Comp. Gen. 149 (1930); 5 Comp. Dec. 478 (1899).

[118]We are somewhat reluctant to admit it, but this case involved an expenditure of $2.67 for the purchase of a toilet seat. Despite overwhelming temptations, we will eschew further comment.

"building, property, or grounds" under GSA's jurisdiction, GSA is authorized to "repair, alter, and improve rented premises" if it determines that the work "is advantageous to the Government in terms of economy, efficiency, or national security." The total cost over the expected life of the lease must be less than the cost of alternative space which does not need the work. Id. Work under 40 U.S.C. § 490(a)(8) is financed from the Federal Buildings Fund, 40 U.S.C. § 490(f).

If an agency other than GSA is doing the leasing under its own authority, what it can or cannot do will depend on the precise terms of its leasing authority, supplemented or restricted, as the case may be, by the decisions.

What happens to the improvements at the end of the lease, and related questions of liability, will depend on the terms of the lease. In one case, for example, the government had leased unimproved land for 10 years and constructed buildings on it. When the lease was over, the government removed the buildings and left the concrete foundations. Unfortunately for the landowner, the lease expressly relieved the government of any responsibility to restore the land to its prior condition, and the court refused to construe this in "all or nothing" terms. M.H. Sherman Co. v. United States, 258 F.2d 881 (9th Cir. 1958). In a similar case where the lease did include the "restore to prior condition" clause, the government was liable. Atlantic Coast Line R.R. v. United States, 129 Ct. Cl. 137 (1954).

The restoration clause is not a rigid requirement that the government remove improvements in any event and at all costs. Thus, in a case where removal would not have been cost-effective, the Attorney General approved a settlement whereby the government agreed to leave the improvements for the use of the lessor in full settlement of all claims against the government. 39 Op. Att'y Gen. 338 (1939). There can be no requirement "that improvements attached to leased premises must be removed when removal would involve the expenditure of public funds greatly in excess of any salvage value." Id. at 340. See also 20 Comp. Gen. 105, 111 (1940).

The restoration clause serves more as a method of measuring damages where the government does not remove the improvements. Whatever the government does or does not do, liability requires

provable damages. The point is illustrated in Realty Associates v. United States, 138 F. Supp. 875 (Ct. Cl. 1956), in which the government leased land and buildings which had been idle for several years and made substantial improvements to the property. When the lease was over and the property returned to the lessor, it had so increased in value as a result of the improvements that it was capable of producing, and did produce, substantial income. Nevertheless, the lessor sued for the cost of restoration on a breach of contract theory. Noting that if the government had restored the property to its former unusable condition, "no one would have been more unhappy than plaintiff" (id. at 877), and invoking Mark Twain's aphorism that "the difference between a dog and a man is that if you pick up a starving dog and make him prosperous he will not bite you" (id. at 878), the court held that the lessor could recover only if he could show that he actually suffered damage as a result of the government's actions. If the property is worth more in its unrestored condition than it would be worth if restored, there is no damage. See also Dodge Street Building Corp. v. United States, 341 F.2d 641 (Ct. Cl. 1965). This principle has also been applied where the leasehold was acquired by condemnation. Flood v. United States, 274 F.2d 483 (9th Cir. 1960), cert. denied, 363 U.S. 805.

The fact that removal may not be feasible or cost-effective does not mean that the government has no alternative to simply giving away the improvements. GAO has recommended that the leasing agency consider, in appropriate cases,

> "the advisability of incorporating in such leases a provision for reimbursement by the lessor of the residual value of such changes at the termination of the lease together with the basis for determining such value. . . . In determining the residual value there necessarily would be for consideration such factors as (1) the rental rate, (2) the lease term, and (3) the type of the alteration, improvement, or repair with particular consideration as to whether or not such building changes at the termination of the lease will operate to enhance the value of the building or be advantageous to the lessor." 39 Comp. Gen. 304, 307 (1959).

The lease in that case was subject to termination by the lessor at the end of each annual renewal term, a situation in which a provision along the lines suggested is particularly desirable. Id.

b. Research

A number of government agencies have research responsibilities not infrequently involving atypical situations with atypical needs. Thus, it probably should not be too surprising that some years ago GAO

noted that a common source of exceptions was "improvements (to a contractor's property) incidental to but necessary to give full force and effect to research contracts made by the Government with private parties." 53 Comp. Gen. 351, 352 (1973).

One case, which we have already noted, is 42 Comp. Gen. 480 (1963). The Public Health Service's National Cancer Institute had entered into a research contract with the San Diego Zoo. Part of the contract involved the installation of cages and related work for the "experimental breeding of primates." GAO evaluated the administrative justification in light of the rule and its exceptions, and found the expenditure authorized. This holding was applied a few years later in another case involving a Public Health Service cancer research contract, 46 Comp. Gen. 25 (1966), allowing the costs incurred by the contractor in converting an unfinished basement into laboratory space for use in performing the contract. Part of the justification was a response to the logical question of why the agency had chosen this contractor rather than one who might have had more suitable facilities.

To avoid the difficult questions cases like these presented, GAO suggested that the Public Health Service might be better off with more explicit statutory authority, noting as a model 10 U.S.C. § 2353. 42 Comp. Gen. at 486. Under 10 U.S.C. § 2353, the military departments may fund the acquisition or construction of facilities and equipment deemed necessary for the performance of research contracts, but this may not include "new construction or improvements having general utility." In addition, the statute prohibits the installation or construction of facilities "that would not be readily removable or separable without unreasonable expense or unreasonable loss of value" unless the contract includes specified safeguards. 10 U.S.C. § 2353(b). This statute clearly overcomes the "permanent improvement" prohibition. B-138868-O.M., June 10, 1959. The Public Health Service took the hint, and now has the explicit authority to enter into research contracts in accordance with 10 U.S.C. § 2353. 42 U.S.C. § 241(a)(7).

Another case involving an exception made for a research project improvement is B-96826-O.M., February 8, 1967. It involved an irrigation system constructed on unimproved land by the Soil Conservation Service in connection with statutorily authorized soil erosion research. As with the Public Health Service cases, this too

would now be authorized by statute. Under 7 U.S.C. § 2250a, Department of Agriculture appropriations may be used to erect buildings or other structures on land owned by someone other than the United States, as long as the government obtains the right to use the land for. the estimated life of or need for the structure, including the right to remove the structure upon termination of government use.

Another agency with research responsibilities is the National Institute of Standards and Technology. GAO considered a number of proposals in the 1950s, concluding in several cases that the Institute could make improvements to leased property where those improvements were essential to carrying out the particular projects and could be removed without material damage to the premises. E.g., B-122439, February 23, 1955 (unimproved land); B-114240, May 8, 1953 (laboratory alteration). Nevertheless, statutory authority is preferable to case-by-case determinations, and legislation was enacted in 1958, now found at 15 U.S.C. § 278e(g), which authorizes the Secretary of Commerce to erect on leased property facilities needed by the Institute.

As this survey of cases suggests, a number of agencies with significant research responsibilities now have adequate statutory authority, with appropriate safeguards (except for 15 U.S.C. § 278e(g), which includes no apparent safeguards), to do what they need to do.

The Environmental Protection Agency presented a somewhat different situation in B-187482, February 17, 1977. In connection with authorized research under the Federal Water Pollution Control Act, EPA wanted to purchase a cooling tower from a private power company, knowing that it would abandon the facility in a few years upon completion of the research. EPA thought the situation was analogous to spending money for permanent improvements to private property. GAO agreed and applied the tests of 42 Comp. Gen. 480, finding, among other things, that the purchase price would amount to approximately 25 percent of the total cost of the research project, that constructing a new tower would have been considerably more expensive, and that the agreement included appropriate safeguards to protect the government's interest in the tower. Accordingly, the purchase was authorized.

c. Public Improvements

By "public improvements" we mean such things as roads and sidewalks. By their nature, when not located on federal property, they tend to be located on land owned by state or local governments rather than private parties. This introduces different factors into the analysis.

Most of the cases involve proposals to construct, repair, or maintain roads leading or adjacent to some government facility. The earlier cases just said "no," the fact that there would be some resulting benefit to the government being irrelevant. E.g., 6 Comp. Gen. 353 (1926); 2 Comp. Gen. 308 (1922). Later cases found a basis to say "no" in a statute we have discussed earlier in this chapter, 41 U.S.C. § 12, which prohibits any contract "for the erection, repair, or furnishing of any . . . public improvement" in excess of the amount "appropriated for the specific purpose." 39 Comp. Gen. 388 (1959) (access road); 32 Comp. Gen. 296 (1952) (deceleration lane on state highway); B-143536, August 15, 1960 (access road). The statement found almost verbatim in each case is, quoting from B-143536:

> "[I]f specific action is required by the Congress with respect to public improvements on Federal property, a fortiori, specific authority would be required for the financing from Federal funds of public improvements on State or county property."

Other cases applying this concept include B-211044, June 15, 1984 (crosswalk across the median strip of a public highway); and B-194135(1), November 19, 1979 (locally owned wastewater treatment plant). In 38 Comp. Gen. 143 (1958), however, improvements to an access road on state land were found authorized under the decisional rules where most of the contemplated improvements were not of a permanent nature and there would be no resulting benefit to the state since the road was no more than a car path leading to the government facility across grazing land. See also B-126950, March 12, 1956 (similar facts, same result).[119]

The prohibition has also been applied in a case where the government technically held fee title extending to the center of a

[119]A factual distinction which did not affect the result is that the rent being paid by the government in 38 Comp. Gen. 143 was nominal whereas in B-126950 it was more of a market rent.

public street, but had no jurisdiction or control over the portion occupied by the street because it was subject to a permanent easement held by the city in trust for the public. B-120012, October 15, 1954.

In the case of sidewalks, there is statutory authority for any executive agency "to install, repair, and replace sidewalks around public buildings, installations, properties, or grounds under the control of such agency and owned by the United States," either directly or by reimbursement to the state or local government, in accordance with regulations of the General Services Administration. 40 U.S.C. § 490(i). Prior to the enactment of this general authority, some agencies had—and still have—their own comparable agency-specific authority. An example is 16 U.S.C. § 555b for the Forest Service. GAO has construed "owned" for purposes of the Forest Service provision as including a 99-year lease. 43 Comp. Gen. 705 (1964). There is no reason why this holding should not apply as well to 40 U.S.C. § 490(i).

Subsection (4) of 40 U.S.C. § 490(i) provides that the statute should not be construed to "increase or enlarge the tort liability of the United States . . . beyond such liability presently existing by virtue of any other law." This of course means primarily the Federal Tort Claims Act. Thus, reimbursement by the federal government under section 490(i) does not operate to relieve the state or local government from any underlying obligation it might otherwise have to make the repairs, or from liability for failure to do so. Connor v. United States, 461 F.2d 1259 (D.C. Cir. 1972) (slip-and-fall on a sidewalk adjacent to a federal building in the District of Columbia).

d. Federal Aviation Administration

The Federal Aviation Administration performs its functions at airports throughout the country and therefore has considerable presence on property which is not owned by the United States. Consequently, the FAA has had frequent occasion to consider the use of its appropriations for various alterations or improvements to nongovernment property.

The FAA has general authority to "acquire, establish, improve, operate, and maintain air navigation facilities." 49 U.S.C. § 44502(a)(1). Under this authority, it could, for example, make repairs and improvements to flight service stations located on premises leased from airport owners or operators. 53 Comp.

Gen. 317 (1973).[120] See also B-143536, August 15, 1960 (similar language in an appropriation act provision applicable to leased as well as acquired lands).

Under another statute, the FAA may approve an airport development grant application only upon receipt of written assurances that—

> "the airport owner or operator will provide, without charge to the Government, property interests of the sponsor in land or water areas or buildings that the Secretary decides are desirable for, and that will be used for, constructing at Government expense, facilities for carrying out activities related to air traffic control or navigation." 49 U.S.C. § 47107(a)(12).

This is also specific authority sufficient to overcome the prohibition on improving non-government property. 46 Comp. Gen. 60 (1966). That case found FAA appropriations available for the reinforcement of building foundations and other structural improvements necessitated by the construction of air traffic control tower cabs on the roofs of those buildings.

A more recent case found an exception in a situation not covered by any of FAA's statutory authorities. The decision, 69 Comp. Gen. 673 (1990), held that the inclusion in a lump-sum appropriation of funds for environmental cleanup at a facility being leased by the FAA on a long-term basis was sufficient to authorize the FAA to make permanent improvements to the facility deemed necessary for the cleanup. The expenditure had been specified in committee reports but not the appropriation act itself. The lesson of this case is that, since the permanent improvement prohibition is nonstatutory, it can be overcome by congressional action that would not be sufficient if it were a statutory requirement.[121]

[120]The issue in 53 Comp. Gen. 317 was whether the expenditure was subject to the 25 percent limitation of section 322 of the Economy Act of 1932. Following B-152722, August 16, 1965, GAO held that it was. As noted earlier in the text, the Economy Act provision was repealed in 1988. While the percentage limitation no longer exists, the FAA statute remains as an independent source of authority.

[121]See the discussion of Tennessee Valley Authority v. Hill in Chapter 2.

e. Private Residences

As one might suspect, there should normally be very little occasion to consider the propriety of using appropriated funds to make permanent improvements to someone's private residence. However, as if to prove that one should never say never, the expenditure has been authorized in two cases.

In 53 Comp. Gen. 351 (1973), the former Veterans Administration sought to install central air conditioning in the home of a disabled veteran. The VA received appropriations for necessary inpatient and outpatient care, and the applicable program legislation defined authorized medical care as including home health services. The legislative history indicated an intent to emphasize non-hospital treatment. The air conditioning was not just a matter of comfort. According to the VA, certain disabled veterans "suffer from a severe impairment of the heat regulatory mechanisms of their bodies to such an extent that their body temperatures can only be safely maintained in an artificially controlled physical environment." The expenditure could not be justified as an exception under the tests of 42 Comp. Gen. 480 (1963) and its progeny because the primary beneficiary would be the disabled veteran, not the government. Nevertheless, upon an administrative determination that the expense was necessary for the effective and economical treatment of the veteran, and that the only alternative would be admission to a hospital, the expenditure was authorized.

As noted in Chapter 4, decisions have held that an agency may use its operating appropriations to protect an agency official whose life has been threatened if the danger may impair the functioning of the agency. A 1991 case, 71 Comp. Gen. 4, took this one step further and held that the Drug Enforcement Administration could use its appropriations to enclose and secure a carport at the leased residence of its Administrator. Although the decision viewed the improvement as primarily benefitting the government, it is perhaps more appropriate to say that, under the circumstances presented—danger to the Administrator's life—the fact of shared benefit, or of some residual benefit to the landlord, should not be enough to invalidate an expenditure which otherwise meets the tests. Of

course, the agency would also have to take appropriate measures, possibly in the form of a provisional agreement with the landlord, to protect the government's interest in the improvement. Id. at 6.

H. Disposal

1. The Property Clause

A fundamental point to understanding the body of law governing the operation of federal agencies is that no government official may dispose of government-owned property unless authorized by Congress. The source of this rule is Article IV, section 3, clause 2 of the United States Constitution, the so-called Property Clause:

> "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."

By virtue of the Property Clause, no agency or official of the government is authorized to sell, lease, give away, or otherwise dispose of government property without statutory authority, either explicit or by necessary implication. As the Supreme Court put it in one case:

> "Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. Art. IV, § 3, Cl. 2. Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or is to be implied from other powers so granted." Royal Indemnity Co. v. United States, 313 U.S. 289, 294 (1941).

This principle has been consistently recognized and applied by the Attorney General and the Comptroller General. E.g., 34 Op. Att'y Gen. 320 (1924); 65 Comp. Gen. 339 (1986); 50 Comp. Gen. 63 (1970); B-157578, September 7, 1965. "Like any other owner [Congress] may provide when, how and to whom its land can be sold." United States v. Midwest Oil Co., 236 U.S. 459, 474 (1915).

The Property Clause is not limited to real property but applies to personal property as well. As the Supreme Court explained in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 331 (1936):

> "The occasion for the grant [in the Property Clause] was the obvious necessity of making provision for the government of the vast territory acquired by the United

States. The power to govern and to dispose of that territory was deemed to be indispensable to the purposes of the cessions made by the States. . . . The grant was made in broad terms, and the power of regulation and disposition was not confined to territory, but extended to 'other property belonging to the United States,' so that the power may be applied, as Story says, 'to the due regulation of all other personal and real property rightfully belonging to the United States.' And so, he adds, 'it has been constantly understood and acted upon.'"

The Property Clause applies to all forms of property, intangible as well as tangible, and this includes legal rights. One manifestation of this is the rule that, unless authorized by statute, government officers have no right to modify existing contracts, or to waive or surrender contract rights which have vested in the government, without some compensating benefit to the government. E.g., 47 Comp. Gen. 732, 736 (1968); 40 Comp. Gen. 684, 688 (1961); B-174058, October 18, 1972. Another is the rule that no government official may, absent statutory authority, waive a debt owing to the United States. E.g., B-171934, April 2, 1971. Similarly, an agency may not, unless authorized by statute, waive the enforcement of a forfeiture accruing to the government's benefit without consideration. 53 Comp. Gen. 574 (1974); 40 Comp. Gen. 309 (1960). This includes the retention of liquidated damages. 26 Comp. Gen. 775, 777 (1947).

The interagency transfer of excess real or personal property is not a disposal for purposes of the Property Clause. 32 Op. Att'y Gen. 511 (1921).

The right to dispose of government property which is no longer needed has been termed "an essential governmental function in the economic management of governmental affairs." City of Springfield v. United States, 99 F.2d 860, 863 (1st Cir. 1938). Congress has delegated this authority to executive agencies in several statutes, the most important of which is the Federal Property and Administrative Services Act.

2. Disposal Under the Federal Property and Administrative Services Act

The Federal Property and Administrative Services Act presents a fairly complex scheme for the disposal of government property. The starting point is the definition of two key terms, "excess property" and "surplus property":

"The term 'excess property' means any property under the control of any Federal agency which is not required for its needs and the discharge of its responsibilities, as determined by the head thereof. . . ."

"The term 'surplus property' means any excess property not required for the needs and the discharge of the responsibilities of all Federal agencies, as determined by the Administrator [of GSA]." 40 U.S.C. §§ 472(e) and (g).

Note that the using agency declares property to be excess, but GSA must declare it to be surplus. Property must be excess before it can be surplus.[122] Obviously, the arbitrary classification of property as excess or surplus in order to provide statutory authority for disposal which otherwise does not exist, is improper. B-61717, April 10, 1947.

a. Excess Property

Agencies have a continuing responsibility to survey property under their control in order to identify property which has become excess. 40 U.S.C. § 483(b). GSA tells agencies to do this at least annually. 41 C.F.R. § 101-47.201-2(a)(1). If an agency identifies property which appears to be excess, it should first see if some other component of the agency can use it. 40 U.S.C. § 483(c). If the property is not needed within the agency, it should be reported to GSA as excess. 41 C.F.R. §§ 101-47.201-2(a)(3), 101-47.202-1. Conversely, if the agency needs property and cannot fill its need by transfer or improved utilization of property already under its control, it should report its need to GSA. 41 C.F.R. §§ 101-47.201-2(c), (d)(2), (d)(3).

GSA then has the responsibility of determining if there is a need for the property by any other federal agency, government corporation, or the District of Columbia, and directing transfer of the property accordingly. 40 U.S.C. § 483(a)(1). According to the legislative history of the Federal Property Act, detailed in B-101646, November 2, 1976 (internal memorandum), GSA is to do this by conducting a "survey" of the needs of other agencies. GAO regards the term "survey" in this context as flexible. It does not require GSA to follow specifically detailed procedures.

"Rather, [the Administrator of GSA] may execute his survey on the basis of a broad analysis from an overall viewpoint making use of his general and specific

[122]The definitions do not distinguish between real property and personal property and the same general scheme applies to both. Some of the operating provisions apply only to one type or the other, however.

knowledge of the situation in his role as the manager of the Government's property." B-165868, June 30, 1971.

GSA calls its procedure "screening." 41 C.F.R. § 101-47.203-5. If GSA finds a "match" and determines that transfer is in the government's best interest, the property is transferred. 41 C.F.R. § 101-47.203-7(b).

The statute requires reimbursement by the receiving agency if either the transferor or the transferee is the District of Columbia or a government corporation subject to the Government Corporation Control Act, or if the property was acquired by using a revolving or reimbursable fund and the transferor agency requests reimbursement of the net proceeds. In all other cases, the extent of reimbursement, if any, is left to the determination of GSA and OMB. 40 U.S.C. § 483(a)(1). Pursuant to agreement between GSA and OMB, the Federal Property Management Regulations require reimbursement of 100 percent of estimated fair market value, except that if the property will replace other property, the amount to be reimbursed is the difference between the estimated fair market value of the property to be replaced and the estimated fair market value of the property to be transferred. 41 C.F.R. § 101-47.203-7(f)(2)(i). The transfer is made without reimbursement if it is specifically non-reimbursable by statute, or if GSA, with OMB's approval, grants an exception. 41 C.F.R. § 101-47.203-7(f)(2)(ii).

Since the receiving agency has already demonstrated a need for the property in order to qualify for the transfer, the amount of the reimbursement is a necessary expense of, and therefore chargeable to, operating appropriations for the program for which the property is to be used. 38 Comp. Gen. 782 (1959). If the property being transferred is a leasehold, the fair market value should not include any restoration obligation incurred by the transferring agency. 28 Comp. Gen. 251 (1948).

Congress occasionally waives the federal government's immunity from state and local taxation with respect to real property owned by a government corporation. E.g., 12 U.S.C. § 1825(a) (Federal Deposit Insurance Corporation). If property subject to such a waiver is declared excess under the Federal Property Act and transferred to an agency or entity that does not have such a waiver, the waiver dies with the transfer and the transferee agency is not authorized to

continue paying the taxes. 32 Comp. Gen. 164 (1952); 36 Comp. Gen. 713 (1957); 34 Comp. Gen. 319 (1955). See also Rohr Aircraft Corp. v. County of San Diego, 362 U.S. 628 (1960), and Board of County Commissioners of Sedgwick County v. United States, 105 F. Supp. 995 (Ct. Cl. 1952) (addressing the issue under the Surplus Property Act of 1944, the predecessor of the Federal Property Act). The immunity attaches on the date the property is declared excess. 32 Comp. Gen. 574 (1953).

As noted above, a government corporation can receive excess property but must pay for it. In the case of a mixed-ownership government corporation, the property loses its federal identity upon being transferred. Therefore, if the property should later become excess to the mixed-ownership corporation, the corporation may dispose of it without having to follow the Federal Property Act. See B-101646/B-175155, September 6, 1979 (internal memorandum discussing transfer to Amtrak).

b. Surplus Property

If no other agency needs the property, GSA then declares it to be surplus. If some other agency has requested transfer as excess property, it cannot be declared surplus until the request has been withdrawn. Skokomish Indian Tribe v. GSA, 587 F.2d 428 (9th Cir. 1978). GSA has "supervision and direction over the disposition of surplus property." 40 U.S.C. § 484(a). GSA, or any executive agency so authorized by GSA, may dispose of surplus property "by sale, exchange, lease, permit, or transfer, for cash, credit, or other property, [and may] take other such action as it deems necessary or proper to dispose of such property." 40 U.S.C. § 484(c). GSA's regulations specify when GSA must act as the disposal agency and when the "holding agency" may do so. 41 C.F.R. § 101-47.302. Absent some applicable statutory exception, 40 U.S.C. § 484 is the exclusive means for the government to divest itself of a property interest. United States v. 434.00 Acres of Land in the County of Camden, Georgia, 792 F.2d 1006 (11th Cir. 1986) (common-law rule that easement terminates when purpose for which it was created ceases to exist not applicable to easement held by government).

The "necessary or proper" clause in 40 U.S.C. § 484(c) "suggests broad power." United States v. 1.33 Acres, 9 F.3d 70, 73 (9th Cir. 1993). That case held that GSA was authorized to condemn an easement several years after the sale of adjacent property in order to complete the sale. (The easement was necessary for access to a

highway and the parties could not come to voluntary terms.) GSA may also, under the broad authority of 40 U.S.C. § 484, authorize the interim nonfederal use of surplus property by lease or permit. See 41 C.F.R. § 101-47.312; B-101646, October 11, 1977 (internal memorandum). The statute does not, however, authorize the use of options to purchase, either standing alone or included in a lease. 41 Op. Att'y Gen. 294 (1957).

Unless otherwise provided by statute or in the deed by which the government acquired the property, the person from whom the government acquired the property does not have an automatic or inherent right to repurchase it if it is declared surplus. This is true regardless of how the property was acquired. Harrison v. Phillips, 185 F. Supp. 204 (S.D. Tex. 1960), aff'd, 289 F.2d 927 (5th Cir. 1961), cert. denied, 368 U.S. 835 (property acquired by voluntary purchase); 34 Comp. Gen. 374 (1955) (donation); B-165511, March 21, 1978 (eminent domain).

With certain exceptions, the disposal agency should have the property appraised. 41 C.F.R. § 101-47.303-4. GSA treats the appraisal results as confidential so as not to influence the government's ability to sell at a favorable price. The courts and GAO agree with this nondisclosure policy. Government Land Bank v. GSA, 671 F.2d 663 (1st Cir. 1982); Martin Marietta Aluminum, Inc. v. GSA, 444 F. Supp. 945 (C.D. Cal. 1977); B-101646, August 16, 1979. The court directed disclosure in GSA v. Benson, 415 F.2d 878 (9th Cir. 1969), but the sale had already taken place and the purchaser needed the information for tax purposes.

Subject to several exceptions, the law provides that disposals of surplus property "shall be made after publicly advertising for bids." 40 U.S.C. § 484(e)(1). While the solicitation is not required to specify a minimum acceptable bid, the government is also not required to give the property away and may reject all bids. 40 U.S.C. § 484(e)(2)(C); B-212285, November 15, 1983. As noted above, the law authorizes sale for cash or credit. If the solicitation specifies that either is equally acceptable, the agency cannot give a preference to cash terms after bids have been opened. B-189500, March 21, 1978. The implied obligation to treat all bids fairly and honestly applies to sales of property as well as to procurement contracts. Prineville Sawmill Co. v. United States, 859 F.2d 905, 909 (Fed. Cir. 1988).

As a general proposition, a wide disparity between appraised values and bid prices is not enough to put the contracting officer on constructive notice of a mistake in bid because of the "myriad of uses" to which the land might be put. B-177695, January 22, 1973. However, in a case where the appraiser had indicated that the property would have little value to anyone other than the immediate adjacent landowner, and there was a large disparity between the appraisal and a bid by someone other than the adjacent landowner, the contracting officer should have been put on notice of the possibility of mistake and should have sought confirmation of the bid. B-160113, November 25, 1966.

If an appraisal is based on a mistake, the resulting contract of sale may be reformed to permit partial refund of the purchase price. B-71334, February 3, 1948 (appraisal included irrigation rights which in fact did not exist). Although not discussed in that decision, this is not viewed as a surrender of contract rights for purposes of the Property Clause. Also, depending on the circumstances, it may be possible to rescind the contract. See Morris v. United States, 33 Fed. Cl. 733, 744-748 (1995)(discussing the theories of misrepresentation, mutual mistake, and unilateral mistake in the context of government real property sales).[123]

The solicitation may require bid deposits or "earnest money," apparently at the agency's discretion, with the winning bidder's deposit to be applied to the purchase price. Any time after acceptance of the offer but prior to the time specified for performance, i.e., while the contract is still executory, the agency may agree to rescind the contract and refund the earnest money. 26 Comp. Gen. 775 (1947). Once there has been a breach or default by the purchaser, however, the deposit belongs to the government and may not be refunded unless expressly provided by statute or in the contract. Id.; 8 Comp. Gen. 592 (1929); B-160256, January 5, 1967, aff'd on recons., B-160256, October 18, 1968. Once an offer has been accepted, earnest money deposits provided by other bidders must be returned. 41 C.F.R. § 101-47.305-3.

[123]See also Dairyland Power Cooperative v. United States, 16 F.3d 1197 (Fed. Cir. 1994); Badgley v. United States, 31 Fed. Cl. 508 (1994); Meek v. United States, 26 Cl. Ct. 1357 (1992); Hartle v. United States, 22 Cl. Ct. 843 (1991).

While advertising for bids is the preferred method of disposal, the statute prescribes a number of situations in which surplus property can be disposed of by negotiated sale, as long as the government obtains "such competition as is feasible under the circumstances." 40 U.S.C. § 484(e)(3). One is when "the character or condition of the property or unusual circumstances make it impractical" to advertise for bids and fair market value can be obtained by negotiation. 40 U.S.C. § 484(e)(3)(G). For an example of a negotiated exchange under this authority, see B-165868, November 19, 1971; B-165868, June 30, 1971; and B-165868, September 29, 1970 (all involve the same exchange). Another situation in which disposal may be negotiated is when

> "the disposal will be to States, Territories, possessions, political subdivisions thereof, or tax-supported agencies therein, and the estimated fair market value of the property and other satisfactory terms of disposal are obtained by negotiation." 40 U.S.C. § 484(e)(3)(H).

The determination of what constitutes "feasible competition" is within GSA's discretion. Dover Sand & Gravel, Inc. v. Jones, 227 F. Supp. 88 (D.N.H. 1963). When negotiating a disposal under subsection (H), GSA is not required to consider offers from nonpublic sources. 57 Comp. Gen. 823 (1978). While subsection (H) does not authorize disposal for less than fair market value, nothing prevents the government from getting more if it can. Port of Seattle v. United States, 450 F.2d 1363 (Ct. Cl. 1971); B-217356, April 22, 1985 (internal memorandum). Since the use of subsection (H) is itself discretionary, there is also nothing to prevent the government from rejecting an offer of fair market value. Government Land Bank v. GSA, 671 F.2d 663, 667 (1st Cir. 1982).

If the government chooses to dispose of surplus property by negotiated sale, the responsible agency must, with exceptions specified in the statute, prepare "an explanatory statement . . . of the circumstances of each disposal," and transmit the statement "to the appropriate committees of the Congress in advance of such disposal." 40 U.S.C. § 484(e)(6). This is nothing more than a "report and wait" provision and is not subject to attack on constitutional grounds. City of Alexandria v. United States, 737 F.2d 1022 (Fed. Cir. 1984). If an agency other than GSA prepares the statement, the agency should submit it to GSA who will in turn submit it to the committees. 41 C.F.R. § 101-47.304-12(d). Nothing in the statute purports to make the validity of a disposal in any way contingent

upon compliance with the reporting requirement. See B-116344, July 21, 1955.

In general, it is improper to classify property as excess or surplus if the holding agency still needs it. This follows from the very definitions quoted earlier. GAO has looked at several cases where an agency wanted to sell property and then lease it back, or sell some facility and then contract with the new owner to provide the same service the facility was providing when it was in government hands. These cases are always questionable, and the agency has the burden of showing that there is some rational basis for its determination. However, an axiom of life is "never say never," and the legitimacy of the transaction cannot be categorically foreclosed. For example:

> "There may be instances where certain property, such as communication facilities, could be sold and the purpose for which it was being used accomplished through private contracts at a cost less than the Government's costs of operation and maintenance of the property. In such cases, it could be argued that the Government's need was for the availability of communication services rather than for a property right in the facilities." B-132099, July 22, 1957.

While the discussion in B-132099 was hypothetical, an actual situation occurred in B-146494, December 4, 1961, concerning the sale of an ammonium perchlorate facility. GAO was satisfied that "the only need of the Government is that sufficient productive capacity be in existence, without reference to whether such productive capacity is Government-owned or privately-owned."

Situations like those described in B-132099 and B-146494 are the clear exception, and in most cases the proper basis for disposal as surplus property will not exist. B-132099, June 25, 1958. Thus, whatever justifications might work in the case of industrial facilities do not work when the need is for office space at a particular location. B-152223, November 6, 1963. Similarly, there is no authority for a "sale with lease-back" simply because the agency does not have enough money for needed renovations. 65 Comp. Gen. 339 (1986). See 45 Comp. Gen. 265 (1965), however, for a case approving the sale of excess property to the successful bidder on a contract to

construct a building on that property to be leased to a different agency.[124]

Subsection (k) of 40 U.S.C. § 484 provides for a number of discretionary types of disposal. GSA can assign surplus property to the Departments of Education or Health and Human Services for conveyance to state and local bodies to be used for education or public health purposes. 40 U.S.C. § 484(k)(1); 41 C.F.R. § 101-47.308-4. These are called "public benefit discount conveyances." See Northrop University v. Harper, 580 F. Supp. 959, 961 (C.D. Cal. 1983). In cases where GSA had already contracted to sell the property to the state or local educational body but title had not yet passed and the purchase price had not yet been paid, GAO has approved rescission of the contract to permit transfer under the (k)(1) procedures. 40 Comp. Gen. 455 (1961); B-157885, November 8, 1965. However, this is not available where the sale has been consummated and the purchase price paid. B-162194, August 18, 1967.

In B-109403, June 3, 1952, the government wanted to reserve mineral rights because a survey suggested the presence of oil. However, a provision purporting to obligate the United States to pay any damages resulting from exercise of the mineral rights amounted to an open-ended indemnification agreement and was therefore unauthorized.

Another subsection authorizes GSA to assign surplus property to the Interior Department for reconveyance for public park or recreation purposes. 40 U.S.C. § 484(k)(2); 41 C.F.R. § 101-47.308-7. GSA's administration of this authority is highly discretionary. New England Power Co. v. Goulding, 486 F. Supp. 18 (D.D.C. 1979) (entirely proper for GSA to give priority to disposal under this subsection). See also Northrop University, 580 F. Supp 959.

Still another subsection authorizes GSA to convey to states or municipalities, without monetary consideration, surplus real property which is suitable and desirable for use as a historic

[124]The legal dilemma in that case was that there is no authority to sell excess property to a private party, and no authority to declare the property surplus if another agency needs it.

monument. 40 U.S.C. § 484(k)(3); 41 C.F.R. § 101-47.308-3. GSA may authorize use of the property for revenue-producing activities. 40 U.S.C. § 484(k)(3)(A); 60 Comp. Gen. 158 (1981). As with the other subsections, subsection (k)(3) is limited to surplus property and does not authorize conveyance of nonsurplus property. B-126823, July 21, 1965.

c. Disposition of Proceeds

The disposition of the proceeds from the disposal of excess and surplus property is governed by 40 U.S.C. § 485, as effectively modified by 16 U.S.C. § 460l-5(a). Subsection (a) of 40 U.S.C. § 485 provides that all proceeds from any transfer of excess property or sale or other disposition of surplus property, except as otherwise provided in the remaining subsections of section 485, must be deposited in the Treasury as miscellaneous receipts. One of the exceptions, already noted, is property acquired by use of a revolving or reimbursable fund. 40 U.S.C. § 485(c). Another, subsection 485(d), permits agencies to deposit part of the proceeds in a special account in the Treasury so that they will be available for refunds if necessary. Subsection 485(e) recognizes contract provisions which permit the proceeds of any sale of government property in the contractor's custody to be credited to the cost or price of work under the contract.

In 1964, Congress enacted Public Law 88-578, the Land and Water Conservation Fund Act of 1965. Section 2(b) of that law, 78 Stat. 897, 899, as codified at 16 U.S.C. § 460l-5(a), requires deposit in the Land and Water Conservation Fund of:

> "All proceeds . . . hereafter received from any disposal of surplus real property and related personal property under the Federal Property and Administrative Services Act of 1949, as amended . . . notwithstanding any provision of law that such proceeds shall be credited to miscellaneous receipts of the Treasury. Nothing in this part shall affect existing laws or regulations concerning disposal of real or personal surplus property to schools, hospitals, and States and their political subdivisions."

The portion of the above provision not quoted gives two categories of exceptions. First, the requirement does not apply to the various subsections of 40 U.S.C. § 485 which themselves provide exceptions to the miscellaneous receipts requirement of 40 U.S.C. § 485(a). Second, it does not apply to provisions in appropriation acts like the following provision which appeared in the Independent Offices Appropriations Act of 1963, Pub. L. No. 87-741, 76 Stat. 716, 725,

under the heading "Operating Expenses, Utilization and Disposal Service [GSA]":

"For necessary expenses, not otherwise provided for, incident to the utilization and disposal of excess and surplus property, as authorized by law, $8,500,000, to be derived from proceeds from the transfer of excess property and the disposal of surplus property."

The Land and Water Conservation Fund is a fund in the Treasury used to finance acquisitions mostly by the Departments of Interior and Agriculture (national parks, national forests, national wildlife refuges). 16 U.S.C. § 460l-9. Money in the fund is available for expenditure "only when appropriated therefor." 16 U.S.C. § 460l-6.

Thus, the 1964 legislation preserved the exceptions of the Federal Property Act, and recognized what would be true in any event—that Congress can legislate exceptions in the future. Subject to these exceptions, proceeds from the sale of surplus real property go to the Land and Water Conservation Fund and not the general fund. The Federal Property Management Regulations reflect this change. 41 C.F.R. § 101-47.307-6. Nothing in the 1964 legislation purported to affect the treatment of proceeds from the transfer of excess property.

Since the disposition of sale proceeds is governed by statute, a 1946 decision found no authority for a proposal to transfer title to a warehouse (built by the government on leased land) to the landowner with its value to be amortized against rental payments. The proposal would have the effect of using the sale proceeds as rent. B-61717, December 10, 1946.

A 1966 decision, 46 Comp. Gen. 356, considered the operation of 16 U.S.C. § 460l-5(a) in the context of a government corporation which was in the process of going out of business. The Virgin Islands Corporation had terminated its operations and wanted to close its books, but there were some assets remaining to be sold. If the books remained open, it was clear that the proceeds would be credited to the corporation's revolving fund, in accordance with 40 U.S.C. § 485(c), and used to offset the government's equity. It was suggested, however, that since the revolving fund was no longer needed, the corporation's accounts could be closed and the proceeds deposited in the Land and Water Conservation Fund. The decision concluded that closing the accounts as a matter of

administrative convenience should not have the effect of diverting the proceeds from being used to repay the government's investment. Since any balances on hand at the time of closing would be deposited as miscellaneous receipts, that was also the proper disposition of the sale proceeds.

d. Deduction of Expenses

A statute, 40 U.S.C. § 485a, provides:

> "[F]rom the proceeds of sales of . . . public property of any kind, before being deposited into the Treasury, either as miscellaneous receipts . . . or to the credit of the appropriations to which such proceeds are by law authorized to be made, there may be paid the expenses of such sales so as to require only the net proceeds of such sales to be deposited into the Treasury . . . ."

This statute originated in 1896. Decisions of the Comptroller General and Comptroller of the Treasury over the decades established the rule that this provision allowed the deduction only of expenses directly connected with the sale and did not authorize deduction of expenses incurred in connection with preparation of the property for sale. E.g., 42 Comp. Gen. 212, 213 (1962). Thus, such things as appraisers' fees, brokerage commissions, auctioneers' fees, and advertising costs could be deducted from the proceeds prior to deposit in the Treasury. 37 Comp. Gen. 59 (1957); 33 Comp. Gen. 31 (1953); 16 Comp. Gen. 876 (1937).

The problem is that 40 U.S.C. § 485a is in apparent conflict with subsequently enacted statutes. It was amended in 1951 (65 Stat. 707) to insert the introductory clause, "Subject to applicable regulations under the Federal Property and Administrative Services Act of 1949, as amended." In more direct conflict is 40 U.S.C. § 485(a), requiring deposit in the Treasury of "all proceeds" except as provided in the remaining subsections of that section. In addition, 16 U.S.C. § 460l-5(a) requires that "all proceeds" be deposited in the Land and Water Conservation Fund except for the situations noted above. Thus, 40 U.S.C. § 485a refers to "net proceeds" while 40 U.S.C. § 485(a) and 16 U.S.C. § 460l-5(a) specify "all proceeds."

A 1947 decision, 26 Comp. Gen. 857, considered the relationship of 40 U.S.C. § 485a to a provision in the Surplus Property Act of 1944, the predecessor of the Federal Property and Administrative Services Act, which also required deposit in the Treasury of "all proceeds" from property disposals. The decision found the two provisions to be in "obvious conflict," and held that the Surplus Property Act

controlled as the latest expression of Congress. 26 Comp. Gen. at 859.

Although there appears to be no decision considering the same question in relation to the current statutes, it has been suggested that 40 U.S.C. § 485a is inconsistent with the current statutes and has been "superceded." See B-232827, October 19, 1988 (internal memorandum considering the conflict in relation to personal property).

The conflict with 40 U.S.C. § 485(a) covers disposals under the Federal Property and Administrative Services Act; the conflict with 16 U.S.C. § 460l-5(a) covers surplus real property and related personal property. For disposals not within these areas of conflict, 40 U.S.C. § 485a continues to apply. 28 Comp. Gen. 594 (1949); B-81635, December 9, 1948.

e. Disposal Under Other Authorities

That the Federal Property and Administrative Services Act was intended to be the pre-eminent law in the areas it covers is evidenced by the first sentence of 40 U.S.C. § 474:

> "The authority conferred by this Act shall be in addition and paramount to any authority conferred by any other law and shall not be subject to the provisions of any law inconsistent herewith . . . ."

Be that as it may, the Federal Property Act is not the only disposal authority. Exceptions to the Federal Property Act's authority tend to be of two types: (1) general provisions applicable to an agency or program, and (2) statutes addressing a specific piece of property.

As to the first type, a 1992 GAO study identified 17 agencies with authority to dispose of real property. Real Property Dispositions: Flexibility Afforded Agencies to Meet Disposition Objectives Varies, GAO/GGD-92-144FS (September 1992). As the title implies, GAO found considerable variation in the programs and their objectives.

In some cases, the statutes deal with property that is exempt from the Federal Property Act by its terms, such as public domain lands. An example is 43 U.S.C. § 1713, authorizing the Interior Department to sell tracts of public land meeting specified disposal criteria. In a case involving the predecessor of this statute, the Bureau of Land Management vacated a sale when, after several years of appeals,

re-appeals, and cross-appeals by the bidders, it learned that the appraised value of the property had increased much beyond the amount of the bids. Noting that the courts had upheld the discretion of the Secretary of the Interior to refuse to sell for whatever reason he found adequate, GAO concluded that the Bureau did nothing wrong. B-168879, May 7, 1970.

For property which would otherwise be within the scope of the Federal Property Act, language such as "notwithstanding any other provision of law" will provide the necessary exemption. B-178205.80, March 16, 1976. Other statutes use more specific exempting language, such as "without regard to the laws governing the disposition of excess or surplus property of the United States." An example is 7 U.S.C. § 1985(c), applicable to certain Department of Agriculture activities. Sale under this provision is to be "at the best price obtainable for cash or on secured credit." Id. Under this language, one court has held that giving a preference to cash bids without providing advance notice of that policy either by regulation or in the solicitation constituted arbitrary and capricious conduct. Simmons v. Block, 782 F.2d 1545 (11th Cir. 1986). The remedy was to re-advertise with full disclosure of the preference. Id. at 1550. A similiar provision from the housing laws is 12 U.S.C § 1750c(f), applied in Montreal Securities, Inc. v. United States, 329 F.2d 956 (Ct. Cl. 1964).

The Internal Revenue Service is authorized to sell property seized under a tax levy. 26 U.S.C. § 6335. If there are no bids from the public at or higher than the minimum price set by the IRS, the United States may purchase the property at that minimum price. 26 U.S.C. § 6335(e)(1)(C). The former owner has the right to redeem the property within 180 days after the sale by paying the purchase price plus interest. 26 U.S.C. § 6337. A sale under 26 U.S.C. § 6335 is a sale only of the taxpayer's interest in the property—any equity over and above outstanding mortgages and liens. Belgard v. United States, 232 F. Supp. 265, 269 (W.D. La. 1964) (seizure and sale under section 6335 had no effect on taxpayer's indebtedness to Small Business Administration).

The second type of exception consists of statutes authorizing or directing the disposal of a particular piece of property in accordance with specified standards or procedures. GSA calls these "special statutes," and recognizes that they are not governed by the Federal

Property Act. 41 C.F.R. § 101-47.301-3. GAO considered one example in B-194482, June 15, 1979. The U.S. Fire Administration, Department of Commerce, had been authorized to purchase, and did purchase, a site for a National Academy for Fire Prevention and Control. When problems developed over the use of that site, Congress enacted legislation authorizing the Fire Administration to sell it, deposit the proceeds in a special account, and apply those funds to the acquisition of a new site. Applying two principles of statutory construction—(1) the specific governs over the general, and (2) if there is any inconsistency, the later enactment controls—and noting GSA's treatment of "special statutes," GAO concluded that the Fire Administration could dispose of the site without regard to the requirements of the Federal Property and Administrative Services Act.

3. Use by Nongovernment Parties

a. Leasing and Concessions

(1) Outleasing in general

The government acquires property in order to perform its own functions, not for use by nongovernment parties. Nevertheless, there are situations in which it is clearly desirable to permit use by nongovernment parties, either in support of the primary government purpose or as an alternative to letting the property sit idle.

Leasing is a form of disposal for purposes of the Property Clause, and is therefore a function of Congress. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 331 ("The power of disposal was early construed to embrace leases"); United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1840); 34 Op. Att'y Gen. 320, 322 (1924); 50 Comp. Gen. 63 (1970); 14 Comp. Gen. 169 (1934); B-191943, October 16, 1978. Accordingly, a federal agency needs statutory authority in order to "outlease" (lease government-owned property to nongovernment parties) property under its control. Naturally, when and if Congress grants such authority, it may also impose conditions on it. E.g., Light v. United States, 220 U.S. 523, 536 (1911) (United States "can prohibit absolutely or fix the terms on which its property may be used").

One question is how specific the authority needs to be. A 1978 GAO study found instances where agencies treated the authority to lease as incident to more general statutory authority giving them custody and control over certain space. See Government Space Leased to Commercial Activities by Agencies Other Than the General Services Administration, LCD-78-337 (October 13, 1978). GAO drew no legal conclusions in the cited report because the issue had been raised in a pending lawsuit. That lawsuit produced Globe, Inc. v. Federal Home Loan Bank Board, 471 F. Supp. 1103 (D.D.C. 1979), in which the court held that GSA possessed long-term commercial outleasing authority, but not the former Federal Home Loan Bank Board. While Globe certainly supports the proposition that specific authority is required, it was based in part on provisions of the Board's enabling legislation and the extent to which it applies to all agencies has not been addressed.

In any event, those agencies most likely to have the need to engage in outleasing have the necessary statutory authority. GSA's authority is found in several provisions of the Federal Property and Administrative Services Act. Under 40 U.S.C. § 490(a)(13), GSA may lease federal buildings sites, including improvements, at a "fair rental value," until they are needed for construction purposes. While this at first blush may seem like fairly short-term authority, a site may not be needed for construction for decades. E.g., B-168096, August 5, 1974 (site had been leased to commercial parking operators since 1930s). GSA is also authorized to lease space to "persons, firms, or organizations engaged in commercial, cultural, educational, or recreational activities," as defined in 40 U.S.C. § 612a, at rates equivalent to the prevailing commercial rate for comparable space. 40 U.S.C. §§ 490(a)(16) and (a)(17). A provision which is not part of the Federal Property Act, 40 U.S.C. § 304a, authorizes GSA to lease certain excess property outside the District of Columbia for periods of up to 5 years.

The military departments are authorized to outlease nonexcess property under their control that is not needed for public use at the time, for terms of up to 5 years. 10 U.S.C. § 2667. The purpose of this provision is

> "to enable property not immediately needed to be leased in such a manner that it will be utilized with as few changes as possible in order that the property could immediately be put back into operation in the event of an emergency." City of San

Francisco v. United States, 443 F. Supp. 1116, 1122 (N.D. Cal. 1977), aff'd, 615 F.2d 498 (1980).

The military departments have had some form of outleasing authority since 1892. See 8 Comp. Gen. 632 (1929). Under this authority, military departments have leased real property for grazing purposes (56 Comp. Gen. 655 (1977)) and agricultural purposes (B-174833, March 10, 1972). They have leased water treatment and transmission facilities to local water districts who could, after supplying the needs of the military reservation, sell the remaining capacity. B-162141, October 18, 1967. They have used the authority of 10 U.S.C. § 2667 to permit former owners of property acquired by the government to remain as lessees until the property is needed for project requirements. 52 Comp. Gen. 300 (1972).[125] And they have used it to grant rent-free use, except for maintenance and service charges, to other government agencies. B-119724-O.M., April 25, 1955.

Leasing authority under 10 U.S.C. § 2667 continues to exist until there has been a final determination that the property is excess. B-188246, May 17, 1978 (preliminary or conditional determination does not terminate the authority). However, it does not apply to property which usage inescapably shows to be excess notwithstanding the absence of a formal determination. B-118030, July 23, 1954.

The Small Business Administration is authorized to rent (or sell) any real property acquired in connection with its loan programs. 15 U.S.C. § 634(b)(3); United States v. Schwartz, 278 F. Supp. 328, 330 (S.D.N.Y. 1968). Other agencies with specific outleasing authority include the Coast Guard (14 U.S.C. § 93(n)), the National Aeronautics and Space Administration (42 U.S.C. § 2473(c)(3)) the National Science Foundation (42 U.S.C. § 1870(e)), the Bureau of Land Management (43 U.S.C. § 1732(b)), the Postal Service (39 U.S.C. § 401(5)), the Internal Revenue Service (26 U.S.C. § 7506(c)), and the General Accounting Office (31 U.S.C. § 782).

[125]When the government does this, the rent it may charge "shall not exceed the fair rental value of the property to a short-term occupier." 42 U.S.C. § 4651(6).

We saw earlier in this chapter that the rights and obligations of the parties are determined mostly under federal law when the government is the lessee. The court in United States v. Morgan, 196 F. Supp. 345 (D. Md. 1961), aff'd, 298 F.2d 255 (1962), applied the same principle where the government was the lessor. In another case, however, the United States successfully brought an unlawful detainer action under a state law which provided for the recovery of double rent. United States v. Hall, 463 F. Supp. 787 (W.D. Mo. 1978), aff'd, 588 F.2d 1214 (8th Cir. 1978).

The disposition of income received from outleasing varies considerably. The only safe generalization is the one that applies to all government receipts under 31 U.S.C. § 3302(b): the money must be deposited in the Treasury as miscellaneous receipts unless the agency has statutory authority for some other disposition. In the area of property leases, this rule is reinforced by 40 U.S.C. § 303b, although the clear trend is away from miscellaneous receipts. Rent received by GSA under the subsections of 40 U.S.C. § 490 cited above is deposited in the Federal Buildings Fund. 40 U.S.C. §§ 490(a)(13) and (a)(18). Rent received by military departments under 10 U.S.C. § 2667 is deposited in a special account in the Treasury to be available, as specified in appropriation acts, for purposes specified in the statute. 10 U.S.C. § 2667(d). A special account is also authorized for income received by the General Accounting Office from renting space in the GAO headquarters building, the receipts to be available as specified in appropriation acts, for maintenance, operation, and repair of the building. 31 U.S.C. § 782.

Many other situations are governed by specific statutory provisions. For example, rent received by the Corps of Engineers "for rental of plant owned by the Government in connection with the prosecution of river and harbor works" may be credited to "the appropriation to which the plant belongs." 33 U.S.C. § 559. This includes the revolving fund established by 33 U.S.C. § 576. B-129718-O.M., January 3, 1957. Several types of lease income are subject to distribution formulas which allocate the receipts, with varying degrees of complexity, among a combination of state and federal purposes. Examples are:

- The Mineral Leasing Act of 1920 and the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 191 and 355.

- Income received by the Forest Service from activities in the national forests. 16 U.S.C. §§ 499 and 500.
- Grazing statutes such as the Taylor Grazing Act, 43 U.S.C. § 315i, and 43 U.S.C. § 1181d relating to certain lands in California and Oregon. See B-203771, January 13, 1982.

(2) 40 U.S.C. § 303b

A question that once generated considerable controversy is whether the "rent" for a lease of government property could include things other than money, such as making repairs or alterations to the property. Opinions split among predictable lines. GAO took the position that rent should be in the form of money only, on the grounds that anything else would amount to a circumvention of the miscellaneous receipts requirement. 8 Comp. Gen. 632 (1929); A-38658, July 15, 1932. The executive branch countered that the authority to lease necessarily implied the authority to agree to forms of consideration other than money. 36 Op. Att'y Gen. 282 (1930). Congress entered the fray by enacting section 321 of the Economy Act of 1932, 47 Stat. 382, 412, 40 U.S.C. § 303b:

"[E]xcept as otherwise specifically provided by law, the leasing of buildings and properties of the United States shall be for a money consideration only, and there shall not be included in the lease any provision for the alteration, repair, or improvement of such buildings or properties as a part of the consideration for the rental to be paid for the use and occupation of the same. The moneys derived from such rentals shall be deposited and covered into the Treasury as miscellaneous receipts."

The Senate Appropriations Committee explained the provision as follows:

"The enactment of this section will put a stop to the more or less general practice which has been adopted of including as a part of the rental consideration provisions in the lease that the tenant shall make certain repairs, alterations, or improvements to public property. By this method improvements are made on public property which may or may not be authorized by law, and indirectly there is an expenditure of funds which should be covered into the Treasury as miscellaneous receipts." S. Rep. No. 72-556, at 14-15 (1932), quoted in 41 Comp. Gen. 493, 495 (1962).

This did not mean that Congress would be unwilling to consider exceptions, merely that it wanted to reserve to itself the power to decide what those exceptions should be.

GAO has held that the statute should apply to any arrangement that creates essentially the same legal relationship as a lease regardless of what it is called. 42 Comp. Gen. 650 (1963); 41 Comp. Gen. 493 (1962). Thus, 42 Comp. Gen. 650 found the statute applicable to a proposal to permit a nonprofit organization to install a coin-operated audio-tour system in the National Zoo, the proceeds to be used to finance a teach-training program and the preparation of a guidebook on the zoo.

In 49 Comp. Gen. 476 (1970), an agency had employees working in two nearby buildings, one government-owned and one leased. A private parking operator was charging commercial rates to park in the leased building. The agency wanted to equalize parking costs for its employees, and proposed to have the private concern operate parking facilities in both buildings "as a single facility" at a uniform rate. The decision concluded that "the contemplated agreement . . . while couched in terms of management services, [amounted to] conferring an interest in Federal property, a leasehold interest from which revenues are derived, in contravention of 40 U.S.C. 303b." Id. at 478.

In B-162986, May 1, 1968, GAO considered a Forest Service proposal for a graduated rate fee system, based on a percentage of sales, to be used for national forest special use permits for commercial enterprises (e.g., ski area operators). Recognizing the relationship of returns to investment, the decision nevertheless concluded that "it would be an unwarranted extension of section 321 to view it as inhibiting any consideration of the permittee's investment for the purpose of determining the fair amount of fees to be charged." GAO applied the same approach more than 20 years later in 70 Comp. Gen. 597 (1991), finding that user fees charged by the Interstate Commerce Commission to carriers for computer equipment installed by the carriers at ICC headquarters were unobjectionable under 40 U.S.C. § 303b.

As noted, Congress has been willing to grant exceptions from 40 U.S.C. § 303b when considered desirable. For example, under 10 U.S.C. § 2667(b)(5), outleases by military departments.

"may provide, notwithstanding [40 U.S.C. § 303b], or any other provision of law, for the improvement, maintenance, protection, repair, or restoration, by the lessee, of the property leased, or of the entire unit or installation where a substantial part of it is leased, as the payment of part or all of the consideration for the lease."

There is no formula for determining how much is a "substantial part." The "substantial part" clause was included "for the express purpose of precluding leases of a minor portion of a plant or building from being used as a subterfuge to obtain maintenance of an entire installation or building without charge to appropriations." B-141157, August 14, 1967. Within this framework, the exception permits "extraordinary as well as ordinary items of maintenance." B-145738-O.M., January 18, 1962. It is a good idea for the government to reserve the right to approve repairs and restoration since the leased property still belongs to the government. B-163784, May 2, 1968.

The statute talks about repair or restoration "of the property leased." Therefore, it does not authorize a lease of one parcel with the lessee agreeing to construct a facility for the government's use on a separate and unleased parcel. B-205685, December 22, 1981. Since the proposal was not within the exception of 10 U.S.C. § 2667(b)(5), it was prohibited by 40 U.S.C. § 303b. Also prohibited by section 303b was a proposal to lease a civilian housing area on Guam to a private concern for an annual rental of one dollar plus operation and maintenance of the housing. 27 Comp. Gen. 543 (1948). Although not specified in the decision, it is hard to see how it could be argued that the property to be leased was "not . . . needed for public use," one of the statutory conditions for leasing under 10 U.S.C. § 2667.

As the language of 40 U.S.C. § 303b requires, exceptions must be specific. The authority to enter into leases "on such terms and conditions as the [agency head] deems appropriate" is not enough. B-117919, February 5, 1954; B-140397-O.M., August 20, 1959. The structure of 10 U.S.C. § 2667, for example, bears this out. Subsection (a) authorizes the Secretary of a military department to lease property "upon such terms as he considers will promote the national defense or be in the public interest"; subsection (b)(5) then provides the specific exemption from 40 U.S.C. § 303b. General authority was enough in B-159719, March 30, 1972, because it was clear that Congress was aware of, and had sanctioned, the activity. That case involved concession agreements with the Federal Aviation Administration for various support facilities at Washington National Airport.

Some other specific exceptions are 16 U.S.C. § 20f and 40 U.S.C. § 303c (National Park Service), 38 U.S.C. §§ 8122(a)(1) and 8201(e) (Department of Veterans Affairs), 42 U.S.C. § 1544 (Department of Housing and Urban Development with respect to housing acquired or constructed under the National Housing Act), and 42 U.S.C. § 2473(c)(11) (National Aeronautics and Space Administration).

(3) Concessions

The government uses concession agreements in a wide variety of situations to support, directly and indirectly, its use of government facilities. Some, such as cafeterias or dry cleaning facilities, are found in public buildings. The major portion in terms of numbers occur on recreational lands managed by the Park Service, Forest Service, Fish and Wildlife Service, and Bureau of Land Management. GAO studies in the early 1990s found that there were approximately 9,000 concession agreements. See Federal Lands: Improvements Needed in Managing Short-Term Concessioners, GAO/RCED-93-177 (September 1993); Federal Lands: Improvements Needed in Managing Concessioners, GAO/RCED-91-163 (June 1991). The same studies noted that there is no single statute authorizing or regulating concessions, and therefore no uniformity as to their use.

GAO has long espoused the view that—

> "the operation of a concession utilizing Government-owned facilities constitutes a valuable privilege for which the Government should be compensated and that contractual and other arrangements relating to the establishment and operation of such activities should be subject to existing statutory provisions governing public contracts." 41 Comp. Gen. 493, 495 (1962).

See also B-129352, January 23, 1957. The most common manifestation of this principle has been the finding that income an agency receives from a concession should be deposited in the Treasury as miscellaneous receipts unless the agency has statutory authority to do something else. E.g., 7 Comp. Gen. 806 (1928); A-51624, March 25, 1944; A-95642, November 18, 1943; A-95642, March 19, 1943.

A related issue is the extent to which 40 U.S.C. § 303b applies to concession agreements. The following passage from 41 Comp. Gen. 493, 495 (1962) illustrates GAO's general approach:

"For all practical purposes if a concession gives a concessioner the exclusive right to the use of real property his rights are identical with [those] of a lessee and the relation of landlord and tenant is created. If the right is not exclusive the occupant is a mere licensee. The relationship of persons under such circumstances is primarily a question of fact . . . . If exclusive possession or control of the premises or a portion thereof is granted, even though the use is restricted by reservations, the instrument or agreement will be considered to be a lease and not a license."

That case involved National Park Service concessions. The Park Service uses concessioners to:

"provide innumerable goods and services including food, lodging, gasoline and souvenirs. Concession activity in the national parks is a thriving business which is becoming increasingly dominated by large corporate concessioners." National Parks and Conservation Association v. Kleppe, 547 F.2d 673, 675-676 (D.C. Cir. 1976) (footnotes omitted).

Originally, both GAO and the Justice Department had concluded that the Park Service was not authorized to permit concessioners to withhold part of their annual fees for deposit to a special fund to finance construction work. 41 Op. Att'y Gen. 127 (1953); B-157/B-32837, August 20, 1952. The 1962 decision quoted above, 41 Comp. Gen. 493, also found 40 U.S.C. § 303b applicable to certain Park Service concession contracts. A few years later, in 1965, Congress enacted the National Park System Concessions Policy Act, 16 U.S.C. §§ 20-20g. Section 7 of that Act, 16 U.S.C. § 20f, provides a specific exemption from 40 U.S.C. § 303b for the National Park Service.

The Park Service legislation gives a concessioner who acquires or constructs improvements a "possessory interest" in those improvements, consisting of "all incidents of ownership except legal title" which, of course, remains in the United States. 16 U.S.C. § 20e. This provision recognizes the government's reliance on concessioners within the national parks, and was designed to give them a property interest which they could encumber in order to obtain construction financing. It also permits encumbrance to enable a new concessioner to finance the purchase of an existing concession. 57 Comp. Gen. 607 (1978).

In 64 Comp. Gen. 217 (1985), GAO reviewed the concession contract between GSA and Guest Services, Inc. (GSI), which operates cafeterias in government buildings in Washington. While GSA charges rent to the tenant agency for the space the cafeteria

occupies, it does not charge rent to GSI. The contract requires GSI to establish a reserve in its accounting system for the purchase and replacement of equipment. Thirty years earlier, in 35 Comp. Gen. 113 (1955), GAO had found a somewhat similar arrangement to be in violation of 40 U.S.C. § 303b. That contract, however, had required the concessioner to actually transfer funds into a bank account, whereas the new reserve was "a mere bookkeeping entry in the internal accounts of GSI." 64 Comp. Gen. at 219. Also, the agreement was more of a license than a lease. Id. at 220-221. Accordingly, and in view of the "historically unique nature" of the GSA-GSI agreement, GAO concluded that there was no violation of 40 U.S.C. § 303b.

b. Granting of Revocable License

A question that arose with great frequency during the early decades of the 20th century was the extent to which the government could grant a license, as opposed to a lease, to use government-owned property. Through a large number of cases before both the Attorney General and the Comptroller General, the following rule developed:

> "[T]he head of a Government department or 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 itself." B-164769, July 16, 1968.

The rationale is that a revocable license is not a property interest, and the granting of such a license is not a "disposal" for purposes of the Property Clause. Therefore, specific statutory authority is not required. The most comprehensive discussion occurs in what is probably the leading case on the subject, 34 Op. Att'y Gen. 320 (1924). Said the Attorney General:

> "It is plain that the intent of the Constitutional provision was to prevent alienation of the title, ownership, or control of Government property, whether real or personal, without Congressional sanction. That is the evil which was intended to be avoided, and no construction beyond that intent should be imposed on the prohibition unless clearly implied, especially when it would lead to unreasonable and unforeseen results." Id. at 323.

A GAO decision discussing many of the early Attorney General opinions is 22 Comp. Gen. 563 (1942). If a revocable license or permit is not a property interest for purposes of the Property Clause, it is equally not a property interest for purposes of the Fifth Amendment. Therefore, termination does not trigger a

constitutional right to compensation. E.g., Acton v. United States, 401 F.2d 896 (9th Cir. 1968), cert. denied, 395 U.S. 945 (1969); Osborne v. United States, 145 F.2d 892 (9th Cir. 1944).

Based on application of the rule, the following activities were found authorized:

- Cultivation of crops on land on which Federal Communications Commission radio monitoring stations were located. 22 Comp. Gen. 563 (1942). Permitting the cultivation would not only produce money for the Treasury but would also help reduce fire hazards by controlling the growth of grass and weeds.
- Use of government research space and facilities by university faculty and graduate students. 36 Comp. Gen. 561 (1957).
- Seminar at the United States Merchant Marine Academy. B-168627, May 26, 1970.
- Rock concert on the grounds of the National Institutes of Health. B-168527, November 19, 1970.[126]
- Use of government-owned land by railroads. 30 Op. Att'y Gen. 470 (1915); 22 Op. Att'y Gen. 240 (1898). The Attorney General cautioned the agency in the 1915 opinion to make sure what it was granting was really revocable "practically speaking, whatever it might be in form." 30 Op. Att'y Gen. at 483.

A more recent case is B-191943, October 16, 1978. The question was the extent to which the Bureau of Land Management could make BLM space available to a commercial firm to microfilm public documents. The firm planned to use the documents to provide a filing service for mining claim holders, and also intended to sell copies of the microfilmed documents to the public. If the first purpose were the only use to be made of the property, the proposal would have been permissible under the revocable license rule. The second purpose was more problematic, however, because BLM had a duty under the law to provide copies of the documents to the public for a reasonable fee and should either perform the task itself or contract out for it under the procurement laws. Because it was not realistic to distinguish between the governmental and the

[126]The decision doesn't specify what was the "purpose useful or beneficial to the government," but we're sure there was one.

private or commercial purposes, GAO concluded BLM should not grant the license.

The rule applies to personal property as well as real property. 47 Comp. Gen. 387 (1968); 44 Comp. Gen. 824 (1965). GAO found a proposal unacceptable in 25 Comp. Gen. 909 (1946) because the arrangement would have the effect of permanently vesting beneficial ownership of the government property in a private contractor and would have resulted in a diminution of government control beyond that contemplated in the typical revocable license. The proposal was subsequently amended and, as amended, approved in B-57383, February 25, 1947. While 25 Comp. Gen. 909 involved personal property, the principle would, of course, be fully applicable to real property. In a similar vein is 38 Comp. Gen. 36 (1958), disapproving a proposal to permit a private utility company to install connections in a government-owned natural gas line because, under the proposed arrangement, the company would relinquish its rights only if it failed to acquire a right to purchase natural gas from the government.

A statute in this area is 40 U.S.C. § 490(a)(17), added by the Public Buildings Cooperative Use Act of 1976, Pub. L. No. 94-541, § 104(a), 90 Stat. 2505, 2506. It authorizes the General Services Administration—

> "to make available, on occasion, or to lease at such rates and on such other terms and conditions as the Administrator deems to be in the public interest, auditoriums, meeting rooms, courtyards, rooftops, and lobbies of public buildings to persons, firms, or organizations engaged in cultural, educational, or recreational activities . . . that will not disrupt the operation of the building."

The terms "cultural," "educational," and "recreational" are defined in 40 U.S.C. § 612a. GSA's implementing regulations are found at 41 C.F.R. Subpt. 101-20.4. Permits may not be issued for more than 30 calendar days, but they are renewable upon submission of a new application. 41 C.F.R. § 101-20.402(a). Permits are generally "free of charge," and this includes the normal level of services that would be provided to the building during the times of permit use. Services over and above this level must be reimbursed, but GSA may waive reimbursement if the cost is "insignificant." 41 C.F.R. § 101-20.407(a).

4. Adverse Possession

The term "adverse possession" refers to a process whereby one can obtain title to someone else's property by "open and notorious" possession for a period of time prescribed by state law. See Black's Law Dictionary 54 (7th ed. 1999). The time period is commonly 20 years, although there is variation.

With respect to property owned by the United States, the situation is different. The quiet title statute, 28 U.S.C. §2409a, provides that "[n]othing in this section shall be construed to permit suits against the United States based upon adverse possession." 28 U.S.C. § 2409a(n). In addition, 28 U.S.C. § 2415(c) provides that "[n]othing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property." The "herein" refers to the various statutes of limitations on suits brought by the government. Thus, the government cannot be sued on an adverse possession theory, and there is no time limit on a suit by the government to eject a trespasser or "adverse possessor." Therefore, as many courts have noted, no one can acquire title to government property by adverse possession. E.g., United States v. Pappas, 814 F.2d 1342, 1343 n.3 (9th Cir. 1987); Sweeten v. U.S. Department of Agriculture, 684 F.2d 679, 682 (10th Cir. 1982); United States v. Santos, 878 F. Supp. 1359, 1362 (D. Guam 1993). As the Supreme Court stated in United States v. California, 332 U.S. 19, 40 (1947) (footnote omitted):

> "The Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."

There is a limited statutory exception, the Color of Title Act, 43 U.S.C. § 1068.[127] The law was enacted in 1928 to enable persons, mostly in the western states, to acquire title to property upon which they resided and which turned out, upon being surveyed, to be

[127]A very few similar statutes are also on the books, but they have extremely limited application, for example, 43 U.S.C. §§ 177 and 178, applicable only to certain lands in New Mexico.

government land.[128] There are two classes of claimants. The first is a person who has possessed the land in good faith and under claim or color of title for more than 20 years, and who has either made valuable improvements to the land or placed part of it under cultivation. The second is a person who possesses the land in good faith and who can trace a "chain of possession" back to at least January 1, 1901, and who has paid state or local property taxes on that land. A claimant, by applying in accordance with Interior Department regulations (43 C.F.R. Part 2540), can purchase up to 160 acres, with mineral rights reserved to the United States. Conveyance is mandatory to a "class I" claimant, discretionary to a "class II" claimant.

The statute sets a price of "not less than $1.25 per acre." Under the regulations, the price is fair market value at the time of appraisal, reduced to reflect value resulting from improvements or development by claimants or their predecessors, and giving consideration to "the equities of the applicant." 43 C.F.R. § 2541.4(a).

A statutory condition for both classes of claimants is that the land be held in good faith. Under the regulations, knowledge that the land is owned by the United States precludes a finding of good faith. This has been upheld as a reasonable interpretation. Day v. Hickel, 481 F.2d 473, 476 (9th Cir. 1973). Until Interior determines that an application meets the statutory requirements, the applicant does not have a vested property interest, merely a priority to purchase. Cavin v. United States, 956 F.2d 1131 (Fed. Cir. 1992) (applicant cannot maintain inverse condemnation suit).

It has been stated that land which has been withdrawn from the public domain "is not subject to the Color of Title Act because it is already appropriated for other purposes." Beaver v. United States, 350 F.2d 4, 10 (9th Cir. 1965), cert. denied, 383 U.S. 937 (1966). Since all public domain lands have been "withdrawn" at least to some extent, perhaps it is more accurate today to say that the statute does not apply to land which has been withdrawn from the public domain and reserved to some use or uses. E.g., United States v. Vasarajs, 908

[128]See M.H. Schwarz, Comment, A Practitioner's Guide to the Federal Color of Title Act, 20 Natural Resources Journal 681 (1980).

F.2d 443, 446 n.4 (9th Cir. 1990) (Color of Title Act not applicable to land on military reservation).

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Chapter 17

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Miscellaneous Topics

A. Boards, Committees, and Commissions

1. Introduction

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

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

- Function: Most of the bodies we are talking about are purely advisory. Some, however, are operational, and others have elements of both. Functions include, for example, such things as the investigation of specific incidents, claims adjudication, and the commemoration of historic persons or events.
- Creation: Advisory bodies can be created by Congress, the President, or a department head. Bodies that are not purely advisory may or may not require specific legislation, depending on their exact nature and functions.
- Membership: The entity may consist entirely of government officers or employees, entirely of nongovernment parties, or some of each.

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

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

One of the earliest instances of the use of presidential commissions—if not purely advisory ones—occurred in 1794, when George Washington named a commission to investigate the Whiskey Rebellion in Pennsylvania.[3] Although the explosive growth of these miscellaneous bodies did not occur until the 20th century, they were sufficiently common in 1842 to prompt Henry Clay to observe that the practice "had grown into use long since in the Executive Department."[4]

No one knows exactly how many miscellaneous boards, committees, and commissions exist at any given time. The only statistics available are for advisory committees subject to the Federal Advisory Committee Act (FACA), certainly the largest single category, and for these there is a clear downward trend as they are a favorite target of cost-cutters. When Congress was considering the FACA, the House Government Operations Committee reported that "there are at least 2,600 interagency and advisory committees and possibly as many as 3,200 presently existing," the uncertainty being that "many agencies are unable to supply a list of all their advisory bodies." H.R. Rep. No. 92-1017 (1972), reprinted in 1972 U.S.C.C.A.N. 3491, 3492. By the end of fiscal year 1992, there were 1,236 federal advisory committees. General Services Administration, Twenty-Second Annual Report of the President on Federal Advisory Committees 1 (1994). On February 10, 1993, President Clinton issued Executive Order No. 12838, directing

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

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

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

executive branch departments and agencies to terminate at least one-third of the "advisory committees subject to FACA (and not required by statute) that are sponsored by the department or agency." By the end of fiscal year 1993, the number of advisory committees had dropped to 1,088. GSA Report cited above, at 1.[5]

The practice of creating and using these miscellaneous boards and commissions is not without controversy. One critic, not wholly without justification, says that the government "is literally drenched in advisory committees," and that "today there is a committee for almost any subject the mind of man can conceive."[6] Yet, counters another, "Surely they must have something important to offer to deserve such popularity. And they have."[7] The House Committee on Government Operations explained the reason for their popularity:

> "The advisory body creates a contribution by the governed to the Government. It provides a means by which the best brains and experience available in all fields of business, society, government and the professions can be made available to the Federal Government at little cost. Our Government and leaders are continually in need of advice on a variety of problems at all times in their attempts to find answers to the problems of our increasingly diversified and complex society. With the increased size and responsibilities of government, the number of advisory and interagency committees has also grown."[8]

[5]Although the number was to drop still further, GAO found that the costs and number of members per committee had increased. Federal Advisory Committee Act: Overview of Advisory Committees Since 1993, GAO/T-GGD-98-24 (November 5, 1997) (congressional testimony).

[6]Donald Lambro, The Federal Rathole 23-24 (1975).

[7]David S. Brown, The Management of Advisory Committees: An Assignment for the '70's, 32 Pub. Ad. Rev. 334 (1972).

[8]H.R. Rep. No. 91-1731, supra note 1, at 4.

A somewhat more cynical view comes from the pen of Herbert Hoover:

"There is no more dangerous citizen than the person with a gift of gab, a crusading complex and a determination to 'pass a law' as the antidote for all human ills. The most effective diversion of such an individual to constructive action and the greatest silencer on earth for foolishness is to associate him on a research committee with a few persons who have a passion for truth—especially if they pay their own expenses. I can now disclose the secret that I created a dozen committees for that precise purpose."[9]

2. Title 31 Funding Provisions

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

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

"§ 1346. Commissions, councils, boards, and interagency and similar groups

"(a) Except as provided in this section—

"(1) public money and appropriations are not available to pay—

"(A) the pay or expenses of a commission,council, board, or similar group, or a member of that group;

"(B) expenses related to the work or the results of work or action of that group; or

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

[9]The Memoirs of Herbert Hoover: 1920-33 281, quoted in Thomas R. Wolanin, Presidential Advisory Commissions—Truman to Nixon 3-4 (1975).

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

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

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

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

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

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

Section 1347, which comprises the so-called "Russell Amendment," is set out later in this discussion.

a. 1842: The First Attempt

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

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

following year, the Attorney General discussed the statute in this much-quoted passage:

"The power of appointment results from the obligation of the executive department of the government 'to take care that the laws be faithfully executed;' an obligation imposed by the constitution, and from the authority of which no mere act of legislation can operate a dispensation. Congress may, however, indirectly limit the exercise of this power by refusing appropriations to sustain it, and thus paralyze a function which it is not competent to destroy. This would seem to be the purpose of the act of 26th August, 1842 . . . ." 4 Op. Att'y Gen. 248 (1843).

The Attorney General went on to point out that payment would require a specific appropriation. Charging a general appropriation would not suffice because general appropriations must be read as limited by existing prohibitory statutes. Id. at 249.

The "undoing" of the 1842 restriction began with a 1915 decision of the Comptroller of the Treasury who quoted the Attorney General's 1843 opinion and agreed that "the purpose of this provision was to prohibit, indirectly, the creation of commissions by the executive [branch] through its inherent power to make appointments." 21 Comp. Dec. 442, 443 (1915). However,—

"I do not think it was the intent or purpose of this law to prohibit the use of an appropriation otherwise available, though general in terms, for the payment of expenses of a commission specifically authorized by Congress." Id.

In this way, a general appropriation available for the expenses of a body specifically created by Congress became a "special appropriation" for purposes of the 1842 law. Id. at 443-444.

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

"The right of the President to appoint any one of these experts to advise him in an individual capacity would undoubtedly be authorized . . . . If he sees fit to appoint or

employ four experts to make a concurrent investigation and report on the various matters of which each is an expert in his particular field, it would not appear that such designation of the individuals thus selected would make them a 'commission [or] inquiry' in the legal sense of the term." Review Nos. 2249 et al., August 22, 1922.[10]

The 1842 enactment never purported to address the extent of the executive's power to create boards and committees, and even though it is still on the books, these administrative interpretations mean that it is no longer a significant funding impediment either.

b. 1909: The Tawney Amendment

The next congressional attempt to control boards and committees grew out of President Theodore Roosevelt's creation in 1909 of a Commission on Fine Arts to advise on artistic aspects of certain public structures and monuments.[11] The following year, Congress gave the Commission a permanent statutory basis in what is now 40 U.S.C. § 104. Before doing that, however, disturbed over the President's willingness to create such bodies without first obtaining congressional approval, it enacted the Act of March 4, 1909, ch. 299, § 9, 35 Stat. 945, 1027, which prohibited the use of appropriated funds to pay any expenses in connection with any commission, council, board, or similar body, or any members of such a group, "unless the creation of the [group] shall be or shall have been authorized by law." This statute, sometimes referred to as the Tawney Amendment, is now found at 31 U.S.C. §§ 1346(a)(1) (prohibition) and 1346(c)(1) ("authorized by law" exception).

This second congressional attempt met with weakening administrative interpretations even more swiftly than did the first attempt. Less than two months after it was enacted, the Attorney General held that the 1909 law did not apply to groups consisting entirely of government officers or employees dealing with matters relating to their scope of employment. 27 Op. Att'y Gen. 308 (1909); 8 Comp. Gen. 294 (1928); B-79195, September 30, 1948. As the Attorney General stated in another opinion, it would make no sense

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

[11]Bybee, supra note 4, at 63-65.

to construe the statute as prohibiting an agency head "from submitting to the concurrent investigation and report of several employees of his department any question which he might submit for investigation to any one of them." 27 Op. Att'y Gen. 300, 307 (1909). The same applies to experts and consultants as long as their employment has been properly authorized. 37 Op. Att'y Gen. 484 (1934).

The key question under this statute is the meaning of "authorized by law." Once again, the Attorney General took the lead, adopting an interpretation that effectively weakened the law's requirements. Noting that every action an agency takes does not have to be spelled out in legislation, he concluded:

> "Congress did not intend to require that the creation of the commissions, etc., mentioned should be specifically authorized by a law of the United States, but that it would be sufficient if their appointment were authorized in a general way by law." 27 Op. Att'y Gen. 432, 437 (1909).

The Comptroller of the Treasury followed suit. 16 Comp. Dec. 422 (1910); 16 Comp. Dec. 278 (1909) (quoting extensively from the Attorney General's opinion). Somewhat inexplicably, several early GAO decisions took the position that specific authority was required.[12] The difficulty with this divergence was that the Attorney General's conclusion was supported by some pretty strong legislative history (27 Op. Att'y Gen. at 437). Finally, in 22 Comp. Gen. 140 (1942), the Comptroller General reviewed this legislative history, repudiated the earlier "specific authority" decisions, and adopted the Attorney General's "authorized in a general way" formulation.

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

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

[12] E.g., 11 Comp. Gen. 331 (1932); 5 Comp. Gen. 231 (1925); A-33870, October 29, 1930; A-16348, November 23, 1926. We say "inexplicably" because other decisions issued during this time period recognized, and purported to agree with, the Attorney General's conclusion. See 11 Comp. Gen. 495, 497 (1932); A-23238, June 20, 1928.

a nature generally recognized as best performed by a commission, board, etc." 11 Comp. Gen. 495, 497 (1932).

Virtually identical statements are found in 31 Comp. Gen. 454, 455 (1952) and B-116975, April 27, 1954, at 4.[13]

There needs to be something more than just the authority to perform the function because the "authorized by law" portion of the statute applies to creation of the body, not performance of the function. See, e.g., B-51203, August 14, 1945; 6 Op. Off. Legal Counsel 541, 549 (1982). The fact situation in the 1909 Attorney General opinion, 27 Op. Att'y Gen. 432, is a good example. The War Department then, as does the Army Corps of Engineers now, performed a variety of civil works functions. Incident to one of them, Congress directed that the work not injure "the scenic grandeur of Niagara Falls." The Department pointed out that it did not have on its payroll experts in "scenic grandeur," and when it had received similar mandates in the past, it went out and contracted for the necessary expertise, often in the form of a committee. This was sufficiently "authorized by law" for purposes of the 1909 prohibition. Similarly sufficient was the situation in 40 Comp. Gen. 478 (1961). The Interior Department had specific authority to consult with various private parties on certain forest matters. For decades, it had done this by the use of advisory bodies. In view of this longstanding practice, the consultation statute could be viewed as furnishing the necessary authority.

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

[13]A more recent decision stated the principle with a minor change in language:

"[The 1909 law] does not necessarily require that commissions, councils, boards, and other such bodies be specifically established by statute. . . . General or specific authority to perform functions or duties is sufficient to allow payment of the expenses of boards, commissions, etc., if such duties or functions can be performed only by such a group or if it is generally accepted that such duties can be performed best by such a group." 40 Comp. Gen. 478, 479 (1961) (citations omitted).

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

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

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

Finally, cases under the 1909 statute continue to recognize the individual versus unit distinction first noted in connection with the 1842 law. A case previously cited, B-116975, April 27, 1954, involved three people inspecting coffee for the Army. It was significant that, although the three conducted their inspections independently, the majority vote determined acceptance or rejection. Thus, the inspectors acted as a unit and the statute applied. The same reasoning applied to tea inspectors for the Navy in 6 Comp. Gen. 140 (1926).[14]

Setting aside subsequent developments for the moment, the combined effect of the 1842 and 1909 enactments—31 U.S.C. §§ 1346(a) and (c)—was that boards and committees created by executive action could be funded if their creation was authorized ("in a general way"), or if Congress appropriated funds for that purpose.

[14]6 Comp. Gen. 140 is one of the "specific authority" cases and to that extent has been modified by 22 Comp. Gen. 140. This, however, has no bearing on the point noted in the text.

c. 1944: The Russell Amendment

Peace prevailed between the branches over the use of boards and committees for a few decades, but ended in 1944 when congressional concern over some of Franklin D. Roosevelt's creations prompted another piece of legislation, forming a "veritable Maginot Line of barriers to funding commissions."[15] This third attempt at congressional control was the so-called Russell Amendment, Pub. L. No. 358, 78th Cong., § 213, 58 Stat. 361, 387. Now codified at 31 U.S.C. § 1347, it provides:

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

Section 213's sponsor stated its purpose as follows:

> "[T]he purpose of the committee amendment, which is apparent from a reading thereof, is to retain in the Congress the power of legislating and creating bureaus and departments of the Government, and of giving to Congress the right to know what the bureaus and departments of the Government which have been created by Executive order, are doing.
>
> "Regardless of what agencies might be affected, the purpose of this amendment is to require them all to come to Congress for their appropriations after they have been in existence for more than a year." 90 Cong. Rec. 3119 (1944), quoted in 24 Comp. Gen. 241, 243 (1944).

The original language makes this intent a little clearer. "Agency" in subsection (a) originally read "any agency or instrumentality including those established by Executive order," and "specific authorization by law" originally read specific authorization for "the expenditure of funds" by the body. 58 Stat. 387.

As had happened with its predecessors, administrative interpretations have narrowed the Russell Amendment's scope and

[15]Wolanin, supra note 9, at 66.

impact. "Specific appropriation" does not mean that the appropriation has to mention the body by name. Inclusion of an item in an agency's budget justification, followed by a lump-sum appropriation which does not prohibit the item, is regarded as a "specific appropriation" for purposes of the Russell Amendment. 24 Comp. Gen. 241 (1944); B-44719, October 7, 1944.[16]

In 3 Op. Off. Legal Counsel 263 (1979), the Justice Department's Office of Legal Counsel concluded that the Russell Amendment does not apply to boards or committees that are purely advisory, stating the test as follows:

> "Mere advisors are not 'agencies' or 'instrumentalities' of Government for purposes of the Russell amendment. They do not become 'agencies' or 'instrumentalities' merely because they meet and advise collectively. They become 'agencies' or 'instrumentalities' for Russell amendment purposes only if the officer to whom they report seeks to invest them with actual authority to take substantive action on his or the Government's behalf." Id. at 265.

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

3. Interagency Funding

a. Joint Funding of Common-Interest Project

It is necessary at the outset to distinguish between joint funding of a project and joint funding of a board, committee, or similar group.

[16]A question which does not appear to have been specifically addressed is whether the cases liberally construing 31 U.S.C. § 1347 can be said to have superseded, at least implicitly, the "specific means specific" approach of the cases under 31 U.S.C. § 1346(a)(2), such as 4 Op. Att'y Gen. 248 (1843).

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

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

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

In any joint funding case—project, board or commission, interagency agreement, etc.—the threshold question is purpose availability. Joint funding cannot be used if the source appropriation is not otherwise available for the object in question. B-182398, March 29, 1976. In other words, joint or interagency funding may not

be used to expand the availability of any of the participating appropriations. Once you cross this threshold, use of a working fund as a financing device is permissible, but the money "must be obligated and expended in accordance with the statutes appropriating such funds and within the period of availability of the original appropriations." B-111199, August 20, 1952.

b. 1945: The First Interagency Funding Statute

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

Section 214's legislative history indicates that it was intended as an amendment to the Russell Amendment. Therefore, to the extent of its terms, it overrides the Russell Amendment's requirement to seek congressional appropriations after one year. B-75669, June 16, 1948. Also, since it specifically makes appropriations available, it overrides, again to the extent of its terms, the prohibition of 31 U.S.C. § 1346(a)(1) (the 1909 statute). 49 Comp. Gen. 305, 307 (1969);[17] 26 Comp. Gen. 354 (1946).

The current version of 31 U.S.C. § 1346(b), stemming from the 1982 recodification of Title 31, makes appropriations available for interagency groups "conducting activities common to executive agencies when the group includes a representative of the agency." The original language, which governs in a case like this,[18] was "authorized activities of common interest to such departments and establishments and composed in whole or in part of representatives thereof." 59 Stat. 134. It is clear from the original language ("in whole or in part") that the interagency group can include private parties in addition to the government representatives. 26 Comp. Gen. at 358.

[17]49 Comp. Gen. 305 was erroneously overruled in part by 54 Comp. Gen. 1055 (1975), and reinstated by 56 Comp. Gen. 572 (1977).

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

Also, the current language would seem to require that the group include at least one representative from every agency participating in the funding. The original (governing) language did not necessarily say this, and in fact a 1962 decision stated:

> "We do not read the language of [section 214] as making agency membership on an interagency board or committee a requisite to the availability of appropriations for meeting the expenses of such interagency groups. Nor have we found anything in the legislative history of the statute which would dictate that such membership is required. Thus in a proper case we would not be required to object to contribution by a nonmember agency toward the expenses of an interagency group, on the sole ground of nonmembership." B-150511, December 28, 1962.

Accordingly, the controlling factor is not membership, but "whether the interagency groups are 'engaged in authorized activities of common interest' to the contributing agencies." B-150511, January 9, 1963.

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

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

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

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

- The National Service Corps Study Group was established in 1962 to study the feasibility of a national service program patterned after the Peace Corps. It consisted of the Attorney General, the Secretaries of Agriculture, Interior, Commerce, Labor, and Health, Education and Welfare, plus some smaller agencies. Since the study extended into such fields as health, education, labor, housing, etc., it could fairly be regarded as being of interest to the agencies asked to participate in the funding. B-150963, July 9, 1963.
- The Defense Department could contribute to the funding of the President's Committee on Equal Employment Opportunity. B-148247, March 5, 1962.
- Agencies could pay "dues" to the Federal Automatic Data Processing Council, as long as the Council was using the money only for the kinds of expenses for which the source appropriations would be available. B-161214-O.M., April 24, 1967.
- The Federal Trade Commission could continue to pay the salary of an employee sent to Japan as part of an interagency trade mission. B-54464, December 14, 1945.

c. Appropriation Act Provisions

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

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

The result was legislation that effectively modified 31 U.S.C. § 1346(b) by prohibiting the use of appropriated funds for interagency financing without prior and specific congressional approval for that type of financing. The provision first appeared in several appropriations acts for 1969. In 1972, it was inserted in the

Treasury-General Government Appropriations Act and made governmentwide ("this or any other act"). This history is outlined in B-147637-O.M., December 12, 1974.

The original version applied only to interagency groups under 31 U.S.C. § 1346(b). Eventually, Congress realized that this was narrower than it had intended, and dropped the specific reference to section 1346(b), as well as changed "congressional approval" to "statutory approval." The 1998 provision states:

"No part of any appropriation contained in this or any other Act shall be available for interagency financing of boards (except Federal Executive Boards), commissions, councils, committees, or similar groups (whether or not they are interagency entities) which do not have a prior and specific statutory approval to receive financial support from more than one agency or instrumentality." Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, § 611, 111 Stat. 1272, 1310 (1997).

Note that the group itself may or may not be an interagency group; the statute is directed solely at the method of funding. The exemption for Federal Executive Boards first appeared in 1996.[19]

Section 611[20] does not apply to a government corporation statutorily authorized to determine the nature and character of its expenditures. B-174571, January 5, 1972 (FDIC). Nor does it apply to the Comptroller of the Currency, whose funds, by statute, are not to be construed as appropriated funds. Id. Thus, as the cited decision concluded, section 611 would not inhibit contributions by either body to the President's Commission on Financial Structure and Regulation.

GAO's first encounter with section 611 was 49 Comp. Gen. 305 (1969). The Veterans Administration wanted to contract with an individual to serve as director of the Interagency Institutes for Federal Hospital Administrators, the contract cost to be shared by the participating agencies. To start with, since 31 U.S.C. § 1346(b) partially superseded 31 U.S.C. § 1346(a) with respect to certain

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

[20]The section number changes from year to year, but is always in the low 600s. For consistency, we will refer simply to "section 611."

interagency groups, there was no need to determine whether this particular group was "authorized by law." This was the good news. The bad news was that 31 U.S.C. § 1346(b) was itself partially overridden by section 611. Interagency funding would require prior and specific legislative approval. 49 Comp. Gen. at 307. Similarly, as we have already noted, 31 U.S.C. § 1346(b), to the extent of certain interagency bodies, also partially supersedes the one-year requirement of the Russell Amendment. Thus, the President could lawfully create an interagency Radiation Policy Council for a duration in excess of one year, but interagency funding would require compliance with section 611. B-196841-O.M., December 18, 1980. More recently, section 611 has been applied to a proposal to purchase solicitation services for the Combined Federal Campaign from an interagency entity. 67 Comp. Gen. 254 (1988).

The "prior and specific" approval can take different forms. One approach is section 629 of the 1998 Treasury-General Government appropriation act:

"Notwithstanding section 611, interagency financing is authorized to carry out the purposes of the National Bioethics Advisory Commission." Pub. L. No. 105-61, § 629, 111 Stat. at 1315.

Since the statute authorizes the concept but not the precise method, there would presumably be some discretion in this regard—e.g., periodic reimbursement, advances to a working fund, etc.

Another approach is illustrated by the Joint Financial Management Improvement Program (JFMIP). The JFMIP was created administratively in 1947 as a cooperative effort by GAO, the Office of Management and Budget, and the Treasury Department. It received a statutory basis in the Budget and Accounting Procedures Act of 1950 (31 U.S.C. § 3511(d)). The Office of Personnel Management joined in 1966. At the present time, GAO initially charges the JFMIP's common expenses (e.g., executive director's salary and secretarial support) to its own appropriation and then, at the end of each fiscal year, bills the other three for 25% each of those common expenses. This funding method is expressly authorized by a proviso appended to GAO's appropriation language every year. See, for 1998, the Legislative Branch Appropriations Act, 1998, Pub. L. No. 105-55, 111 Stat. 1177, 1196 (1997). The purpose of the proviso was to comply with section 611. B-84260-O.M., September 12, 1974.

Perhaps the best illustration of the import and impact of section 611 is the saga of the Federal Executive Boards. In 1961, President Kennedy created interagency groups called Federal Executive Boards to better coordinate federal activities outside of Washington. Their number has increased over the years.[21] From the outset, the Boards were funded from the appropriations of the member agencies rather than by seeking direct appropriations. The enactment of section 611 gave the agencies something of a jolt because they had been supporting the Boards for up to ten years under 31 U.S.C. § 1346(b),[22] entirely legitimately, and now all of a sudden learned that they no longer had the authority to do so.

GAO's first written encounter with the problem came in 1973, when GAO's own field managers asked why they were being asked to pay FEB assessments from personal funds and if there was any way GAO could pick up the tab. GAO reviewed the history of section 611 and concluded that there was no way around the statute.

"We see no possible alternative in the instant case to concluding the language of section [611] prohibits the GAO and all other Federal agencies from using their appropriated funds to provide administrative support, salaries, and reimbursement or payment of a member's assessments for Federal Executive Board activities." B-147637-O.M., December 12, 1974, at 6.

The solution, of course, was to seek specific authorization from Congress. Id.

In 1986, the Veterans Administration and the Small Business Administration came to the conclusion that section 611 barred interagency financing of the Federal Executive Boards, and sought GAO's concurrence. They got it. 65 Comp. Gen. 689 (1986). There was one possible—although probably not very feasible—way out. The decision added, "we see nothing to prevent a single agency with a primary interest in the success of the interagency venture, from picking up the entire costs." Id. at 692. Thus, if you could conclude that one agency had a "primary interest" in a particular Board activity, and if that agency were willing to pay the entire cost

[21]Standardized Federal Regions—Little Effect on Agency Management of Personnel, GAO/FPCD-77-39, at 2 (August 17, 1977).

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

without hope of reimbursement, it could do so. The next question, expectedly, was what does "primary interest" mean? It means that:

"an agency must have a substantial stake in the outcome of the interagency endeavor and the success of the interagency venture must further the agency's own mission, programs or functions." 67 Comp. Gen. 27, 29 (1987).

This latter decision also reiterated that section 611 barred in-kind as well as cash support. Mere attendance at meetings or functions, however, does not constitute support. Id.

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

Why this situation persisted for so many years is not clear. GAO had recommended as early as 1977 that the executive branch present the problem of Federal Executive Board funding to Congress.[23] In any event, as noted above, section 611 was amended in 1996 to exempt the Federal Executive Boards.

Another general provision which has been around for about ten years is section 617 of the 1998 Treasury and General Government Appropriations Act, 111 Stat. at 1312:

"Notwithstanding section 1346 of title 31, United States Code, or section 611 of this Act, funds made available for fiscal year 1998 by this or any other Act shall be available for the interagency funding of national security and emergency preparedness telecommunications initiatives which benefit multiple Federal departments, agencies, or entities, as provided by Executive Order No. 12472 (April 3, 1984)."

[23]GAO/FPCD-77-39, supra note 21, at 24.

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

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

4. The Federal Advisory Committee Act

a. Overview and Applicability

As we have noted, in the world of miscellaneous boards and committees, advisory committees are by far the largest single group. There are several types: general advisory committees, scientific and technical advisory committees, special clientele (industry) advisory committees, specific task (or action) advisory committees, research committees, and public conferences.[24] They are popular because they represent a relatively inexpensive way for the government to get expert advice, or at least advice from different perspectives; they are criticized because many tend to outlast their usefulness.

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

[24]Brown, supra note 7, 32 Pub. Ad. Rev. at 335; Richard O. Levine, Comment, The Federal Advisory Committee Act, 10 Harv. J. on Legis. 217, 217-218 (1973).

"Sort of like satellites, I think of them in that way . . . They go out into outer space but they keep circling around, you know, and no one really knows how many there are or what direction they are going in, or what duplication there is."[25]

In 1972, Congress enacted the first attempt to comprehensively regulate advisory committees—the Federal Advisory Committee Act (FACA), Pub. L. No. 92-463, 86 Stat. 770, 5 U.S.C. App. 2 §§ 1-16, as amended. FACA's purposes are "to eliminate unnecessary committees; to govern the administration of those that remain; and to inform the public about [their] membership and . . . activities."[26] It does this by regulating the creation, operation, and termination of executive branch advisory committees. The theory, in plain English, is to start when you're needed and quit when you're done. The General Services Administration is given the job of prescribing "administrative guidelines and management controls applicable to advisory committees." Id., § 7(c). GSA's regulations are found in 41 C.F.R. Subpt. 101-6.10.[27]

The key issue under FACA, and certainly the most hotly litigated, is how to determine whether or not the statute applies to a particular body. As discussed later, this determination has fiscal consequences. In addition, wholly apart from fiscal matters, a determination that FACA applies means that, among other things: the committee must prepare a detailed charter and file it with appropriate officials before it can meet or take any action (5 U.S.C. App. 2 § 9(c)); its meetings must be open to the public (5 U.S.C. App. 2 § 10(a)(1)); notice of each meeting must be published in the Federal Register

[25]H.R. Rep. No. 91-1731, supra note 1, at 2 (quoting a statement made in committee hearings).

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

[27]The Supreme Court has said that the GSA regulations merit "diminished deference" because they were not issued contemporaneous with the statute, and section 7(c) talks about guidelines and controls, not regulations. Public Citizen v. Department of Justice, 491 U.S. 440, 463-465 n.12 (1989). The D.C. Circuit accords them no deference because FACA is "applicable to all agencies." Association of American Physicians and Surgeons, Inc. v. Clinton, 997 F.2d 898, 913 (D.C. Cir. 1993).

(5 U.S.C. App. 2 § 10(a)(2)); it must keep detailed minutes of each meeting (5 U.S.C. App. 2 § 10(c)); a designated officer or employee of the federal government must call or approve each meeting, and an officer or employee of the federal government must chair or attend each meeting (5 U.S.C. App. 2 §§ 10(e), (f)); and it must make transcripts of meetings available to the public at actual duplication cost (5 U.S.C. App. 2 § 11(a)). Advisory committees must "be fairly balanced in terms of the points of view represented and the functions to be performed." 5 U.S.C. App. 2 §§ 5(b)(2), 5(c); 41 C.F.R. § 101-6.1002(c); National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control, 711 F.2d 1071, 1073 n.1 (D.C. Cir. 1983).

As GAO has pointed out, FACA does not prescribe remedies or penalties for violations, nor does it expressly provide a private cause of action. Thus, assuming a plaintiff can establish standing and then establish some violation, it is up to the court, within the limits of judicial power, to devise an appropriate remedy. See B-278940, January 13, 1998. One court, after finding FACA violations, permanently enjoined the agency from using the advisory body's report, "the product of a tainted procedure." Alabama-Tombigbee Rivers Coalition v. Department of Interior, 26 F.3d 1103, 1107 (11th Cir. 1994). Another potential form of relief is the declaratory judgment. E.g., National Nutritional Foods Association v. Califano, 603 F.2d 327, 336 (2d Cir. 1979). The Second Circuit further noted that, at least as of 1979, no court had used a FACA violation to "invalidate a regulation adopted under otherwise appropriate procedures." Id. Other forms of relief might include orders to open future meetings to the public, produce documents, or comply with any of FACA's other procedural requirements, depending on the precise violation. As far as we are aware, no court has yet to suggest that it could award a judgment for "money damages."

(1) Definition and specific exemptions

FACA § 3(2), as amended by the Federal Advisory Committee Act Amendments of 1997,[28] defines "advisory committee" as follows:

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

"The term 'advisory committee' means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is—

"(A) established by statute or reorganization plan, or

"(B) established or utilized by the President, or

"(C) established or utilized by one or more agencies,

"in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration."

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

The exemption for committees created by the National Academy of Sciences or the National Academy of Public Administration was added in the 1997 amendment.[29] While exempt from the section 3(2) definition, they are nevertheless subject to a set of procedures included in the 1997 legislation. FACA § 15. FACA § 4 further exempts committees whose enabling legislation specifically provides otherwise (this would be the case in any event); committees established or utilized by the Central Intelligence Agency or the Federal Reserve System; and certain state and local bodies.

Exemptions may, of course, appear in other statutes. For example, section 204(b) of the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48, 66, 2 U.S.C. § 1534(b), renders FACA inapplicable to meetings between federal and state, local, or tribal officials, if they deal solely with federal programs "that explicitly or inherently share intergovernmental responsibilities or administration."

Other exemptions derive from case law. The Justice Department has concluded that FACA does not apply to a body created jointly by the United States and another nation. 3 Op. Off. Legal Counsel 321 (1979). It has also found that the Smithsonian Institution is not an "agency" under FACA's definition. Consequently, FACA would not apply to advisory bodies established by the Smithsonian. 12 Op. Off. Legal Counsel 122 (1988).

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

If the specific exemptions do not resolve the question, there are several principles that are relevant in assessing applicability. They are, unfortunately, often difficult to apply, and we do little more than note them and allude to the problem areas.[30]

(2) Advisory versus operational

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

Illustrative cases include Sofamor Danek Group v. Gaus, 61 F.3d 929 (D.C. Cir. 1995) ("Low Back Panel," although established by government, was charged with developing guidelines for health care practitioners rather than providing advice to federal government, and was therefore operational); Public Citizen v. Commission on the Bicentennial of the United States Constitution, 622 F. Supp. 753 (D.D.C. 1985) (Bicentennial Commission primarily operational and therefore exempt); 57 Comp. Gen. 51 (1977) (same result for National Commission on the Observance of International Women's Year); B-222831, May 30, 1986 (internal memorandum) (Statue of Liberty - Ellis Island Foundation). The fact that the commission may be required to submit reports to the President and/or Congress when it has finished its work does not change the result. Public Citizen, 622 F. Supp. at 758. These cases, by the way (except for Sofamor

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

Danek), point to one type of body which is almost always operational—the commemorative or memorial commission. Their role is usually to plan, coordinate, and implement a particular celebration. Further examples of this type are the Christopher Columbus Quincentenary Jubilee Commission, Pub. L. No. 98-375, 98 Stat. 1257 (1984); the Civil War Centennial Commission, Pub. L. No. 85-305, 71 Stat. 626 (1957); and the National Capital Sesquicentennial Commission, Pub. L. No. 80-203, 61 Stat. 396 (1947).

The more difficult situation arises when a body has both advisory and operational functions. FACA clearly anticipates its applicability to committees with some operational functions. For example, a committee's charter—which is not required for an exempt entity—must specify "a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions." FACA, § 9(c)(F). Also, the fragment of FACA § 9(b) quoted above explicitly recognizes the inclusion of nonadvisory functions if specifically provided by statute or Presidential directive. The GSA regulations implement this by exempting committees which are "established to perform primarily operational as opposed to advisory functions." 41 C.F.R. § 101-6.1004(g). An illustrative case is Natural Resources Defense Council v. EPA, 806 F. Supp. 275 (D.D.C. 1992) (EPA's Governors' Forum on Environmental Management primarily operational because participating state governors acted as independent chief executives in partnership with EPA in implementing pertinent legislation). GSA's regulation provides further that a "primarily operational" committee can become subject to FACA "if it becomes primarily advisory in nature." 41 C.F.R. § 101-6.1004(g).

(3) Who is being advised?

The definition in FACA § 3(2), quoted above, refers to bodies established or utilized "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government." FACA § 3(3) expressly incorporates the Administrative Procedure Act definition of "agency," 5 U.S.C. § 551(1), which specifically excludes Congress. See also FACA § 2(a). Thus, assuming the absence of any other disqualifying factors, an advisory committee will be subject to FACA

if it advises the President and/or an executive agency. A body which advises Congress is exempt. E.g., B-135945, March 29, 1973 (National Study Commission established by Federal Water Pollution Control Act exempt from FACA because it advises Congress). As that decision points out, language to specifically include Congress was contained in earlier versions of FACA but was deleted prior to enactment. Similarly, a body established to advise the Comptroller General, an official of the legislative branch, is for that reason not subject to FACA. B-130961-O.M., February 12, 1974.

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

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

(4) "Established or utilized"

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

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

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

Others, viewing the term "utilized" as ambiguous, were guided more by legislative history. E.g. Lombardo v. Handler, 397 F. Supp. at 800.

The Supreme Court confronted the issue in Public Citizen v. United States Department of Justice, 491 U.S. 440 (1989). The question was whether FACA applied to consultations between the Justice Department and a standing committee of the American Bar Association regarding potential nominees for federal judgeships. Clearly, the standing committee was not "established" by the President or by the Justice Department. Equally clearly, if "utilized" were given its ordinary meaning, then the ABA committee was "utilized" by Justice.

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

> "The phrase 'or utilized' . . . appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations . . . 'for' public agencies as well as 'by' such agencies themselves." Id. at 462.

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

Several lower courts have suggested that Public Citizen treated "utilize" essentially as a form of "established." E.g., Aluminum Company of America, 92 F.3d at 905. While there is some truth to this and the distinction surely has been blurred, the fact remains that the statute uses the word "or" and that therefore they are two separate and exclusive concepts. Huron Environmental Activist League v. U.S. EPA, 917 F. Supp. 34, 40 n.6 (D.D.C. 1996). "Established" refers to a government-formed body while "utilized"

refers to a group formed by nongovernment sources but which is nevertheless sufficiently close to an agency as to be amenable to management or control by that agency. Food Chemical News v. Young, 900 F.2d at 332-333. As the D.C. Circuit phrased it in another case, in light of the Public Citizen definition of "utilize"—

> "FACA can only apply if the committee is established, managed, or controlled for the purpose of obtaining advice or recommendations for the federal government." Sofamor Danek Group v. Gaus, 61 F.3d 929, 936 (D.C. Cir. 1995).

If one point emerges from Public Citizen and its progeny, it is that FACA will be difficult to apply to a body not established by the government. To cite a few examples, the following cases all found FACA inapplicable because the bodies in question were not "utilized" in the Public Citizen sense:

- Working groups created to aid in implementing a court order regarding the protection of an endangered species. The groups were not funded by the government, nor were they subject to federal management. Aluminum Company of America, 92 F.3d at 902.
- A group of experts established by a contractor to advise on food and cosmetic safety issues. Not only did the contractor, a private organization, not enjoy "quasi-public status," it set the group's agenda, scheduled its meetings, and reviewed its work. Food Chemical News v. Young, 900 F.2d at 333.
- Although the Environmental Protection Agency determined the schedule and made other logistical arrangements for meetings with cement industry group, there was no showing that the group was subject to EPA's management or control or that it was "so closely tied to the executive branch of the government as to render it a functionary thereof." Huron Environmental Activist League, 917 F. Supp. at 40.
- An advisory committee to the Sentencing Commission was not "utilized" by the Justice Department because it was not, and as a judicial branch entity could not be, managed or controlled by Justice. Minority membership on the committee (in this case, two Justice officials out of 16 members) is not control. Washington Legal Foundation, 17 F.3d at 1450-51.

(5) Other factors

Reminiscent of an interpretation that originated under the Title 31 statutes decades before FACA's enactment, FACA applies to a group

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

> "FACA applies by its terms to 'advisory committees.' 'Advisory committee' is a term that connotes a body that deliberates together to provide advice. Therefore, as a matter of statutory construction, we believe that FACA does not apply to a group which simply acts as a forum to collect individual views rather than to bring a collective judgment to bear." 14 Op. Off. Legal Counsel 53, 55 (1990).

The requirement that a committee act as a committee does not mean that it must give "consensus advice." Physicians and Surgeons, 997 F.2d at 913.

Consensus or not, the advice must relate directly to governmental policy issues. Judicial Watch, Inc. v. Clinton, 76 F.3d 1232, 1233 (D.C. Cir. 1996) (Presidential legal expense trust, established to help defray personal legal fees, not subject to FACA); Grigsby Brandford & Co. v. United States, 869 F. Supp. 984, 1001 (D.D.C. 1994); 41 C.F.R. § 101-6.1003 (GSA's definition of "advisory committee").

An important, although not in and of itself necessarily conclusive, factor is the degree of formality attaching to the group. An early and often-cited FACA case held the statute inapplicable to a group whose "meetings are unstructured, informal and not conducted for the purpose of obtaining advice on specific subjects indicated in advance." Nader v. Baroody, 396 F. Supp. 1231, 1234-35 (D.D.C. 1975). Other cases applied FACA to informal meetings. E.g., National Nutritional Foods Association v. Califano, 603 F.2d 327 (2d Cir. 1979); Food Chemical News, Inc. v. Davis, 378 F. Supp. 1048 (D.D.C. 1974). The more recent trend seems to be to follow the approach of Baroody. Thus, the D.C. Circuit has stated:

> "In order to implicate FACA, the President, or his subordinates, must create an advisory group that has, in large measure, an organized structure, a fixed membership, and a specific purpose." Physicians and Surgeons, 997 F.2d at 914,

cited in Aluminum Company of America, 92 F.3d at 906 ("existence of a formal and structured group leans toward a finding of FACA applicability").

See also Huron Environmental Activist League v. U.S. EPA, 917 F. Supp. 34, 42 (D.D.C. 1996); Grigsby Brandford & Co. v. United States, 869 F. Supp. 984, 1001 (D.D.C. 1994).

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

The status of subcommittees or subgroups is not entirely clear. The FACA § 3(2) definition expressly includes boards, committees, etc., "or any subcommittee or other subgroup thereof." One court has found that task forces of the President's Private Sector Survey on Cost Control were not subject to FACA because "[t]hey do not directly advise the President or any federal agency, but rather provide information and recommendations for consideration to the Committee." National Anti-Hunger Coalition v. Executive Committee, 557 F. Supp. 524, 529 (D.D.C. 1983), aff'd, 711 F.2d 1071 (D.C. Cir. 1983). Under this approach, the subgroup operates essentially as staff of the parent committee. In an internal memorandum, B-199008-O.M., June 14, 1983, at 9, GAO questioned whether this is really what Congress had in mind:

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

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

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

"In contrast to the situation here, in Anti-Hunger the top levels of the outside advisory groups were covered by FACA . . . . In that scenario, there is less reason to focus on subordinate advisers or consultants who are presumably under the control of the superior groups. . . . But when the Task Force itself is considered part of the government—due to the government officials exemption—we must consider more closely FACA's relevance to the working group. For it is the working group that now is the point of contact between the public and the government." Id. at 913 (emphasis in original).

The court did not address the extent to which the distinction would be relevant, if at all, where the parent body is exempt from FACA for some reason other than the government officials exemption.

b. Creation and Funding

Funding of a federal advisory committee depends largely on how it was created. Creation is addressed in FACA § 9:

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

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

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

As this provision indicates, and as the GSA regulations reflect (41 C.F.R. § 101-6.1005), there are several ways to create an advisory committee:

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

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

(1) Statutory committees: creation

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

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

(B) It may address the group's status vis-a-vis FACA. The statute may expressly provide that the group is subject to FACA. E.g., 50 U.S.C. App. § 2169(i)(1) (advisory committees established by the National Commission on Supplies and Shortages). It may render the group wholly exempt from FACA. E.g., Pub. L. No. 98-399, § 5(c), 98 Stat. 1473, 1474 (1984) (Martin Luther King, Jr. Federal Holiday Commission). Or, it may exempt it from certain portions of FACA, implying that FACA is otherwise applicable. E.g., Pub. L. No. 93-348, § 211(a), 88 Stat. 342, 351-52 (FACA § 14—termination and renewal—not applicable to National Advisory Council for the Protection of Subjects of Biomedical and Behavioral Research).

(C) It will prescribe the group's membership and composition. To the extent the group will include or consist of private members, it will prescribe who is to appoint them. E.g., Pub. L. No. 86-380, § 3, 73 Stat. 703, 704 (Advisory Commission on Intergovernmental

Relations, members appointed by President, President of the Senate, Speaker of the House); Pub. L. No. 93-348, 88 Stat. 342, supra (members appointed by department head). The statute may prohibit members from holding any other position as an officer or employee of the United States during their period of service. E.g., 50 Comp. Gen. 736 (1971) (holding that membership on an advisory council was a position as an officer or employee for purposes of such a provision).[31] Absent a provision of this nature, nothing prohibits a private individual from serving on more than one committee. Similarly, a government official may serve on more than one body as long as "the person receives only one salary, the positions are not 'incompatible' from the standpoint of public policy, and there is no augmentation of relevant appropriations." 14 Op. Off. Legal Counsel 157, 160 (1990). See also 8 Op. Off. Legal Counsel 200, 205-206 (1984).

Mixing of the branches on a body with operational functions can be problematic. See 8 Op. Off. Legal Counsel 200 (1984). However, so far at least, no one has objected to persons from different branches serving together on a body which is purely advisory. E.g., 7 Op. Off. Legal Counsel 202 (1983). The executive branch does object to provisions which purport to place any restrictions (e.g., political or racial balance) on the President's appointment power. E.g., 14 Op. Off. Legal Counsel 157, 158 (1990).

(D) It will address the compensation of members and, if applicable, the hiring of staff. Members may or may not be compensated for their services, and members serving without compensation may nevertheless be allowed travel expenses. An example is Pub. L. No. 98-399, § 4(d), 98 Stat. 1473, 1474 (1984) (Martin Luther King, Jr. Federal Holiday Commission). Enabling statutes frequently provide that members who are officers or employees of the government or Members of Congress may not receive compensation for their service as members (because of the dual compensation laws, primarily 5 U.S.C. § 5533), but may be allowed travel expenses. E.g., Pub. L. No. 91-129, § 5(a), 83 Stat. 269, 271 (1969) (Commission on Government Procurement).

[31]For similar holdings in other contexts, see 24 Comp. Gen. 498, 500 (1945); 16 Comp. Gen. 495, 497 (1936); 23 Comp. Dec. 372, 374 (1917); 3 Op. Off. Legal Counsel 321, 322-323 (1979).

Payment of a per diem in lieu of subsistence is available only where authorized by statute. 20 Comp. Gen. 361 (1941); 10 Comp. Gen. 239 (1930). For committees subject to it, FACA § 7(d)(1)(B) provides the necessary authority. For other groups, the authority must be found elsewhere. E.g., 36 U.S.C. § 1403(a) (Holocaust Memorial Council).

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

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

For advisory committees under FACA, the statute imposes a compensation ceiling of the rate specified for GS-18. The regulations say GS-15 but allow a higher rate if the agency head can justify it. 5 U.S.C. App. 2 § 7(d); 41 C.F.R. § 101-6.1033. Both authorize the payment of travel expenses for duties performed away from home or regular place of business. Id.

A common provision exempts members and/or staff from the so-called civil service laws. GAO has held that the phrase "civil service laws" refers to the statutes and regulations governing appointments, and does not include the provisions, now also in Title 5, addressing salary rates. 53 Comp. Gen. 531 (1974). A more precise version of this language is "without regard to the provisions of [5 U.S.C.] governing appointments in the competitive service." Pub. L. No. 93-348, cited above, § 211(a), 88 Stat. at 352. If exemption from both is desired, the modern language is "without regard to the provisions of [5 U.S.C.] governing appointments in the competitive service, and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and General

Schedule pay rates." E.g., Christopher Columbus Quincentenary Jubilee Commission, Pub. L. No. 100-94, § 5, 101 Stat. 700, 701 (1987).

(E) It may make some provision for support services. The committee will need office space, office equipment, staff, etc. Especially if the committee is tied in by subject matter to some existing department, the legislation may direct that department to provide support services. In FACA § 5(b)(5), Congress reminds itself to include a support services provision. Operational groups are less likely to have such a provision since they will, for the most part, receive direct operating appropriations and can use them to procure the needed services, including use of the Economy Act. See B-157312, August 2, 1965. However, a body whose majority is nongovernment (government members were a majority in B-157312) does not have access to the Economy Act. 33 Comp. Gen. 115, 116-117 (1953).

Support service provisions may or may not be reimbursable. For example, the Interior Department is authorized to provide services and support to the Holocaust Memorial Council "on a reimbursable basis." 36 U.S.C. § 1404(e). In contrast, support services provided to the National Commission on Restructuring the Internal Revenue Service by the General Services Administration or the Treasury Department are to be "on a nonreimbursable basis." Pub. L. No. 104-52, § 637(d)(4), 109 Stat. 468, 511 (1995). Still another variation leaves it to the parties to fight it out. E.g., Pub. L. No. 93-556, § 7(b), 88 Stat. 1789, 1792 (1974) (Commission on Federal Paperwork may obtain services from any government agency, "reimbursable or otherwise, as may be agreed" by the Commission and the agency).

(F) It will prescribe applicable reporting requirements. (See "Who is being advised" heading above.)

(G) It will most likely provide for the group's termination, at least for groups intended to have a short duration or single-project groups. A common provision mandates termination a specified number of days or months after submission of required reports. E.g., Pub. L. No. 88-606, § 4(b), 78 Stat. 982, 983 (1964) (Public Land Law Review Commission to terminate on earlier of fixed date or six months after submission of report). Some entities may simply terminate on a

fixed date, an approach suitable for memorial commissions, for example. E.g. Pub. L. No. 98-101, § 7, 97 Stat. 719, 722 (1983) (Commission on the Bicentennial of the Constitution "shall terminate on December 31, 1989").

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

> "In our view, the duration of a statutorily created advisory committee may be 'otherwise provided for by law' either expressly or by implication. Such duration is provided for by implication if the statute that creates or assigns functions to an advisory committee provides for it a specific function that is continuing in nature and is an integral part of the implementation of a statutory scheme." 3 Op. Off. Legal Counsel 170, 171 (1979).

The requirement to make "periodic reports and recommendations" meets this test. Id. at 173-174.

(2) Statutory committees: funding

A final element the enabling statute will address is funding. For the most part, a board or committee created by Congress is funded under the standard two-step procedure: "first the program is authorized and, subsequently, appropriations are made available to carry out the program." B-39995-O.M., April 28, 1983 (referring to the Cost Accounting Standards Board). In FACA §§ 5(b)(4) and (5), Congress tells itself to make sure that legislation contains provisions dealing with authorization of appropriations and the assurance that the advisory body will have funds available for its necessary expenses (although no precise mechanism is prescribed).

The authorization of appropriations may be indefinite, i.e., "such sums as may be necessary."[32] Others may include a monetary ceiling.[33] Still others may cover multiple-year periods either year-by-year or in the aggregate.[34] A variation provides a specific dollar authorization for the first year and "such sums as may be necessary" thereafter.[35] There appear to be no significant consequences flowing from which form is used, nor are we able to generalize as to when a particular form may be regarded as more appropriate.

The authorization is sometimes combined with language prohibiting expenditures except to the extent provided in advance in appropriation acts. E.g., 36 U.S.C. § 1408 (Holocaust Memorial Council); Pub. L. No. 104-169, § 9(b), 110 Stat. 1482, 1488 (1996) (National Gambling Impact Study Commission). Even without language of this sort, an appropriation would still be necessary to carry out the authorization.

The next step is the actual appropriation. There is no required form for the appropriation. It can be an appropriation made directly to the entity; it can be an appropriation to an existing agency to be funneled to the entity; or it can be included in a lump-sum appropriation to a department or agency related in subject matter. The authorization of appropriations may influence, if not limit, this choice. Some, for example, expressly authorize funds to be directly appropriated to the board or commission while others use more discretionary language (funds appropriated "for the activities of" the particular commission or simply "to carry out this act").

[32]Examples are the Commission on Government Procurement, Pub. L. No. 91-129, § 9, 83 Stat. 269, 272 (1969), and the Commission on Organization of the Executive Branch of the Government (the so-called Second Hoover Commission), Pub. L. No. 83-108, § 8, 67 Stat. 142, 144 (1953).

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

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

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

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

Appropriations can be used only for their intended purposes. This means the purposes stated in the appropriation and other pertinent legislation, as amplified by the "necessary expense" doctrine expounded in Chapter 4. E.g., B-211149, June 22, 1983 (because Holocaust Memorial Council had specific authority to solicit donations, it could pay employees or consultants who engage in fund-raising).

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

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

Money received for the use of the government must, in accordance with the miscellaneous receipts statute, 31 U.S.C. § 3302(b), be

deposited in the general fund of the Treasury, subject to exceptions discussed in detail in Chapter 6. For the most part, a body which is purely advisory should not be in a position to generate receipts, with the possible exception of recovering overpayments of compensation or travel allowances. Operational bodies, on the other hand, are more likely to be involved in activities that generate receipts and must therefore contend with the miscellaneous receipts statute.

Specific authority to credit receipts to its operating appropriation makes those funds available for expenditure without further congressional action, at least during the appropriation's period of obligational availability. B-90476, June 14, 1950 (charges for admission to exhibits, plays, and dramatic productions by the National Capital Sesquicentennial Commission). As noted above, language authorizing an agency to act without regard to the laws applicable to federal agencies is sufficient to remove the inhibition on entertainment expenditures. Such language is equally sufficient to overcome the miscellaneous receipts statute. B-136051, August 27, 1959 (sale of publications and commemorative medals by Civil War Centennial Commission). If the board or commission does not have specific authority to charge fees, it must rely on the so-called User Fee Statute, 31 U.S.C. § 9701, in which case the fees are fully subject to the miscellaneous receipts requirement. Since user fees and donations are two different things, the authority to treat donated funds as exempt from fiscal laws does not apply to user fees. B-275959, May 5, 1998 (Holocaust Memorial Council).

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

would be necessary to account for each state's funds separately so that any remaining unexpended balances could be refunded. A-51645, November 6, 1936.

Where an appropriation includes a limit on obligations for a particular item, a supplemental appropriation cannot be used to exceed that limitation unless expressly provided. This rule does not apply—

"where the Congress does not explicitly provide for an increase in limitations theretofore prescribed, but the legislative history of the supplemental act shows that the additional funds were provided to administer new or additional functions and it is clearly shown that funds over and above the original limitations would be required to be expended in order that such functions may be carried out." B-114462, April 22, 1953.

That case held that the War Claims Commission could use funds from a supplemental appropriation for travel expenses incident to closing a field office, even though it would cause a ceiling on travel expenses in the original appropriation to be exceeded.

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

"It is the view of this office that in cases of small appropriations for sectional celebrations, memorials, etc., where the authorizing resolution does not provide for the administrative handling of obligations and expenditures from such appropriations by an existing Government agency, it is preferable that the money be appropriated for payment as a gift in one lump sum to an established local body without any further accounting to the Federal accounting officers. [This procedure] would remove the task of attempting at considerable cost to inform the inexperienced local person or body of persons in the field of the regulations, forms, and procedures required in accounting for public funds." B-8474, February 19, 1940, at 2.

The subject of that discussion was the Benjamin Harrison Memorial Commission, established by Pub. L. No. 76-352, 53 Stat. 1274 (1939). Shortly after GAO's opinion, the authorized amount was appropriated, "to be paid to the Commission for expenditure within its discretion" for authorized purposes. First Deficiency Appropriation Act, 1940, Pub. L. No. 76-447, 54 Stat. 82, 83 (1940). In such a situation, the commission is not required to account for the

funds in the same manner as a regular federal agency. However, it is not free money and the commission does have a record-keeping responsibility, albeit a minimal one. "[I]t is felt desirable that you maintain an adequate record of such funds and of the expenditure thereof." A-84233, June 3, 1937 (Charles Carroll of Carrollton Bicentenary Commission).

Thus far, we have been talking about the fairly straightforward situation where Congress creates a body, authorizes the appropriation of funds, and then makes the appropriation. There are variations. Instead of creating the commission directly, Congress can authorize or direct the President to create it. E.g., Pub. Res. No. 106, 74th Cong., ch. 556, 49 Stat. 1516 (President authorized to establish Charles Carroll of Carrollton Bicentenary Commission); Department of Defense Authorization Act, 1985, Pub. L. No. 98-525, § 1511, 98 Stat. 2492, 2626 (1984) (President directed to establish Chemical Warfare Review Commission). Congress can fund the body by a direct appropriation (e.g., 50 Stat. 10 for the Carroll Bicentenary Commission), or it can tell the President, in effect, to go hunt for the money. See, e.g., 15 U.S.C. § 1022f(b) (advisory boards on national economic programs and policies). These statutes tend to be less detailed than their direct-creation siblings, the detail being filled in by the implementing executive order. E.g., Exec. Order No. 12,502, January 28, 1985 (Chemical Warfare Review Commission).

Congress may, either in conjunction with a direct appropriation or without it, require an existing department or agency to provide financial support services. For example, the law creating the Civil War Centennial Commission provided:

> "Expenditures of the Commission shall be paid by the National Park Service as general administrative agent, which shall keep complete records of such expenditures and shall account also for all funds received by the Commission." Pub. L. No. 85-305, § 6(b)(1), 71 Stat. 626, 627 (1957) (the Civil War Centennial Commission received direct appropriations).

Section 201 of the ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, 939 (1995), codified at 49 U.S.C. § 726(d)(2), authorizes the Secretary of Transportation or the Chairman of the Surface Transportation Board to "pay the reasonable and necessary expenses incurred by" the Railroad-Shipper Transportation Advisory Council. Another variation is to appropriate money to an existing agency, to be transferred to the board or commission when it is

legally capable of receiving them. E.g., 2 Op. Off. Legal Counsel 366 (1977).[36]

Still another variation is found in the law establishing the National Commission on Restructuring the Internal Revenue Service:

> "The Secretary of the Treasury is authorized on a nonreimbursable basis to provide the Commission with administrative services, funds, facilities, staff, and other support services for the performance of the Commission's functions." Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, § 637(d)(4), 109 Stat. 468, 511 (1995) (emphasis added).

Absent a direct appropriation, this would appear to be sufficient authority for Treasury to fund the Commission. However, if Congress had been making direct appropriations and then stopped, a provision of this sort would enable the supporting agency to provide various kinds of stopgap or perhaps even supplemental financial assistance, but would not permit funding of the commission's entire operations, unless of course this was the reason Congress stopped making appropriations. B-39995-O.M., April 28, 1983 (Cost Accounting Standards Board).

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

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

[36]Although not germane to the result or to the point made in the text, the "appropriation" cited in the OLC opinion was merely an authorization.

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

(3) Committees established by the executive branch

The Justice Department has advised that, with the possible exception of performing constitutional responsibilities in an emergency, the President lacks the power to create a new operational agency in the executive branch. Legislation is required. 9 Op. Off. Legal Counsel 76 (1985). However, this inhibition does not exist in the case of an advisory committee. As we have seen, the Federal Advisory Committee Act explicitly recognizes, in sections 3(2) and 9(b), the inherent authority of the President, and of agency heads, to establish purely advisory bodies.[37]

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

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

As one court has noted, "FACA provides very little guidance as to the manner in which advisory committees are to be funded." Metcalf v. National Petroleum Council, 553 F.2d 176, 180 (D.C. Cir. 1977). Be that as it may, the executive order must also provide for funding. While most of the committee's needs will be met by the agency assigned to provide support services, it will still need some money for such things as travel expenses and printing of reports. The President, lacking the authority to authorize or appropriate funds, must look to some existing source. The most common approach is to designate an existing agency to provide funding, subject to the availability of appropriations. The funding agency must be sufficiently related in subject matter to the advisory body so as to pass muster from the perspective of purpose availability. Some examples, which will also provide some indication of the range of advisory bodies that are created, follow:

- Exec. Order No. 13,037, § 4(b) (1997): Commission to Study Capital Budgeting, funded by Treasury Department.
- Exec. Order No. 13,015, § 3(b) (1996): White House Commission on Aviation Safety and Security, funded by Department of Transportation.
- Exec. Order No. 12,961, § 3(c) (1995): Presidential Advisory Committee on Gulf War Veterans' Illnesses, funded by Department of Defense.
- Exec. Order No. 12,546, § 3(c) (1986): Presidential Commission on the Space Shuttle Challenger Accident, funded by the National Aeronautics and Space Administration.
- Exec. Order No. 12,367, § 3(b) (1982): President's Committee on the Arts and the Humanities, funded by the National Endowment for the Arts.
- Exec. Order No. 12,345, § 4(d) (1982): President's Council on Physical Fitness and Sports, funded by Department of Health and Human Services. (This was originally created by President Eisenhower in 1956, and has been renewed by successive Presidents.)
- Exec. Order No. 12,229, § 1-301 (1980): White House Coal Advisory Council, funded by Department of Labor.

The pertinent provisions of FACA are sections 5(b)(5), 5(c), 12, and 14. Section 5(b)(5) tells Congress to make provision for support services and funding in any legislation creating an advisory committee. Section 5(c) makes this applicable to the President or

any other federal official creating an advisory committee.[38] Section 12(a) requires each agency to keep sufficient records to "fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities." The General Services Administration does this for Presidential committees. Section 12(b) directs each agency to be "responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise." Section 14 directs each advisory committee to terminate not later than two years after its creation, except that it can be renewed by the establishing authority for successive two-year periods.[39] Thus, FACA clearly condones the practice of using existing agency appropriations to fund advisory committees. See 63 Comp. Gen. 110, 111 (1983) (President's Commission on Executive Exchange funded by Office of Personnel Management's "salaries and expenses" appropriation); 61 Comp. Gen. 69 (1981) (United States Advisory Commission on Public Diplomacy funded by United States Information Agency).

If the agency providing funding has several appropriations, as in the case of cabinet departments, it must select the one most closely related to the committee's functions, applying the principle that the specific prevails over the general. See B-202362, March 24, 1981 (funding for United States-Japan Economic Relations Group, provided by State Department, is chargeable to appropriation for "International Conferences and Contingencies" rather than "salaries and expenses").

Of course, any expenditure by the committee must be for an authorized purpose. E.g., 61 Comp. Gen. 69 (1981) (committee could procure outside legal advice on the extent of its independence). Restrictions in the funding agency's appropriation act applicable to

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

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

all funds appropriated in that act must generally be followed. B-222758, June 25, 1986 (Chemical Warfare Review Commission violated anti-lobbying provision in Defense Department appropriation act).[40] In addition, lobbying is not an advisory function. Id.

Most committees are funded in the manner described above—from the appropriations of a designated agency. Some are funded from one of the discretionary appropriations available to the President. For example, the so-called Warren Commission (Commission to Report Upon the Assassination of President John F. Kennedy) was funded from the "Emergency Fund for the President." Exec. Order No. 11,130 (1963). So was an earlier body, the Missouri Basin Survey Commission. Exec. Order No. 10,318 (1952). (The Emergency Fund was later redesignated "Unanticipated Needs.")

Some committees have mixed public-private funding. For example, the President's Commission on Executive Exchange received funding support from the Office of Personnel Management, and was also statutorily authorized to impose certain fees and to place them in a revolving fund in the Treasury. This made it necessary to determine whether a given expenditure was direct support or a general administrative expense. GAO concluded in one such case that a word processor and a postage machine were "direct support" expenses and therefore could be charged to the private-sector account, whereas reupholstering furniture and procuring commercial insurance for loaned works of art were administrative expenses chargeable to OPM funds. 63 Comp. Gen. 110 (1983).

Still other committees are intended to perform their functions at little or no cost to the government. An example here is President Reagan's Private Sector Survey on Cost Control in the Federal Government, the so-called Grace Commission. In setting up the Survey's executive committee, the President directed that it was "to be funded, staffed and equipped, to the extent practicable and

[40]We say "generally" because B-222758 is the easy case. More difficult would be the case, on which we have found no precedent or discussion, where a restriction would effectively make it impossible for the committee to do what it was set up to do.

permitted by law, by the private sector without cost to the Federal Government." Exec. Order No. 12,369, § 3(e) (1982).

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

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

As in the case of Presidential committees, Congress may authorize a particular agency to create advisory committees, either specifically or in general terms. E.g., 10 U.S.C. § 5024 (Secretary of Navy authorized to appoint Naval Research Advisory Committee); 15 U.S.C. § 776 (general authority for Department of Energy advisory committees). Alternatively, an agency head can establish an advisory committee without statutory authority. The "establishing document" will vary with the agency's own system of internal directives. For example, the Attorney General has a numbered series of "Attorney General Orders," and used one of these to establish Law Enforcement Coordinating Committees. See 5 Op. Off. Legal Counsel 283 n.2 (1981). Whatever the precise mechanism, the establishment must be "determined as a matter of formal record" and published in the Federal Register. FACA § 9(a)(2). Other procedures are found in the GSA regulations. The committees are fully subject to the termination/renewal provisions of FACA § 14.

If Congress has the greatest latitude in funding options and the President has somewhat less, the individual agency has least of all.

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

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

> "Whether or not one assumes that the Russell amendment was originally intended to apply to nonstatutory advisers or advisory groups, [FACA] has intervened. It has specifically authorized the creation of purely advisory committees; it has provided that they may have a 2-year life; and it has contemplated, and made provision for, the practice of using agency funds to support advisory committees. Accordingly, if indeed agency funds may otherwise be lawfully expended for such a purpose, there is no longer any reason, under the Russell amendment, to bar an expenditure of funds in support of an advisory committee merely because the committee has been in existence for more than 1 year." 3 Op. Off. Legal Counsel 263, 266-267 (1979).

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

In addition to the general funding statutes, there may be agency-specific laws which authorize or restrict agency activity in this area. For example, 22 U.S.C. § 2672 authorizes the State Department to fund the United States' participation in certain international

activities. This was one of the statutes State relied on—properly, GAO found—to participate in funding the National Commission on the Observance of International Women's Year in the mid-1970s. See HRD-77-26, January 13, 1977, at 5-6 (GAO letter report). Section 2672 includes its own one-year restriction similar to the Russell Amendment. See B-202362, March 24, 1981.

(4) Donations

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

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

The statute will normally not define who can make the contributions, but there are exceptions, such as—

"The Commission is authorized to receive funds through grants, contracts, and contributions from State and local governments and organizations thereof, and from nonprofit organizations." Pub. L. No. 89-733, § 6, 80 Stat. 1162 (1966).

The "Commission" refers to the Advisory Commission on Intergovernmental Relations. The provision was not so much a deliberate attempt to exclude individuals, but a desire to foster

increased participation by those most directly affected by ACIR's work.

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

The authority to accept gifts does not include the authority to solicit them. This is especially true because solicitation will almost invariably involve the use of other government funds, either for staff salaries and expenses or the procurement of some fund-raising capacity. E.g., B-211149, June 22, 1983. When Congress wants an entity to engage in solicitation, it specifically so provides in the gift acceptance provision. Examples are 36 U.S.C. § 2304 (Holocaust Memorial Council); 29 U.S.C. § 1513(e) (private industry councils under the Job Training Partnership Act); Pub. L. No. 98-101, 97 Stat. at 721, § 5(h)(1). In order to preclude questions of interpretation, it is always preferable for the statute to use the word "solicit" if that is desired. However, something less may suffice. For example, a statute which provided that nongovernment sources "shall be encouraged to participate to the maximum extent feasible . . . and to make contributions" has been construed as authorizing solicitation. 6 Op. Off. Legal Counsel 541, 544-546 (1982).

In most cases, donated funds are seen merely as an authorized supplementation of the commission's other funding sources. In some cases, however, there is a clear intent that the commission be funded in its entirety, or as close thereto as possible, from donated funds. For example, the statute creating the Martin Luther King, Jr. Federal Holiday Commission specified that "[a]ll expenditures of the Commission shall be made from donated funds." Pub. L. No. 98-399, § 7, 98 Stat. 1473, 1474 (1984). Similarly, the executive order creating the so-called Grace Commission directed that it be funded "to the extent practicable and permitted by law, by the private sector without cost to the Federal Government." Exec. Order No. 12,369, § 3(e) (1982). The requirement may be limited to certain of the commission's functions. E.g., 36 U.S.C. § 2304 (Holocaust Memorial Council may use only donated funds to construct museum). An interesting variation is the Railroad-Shipper Transportation Advisory Council, which is authorized to receive government funds

and to solicit and use donations, but must "undertake best efforts to fund [its] activities privately" before making a request for federal money. Pub. L. No. 104-88, § 201(a), 109 Stat. 803, 939, codified at 49 U.S.C. § 726(d)(4).

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

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

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

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

B. Government Corporations

1. Introduction: The Theory and the Controversy

The federal government has utilized the corporate device in various forms and contexts, for a long time. This usage has been studied probably as intensively as anything else in the federal realm. Although theory and practice often diverge, a theory of government

corporations—albeit an unofficial one in the sense that it is not reflected in legislation—has emerged. In an often-cited passage, the Supreme Court said in a 1927 case:

> "[A]n important if not the chief reason for employing these incorporated agencies was to enable them to employ commercial methods and to conduct their operations with a freedom supposed to be inconsistent with accountability to the Treasury under its established procedure of audit and control over the financial transactions of the United States." United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 8 (1927).

This points to two key features of the government corporation, at least the theoretical government corporation—commercial activities and freedom, to greater or lesser extent, from the laws that govern accountability of non-corporate government agencies to the Treasury.

Twenty years later, another often-cited document, President Truman's 1948 Budget Message, presented views on the proper standards for using the corporate device. A corporate form of organization, according to President Truman, is appropriate for the administration of governmental programs that (1) are predominantly of a business nature, (2) produce revenue and are potentially self-sustaining, (3) involve a large number of business-type transactions with the public, and (4) require greater flexibility than the customary type of appropriations budget ordinarily permits.[41] We see commercial activities and autonomy again, along with another important feature: revenue-producing activities of a type which would benefit from, or be facilitated by, revolving fund-type financing. While President Truman's position is often invoked as a guide in this area, it has never become law and is not always followed.

Although there is no clear and universally accepted standard, it can be seen from the preceding paragraphs that the corporate device is something the government has turned to when it wants to do something that, for the most part, resembles a business enterprise. The practice has, however, engendered some controversy. As a

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

matter of fact, Dr. Harold Seidman, a leading expert in the field, calls the government corporation "one of the most controversial institutional innovations of our time."[42] At one extreme are advocates of the government corporation who view it "with almost religious devotion" and regard it "as a desirable end in itself, regardless of the purpose which it serves."[43] Those at this extreme are driven by what another writer terms a "cultural bias" that anything the private sector does is automatically and inherently "better" than anything the public sector does.[44] For example, Marshall Dimock, one of the government corporation's most ardent early supporters, wrote:

> "It is a tribute to the potential business efficiency inherent in the corporate device that government reliance upon the public corporation has tended to increase with the extension of state trading. Statesmen have realized that bureaucratic influences inhering in a system of central control and integrated administration are difficult to reform. . . . [N]ational legislators have more and more turned to the autonomous device, the public corporation. They have said, in effect, 'Let us use the same kind of legal entity, freedom of management, and independence of finance which contribute to the success of the best-managed private enterprises.' It is an argument that is hard to answer."[45]

Opponents of the government corporation have been no less short on rhetoric.[46] One early critic went so far as to write that "there is no place in our constitutional government for the performance of governmental functions by means of corporations."[47]

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

[43]Id.

[44]Francis J. Leazes, Jr., Accountability and the Business State: The Structure of Federal Corporation 4 (Praeger Publishers, 1987) (hereafter Leazes).

[45]John McDiarmid, Government Corporations and Federal Funds, at xiii (Univ. of Chicago Press, 1938) (introduction by Marshall E. Dimock).

[46]"My God, Senators! Stand up for your rights, and stand up for your country before it is too late, and . . . do away with these corporations that are going to make the United States of America a United States of Russia!" 79 Cong. Rec. 4051 (1935) (Sen. Schall).

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

Most reasoned analyses tend to avoid the extremes and focus instead on how the corporate device works or has been used in specific contexts. For example, Dr. Ronald C. Moe, one of the government's leading experts on government corporations, has noted that several government corporations "perform no commercial functions" and that—

> "Several of the new breed of corporations were created specifically to escape certain government-wide administrative, budgetary and personnel requirements, not because incorporation as a separate legal entity was necessary for their mission."[48]

Another common criticism is the corporation's lack of accountability. If a corporation is given a revolving fund, freedom from the fiscal laws governing other agencies, and perhaps even off-budget status, its accountability to Congress is minimal. In addition, as some analysts have pointed out, corporate autonomy can also diminish accountability to the President and weaken executive branch management.[49] While all supporters of the government corporation seem to laud freedom from accountability to Congress, some favor the escape from presidential control as well.[50]

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

[48]Ronald C. Moe, CRS No. 83-236GOV, Administering Public Functions at the Margin of Government: The Case of Federal Corporations, 24 (1983) (hereafter Moe 1983). See also, Is the Administrative Flexibility Originally Provided to the U.S. Railway Association Still Needed?, GAO/CED-78-19 (February 22, 1978).

[49]E.g., A. Michael Froomkin, Reinventing the Government Corporation, 1995 U. Ill. L. Rev. 543, 607-613 (1995); Ronald C. Moe, Government Corporations and the Erosion of Accountability: The Case of the Proposed Energy Security Corporation, 39 Pub. Admin. Rev. 566, 568 (1979).

[50]E.g., Marshall E. Dimock, Government Corporations; A Focus of Policy and Administration (Part II), 43 Am. Pol. Sci. Rev. 1145, 1149 (1949), summarized in Seidman 1952, supra note 42, at 94-95.

be sued, use and reuse revenues, and own assets."[51] While NAPA was basically supportive of the concept of the government corporation, it weighed in on the side of accountability and management control. The report recommended a set of eight "basic principles" which some view as fairly restrictive and which have been, in effect, honored more in the breach by both the executive and the legislative branches of the federal government. They are:

"1. All government enterprises and corporations should be agencies of the United States.

"2. All administrative and operational functions of the federal government should be performed by agencies of the United States located in the Executive branch.

"3. Although different organizational forms and powers and administrative flexibility are required for the effective performance of different government functions, all Executive organizations should be accountable to the President, duly appointed officials and the Congress.

"4. The officers and employees of government enterprises and corporations (other than mixed-ownership corporations intended for eventual private ownership) should be employees of the United States.

"5. A government corporation should normally be placed under the head of an existing department or agency rather than established as an independent Executive agency.

"6. No government corporation should create a subsidiary without approval of Congress.

"7. Financial transactions of all government corporations should be included in the federal budget.

"8. Corporations expected to be profit-making should be established in the private sector, and government corporations should be self-sustaining or potentially self-sustaining."[52]

[51]National Academy of Public Administration, I Report on Government Corporations 21 (1981) (hereafter NAPA 1981).

[52]Id. at iii-iv (Executive Summary), cited in Moe 1995, supra note 41, at 16.

The NAPA report also emphasized that "[t]he burden of proof for justifying exemptions from these principles should rest with the advocates of such exemptions."[53]

Because of its inherent institutional bias in favor of congressional control, GAO has also weighed in on the accountability side of the ledger. In commenting over the decades on numerous legislative proposals to create new corporations, GAO has recognized that corporations in some cases "may be necessary and valuable means of conducting the public business." B-96983, August 15, 1950. However, it has also expressed a clear preference for the normal budget and appropriations process and the fiscal requirements which flow from that process, and has argued that departures from the standard should be permitted only upon a clear showing that there is some valid programmatic reason for doing so—apart from a desire to be exempt from fiscal and regulatory laws. E.g., B-127124, April 10, 1973; B-160803, February 10, 1967. GAO has also used the "Truman criteria" in assessing the appropriateness of the corporate form. E.g., B-94958, May 23, 1950.

Another point made in various GAO comments is that the need for flexibility does not necessarily require corporate status. Congress can legislatively provide the desired degree of flexibility to any agency. "[B]udgeting, accounting, and reporting may be designed to suit the individual and particular needs of any activity under any method of financing." B-120047, July 17, 1961, at 3. This is related to a point Seidman and Moe have made: Use of the term "corporation" is perhaps unfortunate and confusing because it tends to bring in the entire range of private-sector concepts, some of which are not necessary or simply do not fit when implementing a government program.[54]

Largely because each corporation is the creature of its enabling legislation, there is no single legally recognized model for the government corporation. As Leazes puts it:

[53]Id.

[54]Seidman 1952, supra note 42, at 93; Moe 1983, supra note 48, at 3.

"Federal corporations should not be treated as if they constitute a single class of organizational type. Virtually all are unique creatures, and . . . what is distinctive about them as a group is that each embodies its own calculated mixture of public and private elements and of financing and controls, and each is a result of a particular congressional enactment after extensive controversy over rival policies and interests."[55]

The fact that "[n]o two Federal Government corporations are completely alike"[56] underscores the importance of the enabling legislation. A government corporation (and this is true of any agency as well) "possesses only those powers which are enumerated in the act of Congress creating it."[57] This of course includes any other legislation specifically made applicable. The governing legislation determines the body's powers and functions, its financial arrangements, and its degree of operating flexibility. As Dr. Moe has stated:

"Because there is no general incorporation law defining government corporations, Congress is free to call any entity a 'corporation' and assign to this corporation whatever characteristics it chooses."[58]

Or, as the court in United States v. Nowak, 448 F.2d 134, 138 (7th Cir. 1971), put it:

"If it chooses to make use of a 'corporation,' Congress is not limited by traditional notions of corporate powers and organization but may mold its vehicle in any way which appears useful to the accomplishment of the legislative purpose."

Notwithstanding this susceptibility to variation, it is possible to identify the major characteristics of government corporations. (Apart from the requirement for a legislative charter, none of these rises to the level of a rule of law.) A government corporation is generally (1) a federally chartered entity (2) created to serve a public function (3) of a predominantly business nature. Government Corporations: Profiles of Existing Government Corporations, GAO/GGD-96-14, at 1 (December 1995). Most, but not all, have been

[55]Leazes, supra note 44, at 7.

[56]Moe 1995, supra note 41, at 47.

[57]Seidman 1952, supra note 42, at 93.

[58]Moe 1983, supra note 48, at 33.

created to carry out business-type programs that are thought to need a high degree of autonomy and flexibility. Congress Should Consider Revising Basic Corporate Control Laws, GAO/PAD-83-3, at 1 (April 6, 1983). Consequently, they are not subject to all of the federal statutes or regulations generally applicable to government agencies. Government corporations may be independent or subject to significant federal control as part of a government department or agency.[59] They may or may not have a board of directors, although most do, and may have board members who are named government officials, such as the head of an agency, or board members who are appointed by the President. Many government corporations are either fully or partially funded by the federal government, but may also have authority to raise and collect revenue from other sources consistent with their business-type operations. Congress has authorized other government corporations to issue obligations backed by the full faith and credit of the United States. The theory is that the operational and financial flexibility given to a government corporation allows it to respond more quickly to changes in the marketplace and to take advantage of cost-saving opportunities. Id. at 1.

It is also possible to identify several powers common to most government corporations:

> "With some minor variations, government corporations can sue and be sued; acquire property in their own name; use their revenues; obtain funds either by borrowing from the Treasury or from revolving funds, instead of by securing annual appropriations; and determine the character and necessity of their expenditures and the manner in which they are incurred, allowed, and paid, subject to laws specifically applicable to government corporations rather than to general statutes controlling the expenditure of public funds. These are the vital ingredients which give a government corporation its distinctive character and without which it cannot operate successfully."[60]

While the 20th century proliferation of government corporations has stemmed largely from the perceived attractiveness of the private-sector corporate model, the analysts caution against taking the analogy too far. In this connection, Seidman points out:

[59]E.g., Moe 1983, supra note 48, at 36-39.

[60]Seidman 1952, supra note 42, at 93-94.

"While government and private corporations in the United States do possess certain common characteristics, there are and always have been fundamental differences. Both have a legal personality, can sue and be sued, and generally have boards of directors. Here the resemblance ends. Private corporations, with the obvious exceptions, are organized for profit and the corporate form is utilized primarily to take advantage of limited liability, pooling of investment, transferability of securities, and perpetuity. These benefits are of little or no significance for a government corporation."[61]

And, one more factor cannot, or at least should not, be ignored:

"Public funds (tax dollars), after all, are not freely given in voluntary market exchange for goods and services; they are legally confiscated from citizens, by force if necessary. . . . At this level . . . the private and governmental sectors are fundamentally different. It is for this reason that the standards for governmental control and enforced adherence to prescribed processes and procedures are—and have to be—so much higher than those of the private sector."[62]

GAO, in part because it used to be responsible for auditing government corporations, has conducted periodic surveys of the activities and financing of all existing government corporations. The earliest edition, called the Reference Manual of Government Corporations, was prepared in 1944 primarily for internal GAO use. It was reissued for more general use in 1945. S. Doc. No. 79-86 (1945). A 1985 edition was entitled Reference Manual of Corporations Authorized or Established by the Congress. It wasn't very long before the title was changed again: In 1988, Profiles of Existing Government Corporations was issued as GAO/AFMD-89-43FS (December 1988) and as a committee print of the House Committee on Government Operations. It was updated and reissued in December 1995 with the report designation GAO/GGD-96-14. Since corporations come and go over time, and provisions for their governance and financing may change, each edition of the Manual/Profiles is useful at least for historical purposes and contains material not found in the others. See, e.g., Lebron v.

[61]Id. at 93.

[62]Ronald C. Moe and Robert S. Gilmour, Rediscovering Principles of Public Administration: The Neglected Foundation of Public Law, 55 Pub. Admin. Rev. 135, 143 (1995). Elsewhere, Moe attributes to Wallace Sayre the quip that "the public and private sectors are alike in the nonessentials, differing only in the essentials." Moe 1995, supra note 41, at xiii.

National R.R. Pass'r Corp., 513 U.S. 374, 387, 395 (1995) (citing the 1945 edition).

2. The Problem of Definition

a. Government Corporations

In our preceding discussion of miscellaneous boards and committees, we noted at the outset the lack of a commonly accepted working definition. That lack is equally prominent in the case of government corporations. Dr. Moe has noted:

> "There is at present no universally accepted definition of what constitutes a government corporation, hence there are several listings of government corporations, each different and based upon the definition employed by the compiler."[63]

GAO has also pointed out the lack of a uniform definition. Congress Should Consider Revising Basic Corporate Control Laws, GAO/PAD-83-3, at 8 (April 6, 1983). Definitions found in the United States Code serve only limited purposes. For example, 5 U.S.C. § 103(1) defines the term, but only for purposes of Title 5, as "a corporation owned or controlled by the Government of the United States." Title 31 also has what amounts to a definition by virtue of including the word "instrumentality" in its definition of agency. 31 U.S.C. § 101. The chief (and only) government-wide regulatory statute, the Government Corporation Control Act, fails to include a definition but merely lists the entities covered.

As we have seen, one approach is to try to identify common attributes. One account identifies some of these attributes as "a public purpose, a federal government charter, some form of government supervision, and a public subsidy."[64] While this is useful in establishing a conceptual direction, it suffers when you break it down to the working level. If, for example, one equates "charter"

[63]Moe 1995, supra note 41, at xii. For virtually identical comments, see John T. Tierney, Government Corporations and Managing the Public's Business, 99 Pol. Sci. Q. 73, 76 n.6 (1984), and Moe 1983, supra note 48, at 5.

[64]Leazes, supra note 44, at 18. Leazes also adopts the definitional approach of the Government Corporation Control Act by specifically identifying, by name, the entities he includes under his government corporation aegis. Id. at 9-10.

with "enabling legislation"—and it is beyond question that the charter of a government corporation is its enabling legislation—the attributes apply equally to any government agency. Similarly, we previously noted a statement from a GAO report that government corporations "are generally federally chartered entities created to serve a public function of a predominantly business nature." GAO/GGD-96-14, at 1 (December 1995). This again shows the hazard of generalization, saved by the fortunate inclusion of the word "generally," since some government corporations perform only governmental functions.

Neither is it useful to construct a classification based on the mere presence or absence of the word "corporation" in the entity's name. An old state court case, considering the application of sovereign immunity to a state-created corporation, put it this way:

> "It is not necessary that the thing created by the legislature should be named by it a corporation. Its character depends upon the powers given it, and not upon the name by which the legislature may call it." Gross v. Kentucky Bd. of Mgrs., 49 S.W. 458, 459 (Ky. Ct. App. 1899).

Acknowledging that any classification is imperfect and open to debate, we, for purposes of this discussion, are concerned primarily with the following categories:

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

2. Corporations created and fully or substantially funded by the United States Government, but not subject to the Control Act. Examples include the Legal Services Corporation and the Corporation for Public Broadcasting.[65]

[65]The Corporation for Public Broadcasting has strenuously objected to being included under any "government corporation" umbrella. See NAPA 1981, supra note 51, at Appendix 3. We include it under our umbrella listing because (1) it was statutorily created as a corporation and (2) it spends federal money.

3. Entities created, and at least partially funded, by the federal government which are not designated as corporations but which have comparable powers, and are also at least partially exempt from the Control Act. Examples include the United States Postal Service, the Smithsonian Institution, and the Bonneville Power Administration.[66] (The main difference between this group and group 2 is that the legislation creating a group 3 entity does not confer corporate status on it. Of course, other differences flow from that distinction.)

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

b. Government-Sponsored Enterprises

Although not a major focus of this section, we will, in addition to the categories noted above, occasionally refer to the "government-sponsored enterprise." The term "government-sponsored enterprise" (GSE) refers to a "privately owned and operated federally chartered financial institution that facilitates the flow of investment funds to specific economic sectors."[67] A conceptually similar but more detailed definition is found in the Congressional Budget Act, 2 U.S.C. § 622(8). GSEs are, largely but not exclusively, those entities with names that "sound like those of aging singers or the latest fast-food sandwich"[68]—Fannie Mae, Farmer Mac, etc. As always, there are exceptions. For example, the Government National Mortgage Association—"Ginnie Mae"—is a wholly owned government corporation. 31 U.S.C. § 9101(3)(G). Also, the status of some entities is debatable. Some contended, for example, that the original College Construction Loan Insurance Corporation—

[66]The Bonneville Power Administration is a true hybrid. It is not a government corporation although it has many of the powers of one and operates from a revolving fund. It is subject to the budget, but not the audit, provisions of the Corporation Control Act. See 16 U.S.C. §§ 832a, 838i. Our discussion does not further address the Postal Service or the Smithsonian, which the Supreme Court has called "the oldest surviving government corporation." Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 391 (1939).

[67]A Glossary of Terms Used in the Federal Budget Process: Exposure Draft, GAO/AFMD-2.1.1, at 49 (Rev. January 1993) (hereafter cited as Budget Glossary Exposure Draft).

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

"Connie Lee"—was not a GSE because it was partly government-owned; others included it.[69]

Another not too different definition is:

"A GSE is a privately owned, federally chartered, financial institution with nationwide scope and specialized lending powers that benefit from an implicit federal guarantee to enhance its ability to borrow money."[70]

Legislation creating GSEs has not used the same terminology. Farmer Mac is a "federally chartered instrumentality of the United States." 12 U.S.C. § 2279aa-1(a)(1). So is the Financial Assistance Corporation. 12 U.S.C. § 2278b. Fannie Mae is a "Government-sponsored private corporation." 12 U.S.C. § 1716b. Freddie Mac is simply a "body corporate." 12 U.S.C. § 1452(a). Some have suggested that the legal status of GSEs has been kept intentionally ambiguous.[71]

For purposes of comparing GSEs with other forms of government-created corporations, the important points are that (1) GSEs are regarded as privately owned (which, in some cases and depending on how one frames one's definition, may be only partially true);

[69]Compare Ronald C. Moe and Thomas H. Stanton, Government-Sponsored Enterprises as Federal Instrumentalities: Reconciling Private Management with Public Accountability, 49 Pub. Admin. Rev. 321, 328 n.8 (1989) (Connie Lee not a GSE), with Carrie Stradley Lavargna, Government-Sponsored Enterprises Are 'Too Big to Fail': Balancing Public and Private Interests, 44 Hastings L.J. 991, 999 n.40 (1993) (Connie Lee included as GSE). Congress took action in 1996 to terminate the federal ownership and completely "privatize" Ms. Lee. See 20 U.S.C. § 1155.

[70]Thomas H. Stanton, Federal Supervision of Safety and Soundness of Government-Sponsored Enterprises, 5 Admin. L.J. 395, 401 (1991); Moe and Stanton, supra note 69, at 321.

[71]Moe and Stanton, supra note 69, at 321, concurring with Harold Seidman, The Quasi World of the Federal Government, 6 Brookings Rev. 23 (1988) (hereafter Seidman 1988).

(2) they are financial institutions;[72] and (3) they are supervised but not directly managed by the government.[73] Summary information on a number of GSEs may be found in GAO's Budget Issues: Profiles of Government-Sponsored Enterprises, GAO/AFMD-91-17 (February 1991). GSEs are subject to audit by GAO only if specifically provided by statute. B-114828, November 25, 1975, at 2.

GAO has issued detailed reports on the government's exposure to risks stemming from its use of GSEs. See Government-Sponsored Enterprises: The Government's Exposure to Risks, GAO/GGD-90-97 (August 1990); Government-Sponsored Enterprises: A Framework for Limiting the Government's Exposure to Risks, GAO/GGD-91-90 (May 1991). In 1992, Congress enacted the Federal Housing Enterprises Financial Safety and Soundness Act, 12 U.S.C. ch. 46, to provide a measure of federal supervision and regulation over Fannie Mae and Freddie Mac. The law established an Office of Federal Housing Enterprise Oversight whose job it is to see that Fannie and Freddie are adequately capitalized and operating safely. 12 U.S.C. §§ 4502(6), 4511, 4513(a).

While a GSE is, except as expressly provided, not subject to the laws governing federal agencies, it is nevertheless a creature of statute and exists to perform only those functions assigned to it in its enabling legislation. Any activity it undertakes must directly relate to the performance of one or more of those specified functions. Arnold Tours, Inc. v. Camp, 472 F.2d 427 (1st Cir. 1972) (national bank may not operate a full-scale travel agency); Association of Data Processing Service Organizations v. Federal Home Loan Bank Board, 568 F.2d 478 (6th Cir. 1977) (federal home loan banks not

[72]A broader definition could include entities like the Corporation for Public Broadcasting. E.g., Lloyd D. Musolf and Harold Seidman, The Blurred Boundaries of Public Administration, 40 Pub. Admin. Rev. 124, 125 (1980). Most subsequent definitions, however, including one by the Office of Management and Budget, incorporate the financial institution element. See Government Corporations, OMB Memorandum No. M-96-05, App. I (December 8, 1995) (definition very similar to Moe/Stanton definition quoted in the text).

[73]Moe and Stanton, supra note 69, at 323-324, define "instrumentality" as "a privately owned institution that is supervised but not directly managed by the government," although they acknowledge the lack of a statutory definition.

authorized to sell on-line data processing services to member institutions);[74] 71 Comp. Gen. 49 (1991) (Farmer Mac is authorized to guarantee the timely payment of principal and interest on certain mortgage-backed securities, but is not authorized to purchase those securities). The decision stressed that a statute's purpose clause is not an independent grant of authority. 71 Comp. Gen. at 52.

c. Federally Chartered Corporations

This group consists of the 80-plus corporate entities whose charters comprise Title 36 of the United States Code, Subtitles II and III.[75] Among the best-known examples are the American Red Cross,[76] American Legion, and the United States Olympic Committee. Each entity occupies its own chapter in Title 36, and each is designated a "body corporate and politic" or a "federally chartered corporation." In addition, a provision no longer in the Code used the term "private corporations established under Federal law."[77] Of course this terminology can apply equally to GSEs. The difference is that the Title 36 corporations are not "business corporations;" they are patriotic, fraternal, or charitable associations. The federal charter is viewed as a mark of prestige. The primary purpose of granting it is "to bestow public honor and recognition on the works of the organization." Girl Scouts v. Personality Posters Mfg., 304 F. Supp. 1228, 1232 (S.D.N.Y. 1969).

Although there is variation, the statutory charters "follow a common pattern."[78] The typical charter starts by identifying the incorporators by name and declaring their corporate status. The

[74]The federal home loan banks are usually included as GSEs. E.g., GAO/AFMD-91-17 at 14. They are also identified as mixed-ownership government corporations. 31 U.S.C. § 9101(2)(C).

[75]Apart from this overview treatment and a brief mention later in connection with state and local taxes, our discussion does not further address these entities.

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

[77]36 U.S.C. § 1101 (1994 ed.). Title 36 was recodified in August 1998 by Pub. L. No. 105-225, 112 Stat. 1253. The former section 1101 was omitted as unnecessary. In addition, the American Red Cross was given its own subtitle, subtitle III, as a "treaty obligation organization."

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

incorporators range from a few to several dozen. (The recodification dropped the individual names as executed and unnecessary.) The statute may be creating a new organization, or it may merely be giving a federal charter to an organization already chartered under state law. The statute will then state the corporation's purposes and outline its general powers. A typical "powers" provision will include such things as sue and be sued, adopt and use a corporate seal, adopt by-laws, hold and convey property, and enter into contracts. E.g., 36 U.S.C. § 152305 (National Music Council).[79]

Most have perpetual succession, a feature common to private business corporations. E.g., 36 U.S.C. § 30502(c) (Blue Star Mothers of America). A relatively few have limited duration. For example, the Grand Army of the Republic, chartered in 1924 but in existence long before, consisted of those who had served in the United States armed forces during the Civil War and were honorably discharged. The charter provided that the corporation would terminate when the last of its members died. Act of June 3, 1924, ch. 242, § 6, 43 Stat. 358, 360. This of course happened some time ago, and the charter is no longer carried in the U.S. Code.

A common provision prohibits the corporation from issuing stock or paying dividends. E.g., 36 U.S.C. § 22307(a) (American Symphony Orchestra League). Some go a step further and explicitly prohibit activities for pecuniary profit. E.g., 36 U.S.C. § 152307(a) (National Music Council). Although this language is infrequent, it seems clear based on the stated purposes of these corporations[80] that, even in its absence, the corporation is not intended to operate on a for-profit

[79]Our choice of examples is intended to convey some idea of the types and range of organizations Title 36 encompasses.

By the way, in case you find our citation to 36 U.S.C. § 152305 for the National Music Council (as well as those for the other organizations in this discussion) a bit odd, rest assured that it is correct. The section numbers in title 36 of the U.S. Code go rather higher than seems normal for the Code—up to section 300,111, at the writing of this chapter, to be precise.

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

basis. Several charters provide for termination if the corporation loses its tax-exempt status under the Internal Revenue Code. E.g., 36 U.S.C. § 70108(b) (Fleet Reserve Association).[81]

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

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

For the most part, Title 36 corporations do not receive federal funds. A few do or, at least, are explicitly authorized to seek federal grants, reimbursements, or other kinds of "support." The United States Olympic Committee, for example, can apply for grants from the Department of Commerce. 36 U.S.C. § 384 (1994 ed.).[82] The National Film Preservation Foundation is authorized to receive up to $250,000 a year from the Library of Congress, to be used only to match private contributions and not for administrative expenses. 36 U.S.C. § 151711. The National Academy of Public Administration is required to study and report on "any subject of government" when requested by any branch of the federal government, to be paid for from appropriated funds available to the requestor. 36 U.S.C. § 150104. See also 36 U.S.C. § 150303 (similar provision for National Academy of Sciences). Even in these instances, appropriated funds are only a portion, substantial though it may be, of the corporation's

[81]The source provision, 36 U.S.C. § 5613 (1994), explicitly stated that the charter "shall terminate" if the association fails to maintain its tax-exempt status, language omitted from the recodification in favor of general language prescribing expiration for noncompliance with any charter provision. 36 U.S.C. § 70102(b).

[82]The recodification dropped this provision as "obsolete" because Congress authorized the grants in 1980 and none were ever made. See H.R. Rep. No. 105-326, at 305 (Table 2A) (1997). Since the funds appropriated for this remain available until expended and the authorization contains no expiration, we see no reason the authority could not be used in the future. See Pub. L. No. 95-482, 92 Stat. 1603, 1606 (1978) (authorization); Pub. L. No. 96-304, 94 Stat. 857, 898 (1980) (appropriations.)

revenue. In no case is a Title 36 corporation funded entirely by direct federal appropriations.[83] In a few instances, federal agencies are authorized to provide logistical support. E.g., 36 U.S.C. §§ 70909 (Department of Education authorized to make available "personnel, services, and facilities" to the Future Farmers of America); 220107 (Defense Department authorized to make its resources available to United Service Organizations).

Most of the revenue of these corporations comes from donations and, in some cases, membership fees. Some of the corporations are expressly authorized to engage in income-producing (but not profit-making) activities. E.g., 36 U.S.C. § 220305(7) (United States Capitol Historical Society may sell commemorative medals and other souvenir items); 36 U.S.C. §§ 40703(5), 40732 (Corporation for the Promotion of Rifle Practice and Firearms Safety may charge user fees and may sell surplus rifles). Those without such specific authority could probably engage in limited income-producing activities under their general corporate powers.

Some Title 36 charters include their own audit requirements. The American Red Cross, for example, must prepare an annual itemized report of receipts and expenditures, which is audited by the Department of Defense, and must reimburse the expenses Defense incurs in conducting these audits. 36 U.S.C. § 300110. Title 36 corporations whose charters do not include audit provisions are subject to the general requirements of 36 U.S.C. § 10101, subsection (a) of which requires an annual audit "in accordance with generally accepted auditing standards" by independent accountants. Subsection (b) requires submission of audit reports to Congress, supplemented "in reasonable detail" by a statement of income and expenses including the results of any commercial-type activities. GAO does not audit these corporations. It does, upon request, conduct a limited "report audit," including a review of the corporation's financial statements, to determine whether the audit report complies with the financial reporting requirements of the

[83]Title 36 includes two entities substantially supported by appropriated funds—the American Battle Monuments Commission (36 U.S.C. ch. 21) and the United States Holocaust Memorial Council (id. ch. 23). While placed in Title 36, these are not corporations and are thus not included in the concept of "Title 36 corporations" discussed in the text. Recognizing the essential differences, the recodification separated these from the rest and placed them in Subtitle I, Part B.

statutory charter or 36 U.S.C. § 10101. GAO's report of this review is very brief and, if no problems are found, concludes simply that "nothing came to our attention that would cause us to believe that the financial reporting requirements of the law have not been met." E.g., GAO/AIMD-98-177R, June 12, 1998 (Little League Baseball, Inc.).

The relationship of a Title 36 corporation to the federal government cannot be summarized in a simple statement. Several charters provide that the corporation "may not claim congressional approval or the authority of the United States Government for any of its activities." E.g., 36 U.S.C. §154708(d) (Non-Commissioned Officers Association of America). Others include a more explicit federal disclaimer provision:

> "The United States Government is not liable for any debts, defaults, acts, or omissions of the corporation. The full faith and credit of the Government does not extend to any obligation of the corporation." 36 U.S.C. § 151310 (National Fallen Firefighters Foundation).

For another example, see 36 U.S.C. § 151710 (National Film Preservation Foundation).

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

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

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

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

Others have held that the Red Cross shares the government's immunity from punitive damage awards. Barton v. American Red Cross, 826 F. Supp. 407 (M.D. Ala. 1993), aff'd mem., 43 F.3d 678 (11th Cir. 1994); Doe v. American National Red Cross, 847 F. Supp. at 648-649; Doe v. American National Red Cross, 837 F. Supp. 121 (E.D.N.C. 1992).

There are relatively few cases involving Title 36 corporations other than the Red Cross. The court in United States v. District of Columbia, 558 F. Supp. 213 (D.D.C. 1982), vacated as moot, 709 F.2d 1521 (D.C. Cir. 1983), followed the Red Cross precedent and found the U.S. Capitol Historical Society to be an instrumentality of the United States for purposes of tax immunity. Among the facts the court thought relevant were that the Society receives rent-free space in the Capitol to operate a visitor's center (see 40 U.S.C. § 831), and that its charter expressly prohibits any of the Society's funds from inuring to the benefit of its members (36 U.S.C. § 220308(b)). The judgment was vacated on appeal because Congress passed legislation giving the Society tax-exempt status. See 36 U.S.C. § 220307.

In the Stearns litigation cited above, the court held that the Veterans of Foreign Wars was not a "government actor" for purposes of the anti-discrimination protections of the Fifth Amendment. The Supreme Court reached the same conclusion (although far from unanimously) with respect to the United States Olympic Committee. San Francisco Arts & Athletics, Inc. v. United States Olympic Committee, 483 U.S. 522 (1987). Reaffirming that the mere fact of federal incorporation is not enough, the Court further emphasized that "[e]ven extensive regulation by the government" or the existence of a federal subsidy may not be enough. Id. at 544. It thus appears likely that few, if any, of the other Title 36 corporations would achieve the same level of "instrumentality" as the Red Cross.[84]

A charitable and benevolent corporation which operates without assistance or interference from the government is not a government

[84]One possibility is the Corporation for the Promotion of Rifle Practice and Firearms Safety, 36 U.S.C. ch. 407, because it was created to take over a program formerly administered by the Department of the Army, but there are no cases. Another is the U.S. Capitol Historical Society (see United States v. District of Columbia, cited in the text, discussing the Society's "governmental functions").

agency for purposes of the dual compensation laws, even though government officials may be involved it its administration. 26 Comp. Gen. 192 (1946). Similarly, travel for the benefit of such a corporation is not "official travel" and hence not compensable from appropriated funds, unless it can be shown that the travel also reasonably relates to some official duty of the traveler. B-56268, June 20, 1946.

Another area in which the relationship of Title 36 corporations to the federal government arises is the applicability of the Federal Tort Claims Act (FTCA), which expressly applies to "corporations primarily acting as instrumentalities or agencies of the United States." 28 U.S.C. § 2671. Under this standard, the Red Cross is not an agency or instrumentality for FTCA purposes. Rayzor v. United States, 937 F. Supp. 115 (D.P.R. 1996), aff'd mem., 121 F.3d 695 (1st Cir. 1997). Nor is the Civil Air Patrol, another Title 36 corporation. Pearl v. United States, 230 F.2d 243 (10th Cir. 1956); Kiker v. Estep, 444 F. Supp. 563 (N.D. Ga. 1978).

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

Still another area of controversy is the application of 28 U.S.C. § 1349, which prohibits courts from taking "federal question" jurisdiction of a suit by or against a corporation solely because "it was incorporated by or under an Act of Congress, unless the United States is the owner of more than one-half of its capital stock." The typical Title 36 corporation being a non-stock corporation, some courts have applied section 1349 by using a "government control" test. Thus, for example, the American Red Cross "functions independently and is in no way controlled by the Government" for

purposes of 28 U.S.C. § 1349, one reason being that the president appoints only eight of its 50 governors. C.H. v. American Red Cross, 684 F. Supp. 1018, 1022 (E.D. Mo. 1987), followed in, e.g., Collins v. American Red Cross, 724 F. Supp. 353 (E.D. Pa. 1989). In Burton v. United States Olympic Committee, 574 F. Supp. 517, 524 (C.D. Cal. 1983), the court reached the same result for the United States Olympic Committee because (1) USOC was the legal owner of its property, (2) any surplus funds do not revert to the U.S. Treasury, (3) it is self-governing and operates independent of federal control, and (4) it is not included in the Government Corporation Control Act.

Other courts have applied the stock ownership requirement literally and held that section 1349 can never form the basis of federal jurisdiction of a non-stock corporation because the government cannot own half of what does not exist. E.g., Burton v. USOC, 574 F. Supp. at 523; Stop the Olympic Prison v. USOC, 489 F. Supp. 1112, 1117 (S.D.N.Y. 1980). The Supreme Court has noted the split, but has not resolved it. American National Red Cross v. S.G., 505 U.S. 247, 251 and n.3 (1992).

d. Federally Funded Research and Development Centers

A "Federally Funded Research and Development Center" (FFRDC) is a privately owned but government-funded entity which has a long-term contractual relationship with one or more federal agencies to perform research and development and related tasks.[85] One authority refers to them as "'captive corporations,' which are legally private, but are almost entirely government financed."[86] The Federal Acquisition Regulation (FAR) states:

> "FFRDC's are operated, managed, and/or administered by either a university or consortium of universities, other not-for-profit or nonprofit organization, or an industrial firm, as an autonomous organization or as an identifiable separate operating unit of a parent organization." FAR, 48 C.F.R. § 35.017(a)(3).

The funding agency, which is usually the agency which participated in establishing the FFRDC, is called the sponsor. 48 C.F.R.

[85]Apart from this overview treatment, our discussion does not further address these entities.

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

§ 35.017(b). The FFRDC may be permitted to accept work from parties other than the sponsor if and to the extent specified in the sponsoring agreement. 48 C.F.R. § 35.017-1(c)(5). A sponsoring agreement may not exceed five years, but is renewable in five-year increments indefinitely. 48 C.F.R § 35.017-1(e). The FAR tells agencies to phase out FFRDCs which are no longer needed. 48 C.F.R § 35.017-5. Some better known FFRDCs sponsored by the Department of the Air Force are the Rand Corporation, Mitre Corporation, and the Massachusetts Institute of Technology's Lincoln Laboratory.

FFRDCs originated in the World War II era[87] and have proliferated in subsequent decades. The 1972 report of the Commission on Government Procurement, although expressing concern over the potential pitfalls of single-agency funding,[88] recommended that agencies continue to have "the option to organize and use FFRDCs to satisfy needs that cannot be satisfied effectively by other organizational resources."[89] The Office of Management and Budget's Office of Federal Procurement Policy implemented the Commission's recommendation by issuing Policy Letter No. 84-1, 49 Fed. Reg. 14462, 14464 (April 11, 1984), which was in turn implemented by the subsequent inclusion of coverage in the FAR.

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

[87] 2 Report of the Commission on Government Procurement 17 (1972).

[88] Id. at 18.

[89] Id. at 64 (App. E., Recommendation No. 5).

authorized the Secretary of Defense to establish an FFRDC to provide support to the Strategic Defense Initiative program. Pub. L. No. 100-180, § 227, 101 Stat. 1019, 1057 (1987).

While there is no government-wide statutory guidance on the creation and use of FFRDCs, there is legislation applicable to the military departments. Before obligating or expending funds to operate an FFRDC, the sponsoring department must report to Congress on the "purpose, mission, and general scope of effort" of the proposed FFRDC, and must observe a 60-day waiting period. 10 U.S.C. § 2367(c)(1). An FFRDC may be used only for work that is within the center's purpose, mission, and general scope of effort, as set forth in the sponsoring agreement. 10 U.S.C. § 2367(a). Defense is to include in its budget submission "the proposed amount of the man-years of effort to be funded" for each FFRDC, and is to report the "actual man-years of effort expended" and the actual obligations for each FFRDC after the end of each fiscal year. 10 U.S.C. § 2367(d).

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

> "The first FFRDCs were able to provide a research environment, capable of attracting and retaining the best scientists, which it was difficult to reproduce within the government structure. It is now claimed that establishment of FFRDCs sometimes is motivated more by the desire to evade government personnel and procurement regulations than by desire to create a research environment. It is alleged that some are little more than job shops for their government sponsors. Industry is unhappy because of what it sees as unfair competition."[90]

The "job shop" allegation stems in part from the practice of granting "fringe benefits" which, although reimbursed directly from appropriated funds, exceed those of regular government employees, sometimes by a very wide margin. One example is discussed in a GAO report whose title is very revealing: University Research: U.S. Reimbursement of Tuition Costs for University Employee Family

[90]Seidman 1991, supra note 86, at 43-44. For further discussion of the competition aspects, see Competition: Issues on Establishing and Using Federally Funded Research and Development Centers, GAO/NSIAD-88-22 (March 1988).

Members, GAO/NSIAD-95-19 (February 1995). The Office of Management and Budget subsequently inserted language in OMB Circ. No. A-21, sec. J.8.f(2), to make tuition benefits allowable only for the employees themselves.

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

> "[The FAR] does not make a distinction between an FFRDC's role as a prime contractor or subcontractor. We think that the determination whether an FFRDC is in fact competing with a private firm in violation of the regulation depends not upon whether the FFRDC has submitted a proposal in its own name but upon the impact of its participation, both from a technical and a cost standpoint, upon the procurement." Id. at 5.

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

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

> "While the MITRE Corporation was established . . . for the purpose of engaging in and procuring services to or for the United States Government or any department or agency thereof, the company may not be said to be in any respect an agency or instrumentality of the United States. The affairs of the company are in the hands of private persons, no element of control being vested in the United States, and no provision is made for distributing corporate assets to the United States upon

dissolution of the company. Such interest as the United States might have in MITRE would arise solely under contracts entered into with the company in the same manner as under contracts with any other corporation." B-145898-O.M., June 30, 1961, at 5-6.

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

A variation on this theme is the so-called "GOCO"—a government-owned, contractor-operated facility. See, for example, United States v. Anderson County, Tennessee, 705 F.2d 184 (6th Cir. 1983), describing a GOCO used by the Department of Energy. Energy also funds a group of GOCO research laboratories. A useful report on these is Department of Energy: Uncertain Progress in Implementing National Laboratory Reforms, GAO/RCED-98-197 (September 1998).

e. Summing Up

"Developments in the last 20 years might make one suspect that the U.S. government is going quasi."[91]

The categories we have described make up by far the major portion of the "government corporation universe." They are, however, by no means exclusive. Other agency-specific or program-specific examples dot the federal landscape. One is the Production Credit Association (PCA). PCAs are corporate financial institutions chartered by the Farm Credit Administration under statutory authority. They are statutorily designated as instrumentalities of the

[91]Seidman 1988, supra note 71, at 23.

United States. As such, they have been held immune from awards of punitive damages. Smith v. Russellville Prod. Credit Ass'n, 777 F.2d 1544 (11th Cir. 1985); Rohweder v. Aberdeen Prod. Credit Ass'n, 765 F.2d 109 (8th Cir. 1985); In re Sparkman, 703 F.2d 1097 (9th Cir. 1983). However, they are not "primarily acting as instrumentalities of the United States" for purposes of the Federal Tort Claims Act. South Cen. Iowa Prod. Credit Ass'n v. Scanlan, 380 N.W.2d 699 (Iowa 1986); Waldschmidt v. Iowa Lakes Prod. Credit Ass'n, 380 N.W.2d 704 (Iowa 1986). Also, they are sufficiently independent of the federal government so as not to share the government's exemption from 28 U.S.C. § 1341, which bars federal jurisdiction of state tax cases in favor of remedies under the state courts. Arkansas v. Farm Credit Serv., 520 U.S. 821 (1997). One court analogized them to national banks in the Federal Reserve System. United States v. Haynes, 620 F. Supp. 474, 477 (M.D. Tenn. 1985) (holding that they were not independent agencies for purposes of 18 U.S.C. § 208, the criminal conflict of interest statute).[92]

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

Some analysts believe that an increasing portion of the government's business is being done outside the traditional structure. They also suggest that "[t]he line between what is 'public' and what is 'private' has become indistinct."[93] The literature uses terms like "quasi-private," "quasi-government," and "hybrid organizations."[94] Leazes

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

[93]Moe and Stanton, supra note 69, at 321; Musolf and Seidman, supra note 72. Adding those purely private entities whose doors would close in a matter of weeks if the federal money stopped flowing further emphasizes the point.

[94]See Musolf and Seidman, supra note 72, at 124.

calls them "twilight-zone corporations."[95] Moe regards them as "relatively unaccountable units at the margin of government."[96] Seidman consigns them to a "terra incognita, somewhere between the public and private sectors."[97] The National Academy of Public Administration (itself a Title 36 corporation) has reported:

> "The boundary between the public and private sectors has been blurred so that one cannot say with assurance to which sector many corporations belong or to whom they are accountable."[98]

Students of public administration disagree over whether this blurring is good or bad.[99] Whether it is good, bad, or somewhere in between, it is here, likely to remain, and must be included in any consideration of federal spending issues.

3. Creation

To create a private business corporation, the incorporators file articles of incorporation with a designated office in the jurisdiction—state or District of Columbia—in which they wish to incorporate. Each state, as well as the District of Columbia, has an incorporation law that details these procedures and addresses other aspects of the corporation's existence, such as corporate powers, liability of officers, and issuance of stock. For example, the D.C. law is the District of Columbia Business Corporation Act, 29 D.C. Code Ch. 3.

There is no such thing as a federal incorporation statute. Rather, Congress ordinarily charters a government corporation by specific legislation that sets out its purposes, powers, structure, obligations

[95]Leazes, supra note 44, at 36.

[96]Moe 1983, supra note 48, at 3.

[97]Seidman 1988, supra note 71, at 25.

[98]NAPA 1981, supra note 51, at 4. If this passage is evocative of Moe and Seidman, it may be because both were members of the panel which conducted the NAPA study. Id. at App. 1.

[99]See, e.g., Seidman 1988, supra note 71, at 23-24. For an examination of the hybrid nature of Amtrak, see Arnold Adams, The National Railroad Passenger Corporation [Amtrak]—A Modern Hybrid Corporation Neither Private Nor Public, 31 Bus. Law. 601 (1976).

and sources of funding. Congress may also charter a government corporation by delegating the power to the executive branch or to another government corporation. Either way, the creation of a government corporation must be explicit; it cannot be implied.

a. Historical Background and Purpose

While the proliferation of government corporations largely occurred during the 20th century, the federal government has created or used government corporations since the beginning of the republic. The earliest examples were banking institutions. The first, predating even the adoption of the Constitution, occurred when the Continental Congress authorized the Bank of North America in 1781 and the Superintendent of Finance purchased approximately five-eighths of the capital stock in the name of the government, making the United States the majority owner.[100] In 1791, Congress created and incorporated the (First) Bank of the United States, authorizing the United States to subscribe 20 percent of the corporation's stock. Act of February 25, 1791, ch. 10, 1 Stat. 191.[101] Initial governmental participation in this and other banking enterprises consisted of investment in stock as opposed to management of the corporation.

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

[100]McDiarmid, supra note 45, at 21.

[101]A capsule history starting with the 1791 act may be found in Lebron v. National Railroad Passenger Corporation, 513 U.S. 374, 386-391 (1995).

"The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished." Id. at 411.

Later in the opinion, the Chief Justice wrote what has become one of the most famous statements in American constitutional law:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but [are consistent] with the letter and spirit of the constitution, are constitutional." Id. at 419.

The courts have never seriously questioned Congress' power to create or employ corporate entities as a means of carrying into effect the substantive powers granted to it by the Constitution. For example, in Luxton v. North River Bridge Co., 153 U.S. 525 (1894), the Supreme Court held that Congress, in exercising its power to regulate interstate commerce, indisputably has the power to create a corporation to construct a bridge across navigable water between two states.[102] Congress is not restricted to creating a new corporation, but can acquire or employ an existing private corporation to carry out its substantive constitutional powers. New York ex rel. Rogers v. Graves, 299 U.S. 401 (1937). Here, Congress acquired the entire capital stock of a private corporation and elected its board of directors to carry out constitutional powers of regulating commerce and providing for national defense in maintaining, operating and protecting the Panama Canal.

Congress has created or employed corporations to carry out varied purposes. Turning again to Chief Justice Marshall's words, "[t]he power of creating a corporation is never used for its own sake, but for the purpose of effecting something else." M'Culloch, 17 U.S. at 411. A more recent analyst has noted that "[g]overnment-

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

sponsored corporations are simply a means of securing governmental objectives."[103] Some government corporations are charged with developing projects or functions not adaptable to private industry while others are responsible for meeting needs in the market that are unmet by private industry. Those purposes include governance, as well as social and educational programs. Government corporations have also been created, usually in bunches, to meet war or economic emergencies. The 20th century saw three such surges: World War I, the Great Depression, and World War II.

First, during World War I, government corporations were created to mobilize the war effort by transacting business in the same manner as private commercial firms. These included the War Finance Corporation,[104] the United States Shipping Board Emergency Fleet Corporation,[105] the United States Spruce Production Corporation,[106] and others. After the war, many of the corporations, having fulfilled their mission to support the war effort, and being intended as temporary to begin with, were liquidated.

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

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

[104]The War Finance Corporation was organized under the Act of April 5, 1918, ch. 45, 40 Stat. 506, to provide financial assistance to industries important to the successful prosecution of the war.

[105]The Emergency Fleet Corporation was organized on April 16, 1917 (McDiarmid, supra note 45, at 24-25) to purchase, construct and operate merchant vessels under the authority of the original Shipping Board Act, Act of September 7, 1916, ch. 451, § 11, 39 Stat. 728, 731.

[106]The Act of July 9, 1918, ch. 143, 40 Stat. 845, 888, authorized the War Department's Director of Aircraft Production to form corporations to aid the government's production of aircraft and related equipment. Under this authority, the United States Spruce Production Corporation was created on August 20, 1918, to make available aircraft lumber for war use. Due to the signing of the armistice, it was in full operation for a total of eleven days. McDiarmid, supra note 45, at 29-30.

government corporations extensively to stabilize the economy and encourage economic growth.[107] For example, the Reconstruction Finance Corporation had a central role in planning and financing recovery programs by providing loans to banks, railroads, business enterprises, mining interests, public agencies, agricultural marketing organizations, and purchasing stock in banks, insurance companies, mortgage corporations, and corporations engaged in defense activities.[108] The Federal Deposit Insurance Corporation was created to promote and preserve public confidence in banks and protect the money supply by insuring deposits, periodically examining insured banks, and regulating certain securities, mergers, consolidations, acquisitions and assumption transactions of the banking sector.[109] The Commodity Credit Corporation was created for the purpose of "stabilizing, supporting, and protecting farm income and prices, of assisting in the maintenance of balanced and adequate supplies of agricultural commodities . . . and of facilitating the orderly distribution of agricultural commodities."[110] The primary method the CCC uses to achieve its purpose is providing loans. The Federal Housing Administration was established to encourage improvement in housing standards and conditions, to provide an adequate home financing system by insurance of housing mortgages and credit, and to exert a stabilizing influence on the mortgage market.[111] The primary method used by FHA to fulfill its purpose is providing mortgage insurance.

World War II provided the impetus for the third major surge in 20th century government corporations. Over twenty government corporations were created to meet the wartime production needs of

[107]Leazes, supra note 44, at 21.

[108]Act of January 22, 1932, ch. 8, 47 Stat. 5, as amended. See also Act of June 25, 1940, ch. 427, § 6, 54 Stat. 572, 574, and Presidential Proclamation No. 2016, December 8, 1932.

[109]Banking Act of 1933, § 8, 48 Stat. 162, 168, superseded by Federal Deposit Insurance Act, 64 Stat. 873 (1950), codified in 12 U.S.C. ch. 16.

[110]15 U.S.C. § 714. The Commodity Credit Corporation was originally established by Exec. Order No. 6,340, October 16, 1933, and was given a statutory charter in 1948.

[111]National Housing Act, Pub. L. No. 73-479, § 1, 48 Stat. 1246 (1934). Provisions now appear in 12 U.S.C. ch. 13, subch. II, and 42 U.S.C. 3533.

World War II. These included the War Damage Corporation[112] (to provide insurance and reasonable protection against loss or damage to property, real or personal, resulting from enemy attack, including any action taken by the military, naval or air forces of the United States in resisting enemy attack), the Smaller War Plants

Corporation[113] (to aid in mobilizing the productive facilities of small business in the interest of successful prosecution of the war), and the Defense Plant Corporation[114] (to aid the Government in its national defense by financing or engaging in the construction, extension and operation of plants engaged in war production).

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

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

[113]The Smaller War Plants Corporation was created by Pub. L. No. 77-603, § 4, 56 Stat. 351, 353 (1942).

[114]The Defense Plant Corporation was created by the Reconstruction Finance Corporation on August 22, 1940, under the same statutory authority as the War Damage Corporation (discussed in note 111, supra). See GAO, Reference Manual of Government Corporations, S. Doc. No. 79-86, at 32 (1945).

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

At any given time, it seems, several new corporations are being proposed or studied. See, e.g., Government Corporations: Profiles of Recent Proposals, GAO/GGD-95-57FS (March 1995). The Office of Management and Budget disseminated a document in 1995 entitled "Specifications for Creating Government Corporations" (OMB Memorandum M-96-05, December 8, 1995). This presents OMB's standards and approach for evaluating proposals for new corporations. The OMB paper incorporates many of the principles of the 1981 NAPA report noted earlier.

Congress has categorized or designated some government corporations as nonprofit (e.g., Legal Services Corporation 42 U.S.C. § 2996b(a)) while others are designated as for-profit. For example, the United States Enrichment Corporation (USEC) was created to operate as a business enterprise on a profitable and efficient basis by marketing and selling enriched uranium, and uranium enrichment and related services, primarily for use by electric utilities worldwide. 42 U.S.C. § 2297b.[115] Another example is Amtrak, whose organic legislation currently specifies that it "shall be operated and managed as a for-profit corporation." 49 U.S.C. § 24301(a)(2). Originally, Amtrak's statute simply declared it to be a "for profit corporation" (Pub. L. No. 91-518, § 301, 84 Stat. 1327, 1330), but the language was changed to recognize the realities of the situation.

b. Need for Statutory Authority

Prior to 1946, government corporations came into being in one of three ways: (1) specifically created by statute, (2) created by an executive branch department or another government corporation under statutory authorization or delegation, or (3) created by the executive branch by purely administrative action, with no statutory

[115]Congress enacted legislation in 1996 to "privatize" USEC. See USEC Privatization Act, enacted as part of the massive Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, tit. III, Ch. 1, Subch. A, 110 Stat. 1321, 1321-335 (1996).

This "omnibus" act is, itself, a fascinating document. Its publication in Statutes at Large begins with a footnote stating that the act's "original hand enrollment as signed by the President . . . is reprinted without corrections. Footnotes indicate missing or illegible text in the original."

authority. Lebron v. National R.R Pass'r Corp., 513 U.S. 374, 388-389 (1995). The power of Congress to create government corporations, either directly or by delegation, had been settled since M'Culloch v. Maryland[116] in 1819. The issue of executive creation came to a head in the 1940s. The lines of battle were formed when the Farm Security Administration, which wanted to purchase land but lacked the requisite statutory authority, created several corporations whose officers and directors were Department of Agriculture employees. The Department then made loans to the corporations, which in turn bought the land. Not surprisingly, the legality of this arrangement was questioned. On the issue of whether the Department could create corporations without statutory authority, the parties split along predictable lines. The Comptroller General of the time, who never much liked government corporations to begin with, said "No." B-23881, March 5, 1942. See also 21 Comp. Gen. 892, 893 (1942). The Attorney General of the time, who apparently liked them a lot more, said "Yes." 40 Op. Att'y Gen. 193 (1942). See also 37 Op. Att'y Gen. 288 (1933).

GAO's conclusion was based partially on sovereign immunity reasoning. The power to sue and be sued is an important power of any corporation. The Supreme Court had recently decided Federal Housing Administration v. Burr, 309 U.S. 242 (1940), and Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381 (1939), which strongly implied that this power could be granted only by Congress. B-23881, March 5, 1942, at 18. It was not necessary for the Court to directly address the question because neither case dealt with a corporation created purely by executive action, but it would seem fundamental that an agency cannot confer powers, authorities, or exemptions it does not have, unless of course it is operating under express statutory authority.[117]

Of course, as the "sue and be sued" point suggests, the heart of the question was never the creation of corporate entities per se. It was the powers that could be given to them. One decision stated:

[116]17 U.S. (4 Wheat.) 316 (1819). See the discussion above in 17(B)(3)(a).

[117]The Attorney General's opinion did not address this point, but did remind GAO that it had at least implicitly condoned the practice by issuing decisions concerning nonstatutory corporations—16 Comp. Gen. 613 (1936), for example—without questioning the legality of their creation. 40 Op. Att'y Gen. at 201.

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

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

"There is a clear and vital difference between a corporation created pursuant to statutory direction with clear statutory grant to remove its transactions from the safeguards surrounding appropriations and to avoid not only Executive direction but accountability for the public moneys entrusted to it, and a corporation created within the Government [without such specific authority]. In some instances, it is true, the laws creating corporations have been so broad as to exclude Executive control and permit escape from accountability. A corporation of the other class, however, created as an additional administrative agency, can have no such status or uncontrolled authority. It can exercise no wider authority than as though operating as an unincorporated unit in the Executive branch. By the act of incorporating Executive responsibility is not shifted, Executive control avoided, nor accountability escaped." A-53085, January 11, 1934, at 5.

The idea of a legislative requirement was not new. Interestingly, opposition to government corporations in the 1930s stemmed not so much from the accountability perspective as from the fact that they competed with the private sector. See, e.g., 79 Cong. Rec. 4048 (1935). As a congressional report put it, "[g]overnment corporations to a great degree do business in competition with private enterprise. They encroach upon and compete with business, which is under serious disadvantage [while the government corporation's advantages, like tax exemptions and cheap credit, make it] an invincible competitor."[118]

The idea of a legislative charter became law several years later as section 304(a) of the Government Corporation Control Act, Pub. L.

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

No. 79-248, 59 Stat. 597, 602 (1945). Now codified at 31 U.S.C. § 9102, it provides:

"An agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action."

The legislative history of the Corporation Control Act noted the existence of several government corporations created without legislative authority and the potential for problems arising when such corporations were created under state law.[119] The House Report accompanying the legislation stated:

"The committee does not consider the practices of chartering wholly owned Government corporations without prior authorization by the Congress or under State charters to be desirable. It believes that all such corporations should be authorized and chartered under Federal statute. The bill provides that in the future all corporations which are to be established for the purpose of acting as agencies or instrumentalities of the United States must be established by act of Congress or pursuant to an act of Congress specifically authorizing such action." H.R. Rep. No. 79-856, at 11 (1945).

Section 9102, by its terms, applies to acquisition as well as creation. With respect to existing nonstatutory corporations, the statute directed them to either seek a legislative charter or liquidate. Pub. L. No. 79-248, § 304(b), 59 Stat. at 602.

There has been little case law, administrative or judicial, addressing the requirement of section 9102. A number of cases have found section 9102 inapplicable. We have previously noted two of these: 71 Comp. Gen. 155 (1992) (federally funded research and development centers) and Varicon International v. OPM, 934 F. Supp. 440 (D.D.C. 1996) (corporation formed by former government employees to do the same work they did when they were on the payroll). A 1975 GAO opinion to a committee chairman also found the statute inapplicable to so-called "proprietaries" of the Central Intelligence Agency—corporations formed by the CIA largely to provide "cover" for CIA activities. GAO found "irreconcilable conflict" between section 9102 and the statutory mandate of the CIA. This being the case, the answer was easy—the CIA's mandate

[119]S. Rep. No. 79-694, at 13 (1945). See also S. Doc. No. 78-227, supra note 118, at 27. (Strictly speaking, this is not direct legislative history of the Control Act.)

had to prevail. B-179296, December 10, 1975. A later opinion found the statute inapplicable to the creation of subsidiaries by a federally-chartered private institution which had been converted from a mixed-ownership government corporation. B-219801, October 10, 1986, at 5-6. Prior to the statutory conversion, section 9102 would have applied. Id.

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

An example of what GAO regarded as a clear violation of the statute is found in B-278820, February 10, 1998. The question was whether the Federal Communications Commission was authorized to establish two not-for-profit corporations to administer certain functions of the universal service program for schools, libraries, and rural health care providers.[120] The FCC argued that it did not establish or acquire the corporations, but had directed the National Exchange Carrier Association, Inc. to create them. While it was true that the Association and not the FCC was the incorporator, an examination of the FCC's role showed that it was involved in approving the proposed articles of incorporation and bylaws, approving the chief executive officers of the corporations, determining the size, composition, and term of office of the boards of directors, as well as selecting or approving the directors themselves. In GAO's view, the corporations were created to carry out governmental functions (specifically, the implementation of a statutory mandate), and the Association had simply acted as the incorporator for the convenience of the FCC. Under these circumstances, although the FCC did not directly establish or acquire the corporations, the identity of the incorporator was not

[120]The statutory mandate for this program is section 254(h) of the Communications Act of 1934, as added by the Telecommunications Act of 1996, 47 U.S.C. § 254(h).

the determinant of section 9102's applicability. The prohibition would be meaningless if agencies could avoid it simply by using another party to act as incorporator. Thus, for purposes of 31 U.S.C. § 9102, an agency may not cause, directly or indirectly, a corporation to be created to carry out government functions without specific statutory authority.

Once GAO determined that the FCC had "established" a corporation within the meaning of section 9102, the next issue was whether the FCC had the requisite statutory authority. The FCC suggested that it was authorized to establish the corporations pursuant to sections 254 and 4(i) of the Communications Act. Section 254, 47 U.S.C. § 254, involves the FCC in a variety of universal service program functions, such as defining universal service, developing specific and predictable support mechanisms, and providing for equitable contributions by service providers, but nowhere authorizes the creation of corporations. Section 4(i), 47 U.S.C. § 154(i), provides:

> "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter [the Communications Act], as may be necessary in the execution of its functions."

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

Another skirmish involved creation of the now-defunct Federal Asset Disposition Association (FADA). In a series of assignments relating to the Federal Home Loan Bank Board, GAO reviewed the Board's authority for the creation of various entities operating under

its direction. One of those entities was FADA, created pursuant to statutory authority to organize new federal savings and loan associations. Problem was, GAO felt that an entity created under that authority should bear some resemblance to a federal savings and loan association. FADA, on the contrary, exercised none of the basic functions of a savings and loan association. Most tellingly, it did not accept savings and it did not make loans. B-226708.4, March 15, 1989 (Enclosure at 4). In fact, GAO found that the Federal Savings and Loan Insurance Corporation (FSLIC) held all of FADA's stock, the Bank Board appointed its board of directors, and FADA's self-described sole purpose was to assist the FSLIC in managing and disposing of assets. It was hard to escape the conclusion that the FADA was a federal savings and loan association "only on paper." Id. at 3-4. Accordingly, GAO concluded that FADA was in fact a corporation wholly owned and controlled by the federal government and engaged in the performance of federal functions, and that its creation exceeded the Bank Board's authority.[121] In addition to B-226708.4 cited above, see B-226708.3, December 12, 1988, B-226708.2, September 29, 1988, B-226708, September 6, 1988, and Failed Thrifts: No Compelling Evidence of a Need for the Federal Asset Disposition Association, GAO/GGD-89-26 (December 1988).

A corporation created without legislative authority can be, in effect, "ratified" by subsequent legislation. For example, in 21 Comp. Gen. 928 (1942), the Virgin Islands case discussed earlier, although the corporation had been created without statutory authority, subsequent legislation made it clear that "Congress has recognized . . . the corporate existence and status." Id. at 930. See 17 Comp. Gen. 50 (1937) for another example. Subsequent legislation was also involved in the FADA situation, but GAO did not regard it as rising to the level of congressional ratification. B-226708, September 6, 1988, at 12.

[121]FADA was dissolved under the provisions of the Financial Institutions Reform Recovery and Enforcement Act of 1989 (FIRREA). Pub. L. No. 101-73, 103 Stat. 183. FIRREA also abolished both the Federal Home Loan Bank Board and the FSLIC. Id. § 401, 103 Stat. 354. Thus, all of the principal entities discussed in the GAO materials cited in the text are gone. The case remains useful, however, to illustrate the proposition that a goose does not become a swan merely because someone calls it one. For more on the FADA saga, see Moe 1995, supra note 41, at 22-26; Seidman 1988, supra note 71, at 26.

As noted previously, Congress may create a corporation directly, or it may authorize another agency or government corporation to do the creating. This is the reason for the "by or under" language in 31 U.S.C. § 9102. Of course this was true even prior to the Corporation Control Act. For example, the Reconstruction Finance Corporation, described briefly earlier, was so authorized and did in fact create several other government corporations.[122] For a more recent example, the Farm Credit System banks, which include the federal land banks, federal intermediate credit banks, and banks for cooperatives, are mixed-ownership government corporations listed in 31 U.S.C. § 9101(2) and are therefore governed by the restriction contained in 31 U.S.C. § 9102. Thus, when it became desirable for Farm Credit System banks to be able to organize subsidiary corporations to perform certain functions the banks were authorized to perform, Congress recognized that specific statutory authority was required.[123]

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

[122]Reconstruction Finance Corporation Act, § 5d, 47 Stat. 5 (1932), as amended, Act of June 25, 1940, 54 Stat. 572, 573. The RFC seized the opportunity "with gusto." Lebron, 513 U.S. at 389. Some of the government corporations the RFC created are the Defense Plant Corporation, Defense Supplies Corporation, Rubber Reserve Company, Metals Reserve Company, War Damage Corporation, United States Commercial Company, Petroleum Reserves Corporation, and the Rubber Development Corporation. See S. Doc. No. 78-227, supra note 118, at 10-14.

[123]12 U.S.C. §§ 2211 and 2212; H.R. Rep. No. 96-1287, at 23, 42 (1980), reprinted in 1980 U.S.C.C.A.N. 7095, at 7106, 7125 (accompanying report of House Agriculture Committee).

4. Management

a. Government Corporation Control Act

(1) Origin

Many of the government corporations created to meet production needs during World War I were liquidated promptly after the war. As a result, before the 1930s, "there was not a pressing need for general procedures to govern the management of government corporations." Congress Should Consider Revising Basic Corporate Control Laws, GAO/PAD-83-3, at 3 (April 6, 1983); B-103455, May 21, 1951. During the Depression and New Deal eras, many corporations were formed to serve various economic needs, and others were created to meet the production needs of World War II. These were not so quick to go away. By the mid-1940s,"there were 63 wholly owned and 38 partly owned Federal corporations." Id. Government corporations "had gotten out of hand, in both their number and their lack of accountability." Lebron, 513 U.S. at 389. Control procedures, such as they were, were developed through piecemeal administrative action that was not necessarily consistent and did not include all government corporations.

The initial congressional response was a two-year study by the Joint Committee on Reduction of Nonessential Federal Expenditures. Noting the lack of overall control, the resulting report recommended the prompt enactment of legislation to (1) require government corporations to prepare business-type budgets for inclusion in the President's budget submitted to Congress; (2) provide for a measure of Treasury control over a corporation's accounts; and (3) require GAO audits.[124] This became the blueprint for what was to become the Government Corporation Control Act.

The first legislative step to implement these recommendations was the so-called George Act, Act of February 24, 1945, ch. 4, § 5, 59 Stat. 5, 6. This statute required GAO to audit the financial transactions of all government corporations annually, in accordance with the principles and procedures applicable to commercial corporate transactions and under rules prescribed by GAO. The law further required that each audit report "shall also show specifically every

[124]S. Doc. No. 78-227, supra note 118, at 30.

program, expenditure, or other financial transaction or undertaking, which, in the opinion of the Comptroller General, has been carried on or made without authority of law." Id. § 5(b). Because the statute used the words "all Government corporations," it applied to mixed-ownership, as well as wholly owned, corporations. 25 Comp. Gen. 7 (1945). Under section 5(c) of the George Act, the cost of the audits was to be borne by GAO's own appropriations, but a given corporation could agree to pick up the audit tab. (Why it might want to do so is not clear.)

The audit requirements of the George Act were superseded on December 6, 1945, when Congress enacted the Government Corporation Control Act (GCCA), Act of December 6, 1945, ch. 557, 59 Stat. 597, codified at 31 U.S.C. §§ 9101-9110. The new law was designed to provide an overall control of government corporations by making them more accountable to Congress for their operations while allowing them the flexibility and autonomy needed for their commercial activities.[125] The declared congressional policy was "to bring Government corporations and their transactions and operations under annual scrutiny by the Congress and provide current financial control thereof."[126] The Control Act addresses budget controls, financial controls, and audit controls.

(2) Definitions

As noted earlier, the Government Corporation Control Act made no attempt to define the term "government corporation." Instead, it merely declared that there were two types: the wholly owned government corporation and the mixed-ownership government corporation. See 31 U.S.C. § 9101(1). The law lists the entities covered under each type. Wholly owned government corporations include the Commodity Credit Corporation, Export-Import Bank, Federal Prison Industries, Government National Mortgage Association, Overseas Private Investment Corporation, Pension Benefit Guaranty Corporation, Saint Lawrence Seaway Development Corporation, and the Tennessee Valley Authority, plus

[125]H.R. Rep. No. 79-856, at 3 (1945). An unimpressed Dr. Seidman has called the law the "government corporation de-control act." Seidman 1991, supra note 86, at 41; Moe 1995, supra note 41, at 7.

[126]GCCA, § 2, 59 Stat. 597.

several others. 31 U.S.C. § 9101(3). Examples of mixed-ownership government corporations are the Federal Deposit Insurance Corporation, Federal Home Loan Banks, Federal Land Banks, Central Liquidity Facility of the National Credit Union Administration, Resolution Funding Corporation, and the former Resolution Trust Corporation. 31 U.S.C. § 9101(2).

In trying to understand the two types, the plain meaning of the law's language is the proper starting point, although in this instance it doesn't help very much. The House report accompanying the original Control Act stated:

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

The 1981 report of the National Academy of Public Administration followed suit. Wholly owned corporations—

"pursue a governmental mission assigned in their enabling statute and are financed by appropriations. Their assets are owned by the government and managed by board members or an administrator appointed by the President or Secretary of a Department."

Mixed-ownership corporations—

"have a combination of governmental and private equity; hence their assets are owned and managed by board members selected by both the President and private stockholders. They are usually intended for transition to the private sector."[127]

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

[127]NAPA 1981, supra note 51, at 21. An example of such a transition is discussed in B-219801, October 10, 1986.

and exclusively under direct annual appropriations from Congress, the same as any non-corporate agency.[128]

The only safe generalization is that a wholly owned government corporation is one listed in 31 U.S.C. § 9101(3) or so designated in its enabling legislation; a mixed-ownership government corporation is one listed in 31 U.S.C. § 9101(2) or so designated in its enabling legislation.[129] Of course, Congress remains free to create corporations wholly outside the Control Act structure. Examples are the Legal Services Corporation and the Corporation for Public Broadcasting. Accordingly, the wholly owned/mixed-ownership classification is relevant only for purposes of applying the rest of the Control Act.

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

[128]Is the Administrative Flexibility Originally Provided to the U.S. Railway Association Still Needed?, GAO/CED-78-19, at 2 (February 22, 1978). The U.S. Railway Association was created by Pub. L. No. 93-236, title II, 87 Stat. 985, 988 (1974). The mixed-ownership designation was section 202(g), 87 Stat. 992. A typical appropriation was Pub. L. No. 94-134, 89 Stat. 695, 709 (1975). It was abolished in 1987. See 45 U.S.C. § 1341(a).

[129]See Budget Glossary Exposure Draft, supra note 67, at 57, 86.

The Government Corporation Control Act did not attempt to address corporations created after its enactment—nor could it, since one Congress cannot bind a subsequent Congress. There is evidence in the legislative history, however, of the contemplation that the act would be made applicable. In this connection, the report of the Senate Committee on Banking and Currency stated:

"The committee contemplates that any new corporation so created or authorized hereafter will be made subject to the appropriate provisions of this bill by the creating or authorizing legislation." S. Rep. No. 79-694, at 14 (1945).

This contemplation has met with limited success. Of the 30 corporations created by Congress from the mid-1960s to the mid-1980s, seventeen were not made subject to the Government Corporation Control Act. GAO/PAD-83-3, at 5; Harold Seidman and Robert Gilmour, Politics, Position, and Power at 285 (Oxford Univ. Press, 4th ed. 1986).

(3) Budget provisions

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

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

Apart from these minimum requirements, the President, acting through the Office of Management and Budget, has broad discretion

to determine the form and content of the corporate budgets. 31 U.S.C. § 9103(a).[130] The President may revise a corporation's budget program. 31 U.S.C. § 9103(c). The President then must include it as part of the budget submitted to Congress under 31 U.S.C. § 1105. Id. For OMB's guidance, see OMB Circ. No. A-11, §§ 32, 34.4, 36.3 (1998). For examples of what this all looks like in real life, see Appendix to the Budget of the United States Government for Fiscal Year 1999, at 92 (Federal Crop Insurance Corporation), 98 (Commodity Credit Corporation), 642 (Pension Benefit Guaranty Corporation), and 1141 (Tennessee Valley Authority).

Congress then considers the budget programs for wholly owned government corporations along with the rest of the federal budget, which includes, as and to the extent necessary or appropriate, making appropriations as authorized by law; making corporate financial resources available for operating and administrative expenses; and providing for repaying capital and the payment of dividends. 31 U.S.C. § 9104. Section 9104 does not prevent a corporation from carrying out or financing its activities as authorized by some other law, nor does it affect the corporation's authority to make commitments without fiscal year limitation. 31 U.S.C. § 9104(b). An example of a budget approval provision is the following, from the 1998 Department of Transportation and Related Agencies Appropriations Act, Pub. L. No. 105-66, 111 Stat. 1425, 1439 (1997):

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

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

[130]The source provision is much clearer on this point. See GCCA, § 102, 59 Stat. 598. Section 102 also uses the terms "budget program" and "plan of operations," which appear to be synonymous with "business-type budget" for GCCA purposes.

The President may include with the budget submission a recommendation that a wholly owned corporation be treated as a non-corporate agency for fiscal purposes. If Congress approves, the corporation retains its corporate identity, but is thereafter subject to the laws governing "appropriations, expenditures, receipts, accounting, and other fiscal matters" in the same manner as non-corporate agencies. 31 U.S.C. § 9109. (The quoted language comes from the source provision, GCCA § 107, 59 Stat. 599.)

Sections 9103, 9104, and 9109 apply only to wholly owned corporations. The exclusion of mixed-ownership corporations was deliberate. The legislative history explains the rationale.

"The budget provisions of the bill do not apply to the mixed-ownership corporations in which private stockholders have an interest in the net worth and in the profits or losses of the corporations." S. Rep. No. 79-694, at 7 (1945).

See also H.R. Rep. No. 79-856, at 7 (1945). Although subsequent changes in the nature of government corporations have made this premise inapplicable in many cases, the fact remains that the budget provisions apply only to wholly owned corporations.

The only budget-related provision of the Government Corporation Control Act applicable to mixed-ownership corporations was relocated as part of the 1982 recodification of Title 31 and is now found at 31 U.S.C. § 1105(a)(24). It provides that the President's budget submission to the Congress may include—

"recommendations on the return of Government capital to the Treasury by a mixed-ownership corporation (as defined in section 9102(2) of this title) that the President decides are desirable."

(4) Other financial controls

While the corporation control legislation was being considered, the Treasury Department was urging that all government funds should be kept in the Treasury. The statute addressed this concern in what is now 31 U.S.C. §§ 9107(b) and (c). Subsection (b) requires that the accounts of all government corporations, both wholly owned and mixed-ownership, be kept in the Treasury. However, if the Secretary of the Treasury approves, they may be kept in a Federal Reserve Bank, or a bank designated as a depositary or fiscal agent of the United States. Treasury is authorized to waive these requirements.

Such an account might include, for example, a corporate checking account whose checks would be signed by authorized corporation officials accountable directly to the board of directors. E.g., B-68830, October 6, 1947.

Subsection (c) exempts the following:

- A temporary account of not more than $50,000 in one bank.
- A mixed-ownership corporation from which government capital has been entirely withdrawn, during the period it remains without government capital.
- Certain specified farm credit institutions, which are nevertheless required to report to Treasury annually the names of depositaries in which their accounts are kept.

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

Three years later, in 1949, Congress added what is now 31 U.S.C. § 9107(a), which authorizes government corporations, with the Comptroller General's concurrence, to consolidate their cash, from whatever source, including appropriations, into one or more accounts for banking and checking purposes. Of course, the funds are to be used only for authorized purposes.[131] In reviewing a proposal under this provision, GAO's concern is the diminution of internal controls. E.g., B-58312, November 14, 1950 (approving an unspecified proposal by the Tennessee Valley Authority because it would simplify procedures without lessening internal controls).

Unless specifically authorized by statute, a corporation maintaining an account in the Treasury under 31 U.S.C. § 9107(b) is not entitled to receive interest on those funds, directly or indirectly. B-114839-O.M., January 9, 1976. (The device tried in that case was an offsetting credit for imputed interest.)

[131]Independent Offices Appropriation Act, 1950, Pub. L. No. 81-266, § 309, 63 Stat. 631, 662.

The law also includes provisions, which we will address later, dealing with Treasury control over the debt obligations of government corporations.

(5) Audit

In the 1940s, any discussion of government auditing meant auditing by the General Accounting Office. The original Government Corporation Control Act essentially incorporated the audit provisions of the George Act, which had been enacted less than a year earlier. Under these provisions, GAO was to audit annually every wholly owned government corporation and every mixed-ownership government corporation for any period in which government capital was invested in it, and report the results to Congress. GCCA §§ 105, 106, 202, 203, 59 Stat. 599-600.

The audit was to be a "commercial-type audit" rather than the customary governmental audit. The legislative history explained:

> "The Comptroller General and the Congress have recognized that the regular governmental type of audit may not be suitable to the operations of a Government corporation. In general, the purpose of the governmental type of audit is to determine the validity of expenditures under appropriations made by the Congress in the light of restrictions and limitations placed by the Congress generally upon expenditures from appropriated funds . . . . On the other hand, the commercial type of audit, as applied to a business corporation, is separate and distinct from the accounting system and internal financial controls of the corporation, and is designed to determine the financial condition of the corporation as of a given date and the results of its financial operations during the period under audit, and to establish whether the corporate funds have been regularly expended in accordance with corporate authorization." H.R. Rep. No. 79-856, at 7-8.

For further elaboration, see pages 95-96 of the House report and S. Rep. No. 79-694, at 8-9. In 1975, the audit requirement was reduced from every year to at least once every three years.[132] GAO's auditing of government corporations, first under the George Act and then under the Control Act, is widely credited with providing the stimulus

[132]General Accounting Office Act of 1974, Pub. L. No. 93-604, § 601, 88 Stat. 1959, 1962.

for GAO to modernize its audit concepts and practices from the old "voucher auditing" system.[133]

The Government Corporation Control Act's audit and reporting provisions were completely overhauled by section 305 of the Chief Financial Officers Act of 1990, Pub. L. No. 101-576, 104 Stat. 2838, 2853, 31 U.S.C. §§ 9105 (audits) and 9106 (management reports). The audit is to be conducted by the corporation's Inspector General or by an independent external auditor chosen by the Inspector General. For a corporation that does not have an Inspector General, the head of the corporation selects the independent auditor. 31 U.S.C. § 9105(a)(1). The audit is to be conducted "in accordance with applicable generally accepted government auditing standards." 31 U.S.C. § 9105(a)(2). This means the standards set forth in GAO's so-called "yellow book," Government Auditing Standards (1994). These differ from the more commonly known "generally accepted auditing standards" in that the government auditing standards require reporting on internal controls and compliance with laws and regulations. Government Corporations: CFO Act Management Reporting Could Be Enhanced, GAO/AIMD-94-73, at 4 n.2 (September 1994). Audit reports are to be submitted to the head of the corporation and to the Government Operations/Governmental Affairs Committees. 31 U.S.C. § 9105(a)(3).

The revised 31 U.S.C. § 9106 requires each government corporation to submit a management report each fiscal year to Congress, with copies to the President, the Director of OMB and the Comptroller General. The management report must include statements of financial position, operations, cash flows, a reconciliation to the corporation's budget report where applicable, a statement on internal accounting and administrative control systems, the report regarding the audit of the corporation's financial statements, and any other comments and information necessary to inform Congress about the operations and financial condition of the corporation.

[133]See Frederick C. Mosher, The GAO: The Quest for Accountability in American Government, 105-08 (Westview Press, 1979); Ellsworth H. Morse, Jr., The Government Corporation Control Legislation of 1945, 10 GAO Rev. 11 (No. 4, 1975). GAO had long wanted the authority to audit government corporations. One of its first products under the Control Act was a 10-volume report on the audit of the Reconstruction Finance Corporation and its subsidiaries. Mosher at 108; Morse at 15.

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

The 1990 revision of 31 U.S.C. § 9105 shifted primary responsibility for auditing government corporations from GAO to the Inspectors General. GAO continues to have a role, however. GAO may (1) review any audit conducted under subsection (a)(1), reporting its results to Congress, OMB, and the head of the corporation, and (2) may conduct its own financial statement audit at the discretion of the Comptroller General or at the request of a congressional committee. 31 U.S.C. § 9105(a)(4).

The original Corporation Control Act prohibited government corporations from using their funds to pay for private audits. GCCA § 301(d), 59 Stat. 601. This was intended to prevent duplication of efforts during the time that the law required GAO to conduct the audits. B-205488-O.M., January 19, 1982. Since the statute now explicitly permits the use of external auditors, this prohibition was dropped. However, the concern over duplication is reflected in 31 U.S.C. §§ 9105(a)(4) and (c). Subsection (a)(4) provides that an audit by GAO under that subsection will be in lieu of the otherwise required Inspector General audit. Under subsection (c), the GAO audit will also be in lieu of any GAO financial transaction audit required under any other law.

Subsection (c) recognizes that other laws include specific audit requirements for GAO to carry out. It provides that Comptroller General audits made under section 9105 are “in lieu of” any audit of a government corporation that is required by another law. Id. Reconciling Control Act audits with other statutory audits is largely an exercise in common sense. For example, where other legislation requires GAO to conduct annual audits of a corporation’s financial statements, the audits serve the purposes of section 9105 as well, obviating the need for the Inspector General audit. B-239201.3, July 25, 1991. An enabling act provision authorizing or directing GAO to audit the “operations” of a corporation gives GAO broad discretion over how to conduct that audit. While such a requirement

can be satisfied by a financial audit, it can also extend to a full program audit. B-200951-O.M., December 24, 1980, as clarified by B-200951-O.M., May 11, 1981.

A GAO audit under the Government Corporation Control Act is financed initially from GAO's own appropriations, but its "full cost. . . as determined by the Comptroller General" must be reimbursed by the corporation. 31 U.S.C. §9105(a)(5).[134] The purpose of the reimbursement requirement is to prevent government corporations from receiving a hidden subsidy from the taxpayers. B-207203-O.M., June 4, 1982. "Full cost," GAO has determined, includes both direct costs (employee salaries and travel expenses, for example) and indirect costs, including overhead. B-207203-O.M., supra; B-96792, August 10, 1950 (in which GAO billed Federal Prison Industries for every last penny in its administrative expense allocation). Subsection (a)(5) further requires that the reimbursements be deposited as miscellaneous receipts. This was superseded by a seemingly permanent proviso attached to GAO's appropriation in the Legislative Branch Appropriations Act, 1995, Pub. L. No. 103-283, 108 Stat. 1423, 1440 (1994), permitting GAO to credit the reimbursements to its then-current appropriation, to remain available until expended. Congress can then, as it did in Pub. L. No. 103-283, appropriate a specific sum from the "no-year" account for use during the current fiscal year.

The original Control Act authorized GAO's audit reports to include essentially the items now included by the corporations in their management reports, plus several other things, such as any impairments of capital, any recommendations for the return of government capital, and any transactions or expenditures believed to be illegal. GCCA §§ 106 and 203, 59 Stat. 599-600. That reporting requirement displaced GAO's authority to disallow corporate expenditures. B-58302, April 29, 1947; 37 Comp. Gen. 666, 668-69. The reporting language currently contained in the GCCA, in 31 U.S.C. § 9105(a)(4)(B), is more general—GAO shall report "the results of the review and make any recommendation [it] considers

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

appropriate." It certainly is broad enough to include the elements the 1945 law specified.

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

b. Appointment and Control of Directors

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

The need for a board of directors has been questioned from the managerial perspective, as well. For example, Dr. Moe has written:

> "Even the use of the term 'corporation' is unfortunate because it tends to encourage improper borrowing of concepts from the private sector. For instance, there is no particular reason for government corporations to have boards of directors, yet this feature is found in most proposals for new corporations apparently because corporations in the private sector have boards of directors."[135]

Dr. Seidman agrees, quoting a Brookings Institution report to the effect that "there appears to be nothing inherent in the corporate form of organization to require a board instead of a single administrator."[136] There are, of course, opposing views. According to Marshall Dimock, an early observer of government corporations, "[a]n effective board of directors is the key to program success."[137]

[135]Moe 1983, supra note 48, at 3-4.

[136]Seidman 1952, supra note 42, at 92.

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

The federal government's involvement in the selection or appointment of directors has evolved along with the development of government corporations. As we have seen, the United States' initial participation in the creation of government corporations involved chartering of the entity and ownership of stock. However, with the creation of the Second Bank of the United States in 1816, the President was authorized to appoint, by and with the consent of the Senate, 5 of the Bank's 25 directors, the rest to be elected annually by shareholders other than the United States. During the 19th century, the federal government "continued to charter private corporations . . . but only once participated in such a venture itself," that being, the Union Pacific Railroad. Lebron v. National R.R. Pass'r Corp., 513 U.S. 374, 387 (1995). The Union Pacific Railroad was chartered in 1862 with the President appointing two of its directors. Act of July 1, 1862, ch. 120, § 1, 12 Stat. 489, 491.

The 20th century saw considerable variation in managerial structure, mostly within a framework of increased government involvement. In 1902, as part of the statute authorizing construction of the Panama Canal (32 Stat. 481), Congress authorized the President to purchase all stock and property of the Panama Railroad Company, making the government the sole shareholder. The Secretary of War, as holder of the stock, appointed all of the company's directors. According to Lebron (513 U.S. at 387), this was the first instance in which the government appointed a majority of directors.

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

Development Foundation,[138] Commodity Credit Corporation, Export-Import Bank, and the Tennessee Valley Authority.[139] In one instance, the directors are appointed by a department head. See 7 U.S.C. § 1505(a) (Federal Crop Insurance Corporation's directors appointed by Secretary of Agriculture). The Tennessee Valley Authority legislation includes an interesting qualification: directors must "profess a belief in the feasibility and wisdom" of the TVA Act of 1933. 16 U.S.C. § 831a(h).

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

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

Another way the government can exert management influence or control is to designate a corporation as an entity within a particular

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

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

department or agency and under the control of the head of that department or agency. For example, the Commodity Credit Corporation is "an agency and instrumentality of the United States, within the Department of Agriculture" (15 U.S.C. § 714); the Saint Lawrence Seaway Development Corporation is "subject to the direction and supervision of the Secretary of Transportation" (33 U.S.C. § 981); the Overseas Private Investment Corporation is "an agency of the United States under the policy guidance of the Secretary of State" (22 U.S.C. § 2191); Federal Prison Industries, Inc. is in the Department of Justice (Reorg. Plan No. 2 of 1939, § 3(a), 5 U.S.C. App. I.) Each alternative—departmental placement or independence—has its supporters and there is no clear winner. The 1981 report of the National Academy of Public Administration recommended that government corporations "should normally be placed under the head of a cabinet department,"[140] but this has not been followed. Moe concludes that government corporations "may be placed virtually anywhere in the executive establishment. Organizational placement is not a distinguishing element for government corporations."[141]

The enabling legislation will also provide for officers of the corporation. In probably the majority of instances, they are appointed by the President of the United States (e.g., 22 U.S.C. § 2193, Overseas Private Investment Corporation), but in others they are appointed by the board of directors (e.g., 16 U.S.C. § 831b, TVA). Whether the board of directors or the "chief executive officer" is the "head" of the corporation depends on the statutory powers given to each. If the enabling legislation vests management and control in the board of directors, the "head" of that corporation, unless the statute provides differently, is the board of directors collectively, that is, acting as a body. 25 Comp. Gen. 467 (1945). In contrast is the Corporation for National and Community Service. It has a board of directors (42 U.S.C. § 12651a), but the law further specifies that the Corporation "shall be headed by [a] Chief Executive Officer . . . appointed by the President" (42 U.S.C. § 12651c).

[140]NAPA 1981, supra note 51, at 61.

[141]Moe 1995, supra note 41, at 50.

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

As noted earlier, while the overwhelming majority of government corporations have boards of directors, a few do not. Moe identified three which, at the time he wrote, did not have boards of directors—Government National Mortgage Association, Resolution Trust Corporation (since terminated), and Saint Lawrence Seaway Development Corporation.[142] Another such corporation that was later created is the Community Development Financial Institutions Fund. Its management consists of a presidentially-appointed Administrator and advisory board. 12 U.S.C. § 4703.[143]

The appointment of most or all of a board of directors is most appropriate for corporations owned or controlled by the United States. When you move further and further away from this model, the government's managerial involvement—usually, but not always—diminishes. For example, in the typical government-sponsored enterprise, the government will appoint some directors to make sure its voice will be heard, but the majority is appointed by non-government sources. Thus, the President appoints 5 out of 18

[142]Id. at 58.

[143]For a couple of years in the mid-1990s, this provision was overridden by an appropriation act proviso which made the Secretary of the Treasury the Administrator and placed the Fund in the Treasury Department. E.g., Pub. L. No. 104-134, 110 Stat. 1321, 1321-94 (FY 1996). The proviso was dropped in fiscal year 1997. See Pub. L. No. 104-204, 110 Stat. 2874, 2907 (1996).

Fannie Mae directors, 5 out of 18 for Freddie Mac, 5 out of 15 for Farmer Mac, and 7 out of 21 for Sallie Mae.[144]

One would expect a minimal federal managerial role in a federally-chartered corporation expressly designated as not an agency or instrumentality of the United States. For example, the Communications Satellite Corporation (Comsat) was created by the Communications Satellite Act of 1962, Pub. L. No. 87-624, tit. III, 76 Stat. 419, 423, to develop a commercial communications satellite system. It is expressly designated a "for profit" corporation and not an agency or establishment of the United States. 47 U.S.C. § 731. Befitting this status, Comsat was capitalized entirely with private

funds.[145] However, it was clearly intended to operate with government-conferred advantages. The statute declared that the United States participation in the global communications network would be through Comsat, "subject to appropriate governmental regulation," whatever that means. 47 U.S.C. § 701(c). The law also directed agencies such as the National Aeronautics and Space Administration, the Federal Communications Commission, and the Department of State, to provide technical advice, cooperation in research and development, and other services to Comsat. 47 U.S.C. §§ 721, 742.

Comsat has a 15-member board of directors, only three of whom are government-appointed, the rest being elected by private shareholders. 47 U.S.C. § 733. The Attorney General determined that the presidentially-appointed directors held private posts and were not officers of the United States. 40 Op. Att'y Gen. 165 (1962). As such, these directors would owe their primary fiduciary obligation to the corporation, not the Government. Id. at 171. These directors would not necessarily represent the views of the President, or the public interest beyond that ordinarily expected of directors of a private corporation, although they certainly could do so. Id.

[144]Our source for these examples is Budget Issues: Profiles of Government-Sponsored Enterprises, GAO/AFMD-91-17 (February 1991).

[145]Leazes, supra note 44, at 25-26.

In terms of the government's managerial role, somewhere in between the wholly owned corporation model and the Comsat model are the Corporation for Public Broadcasting and the Legal Services Corporation. Both are chartered as nonprofit corporations and are not to be regarded as agencies or establishments of the United States. See 47 U.S.C. § 396(b); 42 U.S.C. §§ 2996b and 2996d(e)(1). Neither is subject to the Government Corporation Control Act. Nevertheless, perhaps because both are federally-funded as well as federally-created and perform essentially governmental rather than commercial functions, their entire boards of directors are appointed by the President. 47 U.S.C. § 396(c); 42 U.S.C. § 2996c.

5. Sources of Funds and Financing

There is no single model for the funding structure of a government corporation. The corporate form alone does not dictate any particular type of funding. Just as with the corporation's organization and powers, its funding structure varies according to its purpose and activities as reflected in the enabling legislation. As one court has noted, "Congress is not limited by traditional notions of corporate powers and organization" and it "need not capitalize corporate instrumentalities of the United States in any rigidly prescribed manner."[146] United States v. Nowak, 448 F.2d 134, 138 (7th Cir. 1971). In fact, Congress has funded government corporations using a variety of sources and methods: direct appropriation of funds, federal borrowing, charges or user fees for services provided to the public, federal ownership of stock, and private investment or financing (e.g., sale of debt securities) with actual or implied backing by the United States, or some combination of these methods.

a. Types of Financing: Government

(1) Direct appropriations

One funding option is the direct appropriation of funds from the general fund of the Treasury, exactly the same as for an unincorporated agency. In its 1995 study, Government Corporations: Profiles of Existing Government Corporations, GAO found that, out of 24 corporations then listed in the Government Corporation

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

Control Act, 15 had received federal appropriations in fiscal year 1994. GAO/GGD-96-14, at 21-22. As a general proposition, wholly owned corporations were more likely to receive direct appropriations than mixed-ownership corporations, although some mixed-ownership corporations received appropriations while some wholly owned corporations did not. In addition, several corporate entities not subject to the Control Act received appropriations. Id.

Direct appropriations may provide all or part of a corporation's funding. Examples of government-created corporations fully funded by congressional appropriations are the Corporation for National and Community Service and the Legal Services Corporation.[147] Fully-funded corporations tend to be those with non-commercial functions. There is no nexus between full funding status and inclusion or exclusion from the Government Corporation Control Act. For example, the Corporation for Community Service is subject to the act, while Legal Services is not. An example of partial appropriations funding is the Commodity Credit Corporation. Largely because the CCC administers a variety of relatively high-risk programs, the typical year produces nonrecoverable losses which are funded from a "net realized losses" appropriation.[148] Congress may provide appropriations for certain start-up costs, with the expectation that private financing will then take over. An example is discussed in 69 Comp. Gen. 289 (1990) (Pennsylvania Avenue Development Corporation could amortize construction consultants' fees as a cost of construction because they were not the kind of start-up costs for which Congress had provided appropriations).

Congress can structure a corporation's appropriation however it wishes. The appropriation cited above for the Corporation for National and Community Service is a simple lump sum; that for the Legal Services Corporation is a lump sum with a few earmarks.[149] At

[147]See, respectively, the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-78, 111 Stat. 1467, 1509 (1997), and the Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-119, 111 Stat, 2440, 2510 (1997).

[148]E.g., Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-86, 111 Stat. 2079, 2091 (1997).

[149]See note 147, supra.

what is perhaps the other extreme, at least for a government corporation, the 1988 appropriation for the Commodity Credit Corporation's operating expenses consisted of 17 line items, plus limited transfer authority.[150] The import of lump-sum and line-item appropriations in this context is no different than it is for unincorporated agencies.

Most corporate appropriations are definite in amount; some are not. For example, the Federal Crop Insurance Corporation's 1998 appropriation to the FCIC Fund was "such sums as may be necessary, to remain available until expended," i.e., an indefinite, no-year appropriation.[151] The Commodity Credit Corporation (CCC) is authorized to receive its "net realized losses" appropriation on a "current, indefinite" basis. 15 U.S.C. § 713a-11. This is merely an authorization, however, and Congress remains free to structure the appropriation some other way. 67 Comp. Gen. 332 (1988). The CCC's 1998 appropriation was a current, indefinite appropriation ("[f]or fiscal year 1998, such sums as may be necessary"), but subject to a monetary ceiling.[152] Since the CCC receives a direct appropriation for net losses, it is logical that net gains, should they ever occur, be deposited in the Treasury as miscellaneous receipts, and this is what the law requires. 15 U.S.C. § 713a-12. Cf. Knowles v. War Damage Corp., 171 F.2d 15, 19-20 (D.C. Cir. 1948) (not illegal for a statute to require a government corporation to pay its surplus funds into the Treasury).

(2) Federal borrowing

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

[150]Pub. L. No. 100-202, 101 Stat. 1329, 1329-335 (1987).

[151]Pub. L. No. 105-86, supra note 148, 111 Stat. at 2091.

[152]Id.

Telephone Bank). The Pension Benefit Guaranty (PBGC) provision just cited is fairly typical:

> "The [PBGC] is authorized to issue to the Secretary of the Treasury notes or other obligations in an aggregate amount of not to exceed $100,000,000, in such forms and denominations, bearing such maturities, and subject to such terms and conditions as may be prescribed by the Secretary of the Treasury. Such notes or other obligations shall bear interest at a rate determined by the Secretary of the Treasury . . . . The Secretary of the Treasury is authorized and directed to purchase any notes or other obligations issued by the [PBGC] under this subsection."

Some borrowing provisions, like the PBGC statute, have a fixed dollar ceiling. Others have a variable ceiling, like 7 U.S.C. § 947(a) (amount borrowed by Rural Telephone Bank which is outstanding at any one time "shall not exceed twenty times the paid-in capital and retained earnings" of the Bank). Unused borrowing authority is a form of contingent liability. United States v. Nowak, 448 F.2d 134, 138 n.4 (7th Cir. 1971). In determining the amount of unused borrowing authority, a corporation may exclude interest on outstanding obligations already held by the Treasury. B-89366-O.M., September 9, 1964. If a contrary congressional intent can be established, however, the answer will be different. See B-125007/ B-127378, July 20, 1956.

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

In lieu of direct borrowing from the Treasury, it may be possible to go through an intermediary, the Federal Financing Bank (FFB). The FFB was created in 1973 to coordinate federal and federally assisted borrowings and thereby hopefully reduce their costs. 12 U.S.C. § 2281. The FFB is itself a corporate entity under the general direction and supervision of the Secretary of the Treasury, and an instrumentality of the United States. 12 U.S.C. § 2283. While not listed in the Government Corporation Control Act, the FFB is subject to the act's budget and audit provisions for wholly owned government corporations. 12 U.S.C. § 2293. For present purposes, two provisions of the act creating the FFB are relevant. Under

12 U.S.C. § 2285(a), "[a]ny Federal agency which is authorized to issue, sell, or guarantee any obligation is authorized to issue or sell such obligations directly to the [FFB]." "Federal agency" includes "a corporation or other entity established by the Congress which is owned in whole or in part by the United States." 12 U.S.C. § 2282(1). Thus, at least certain corporations with statutory borrowing authority can issue their obligations directly to the FFB, which can then issue its own securities either in the private market or, more likely, to the Treasury. 12 U.S.C. § 2288.

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

In two opinions to Members of Congress, GAO reviewed the financing arrangements for building construction at the government-owned Federal Triangle site in the District of Columbia. The former Pennsylvania Avenue Development Corporation, a wholly owned government corporation, was responsible for the planning, development, and construction oversight of the project. The original plan was to obtain private financing for the construction. It was later decided, however, that financing through the FFB would save the government interest costs. The project's trustee obtained the financing through a promissory note issued to the FFB, and secured

by the trustee's assignment to the FFB of the trustee's rights to receive statutorily-required rental payments from the General Services Administration. GAO concluded that the FFB was an appropriate source of financing because the Federal Triangle building—designated the Ronald Reagan Federal Building—was fundamentally a project being constructed by the federal government. Several factors supported this conclusion. The federal government, by statute, bore the full risks of developing and owning the project; the land on which the project was being built belonged to the United States; and the government carried the principal rights and obligations associated with ownership of the project, including the project's design and specifications for construction. The Pennsylvania Avenue Development Corporation most likely would have met the Justice Department's eligibility criteria, except that there was no need to apply that test because, under the Federal Triangle legislation, the promissory note issued for financing purposes was in effect an obligation of GSA rather than the Corporation. B-248647, December 28, 1992; B-248647.2, April 24, 1995.

As the 1995 opinion pointed out, a corporation (or unincorporated agency, for that matter) with statutory borrowing authority does not need further specific authority to use the FFB. The provisions of the law creating the FFB noted above supply the necessary authority. B-248647.2, supra, at 3.

(3) Federal ownership of stock

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

Of the modern (post-Corporation Control Act) government corporations, some issue stock, many do not. A government corporation issues stock if it is authorized to do so in its enabling legislation. The statute will specify the amount of stock that may be

issued and who may or must subscribe to it. For example, the federal government owns 100% of the capital stock of the Commodity Credit Corporation (15 U.S.C. § 714e), the Export-Import Bank (12 U.S.C. § 635b), and the Federal Crop Insurance Corporation (7 U.S.C. § 1504(a)). The Rural Telephone Bank is authorized to issue three classes of stock, one owned by the government, one by loan recipients, and one by specified classes of purchasers. 7 U.S.C. § 946.

b. Types of Financing: Private

(1) Sources of private financing

Private financing can take one of three forms: fees and charges, stock ownership, and borrowing. For the most part, authority to assess fees and charges will be spelled out in the pertinent legislation. The kinds of receipts vary with the type of program being administered. The Tennessee Valley Authority receives income from the sale of electric power (including sales to government agencies, 44 Comp. Gen. 683 (1965)). The Pension Benefit Guaranty Corporation collects premiums from sponsors of covered pension plans. 29 U.S.C. § 1306. The St. Lawrence Seaway Development Corporation for many years received its income from tolls (33 U.S.C. § 988; 35 Comp. Gen. 267 (1955)), but Congress suspended this authority with respect to commercial vessels in 1994 (33 U.S.C. § 988a), and began funding the Corporation from the Harbor Maintenance Trust Fund. See 33 U.S.C. § 2238 and 26 U.S.C. § 9505. The Panama Canal Commission's revolving fund received toll receipts and was authorized to retain interest generated by amounts deposited in financial institutions outside the Treasury. 22 U.S.C. § 3712; B-280951, December 3, 1998.

If there is no express authority, it may nevertheless be possible for a corporation to assess fees under 31 U.S.C. § 9701, the so-called "user charge statute," covered in detail in Chapter 15. Section 9701 by its terms applies to wholly owned, but not mixed-ownership, government corporations. The limitation to wholly owned corporations is because they are the closest to regular government agencies. This does not mean that other types of government-created corporations may not charge fees, merely that they must find the authority elsewhere.

A government-created corporation designated as private may also find itself on the other end of the transaction—having to pay

government agencies for services rendered to it. For example, the Communications Satellite Act authorizes certain services to be provided to Comsat on a reimbursable basis, but does not further address how the charges are to be determined. Absent anything to the contrary in the law or its legislative history, GAO found it legitimate to determine the charges in accordance with the standards under 31 U.S.C. § 9701. B-168707-O.M., May 11, 1970.

A statutory authorization may also be a limitation. The Export-Import Bank, for example, is authorized to charge fees for conferences, seminars, and publications. 12 U.S.C. § 635(a)(1). Then, similar to authority given to the executive branch generally, the statute authorizes the Bank to accept voluntary contributions for travel and subsistence expenses incurred by its officers or employees. Given this structure, GAO found that the statute does not authorize the Bank to require its customers to pay the travel and subsistence expenses. B-272254, March 5, 1997.

The second form of private financing is private subscription to stock. Naturally, one would not expect to find this in the case of a wholly owned government corporation, but it is a theoretical option for Congress to consider for mixed-ownership corporations, and is commonly found in government-sponsored enterprises. Statutory provisions for GSEs may prescribe classes of common stock, voting and nonvoting stock, preferred stock, and may address institutional versus general subscription. Examples are 12 U.S.C. § 1453 (Freddie Mac); 12 U.S.C. § 2124 (Banks for Cooperatives); 12 U.S.C. § 2279aa-4 (Farmer Mac); and 20 U.S.C. § 1087-2(f) (Sallie Mae). The Justice Department has concluded that, as long as no statute prohibits it, a corporation can use preferred stock as a dividend to its shareholders of common stock. 9 Op. Off. Legal Counsel 19 (1985). (This case involved Freddie Mac, whose legislation later changed, but the point is still good.) Other federally-created corporations which are chartered as private may be stock (Comsat) or nonstock (Corporation for Public Broadcasting) corporations. As with the GSEs, the details are found in the enabling legislation. E.g., 47 U.S.C. § 734(a) (Comsat stock to be "sold in a manner to encourage the widest distribution to the American public").

The third type of private financing is borrowing—the issuance of promissory notes, bonds, or other debt obligations to the public. An example is 7 U.S.C. § 947, which authorizes the Rural Telephone

Bank to borrow from the public as well as from the Treasury. The Commodity Credit Corporation has comparable authority in 15 U.S.C. § 713a-4.

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

Congress can include express disclaimer language in the statute, which will then of course control. E.g., 12 U.S.C. § 1721(b) (Ginnie Mae). If, however, the test for an obligation of the United States (as set out in the Attorney General's opinions) is met, disclaimer language found only in legislative history is not enough. 68 Comp. Gen. at 18-19.

As with borrowing from the Treasury, borrowing from the public can also be handled through the Federal Financing Bank. Indeed, individual agency offerings to the public were the main concern behind the law creating the Federal Financing Bank. See, in this regard, 12 U.S.C. § 2281. See also H.R. Rep. No. 93-299, at 2 (1973), reprinted in 1973 U.S.C.C.A.N. 3153, 3154-55.

(2) Market perception of implied backing by United States

"As one wag puts it: With GSEs, you privatize the profits and socialize the risk."[153]

The preceding discussion outlines when a government corporation's obligations may be backed by the full faith and credit of the United States. Government-sponsored enterprises (GSEs) are generally regarded as one step further removed from "government status" and, therefore, further removed from government backing, at least official backing. Of course, Congress is free to provide federal backing whenever it wishes. E.g., 12 U.S.C. § 2278b-6(d)(4)(A) (if Financial Assistance Corporation is unable to pay principal or interest on its obligations, Treasury is required to pay and try to recover from the defaulting bank). More often than not in the case of GSEs, however, Congress has enacted express disclaimers. For example, 12 U.S.C. § 4503 disclaims any federal guarantee of the obligations or liability of Fannie Mae, Freddie Mac, and the Federal Home Loan Banks, and any implication that they are backed by the full faith and credit of the United States. (The Home Loan Banks are mixed-ownership government corporations; the other two are GSEs.)

Searching the statutes for guarantee or disclaimer language addresses only the presence or absence of a formal, "official" obligation. Even in the case of a disclaimer, virtually every analyst or commentator who has examined GSEs has emphasized the existence of a market perception of implied backing by the United States because, presumably, the GSE will not be allowed to fail. Dr. Moe states, very simply, that "[t]he Federal Government implicitly guarantees the value of GSE obligations and mortgage-backed securities."[154] This implicit guarantee has been called the "distinguishing characteristic"[155] of GSEs and their "most valuable

[153]Ronald C. Moe, The 'Reinventing Government' Exercise: Misinterpreting the Problem, Misjudging the Consequences, 54 Pub. Admin. Rev. 111, 113 (1994).

[154]Moe 1995, supra note 41, at 38.

[155]Moe and Stanton 1989, supra note 69, at 322; Ronald C. Moe, Liabilities of the Quasi Government, 20 Gov't Exec. 47, 49 (1988). Moe and Stanton, at 321, go so far as to include the implicit guarantee as an element of the definition of a GSE. See also Moe 1995, supra note 41, at 38.

perk."[156] Another writer suggests that in the event of GSE failure, the government would have "no real alternative but to deliver on the implicit guarantee" in order to avoid disruption in the credit markets.[157]

The implicit guarantee results from the facts that GSEs are regarded as instrumentalities of the United States, and their obligations have many of the characteristics of Treasury obligations.[158] As another commentator has pointed out, some of the most prominent private credit-rating agencies "have rated enterprise securities based on the strength of this implied government guarantee, in spite of the knowledge that no actual guarantee exists."[159]

This market perception of a federal guarantee confers significant economic benefits on GSEs. Primarily, it enables them to borrow money at rates much lower than private corporate obligations, and almost as low as the rates Treasury itself pays on its borrowings.[160]

(3) Statutory controls

In addition to the budget, audit, and account controls previously described, the Government Corporation Control Act, 31 U.S.C. § 9108, addresses the debt obligations of all government corporations, wholly owned and mixed-ownership, unless specifically exempted. Under subsection (a), a government corporation may not issue or offer obligations to the public unless the Secretary of the Treasury has approved[161] the form,

[156]Nitschke, supra note 68, at 1580.

[157]Froomkin, supra note 49, at 580.

[158]The common characteristics are listed in Stanton, supra note 70, at 404-05.

[159]Lavargna, supra note 69, at 1011.

[160]See, e.g., Budget Issues: Profiles of Government-Sponsored Enterprises, GAO/AFMD-91-17, at 7 (February 1991); Lavargna, supra note 69, at 1010-11; Stanton, supra note 70, at 404.

[161]The 1982 recodification of Title 31 changed the original "approve" (see 59 Stat. 602) to "prescribe." We think "prescribe" could be a bit misleading in that it often is used to refer to the issuance of regulations, whereas "approve" clearly includes ad hoc action.

denomination, maturity, and interest rate of the obligations and the conditions to which they will be subject; the manner and times of their issuance; and the price for which they will be sold.

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

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

Subsection (d) contains the exemptions. The approval requirements of subsections (a) and (b) do not apply to certain named mixed-ownership government corporations, nor to any mixed-ownership corporation from which government capital has been entirely withdrawn.

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

6. Fiscal Autonomy

a. Account Settlement

GAO's "account settlement" authority refers to the first portion of 31 U.S.C. § 3526(a)—"The Comptroller General shall settle all accounts of the United States Government." During the pre-World War II period and for a while thereafter, this meant that all accounts had to be physically transmitted to GAO, where GAO auditors scrutinized them, line by line, "disallowing" or "taking an exception to" (they mean the same thing) expenditures found to be illegal. GAO's application of this authority underwent major evolution during the third quarter of the 20th century. Now, agencies retain their own accounts, keeping them available for audit,[162] and an

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

account is regarded as "settled" by operation of law after three years except for unresolved items. See 31 U.S.C. § 3526(c). While account settlement is nowhere near what it used to be, it is nevertheless relevant in determining such things as (1) the kinds of audit GAO is authorized to perform, (2) who may request a legal decision from GAO,[163] and (3) the application of the accountable officer relief statutes.

During the decades preceding enactment of the Government Corporation Control Act, the relationship of GAO to government corporations was a major battlefield. The corporations argued that they should be exempt from GAO's account settlement authority; GAO argued the opposite.[164] In 1927, the Supreme Court decided the case of United States ex rel. Skinner & Eddy v. McCarl, 275 U.S. 1 (1927). A contractor sought a writ of mandamus to compel GAO to consider its claim against the Emergency Fleet Corporation. The Court held that the claim was not within GAO's claims settlement jurisdiction. The executive branch seized on this case to declare as a blanket proposition that GAO's account settlement authority did not extend to government-owned corporations. E.g., 40 Op. Att'y Gen. 84 (1941). While this was certainly an arguable position, GAO's initial reaction was to distinguish Skinner & Eddy, pointing out that the Court had not directly ruled on that question. B-29072, November 16, 1943. GAO tried to reconcile the conflicting views, holding that accountable officers still had to render their accounts, but that GAO, in performing its settlement audit, would recognize the corporations' exemption from various laws. B-24827, May 22, 1942.

Two developments have largely resolved the issue. First was the enactment of the Government Corporation Control Act. As described earlier, the Control Act mandated a commercial-type audit—as opposed to the traditional governmental audit—and told GAO to include in its audit reports anything it believed to be illegal.

[163]In the early days, when large numbers of employees were poring over every account, GAO was more likely to turn down a request from an entity not within its account settlement jurisdiction. E.g., B-112540, November 25, 1952. In more recent times, as GAO has come to view its decision function more as providing a service, this has become less likely.

[164]Many of the squabbles are recorded in John McDiarmid, Government Corporations and Federal Funds (Univ. of Chicago Press, 1938).

Although some decisions reflect ambivalence,[165] GAO tended to view this as supplanting its account settlement authority with respect to corporations. E.g., B-58302, April 29, 1947 (former Reconstruction Finance Corporation); B-146820, June 2, 1967 (CCC), B-150556, May 29, 1968 (CCC); B-152534-O.M., December 4, 1963 (Panama Canal Company).

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

> "The Corporation shall determine the character and necessity for its expenditures . . . and the manner in which they shall be incurred, allowed, and paid, without regard to the provisions of any other laws governing the expenditure of public funds and such determinations shall be final and conclusive upon all other officers of the Government." 7 U.S.C. § 1506(i).

There are variations in language. (The "final and conclusive" part is probably redundant.) GAO views the "character and necessity" provision as ousting its account settlement authority. E.g., B-226708.3, December 12, 1988 (former FSLIC); B-200103, March 5, 1981 (CCC); B-34706, December 5, 1947 (generally). Some decisions also mention other corporate powers like the power to sue and be sued or to conclusively settle claims, but the "character and necessity" power is the crucial element.

The first step in the analysis is to examine a corporation's particular legislation. If Congress has addressed the matter one way or the other, there is no need to go further. Congress is always free to make a particular corporation subject to GAO's account settlement. E.g., B-123943-O.M., July 1, 1955. An example is Federal Prison Industries, whose legislation provides:

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

"Accounts of all receipts and disbursements of the corporation shall be rendered to the General Accounting Office for settlement and adjustment, as required by the Comptroller General." 18 U.S.C. § 4126(d).

See B-98983-O.M., December 18, 1950. The Tennessee Valley Authority (TVA) has an interesting structure. The TVA is expressly made subject to the account settlement laws, but a determination of necessity by the TVA Board of Directors will override a GAO finding to the contrary. 16 U.S.C. § 831h(b). See, e.g., B-209585, January 26, 1983; B-114850-O.M., September 21, 1977.

If a corporation's enabling legislation does not address account settlement, then, for the two reasons noted above, GAO will conclude that the authority does not exist. Most of the cases, including all of the cases cited in the preceding paragraphs, have involved wholly owned corporations. For example, with respect to the Department of Housing and Urban Development when carrying out those functions specified in 31 U.S.C. § 9101(3), see B-182653, January 16, 1975; B-181961/B-182280, November 26, 1974; B-99262-O.M., January 11, 1951. If this is true for wholly owned corporations, it surely must be true for mixed-ownership corporations like the Federal Deposit Insurance Corporation (B-210496, February 1, 1983), and to corporations created and funded by the government but designated as "private," like the Legal Services Corporation (B-241591, March 1, 1991; B-203901, July 9, 1982; B-204886, October 21, 1981).[166]

If the account settlement laws do not apply to a particular corporation, neither do the laws providing for the relief of accountable officers. In such a case, any accountability of officers or employees of the corporation is up to the corporation itself to determine, and would be accountability to the corporation, not the United States. B-88578, August 21, 1951. See also B-83360-O.M.,

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

April 8, 1949 (Certifying Officers' Act not applicable to Federal Crop Insurance Corporation).[167]

b. Status of Funds

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

Viewing the principle in the abstract, that is, setting aside for the moment the question of the consequences of the status determination, there is no reason the principle should not apply to government corporations as well as unincorporated agencies. Thus, GAO has applied the principle in the following situations:

- Tolls assessed and collected by the St. Lawrence Seaway Development Corporation. B-193573, January 8, 1979, as modified by B-193573, December 19, 1979, and restated in B-217578, October 16, 1986. (As noted elsewhere, the Corporation stopped being funded from tolls in the mid-1990s.)
- The Prison Industries Fund operated by Federal Prison Industries, Inc., the receipts of which consist primarily of proceeds from the

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

sale of FPI products and services. 60 Comp. Gen. 323 (1981); B-230304, March 18, 1988.[168]

- Revolving funds of the Pension Benefit Guaranty Corporation in its capacity as insurer of private pension plans. B-223146, October 7, 1986; B-217281-O.M., March 27, 1985.
- Power program funds (revenue and bonds) of the Tennessee Valley Authority. 64 Comp. Gen. 756, 761-62 (1985).
- Bonneville Power Administration Fund, a revolving fund consisting of all receipts of the Bonneville Power Administration, proceeds from the sale of its bonds, and appropriations Congress may make (16 U.S.C. § 838i). 67 Comp. Gen. 8, 10 (1987).
- Capitalization obtained from the United States Treasury under borrowing authority. B-223857, February 27, 1987 (CCC); B-193573, December 19, 1979 (St. Lawrence Seaway Development Corporation).

It makes no difference whether the statutory language authorizing retention and use is found in an appropriation act or in other legislation. B-193573, December 19, 1979, at 7. The fact that the fund has repaid its initial capitalization to the Treasury and has become self-supporting is also immaterial. 60 Comp. Gen. 323, 326 (1981).

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

This being the case, application of the principle to a mixed-ownership government corporation, although possible in theory and perhaps even desirable in some instances, would seem less appropriate. Thus, assessments levied on insured banks by the Federal Deposit Insurance Corporation and used to pay the FDIC's operating expenses are not regarded as "appropriated funds." 23 Comp. Gen. 83 (1943); B-20892, December 11, 1941;

[168]No less a supporter of corporate autonomy than John McDiarmid has referred to the Prison Industries Fund as a "permanent appropriation." See McDiarmid, supra note 45, at 55.

B-214157-O.M., April 2, 1984, at 8-9. See also A-91137, April 11, 1938 (FDIC's assessment-derived funds, while not an appropriation, are the equivalent of an appropriation for purposes of availability for necessary expenses). (None of these cases use the term "mixed-ownership" corporation because they all pre-date the explicit legislative recognition of that term in the Corporation Control Act.)

The Pension Benefit Guaranty Corporation (PBGC) illustrates a situation in which funds in the hands of a wholly owned corporation are not regarded as appropriated funds. The PBGC has two very different functions: it insures certain private pension plans, and it is authorized to serve as trustee for terminated plans. In B-217281-O.M., March 27, 1985, the issue was whether the PBGC had to follow the federal procurement regulations in obtaining investment manager services for (1) excess capital in its revolving funds and (2) assets of terminated plans in its hands as trustee. As noted above, when the PBGC is acting in its capacity as pension plan insurer, its revolving funds are treated as appropriated funds. Accordingly, the procurement regulations applied when procuring services for the revolving funds. However, when serving in its trustee capacity, the PBGC is treated as a private fiduciary and its powers include collecting amounts due the plan, paying plan benefits, liquidating plan assets, and recapturing prior payments. 29 U.S.C. § 1342(d)(1)(B).[169] The funds of terminated plans PBGC administers are trust funds, privately created and privately funded, and are not treated as appropriated funds. Therefore, the PBGC is not bound by the federal procurement regulations when procuring services for its trust funds. Similarly, when using trust funds in its trustee capacity, the PBGC could modify existing contracts and could enter into a contingent-fee arrangement with outside counsel for litigation, without regard to the laws governing the expenditure of appropriated funds. B-223146, October 7, 1986.

In the case of an unincorporated agency, the question whether certain funds are appropriated funds has very significant consequences. If they are, "they are subject to the various restrictions and limitations on the uses of appropriated moneys." 35 Comp. Gen. 615, 618 (1956). In the case of a government

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

corporation, the result is still to subject the corporation to certain laws governing appropriated funds (or to determine the scope of exemptions for "nonappropriated funds"), but, as discussed next, the range of applicable laws is much narrower and varies depending on the precise terms of a given corporation's governing legislation.

c. Application of Fiscal Laws

As we have seen, fiscal autonomy is one of the key features of government corporations, and, in some cases, the primary impetus for their creation. "Government corporations," GAO conceded long ago, "are conceived not for the purpose of limiting the Government prerogative . . . but of accelerating and enlarging it and of making it more flexible." B-37981, June 1, 1944, at 52. The earliest battles, centering on the effect of corporate status per se, were inconclusive.[170] Changes in the law since that time now provide a framework.

(1) "Character and necessity" provision

GAO has often stated that the funds of "regular," non-corporate agencies, including the various forms of authority to retain and use receipts, are, absent statutory provision to the contrary, "subject to the statutory controls and restrictions applicable to appropriated funds." E.g., 63 Comp. Gen. 285, 287 (1984). In the corporate context, however, this statement is too broad and must be qualified. B-193573, December 19, 1979. The reason, and perhaps the most significant element in the fiscal autonomy of a government corporation, is what we will call the "character and necessity" provision appearing in many, if not most, legislative charters. The provision seems to have originated in the 1930s and there are several variations. An example of the simplest form is 15 U.S.C. § 714b(j), which provides that the Commodity Credit Corporation—

> "[s]hall determine the character of and the necessity for its obligations and expenditures and the manner in which they shall be incurred, allowed, and paid."

A variation is 33 U.S.C. § 984(a)(9), providing that the St. Lawrence Seaway Development Corporation—

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

"shall determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid, subject to provisions of law specifically applicable to Government corporations."

There is no material difference between these versions.

The first thing a "character and necessity" provision does is permit the corporation to avoid the various nonstatutory and "policy rules" the rest of the government follows. The one that comes immediately to mind is entertainment. Of course the congressional approach to providing funds for entertainment is clear statutory recognition of the rule, but there is nevertheless no statute which directly says "Thou shalt not party at the taxpayers' expense." Consequently, a corporation empowered to determine the character and necessity of its expenditures can spend its money on the range of items discussed in Chapter 4 under the "entertainment" heading, subject of course to any applicable statutory restrictions. B-127549, May 18, 1956; B-35062, July 28, 1943. Accordingly, a corporation operating with appropriated funds but without the "character and necessity" provision is subject to the entertainment rules. B-270199, August 6, 1996. (The decision does not mention the lack of "character and necessity" authority, but that was in fact the case and indeed the essential prerequisite to applying the rules.)

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

Another category of expenditures legally unobjectionable under "character and necessity" authority are items grouped in Chapter 4 under the heading "Personal Expenses and Furnishings." Examples are:

- Physical examinations for certain employees of the St. Lawrence Seaway Development Corporation. 41 Comp. Gen. 531 (1962).
- Expenses necessary to qualify an employee to do his or her job. B-2835, April 18, 1939 (qualification as notary).

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

Still another item of expenditure for which funds of a non-corporate agency are unavailable, but which is permissible under a corporation's "character and necessity" power, is hazard insurance on various types of property. 16 Comp. Gen. 453 (1936) (wholly owned corporation); B-200103, March 5, 1981 (CCC, also wholly owned); A-51647/B-15611, January 12, 1942 (unincorporated commission with similar statutory discretion). See also 55 Comp. Gen. 1321 (1976); 11 Comp. Gen. 59 (1931).

This applies as well to creating a reserve for fire, theft, and similar losses. B-123709-O.M., June 29, 1955. Other examples of expenditures found to be within the scope of a "character and necessity" provision are a memorial plaque by the Pennsylvania Avenue Development Corporation (64 Comp. Gen. 124 (1984)); publicity photographs, including 47 pictures of one official (A-57964, January 30, 1935);[171] improvements to nonfederal property (B-11279, August 15, 1940); contracting for personal services to conduct a management survey (33 Comp. Gen. 143 (1953)); contracting for personal services to sell crop insurance on a fee or commission basis (B-48591, March 29, 1945); and the use of air travel credit cards back when GAO was cautioning against them (B-150282, October 21, 1966).

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

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

[171]Some of the cases cited in this portion of the text, such as A-57964 and the two personal services cases, involve a statutory variation which confers "character and necessity" authority "without regard to any other provisions of law governing the expenditure of public funds." The effect of the "without regard" language will be addressed later in the text. In the cases cited here, the presence of a "without regard" clause was incidental and the results would have been the same without it.

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

One example is 44 U.S.C. § 501, requiring the Government Printing Office to do all printing and binding for the government. (This provision is discussed in more detail under the "Printing and Binding" heading of this part.) Two additional examples, noted in B-193573, December 19, 1979, are 5 U.S.C. § 3107 (prohibiting use of appropriated funds to pay publicity experts) and 31 U.S.C. § 1345[172] (prohibiting use of appropriated funds to pay lodging or feeding of non-government persons at meetings or conventions). See also B-7067, July 10, 1940, and B-3163, April 24, 1939 (now-obsolete portions of predecessor of 5 U.S.C. § 3106 restricting hiring of attorneys).

A formulation GAO has often used is that a wholly owned government corporation with the power to determine the character and necessity of its expenditures is subject to (1) its own charter (enabling legislation); (2) the Government Corporation Control Act, if and to the extent applicable; (3) applicable restrictions contained in annual appropriation acts; and (4) statutes expressly applicable to wholly owned corporations. E.g., B-58305-O.M., April 10, 1951 (Federal Intermediate Credit Banks, subsequently converted to mixed-ownership but listed as wholly owned in the original Corporation Control Act); B-58305-O.M., March 8, 1951 (former Production Credit Corporation); B-58306(2)-O.M., November 14, 1950 (CCC); B-58318-O.M., October 27, 1950 (Export-Import Bank); B-90250-O.M., March 28, 1950 (corporate functions of Federal Housing Administration).[173] Similar statements appear in a number of more recent items. E.g., B-217578, October 16, 1986.

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

[173]These are from a series of memoranda issued by the Comptroller General to GAO audit divisions shortly after enactment of the Corporation Control Act, when GAO was refining its ability to conduct corporate audits.

The formula for mixed-ownership government corporations is similar except for the final element. Some earlier mixed-ownership corporations included the "character and necessity" authority or its functional equivalent. E.g., 12 U.S.C. § 1820(a) (FDIC "shall determine and prescribe the manner in which its obligations shall be incurred and its expenses allowed and paid"). More recent ones tend not to have it. E.g., Pub. L. No. 93-236, title II, 87 Stat. 985, 990 (the now-defunct U.S. Railway Association). For a mixed-ownership corporation, at least one not receiving direct appropriations, it is probably not necessary. Our review of cases involving the FDIC indicates that its autonomy is abetted by the "character and necessity" clause, but that it would most likely have the same degree of autonomy without it, by virtue of its mixed-ownership status and the source of its funding. For example, the FDIC is not required to follow the obligation recording statute, 31 U.S.C. § 1501 (B-121541, December 30, 1954); the statutory restrictions on the purchase of motor vehicles and aircraft, 31 U.S.C. § 1343 (B-94685-O.M., May 8, 1950); or the recurring appropriation act provision restricting the funding of interagency groups (B-174571, January 5, 1972). Attempting to generalize, the first three elements of the formula would be the same as for a wholly owned corporation: a mixed-ownership corporation is subject to its own statutory charter, the Government Corporation Control Act, if and to the extent applicable, and applicable provisions in appropriation acts. In addition, for the fourth element, it is subject to post-charter laws specifically applicable to mixed-ownership corporations. See B-58300-O.M., November 30, 1950 (FDIC).

(2) "Without regard" clause

In addition to the various minor linguistic variations, there is one major variety of the "character and necessity" clause, illustrated by the Federal Crop Insurance Corporation statute quoted above in our discussion of account settlement. It confers the "character and necessity" power, "without regard to the provisions of any other laws governing the expenditure of public funds." Clearly, as a matter of basic statutory construction (or, reading the English language), this version must confer more than the basic "character and necessity" clause that does not include the "without regard" language. Exactly what that "more" is has been the subject of surprisingly little attention, at least in accessible research materials. The question was squarely presented to GAO in 1946 by the (then)

Bureau of the Budget, but GAO declined to answer. B-56550, March 28, 1946. While we have found no definitive discussion of the issue, the rule—subject to exceptions, we are sure—appears to be that the "without regard" language gives the corporation, in addition to everything it gets under the basic "character and necessity" clause, the further ability to avoid laws expressly applicable to government corporations (but not, of course, specifically applicable to the particular corporation), at least laws on the books at the time the "without regard" language was enacted.[174]

For example, in B-94115, November 15, 1950, GAO reviewed the "without regard" clause of the Reconstruction Finance Corporation. Clearly, the clause permitted the RFC to avoid laws existing on May 25, 1948, the date of the clause's enactment, even laws expressly applicable to government corporations. However, GAO added, the broad latitude of the "without regard" clause had been modified by the enactment after 1948 of legislation expressly applicable to government corporations. Id. Several months earlier, the Comptroller General had told GAO's auditors essentially the same thing with respect to the corporate functions of the Federal Housing Administration, B-90250-O.M., March 28, 1950. A good example of how this works is discussed below in connection with apportionment.

A government corporation with a "character and necessity" provision which includes the "without regard" clause has considerable discretion indeed. The discretion is not unlimited, however. It is—

> "a legal discretion to be exercised within the limitations and for the purposes of the statutes providing the funds and prescribing the activities of the [corporation]."
> 14 Comp. Gen. 698, 700 (1935).

It does not place the corporation "beyond all law or accountability with respect to its expenditures." 14 Comp. Gen. 755, 758 (1935). GAO has not attempted to draw the outer limits of this discretion, other than to suggest a broad "public policy" limitation. The practice

[174]We are aware of the seemingly inconsistent discussion in 65 Comp. Gen. 226 (1986). While that case was correctly decided, some of the discussion appears to misinterpret earlier decisions. The matter is covered in more detail under the "Printing and Binding" heading of this Part.

GAO found illegal in 14 Comp. Gen. 755 was permitting attorneys employed by a government corporation to represent, on a fee basis, private parties in their dealings with the corporation. "The permitting of employees to practice before the public agency by which employed would seem so improper and so out of line with sound public policy as to suggest no need for a prohibiting statute." Id. at 758. Other examples are 14 Comp. Gen. 638 (1935) (use of housing assistance funds to conduct an advertising campaign designed to drum up customers for the program); B-44435, October 5, 1944 (making a payment another party is contractually obligated to make).

Neither is discretion license. It is a conscious, rational choice between two or more alternatives. As such, it must be exercised in accordance with the corporation's established decision-making machinery and procedures. Rubber-stamping an expenditure already made—merely because it was made—"does not constitute the exercise of discretion . . . but a condoning of what has already been done." 14 Comp. Gen. at 700. See also 18 Comp. Gen. 479 (1938); B-56550, March 28, 1946. This does not mean that the machinery must be invoked for each individual transaction. In some cases, the exercise of discretion on a categorical basis is legitimate, as long as done under the established procedures and documented. E.g., A-98289/A-60495, January 18, 1939 (formal board resolution that requirement to have printing done at Government Printing Office is not applicable to the corporation).

(3) Laws expressly applicable

It is clear at this point that it is important to know what laws are expressly applicable to government corporations. GAO prepared a list many years ago which is still useful (B-34706/B-56550-O.M., November 9, 1949), but amendments, recodifications, and inter-title transfers, etc., over the years have in many cases separated the substantive and definitional provisions. Consider, for example, the Administrative Expenses Act of 1946, ch. 744, 60 Stat. 806. After the first 17 sections set out substantive provisions, section 18 provided the following definitions:

"The word 'department' as used in this Act shall be construed to include wholly owned Government corporations . . . . The word 'appropriation' shall be construed as including funds made available by legislation under . . . the Government Corporation Control Act." 60 Stat. at 811-12.

Thus, any of the first 17 provisions containing the word "department" or the word "appropriation" is expressly applicable to wholly owned government corporations. E.g., 27 Comp. Gen. 757, 758 (1948) (Tennessee Valley Authority may avail itself of authority in section 1 of Administrative Expenses Act, now found in 5 U.S.C. § 5724, to pay travel expenses incident to permanent change of station). The provisions of the Administrative Expenses Act ended up in various locations in the United States Code. Some of the provisions that found their way into Title 5 have retained the appropriate definitional language. E.g., 5 U.S.C. §§ 3109 (employment of experts and consultants) and 7903 (purchase of special clothing or protective equipment). Sometimes it is necessary to look beyond the provision itself. For example, the Government Employees Incentive Awards Act superseded similar authority in section 14 of the Administrative Expenses Act, but did not narrow its scope. The Incentive Awards Act applies to "an Executive agency." 5 U.S.C. § 4501(1)(A). For purposes of Title 5, the term "Executive agency" includes government corporations (5 U.S.C. § 105), which in turn means corporations owned or controlled by the United States (5 U.S.C § 103(1)). The travel expense authority of 5 U.S.C. § 5724 requires a similar analysis. Section 5724(a) refers to "agency." Section 5701 defines agency as including "Executive agency" but not "Government controlled corporation." Applying 5 U.S.C. § 103 again, section 5724 is applicable to wholly owned government corporations.

Some of the provisions of the Administrative Expenses Act are now in Title 31. For example, section 11, 60 Stat. 809, amended the first sentence of the advance payment statute to read, "No advance of public money shall be made in any case unless authorized by the appropriation concerned or other law." The 1982 recodification of Title 31 was not intended to make substantive changes. Therefore, applying the definitions contained in section 18, the advance payment statute applies to wholly owned corporations. GAO applied the identical reasoning to conclude that statutory restrictions on home-to-work transportation, 31 U.S.C. § 1344 (whose source is section 16 of the Administrative Expenses Act) apply expressly to government corporations. B-210555.11, April 1, 1986. The home-to-work statute was completely overhauled later in 1986. The revised statute expressly applies to government corporations as defined in 5 U.S.C. 103 plus mixed-ownership corporations. 31 U.S.C. §§ 1344(g)(2)(D), (E), (F).

Still another provision of the Administrative Expenses Act, section 9, 60 Stat. 809, amended the statutory requirement for advertising now found in 41 U.S.C. § 5. Since it uses the word "appropriation," it applies to wholly owned corporations by virtue of section 18, which itself is now found at 41 U.S.C. § 5a.

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

(4) Appropriation act provisions

Another source of expressly applicable laws is appropriation acts. Worthy of note is section 609 of the Treasury and General Government Appropriations Act, 1998, Pub. L. No. 105-61, 111 Stat. 1272, 1310:

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

any functions budgeted as administrative expenses are subsequently transferred to or paid from other funds, the limitations on administrative expenses shall be correspondingly reduced." (Emphasis added.)

The ancestor of this provision first appeared in the very first Government Corporation Appropriation Act (Act of July 20, 1946, ch. 589, § 301, 60 Stat. 586, 595), enacted a short six months after the Corporation Control Act. Since 1972, it has been carried in the Treasury-General Government appropriation acts in the title containing the government-wide general provisions, so "this head" refers to that title (e.g., Title VI in the 1998 act). Therefore, there may be other laws expressly applicable to government corporations, by virtue of the underscored language, in the pertinent title each year. Although this provision has been around since 1946, GAO does not appear to have addressed the underscored language in writing.

There is no government-wide definition of "administrative expenses." Generally, the term refers to "overhead" type expenses like salaries, office supplies and equipment, payroll taxes, and telephone and other utility expenses. Leonard v. S.G. Frantz Co., 49 N.Y.S.2d 329, 332-33 (N.Y. App. Div. 1944). In contrast, nonadministrative or program expenses are things like loan guarantee or subsidy payments. GAO has suggested that a fixed definition in other than the most general terms would probably be impossible because the status of a given expense depends on the particular program, the governing legislation, and congressional intent, and what may be an "administrative expense" under one program or law may not be under another. B-24341, March 12, 1942, at 5. As the last sentence of the general provision quoted above demonstrates, a corporation has considerable discretion in allocating items of expense. Program statutes or regulations may include their own definitions, which of course would control. E.g., 12 U.S.C. § 1702 (National Housing Act). Congress may also address the issue in appropriation acts by providing that specific items of expense shall or shall not be considered administrative expenses for purposes of a statutory limit. E.g., Pub. L. No. 105-78, 111 Stat. 1467, 1472 (1997) (Pension Benefit Guaranty Corporation); Pub. L. No. 105-118, 111 Stat. 2386, 2387 (1997) (Export-Import Bank).

Another form of language Congress has used is a restriction applicable to "any appropriation contained in this or any other Act, or of the funds available for expenditure by any corporation or agency." This language has been held to embrace both wholly

owned corporations (B-114823, December 23, 1974, Export-Import Bank) and mixed-ownership corporations (B-164497(5), March 10, 1977, U.S. Railway Association).

(5) Other Title 31 provisions

The post-recodification Title 31 defines "agency" to mean "a department, agency, or instrumentality of the United States Government." 31 U.S.C. § 101. The codification note following 31 U.S.C. § 1511 makes it clear that "instrumentality" is intended to include those government corporations which are instrumentalities of the United States. This applies to all of Title 31 unless another more specific provision intervenes, which it does on several occasions. For example, GAO's authority to prescribe accounting principles and standards (31 U.S.C. § 3511) does not apply to government corporations. B-207435, July 7, 1982. This is because, for purposes of the chapter in which section 3511 appears, the definition of "executive agency" specifically excludes corporations or other entities subject to the Government Corporation Control Act. 31 U.S.C. § 3501. Similarly, 31 U.S.C. §§ 717 (program evaluations) and 720 (agency reports on GAO recommendations) include their own definitions under which they apply to wholly owned, but not mixed-ownership, government corporations.

The Antideficiency Act's prohibition against overobligation and overspending, 31 U.S.C. § 1341, has been applied to wholly owned corporations with "character and necessity" authority. B-223857, February 27, 1987 (CCC); B-135075-O.M., February 14, 1975 (Inter-American Foundation). In B-223857, GAO found also that the CCC violated the voluntary services prohibition, 31 U.S.C. § 1342, by directing contractors to continue performance after its borrowing authority had been depleted. A government-created corporation statutorily designated as private or not an agency or instrumentality of the United States is not subject to the Antideficiency Act. B-175155, July 26, 1976, at 11 (Amtrak).

The statute which prescribes the standards for recording obligations, 31 U.S.C. § 1501, also applies to government corporations which are agencies or instrumentalities of the United States. E.g., B-123943-O.M., July 1, 1955 (Institute of Inter-American Affairs); 34 Comp. Gen. 825 (1954) (GAO's initial guidance on implementing the then-new recording statute). See also United

States v. American Renaissance Lines, 494 F.2d 1059 (D.C. Cir. 1974) (CCC), and 37 Comp. Gen. 691 (1958) (St. Lawrence Seaway Development Corporation), in which the court and GAO, respectively, treated the statute as applicable without directly addressing the issue. The original enactment of 31 U.S.C. § 1501 was section 1311 of the Supplemental Appropriations Act for 1955 (68 Stat. 830); section 1306 is the "this head" provision for that year.

The Economy Act, 31 U.S.C. § 1535, applies at least to wholly owned government corporations. The corporation can be the requisitioning agency (13 Comp. Gen. 138 (1933); B-27842, August 13, 1942), or the performing agency (B-116194, October 5, 1953; B-39199, January 19, 1944; A-46332, January 9, 1933). If a corporation has specific charter authority to provide goods or services to other government establishments, the specific authority will displace the Economy Act. E.g., 44 Comp. Gen. 683 (1965) (sale of electric power by Tennessee Valley Authority to other government agencies).

The so-called "Stale Check Act," Act of July 11, 1947, ch. 222, 61 Stat. 308, now codified in 31 U.S.C. § 3328, has been held applicable to a government corporation with "character and necessity" power including the "without regard" clause. B-70248, September 1, 1950. Naturally, it would apply to corporations without that authority. B-70248, November 6, 1947; B-100893-O.M., March 27, 1951. This act prescribes requirements for handling Treasury checks. The original language applied expressly to checks "drawn by wholly owned and mixed-ownership Government corporations," except for "transactions regarding the administration of banking and currency laws." 61 Stat. 308. The 1982 recodification dropped the definitional language. Nevertheless, in view of the original language, the statute should still apply to government corporations.

The 1950 decision cited in the previous paragraph involved the Reconstruction Finance Corporation, which received its "without regard" authority in 1948, a year after enactment of the Stale Check Act. At first glance, therefore, this would appear to contradict our earlier discussion that a "without regard" clause permits the corporation to avoid expressly applicable laws already in existence. The answer is that it depends on what kind of law you're talking about. The decision stated:

"[W]here the Corporation has decided a payment should be made, and issued a check drawn on the Treasurer of the United States, it appears that the discretion of the Corporation has then been exercised. . . . The obligation after issuance of the checks . . . appears clearly to be a Treasury obligation, not one of the Reconstruction Finance Corporation." B-70248, September 1, 1950, at 5.

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

A final provision we will note is 31 U.S.C. § 3302(b), the miscellaneous receipts statute. If "character and necessity" authority is one major leg upon which the fiscal autonomy of a government corporation rests, the use of revolving fund-type financing is the second. If a government corporation is realistically expected to perform business-type functions with any efficiency, the requirement to deposit all receipts in the Treasury and await congressional appropriations can be a serious impediment. True as that may be, even a government corporation needs statutory authority to overcome 31 U.S.C. § 3302(b); corporate status alone is not enough. 52 Comp. Gen. 54, 55 (1972); 5 Comp. Gen. 1004 (1926). For most corporations, the solution is the charter authority to retain and reuse receipts, the exact type of receipts varying with the particular corporation. These are called "public enterprise revolving funds" and effectively displace 31 U.S.C. § 3302(b).[175] Revolving funds are covered in Chapter 15 and we will not repeat that discussion here, except to emphasize that the legislation creating the fund determines what can go into it and what it can be used for.

[175]For the distinctions between government corporation revolving funds and those of unincorporated agencies, see Moe 1995, supra note 41, at 62.

For example, the statute for the Overseas Private Investment Corporation, 22 U.S.C. § 2196, uses very broad language—"all revenues and income . . . from whatever source derived." See 52 Comp. Gen. 54 (1972) (interest earned by OPIC on foreign currencies held in designated depositaries pending their sale for dollars may be retained and used).

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

d. Program Implementation

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

It would seem hardly open to question that the very common-sense statute, 31 U.S.C. § 1301(a), which prohibits the use of appropriations for other than their intended purposes, applies to the "appropriated funds"—as we have described that term earlier—of a government corporation. E.g., 30 Op. Att'y Gen. 508 (1915). In that case, the Attorney General advised the Panama Railroad that setting rates below the cost of service would amount to giving away corporate assets and improperly diverting the company's funds, "irrespective of whether we observe or disregard the corporate fiction." Id. at 509.

The analytical approach to purpose availability is essentially the same for a corporation as for other agencies. The expenditure must bear a logical relationship to furthering some authorized function or activity, and must not be otherwise prohibited or otherwise expressly provided for. For example, it is within the discretion of Federal Prison Industries, Inc., (FPI) to engage in the business of manufacturing envelopes for sale to the rest of the government. B-240914, August 14, 1991. While FPI is generally supposed to seek

out more labor-intensive activities, this is not an absolute legal requirement, and the corporation could properly determine that envelope manufacturing would further its objectives. Similarly, the Saint Lawrence Seaway Development Corporation could use its funds for minor work on the Canadian side of the border if closely related and ancillary to its primary work on the United States side. 34 Comp. Gen. 309 (1954).

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

When you add "character and necessity" authority to the discretion already inherent under 31 U.S.C. § 1301(a), the result is that a government corporation has much more spending discretion than other agencies. In addition, it has the power to make its own final and conclusive decisions. But it is still subject to the overall limitation that its discretion be exercised "within the limitations and for the purposes of the statutes providing [its] funds and prescribing [its] activities." 14 Comp. Gen. 698, 700 (1935). In this sense, the concept of purpose—using the standards of corporate autonomy and not those of non-corporate agencies—along with the "public policy" concerns noted earlier, may be said to define the outer limits of a corporation's discretion.

An illustration of how all this can work is B-48184, March 14, 1945. The Federal Housing Administration had acquired title to a rental housing development under its mortgage insurance program. The FHA could retain and operate the development or could, within its discretion, sell it. A major drawback was that, except for a "low grade combination grocery store and beer parlor," there were no shopping facilities in the development or nearby area. After unsuccessfully trying to interest private capital, the FHA proposed to use its own funds to provide a "shopping center" consisting of a food store, drug store, barber shop, beauty shop, shoe repair shop, laundry, gasoline station, and a management office. The shopping

center, said FHA, would help significantly to make the development livable during the period of FHA operation, and would enhance its value if and when the FHA decided to sell it. The FHA had statutory authority to "deal with, complete, rent, renovate, modernize . . . or sell" the property, and to determine the necessity of its expenditures. In light of this authority and the FHA's justification, GAO concurred with the proposal, notwithstanding the lack of statutory authority for new construction.

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

(1) Commodity Credit Corporation

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

In a 1982 case, the Justice Department's Office of Legal Counsel reviewed two programs CCC had created to promote agricultural exports by guaranteeing exporters or their financing institutions against certain risks. There was no explicit statutory authority for the programs, but CCC is authorized to "use its general powers" to "aid in the development of foreign markets for agricultural commodities." 15 U.S.C. § 714c(f). One of those general powers is the "character and necessity" power. Since the programs were unquestionably designed to promote exports, they had adequate statutory authority. 6 Op. Off. Legal Counsel 233 (1982). The following year, GAO reviewed payments made under these programs to United States banks which had financed exports to the

(then) Polish People's Republic. While the CCC had not strictly complied with its own regulations, the deviations were essentially on matters of procedure, which the CCC could waive. Therefore, GAO found nothing objectionable. B-208610, September 1, 1983.

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

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

Cases involving the price support program for milk and milk products illustrate a situation in which corporate discretion must be subordinated to the terms of the program statute. The pertinent

statute, an earlier version of 7 U.S.C. § 1446(c), provided that price support "shall be provided through loans on, or purchases of, milk and the products of milk and butterfat." Some within Agriculture wanted to make direct price support payments, relying on CCC's broad general powers. The Department's Solicitor said, effectively,"No, you can do only what the statute says." The matter then went to the Attorney General, who also said, "no." 41 Op. Att'y Gen. 183 (1954). The CCC's general powers "cannot reasonably be deemed to enlarge the specific powers granted in [the price support statute]." Id. at 186. Agriculture then proposed to purchase the products at one price, and then sell them back to the same parties at a lower price. The products themselves would never move. GAO got into the act this time, holding that this was not a bona fide purchase and that the payments were, therefore, unauthorized. B-124910, August 15, 1955. Justice then proceeded to initiate recovery of the amounts improperly paid, and at least three courts of appeals agreed that the payments were illegal and could be recovered.[176] See also B-211462-O.M., October 31, 1983 (statutory payment limitation applies to in-kind payments as well as cash, CCC's broad discretion notwithstanding).

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

An illustration of an expenditure expressly otherwise provided for is B-142011, June 19, 1969, very similar in principle to 63 Comp. Gen. 31, the Central Liquidity Facility decision summarized earlier.

[176]Kraft Foods Co. v. Commodity Credit Corporation, 266 F.2d 254 (7th Cir. 1959); Land O'Lakes Creameries, Inc. v. Commodity Credit Corporation, 265 F.2d 163 (8th Cir. 1959); Swift & Co. v. United States, 257 F.2d 787 (4th Cir. 1958).

Some had suggested that the Agriculture Department could avoid a limitation in its salaries and expenses appropriation by having certain salaries paid from CCC funds. Agriculture felt this would be improper. GAO agreed:

"We see no significant distinction between using an otherwise available general appropriation for a particular object, when there is a specific appropriation for such object, and using corporate funds for a purpose for which a specific appropriation has been made, in order to avoid a limitation pertaining to the specific appropriation." B-142011, at 12.

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

"While included among the general powers of the CCC is the authority to determine the character and necessity of its expenditures . . . the broad administrative discretion thereby conferred must be exercised in conformity with the congressional purpose of the CCC . . . and in accordance with the specific powers granted to the CCC [by statute]. . . . Nothing in these provisions . . . suggest[s] a congressional intent to allow conversions of dollar funds to foreign currencies for use for congressional travel."[177]

(2) Bonneville Power Administration

The Bonneville Power Administration is one of the Department of Energy's regional power marketing administrations. Created in 1937, it markets and transmits electric power in the Pacific Northwest. It is not a government corporation but "an office in the Department of Energy . . . under the jurisdiction and control of the Secretary of Energy." 16 U.S.C. § 832a(a). Nevertheless, its statutory powers are comparable to those of a wholly owned government corporation. It is financed through a revolving fund, 16 U.S.C. § 838i, and has the following general powers:

"Subject only to the provisions of this chapter, the Administrator is authorized to enter into such contracts, agreements, and arrangements, including the

[177]The statute was subsequently amended to give Treasury a permanent indefinite appropriation to purchase the necessary currencies. See B-129650, March 27, 1979.

amendment, modification, adjustment, or cancellation thereof and the compromise or final settlement of any claim arising thereunder, and to make such expenditures, upon such terms and conditions and in such manner as he may deem necessary.

"The administrator may make such expenditures for offices, vehicles, furnishings, equipment, supplies, and books; for attendance at meetings; and for such other facilities and services as he may find necessary for the proper administration of this chapter." 16 U.S.C. §§ 832a(f), 832h(b) (respectively).

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

Before the enactment of 16 U.S.C. § 832a(f), Bonneville's spending discretion was not materially different from that of other government agencies. E.g., B-46169, May 5, 1945 (appropriations unavailable for entertainment). However, the enactment of that provision in October 1945 made a material change:

"The legislative history of [16 U.S.C. § 832a(f)] indicates that its purpose was to free the Administration from the requirements and restrictions ordinarily applicable to the conduct of Government business and to enable the Administrator to conduct the business of the project with a freedom similar to that which has been conferred on public corporations carrying on similar or comparable activities." B-105397, September 21, 1951, at 3.

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

The latitude given Bonneville has enabled it to structure its dealings to reflect the nature of the business in which it is involved, the characteristics of the geographical region in which it operates, and changing circumstances. In a 1962 case, for example, Bonneville

proposed an agreement with the ill-fated Washington Public Power Supply System (WPPSS) under which WPPSS would furnish to Bonneville electric power purchased from the Atomic Energy Commission's Hanford reactor, and Bonneville would provide "firm power" (i.e., not subject to interruptions) in exchange. The agreement would terminate if the reactor was discontinued prior to commencement of commercial operations, in which event Bonneville would reimburse WPPSS for certain expenses incurred up to that point. As long as the Atomic Energy Commission's participation received congressional approval, GAO found no problem with Bonneville's authority to enter into the agreement. B-149016, B-149083, July 16, 1962.

In 46 Comp. Gen. 349 (1966), Bonneville was acquiring 500-kv. circuit breakers, and decided to spread the risk among several manufacturers to minimize risk of major power failure until the circuit breakers had been in service for sufficient time to assure that they were free from defects. Bonneville's discretion permitted it to do this, and to exclude from the solicitation two firms from which it had already purchased circuit breakers.

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

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

then proposed to purchase power for its preference customers under what it called a "trust-agency" agreement. While finding this authorized as well, GAO stressed the purpose limitation on Bonneville's discretion:

> "While 16 U.S.C. § 832a(f) is intended to confer broad administrative discretion on the Administrator, that discretion must always be exercised in furtherance of the purposes, and subject to the provisions, of the [program legislation]." B-137458, September 13, 1974, at 5.

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

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

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

The extent to which Bonneville's range of discretion permits it to tailor arrangements to fit specific program needs is illustrated in B-210929, August 2, 1983. As construction of one of the WPPSS plants approached completion, WPPSS found itself unable to obtain further bond financing. Bonneville proposed, and GAO concurred, to pay, by direct disbursement or net billing, to complete construction of the WPPSS project. The argument against direct payment was that Bonneville had not presented this as an option when seeking congressional approval. However, GAO found that direct payment would not be inconsistent with congressional approval of the net billing approach since direct payment funds would be derived at least ultimately from rate adjustments, and the

end result—costs borne by Bonneville's ratepayers rather than taxpayers—would be the same. It would amount simply to "[doing] directly what Congress otherwise authorized it to do indirectly." Id. at 16.

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

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

(3) Amtrak

Amtrak was created by the Rail Passenger Service Act of 1970,

Pub. L. No. 91-518, title III, 84 Stat. 1327, 1330.[178] Its purpose is to provide modern and efficient intercity and commuter rail passenger transportation. 49 U.S.C. § 24101(b). Although federally created and receiving substantial federal financial assistance, Amtrak is to be "operated and managed as a for-profit corporation," and is "not a department, agency, or instrumentality of the United States Government and shall not be subject to title 31." 49 U.S.C. §§ 24301(a)(2) and (3), as amended by Pub. L. No. 105-134, § 415(d), 111 Stat. 2570, 2590 (1997).[179] It was originally designated a mixed-ownership government corporation,[180] but this was dropped in 1997.[181] It is also classed as a railroad carrier for purposes of certain portions of the Interstate Commerce Act (49 U.S.C. § 24301(a)(1)), and is thus subject to the jurisdiction of the Surface Transportation Board, successor to the Interstate Commerce Commission, to that limited extent.[182] GAO is authorized to conduct "performance audits of [Amtrak's] activities and transactions." 49 U.S.C. § 24315(e); B-175155, October 21, 1981 (internal memorandum).

The congressional objective is eventual profitability and elimination or at least minimization of federal subsidies. See 49 U.S.C. § 24101(d), as amended by Pub. L. No. 105-134, § 201, 111 Stat. at 2578, mandating that Amtrak operate without federal operating grants by fiscal year 2004. Nevertheless, federal financial assistance has always been necessary. This takes the form of appropriations made to the Secretary of Transportation for the purpose of making

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

[179]The version in effect immediately prior to the 1994 recodification said that Amtrak was not "an agency, instrumentality, authority, or entity, or establishment" of the United States. 45 U.S.C. § 541 (1988 ed.).

[180]Pub. L. No. 91-518, § 804, 84 Stat. at 1340.

[181]Pub. L. No. 105-134, § 415(d)(2), 111 Stat. at 2590.

[182]Subsection 24301(a)(1) was amended by Pub. L. No. 105-134, § 401, 111 Stat. at 2585, to clarify Amtrak's relationship to the Interstate Commerce Act. See H.R. Rep. No. 105-251, at 36 (1997).

"grants" to Amtrak. E.g., Department of Transportation and Related Agencies Appropriations Act, 1998, Pub. L. No. 105-66, 111 Stat. 1425, 1435 (1998). Amtrak makes its funding requests to the Secretary of Transportation, who in turn includes them as part of Transportation's portion of the President's budget. B-175155(2), September 26, 1978 (requirement in 31 U.S.C. § 1105(a)(5) for five-year projection not applicable to Amtrak's funding requests to Secretary). As with the 1998 appropriation, the funds are made available until expended, and may include separate amounts for operating losses and capital improvements. Amtrak receives half of the appropriation on October 1, and the balance at not less than 90-day intervals unless it can justify more frequent payment. 49 U.S.C. § 24104(d).

The statutory payout schedule "has virtually assured" that Amtrak will receive more money than it immediately needs for current expenses. B-175155(2), April 22, 1975, at 4. Congress did not restrict the use of these funds but "expects Amtrak to utilize them in accordance with its best business judgment." Id. Thus, a line of Comptroller General decisions held that Amtrak could use its "grant funds" for such things as advances on capital equipment (B-175155(2), April 22, 1975); investment to the extent funds are not currently needed (B-175155, June 11, 1975); payment of operating expenses while funds from other sources are temporarily invested (Id.); retirement of long-term debt obligations under a since-repealed provision for the Secretary of Transportation to guarantee loans to Amtrak (B-175155(2), July 26, 1976); and installing fire fighting equipment in railroad tunnels in New York City to comply with a safety order of the New York City Fire Department (B-175155, May 22, 1978). When investing "excess" funds, Amtrak may retain the interest earned, notwithstanding their designation as "grant funds." B-175155, June 11, 1975.

In surveying decisions and opinions relating to Amtrak, the details are of secondary importance because virtually every provision of Amtrak's legislation has changed, sometimes repeatedly. These cases are intended to illustrate the operational and spending freedom of a "non-instrumentality" corporation, in principle. The Supreme Court has said that Amtrak's non-instrumentality disclaimer "is assuredly dispositive of Amtrak's status . . . for purposes of matters that are within Congress' control." Lebron v. National R.R. Pass'r Corp., 513 U.S. 374, 392 (1995). Thus, the

answer to the typical question of whether this or that law applicable to government entities applies to Amtrak is, "no." E.g., Sentner v. Amtrak, 540 F. Supp. 557 (D.N.J. 1982) (Amtrak does not share the government's immunity from awards of punitive damages). See also B-206638, April 1, 1982 (internal memorandum) (Federal Acquisition Regulations, mandatory provisions of Federal Supply Schedule).

Of course, since we are talking about "matters within Congress' control," Congress does have a certain freedom in defining the applicability of laws. For example, we noted earlier that Amtrak is not subject to the Antideficiency Act. B-175155, July 26, 1976. Yet, Amtrak's 1998 appropriation includes a proviso that "the incurrence of any obligation or commitment by the Corporation for the purchase of capital improvements with funds appropriated herein which is prohibited by this Act shall be deemed a violation of 31 U.S.C. 1341." Pub. L. No. 105-66, 111 Stat. at 1435. The point is that making the Antideficiency Act applicable, even to this limited extent, required legislation specifically applicable to Amtrak.

Another group of GAO cases deals with compensation issues. The 1970 legislation creating Amtrak placed no limit on the compensation of the corporation's officers. A 1972 amendment limited compensation to level 1 of the Executive Schedule.[183] A question arose as to whether the value of fringe benefits had to be counted in applying the ceiling. Amtrak wanted to provide fringe benefits normal in the rail industry. These included group life insurance, travel accident insurance, long-term disability benefits, hospital surgical and major medical coverage, non-contributory retirement benefits, and free transportation for employees and their dependents on Amtrak trains. Noting that the ceiling was the same as that for cabinet members, who receive fringe benefits in addition to their statutory compensation, and finding nothing to indicate a contrary intent for Amtrak officers, GAO concluded that the fringe benefits need not be considered "compensation" for purposes of the ceiling. B-175155, January 7, 1974. The limitation was changed in 1988[184] to prohibit rates of compensation greater than "the general level of pay for officers of rail carriers with comparable

[183]Pub. L. No. 92-316, § 1(a), 86 Stat. 227 (1972).

[184]Pub. L. No. 100-342, § 18(c), 102 Stat. 624, 636 (1988).

responsibility." 49 U.S.C. § 24303(b). While the ceiling is now more amorphous than the fixed-dollar ceiling of 1974, the principle of B-175155 should remain valid, unless practices in the private rail industry change so as to include fringe benefits as part of "compensation."

Amtrak was also offering its officers "separation agreements," under which they would receive an additional payment of up to a year's salary upon termination of their services. If somehow the payments could be regarded as payments for post-termination services, they would be permissible. If, however, they were nothing more than a form of deferred compensation to avoid the statutory limitation, they would violate the statute. B-175155, May 1, 1974; B-175155, January 7, 1974. Amtrak developed an agreement under which the officer agreed to perform whatever services might be necessary, for a period of six months, to accomplish an orderly transition of responsibilities to his or her successor, and to complete unfinished assignments. This was sufficient to avoid the "deferred compensation" objection and therefore did not violate the limitation. B-175155, October 3, 1974; B-175155, September 5, 1974.

Another source of Amtrak's powers is the District of Columbia Business Corporation Act, which applies to Amtrak to the extent consistent with the Rail Passenger Service Act. 49 U.S.C. § 24301(e). Thus, Amtrak can sell real property (B-175155, June 14, 1978),[185] and it can make loans, provided they serve a corporate purpose (B-207880-O.M., November 5, 1982), because both actions are authorized under the District of Columbia law.

7. Application of Other Laws

A government corporation's autonomy, while conferring considerable spending discretion, does not remove it from the coverage of all laws of the United States. We set forth here several laws governing the operations of federal agencies. As one would

[185]Sometimes, dealing with GAO case law can be a complicated, confusing, and even daunting task. For one thing, GAO has tended to re-use "B" file designations for similar subjects—counting on "sub-numbers" and dates to distinguish between different cases. This made proofing this manual difficult, and careful reading of it critical. For example, in the preceding textual discussion of Amtrak, how many different GAO items with the B-file designation "B-175155" can you find? (Hint: There are 12.)

expect, wholly owned corporations are subject to more of the laws than mixed-ownership corporations, which are in turn subject to more than the so-called "non-instrumentality" corporations. A summary chart, including some laws not covered here, may be found in Government Corporations: Profiles of Existing Government Corporations, GAO/GGD-96-14, App. III (December 1995).

a. Civil Service Laws

We use the term "civil service laws" to mean the body of laws in Title 5 of the U.S. Code governing the appointment, classification, pay, allowances, and other benefits of federal officers and employees. The applicability of Title 5, or portions thereof, to a government corporation depends on (1) the definitions in Title 5, and (2) the corporation's own charter.[186] Title 5 includes a few general definitions and a great many specific ones. Section 105 of 5 U.S.C. defines "Executive agency" to include government corporations. "Government corporation" is defined as "a corporation owned or controlled by the United States." 5 U.S.C. § 103(1). "Government controlled corporation" does not include a corporation owned by the United States. 5 U.S.C. § 103(2). In addition, 5 U.S.C. § 2105(a) defines "employee" as someone appointed in the civil service by, as pertinent here, the President, "an individual who is an employee under this section" (which would include wholly owned corporations), or "the head of a Government controlled corporation." GAO has interpreted "government controlled corporation" in these definitions to mean a mixed-ownership government corporation. B-221677, July 21, 1986.

Thus, unless it specifically provides otherwise, a provision in Title 5 that applies to an "Executive agency," a "Government corporation," or an "employee" applies to wholly owned and mixed-ownership government corporations. E.g., 5 U.S.C. § 2301(a) (merit system principles apply to "an Executive agency"); 5 U.S.C. §§ 8701(a)(1),

[186]GAO observed in 1943 that "there can not be stated any broad generality that persons employed by the Government's corporations are or are not employees of the United States for all purposes." B-37559, November 5, 1943, at 3, quoted in 23 Comp. Gen. 815, 816 (1944). Dr. Moe wrote in 1995 that approximately one half of the government corporations were subject to the civil service laws and that the exemptions, "both partial and complete," were "numerous and complex." That statement has retained its veracity. Moe 1995, supra note 41, at 56.

8901(1)(A) (provisions for group life and group health insurance apply to employee as defined in § 2105).

A provision applicable to an Executive agency but not a government controlled corporation applies to wholly owned, but not mixed-ownership, government corporations. A good example is what is perhaps the heart of the civil service system, the provisions governing classification (5 U.S.C. ch. 51) and pay (ch. 53, subch. III). The classification chapter applies to Executive agencies but not government controlled corporations. 5 U.S.C. § 5102(a)(1)(A), (i). Subchapter III of chapter 53 adopts the definition of section 5102. 5 U.S.C. § 5331(a). Thus, unless specified otherwise, the classification and pay provisions apply to wholly owned, but not mixed-ownership, corporations. An illustrative case containing important discussion is Dockery v. Federal Deposit Insurance Corporation, 64 M.S.P.R. 458 (1994) (FDIC, a mixed-ownership corporation, not subject to classification laws).

The following inventory does not purport to be complete:

Whistleblower Protection Act—excludes government corporations, except with respect to improper personnel actions resulting from disclosure of information the employee reasonably believes evidences a violation of law, gross mismanagement, gross waste of funds, an abuse of authority, or substantial danger to public health or safety, with certain qualifications. 5 U.S.C. §§ 2302(a)(2)(C), (b)(8).

Experts and consultants—applies to wholly owned, but not mixed-ownership, government corporations. 5 U.S.C. § 3109(a).

Senior Executive Service—does not apply to government corporations. 5 U.S.C. § 3132(a)(1).

Government Employees Training Act—applies to "a Government corporation subject to chapter 91 of title 31," that is, both wholly owned and mixed-ownership corporations subject to the Government Corporation Control Act. 5 U.S.C. § 4101(1)(C).

Performance appraisal system—not applicable to government corporations. 5 U.S.C. § 4301(1)(i). E.g., B-233528, December 14,

1988 (Overseas Private Investment Corporation not required to submit its performance appraisal system for review by OPM.)

Government Employees Incentive Awards Act—applies to both wholly owned and mixed-ownership corporations. 5 U.S.C. §§ 4501(1)(A), (2)(A).

Dual compensation laws—apply to government corporations. 5 U.S.C. § 5531(2). E.g., B-238303, B-236399, May 29, 1991 (retired military officer employed by FDIC).[187] They do not apply to corporations statutorily designated as not agencies or instrumentalities of the United States. B-170582, July 15, 1976. For a corporation subject to the dual compensation laws, using a personal services contract rather than employment in order to avoid the statutory restrictions is improper. Of course, GAO can do no more than report the matter to Congress. B-222334, June 2, 1986.[188]

Severance pay—applies to government corporations. 5 U.S.C. § 5595(a)(1)(A). E.g., B-114839-O.M., August 11, 1978 (former Panama Canal Company). The statute expressly excludes employees, other than members of the Senior Executive Service, paid at or in excess of Executive Schedule levels. 5 U.S.C. § 5595(a)(2)(i). Since the SES does not extend to government corporations, the president of a government corporation who is compensated at an Executive Schedule level is not entitled to severance pay. B-215273, June 28, 1984.

[187]Under an earlier version of the statute without the explicit definition, the Court of Claims had held that the United States Shipping Board Emergency Fleet Corporation was a private corporation and not part of the government for purposes of the dual compensation laws. Dalton v. United States, 71 Ct. Cl. 421 (1931). Apart from the statutory changes, the case can be disregarded, even though not directly overruled, because it was one of the rare instances in which Congress refused to appropriate funds to pay the judgment. See First Deficiency Act, 1932, Act of February 2, 1932, ch. 12, title II, § 3, 47 Stat. 15, 28; 23 Comp. Gen. 815, 817 (1944).

[188]As noted earlier, a government corporation empowered to determine the character and necessity of its expenditures, as was the corporation in this case, is not required to follow the government's policy on personal service contracts. Intimations to the contrary notwithstanding, the contract in B-222334 was objectionable, not because it was a personal services contract per se, but because it was used to circumvent the statutory restriction on compensation.

Back Pay Act—applies to government corporations. 5 U.S.C. § 5596(a)(1). E.g., Payne v. Panama Canal Company, 607 F.2d 155 (5th Cir. 1979) (former Panama Canal Company subject to Back Pay Act, notwithstanding its power to sue and be sued in its own name).

Travel and transportation—The travel and transportation provisions of 5 U.S.C. ch. 57, subch. I and II, apply to wholly owned, but not mixed-ownership, corporations. 5 U.S.C. §§ 5701(1)(A), (i) , 5721(1). E.g., B-214811, July 25, 1984 (internal memorandum) (wholly owned corporation should not reimburse travel expenses of official's spouse unless spouse was providing some sort of direct service to government). The Federal Deposit Insurance Corporation, as a mixed-ownership corporation, is not subject to the provisions governing service agreements in return for payment of relocation expenses. However, work for the FDIC qualifies as "government service" for purposes of fulfilling the agreement. B-221677, July 21, 1986.

Uniform allowance—applies to wholly owned government corporations. 5 U.S.C. § 5901(a).

Annual and sick leave—applies to government corporations, both wholly owned and mixed-ownership. 5 U.S.C. § 6301(2)(A).

Federal Employees Compensation Act—FECA's definition of "employee" includes "an officer or employee of an instrumentality wholly owned by the United States." 5 U.S.C. § 8101(1)(A). FECA, where it applies, is the employee's exclusive remedy just as it is for employees of non-corporate agencies. Pinto v. Vessel "Santa Isabel," 492 F. Supp. 689 (D.C.Z. 1980) (former Panama Canal Company); Posey v. TVA, 93 F.2d 726 (5th Cir. 1937) (TVA).

Retirement—Both the Civil Service Retirement System and the Federal Employees Retirement System apply to employees as defined in 5 U.S.C. § 2105, and therefore apply to government corporations. 5 U.S.C. §§ 8331(1)(A), 8401(11)(A)(CSRS, FERS, respectively).

A law related in subject matter to Title 5 is the Fair Labor Standards Act, 29 U.S.C. §§ 201-219, which provides, among other things, for overtime compensation for time worked in excess of 40 hours in a week. The FLSA adopts the definition of Executive agency of

5 U.S.C. § 105, and therefore includes government corporations. E.g., 54 Comp. Gen. 617 (1975) (FLSA applicable to former Panama Canal Company). Another relevant statute is Title VII of the Civil Rights Act of 1964. Its employment discrimination provisions apply to "executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds)." 42 U.S.C. § 2000e-16(a).

The general and specific Title 5 definitions determine the applicability of various provisions to government corporations only in the absence of more specific direction in the legislative charter. Government corporations are commonly empowered to "appoint and fix the compensation of such officers, attorneys, employees, and agents as may be required." E.g., 29 U.S.C. § 1302(b)(6) (PBGC). This alone, while affording some discretion, does little more than authorize appointment and compensation within the civil service structure. A variation specifically makes the authority subject to the civil service laws. E.g., 33 U.S.C. § 984(a)(7) (St. Lawrence Seaway Development Corporation). The comparable provision for the Inter-American Foundation limits the total number of employees. 22 U.S.C. § 290f(e)(5). An example of seemingly broader language is 7 U.S.C. § 5903(n)(3), as amended by the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, § 723, 110 Stat. 888, 1115, providing that officers or employees of the Alternative Agricultural Research and Commercialization Corporation "shall be subject to all laws of the United States relating to governmental employment."

An important variation authorizes appointment and compensation without regard to the civil service laws applicable to officers and employees of the government. E.g., 16 U.S.C. § 831b (Tennessee Valley Authority); 7 U.S.C. § 943(d) (Rural Telephone Bank). The "without regard" authority is not an "all or nothing" proposition. The corporation may, in its discretion, appoint some employees in accordance with the civil service laws and invoke the exemption for others. 37 Op. Att'y Gen. 7 (1932). Of course, the "discretion" should be reasoned and not arbitrary. Some charters exempt only a portion of the corporation's employees from the civil service laws. E.g., 22 U.S.C. § 2193(d) (Overseas Private Investment Corporation may hire, pay, and fire up to 20 of its employees without regard to civil service laws). A corporation possessing the "without regard" authority is, to the extent of its coverage, not required to follow, for

example, the dual compensation laws (19 Comp. Gen. 926 (1940); B-9113, April 30, 1940),[189] or the laws governing annual and sick leave (A-49652, June 28, 1933). It is free to set up its own parallel system. See, e.g., TVA v. Kinzer, 142 F.2d 833 (6th Cir. 1944), discussing TVA's retirement system. As the Attorney General has pointed out, the inclusion of the "without regard" clause in some charters evidences the congressional understanding that the employees would otherwise be subject to the civil service system, else there would be no need to exempt them. 39 Op. Att'y Gen. 238, 241 (1939).

One thing GAO has been reluctant to sanction is the making of deductions from an employee's salary for payment to private organizations, and has advised that statutory authority should be obtained before making deductions for union dues (B-105819, December 19, 1951) or a union pension and welfare fund (32 Comp. Gen. 572 (1953)). Both decisions suggest, however, that the corporation could use its power to fix compensation to include these items in the amount of compensation actually paid to the employee, who would then make the contributions, subject to any statutory limits on total compensation payable. See also B-82293, January 3, 1949 (similar holding with respect to life and health insurance premiums prior to the enactment of the general legislation now in Title 5). Presumably, had the authority to fix compensation in these cases included the "without regard" clause, there would have been no objection to making the deductions.

The "without regard" authority may itself have qualifications which may extend beneficial provisions and/or impose restrictions. For example, 16 U.S.C. § 831b includes two qualifications for TVA employees: they are covered by the Federal Employees Compensation Act, and their salaries may not exceed that of board members. In GAO's view, the authority to fix compensation, even with the "without regard" language, is not sufficient to overcome explicit salary restrictions in TVA's charter, and GAO has found unauthorized payments variously called retention payments, management staffing incentive payments, merit incentive

[189]Earlier decisions to the contrary, such as 14 Comp. Gen. 527 (1935) and 14 Comp. Gen. 822 (1935), must be regarded as implicitly overruled by the decisions cited in the text. Why this was not done explicitly is not clear.

supplemental retirement income payments, etc., although TVA itself has the last word, at least at the administrative level. B-222334, June 2, 1986; B-205284, November 16, 1981.

In addition to charter exemptions, other specific exemptions are scattered throughout Title 5. For example, the Government Employees Incentive Awards Act does not apply to TVA or the Central Bank for Cooperatives, 5 U.S.C. § 4501(1), (i), (ii); the severance pay statute does not apply to TVA, 5 U.S.C. §5595(a)(2)(vii); the annual and sick leave laws and the group health insurance provisions do not apply to corporations supervised by the Farm Credit Administration "if private interests elect or appoint a member of the board of directors," 5 U.S.C. §§ 6301(2)(vii), 8901(1)(i). The exemption for the farm credit corporations is repeated in 5 U.S.C. § 6308(a), which authorizes the transfer of annual and sick leave balances when an employee transfers to a position under a different leave system without a break in service. The exemption was repeated to permit those corporations to make lump-sum payments for leave rather than transferring the balances. See B-124592, December 1, 1955.

If a corporation is designated as not an agency or instrumentality of the United States, its employees are not employees of the United States. Hrubec v. National Railroad Passenger Corporation, 49 F.3d 1269, 1270 (7th Cir. 1995), and 902 F. Supp. 149 (N.D. Ill. 1995) (Amtrak). Accordingly, Title 5 would not apply. However, Congress may incorporate restrictions in the corporate charter. For example, employees of the Legal Services Corporation are not considered employees of the United States but are subject to Title 5 provisions relating to retirement, life insurance, health insurance, and work injuries. 42 U.S.C. §§ 2996d(e), (f). Officers and employees of the Corporation for Public Broadcasting are similarly not officers or employees of the United States, but their annual rate of pay may not exceed the "rate of basic pay in effect from time to time for level I of the Executive Schedule." 47 U.S.C. § 396(e)(1).

b. Procurement Laws and Regulations

In contrast to the civil service laws, the applicability of procurement laws and regulations to government corporations is fairly simple: They apply, for the most part, to wholly owned government corporations, but not to mixed-ownership corporations and certainly not to "non-instrumentalities."

(1) 41 U.S.C. § 5

Perhaps the oldest general procurement law still on the books, 41 U.S.C. § 5—the old Revised Statutes § 3709—requires that, unless otherwise provided and with several stated exceptions, "purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals." As noted in our earlier discussion of the applicability of fiscal laws, this statute was revised as part of the Administrative Expenses Act of 1946. It applies to the administrative expenses of wholly owned government corporations. 41 U.S.C. §§ 5 (last sentence), 5a. It does not apply to mixed-ownership corporations. E.g., B-138105-O.M., March 4, 1959.

GAO has not attempted to define "administrative expenses" for this law any more than it has for other laws. Rather, GAO has followed a case-by-case approach. For example, "[t]he procurement of grain storage structures [by the Commodity Credit Corporation] obviously is not an administrative expense" for purposes of the advertising statute. B-119791, October 22, 1954. Nor is the construction and equipping of a substation by the former Panama Canal Company. B-122655, April 7, 1955. Nor is the purchase of a generating set for supplying electric power. B-114990, August 19, 1953.

(2) Federal Property and Administrative Services Act

The primary statute governing the procurement of goods and services by the civilian agencies of the federal government is title III of the Federal Property and Administrative Services Act of 1949 (the Property Act), codified in 41 U.S.C. ch. 4, subch. 4. Subsections 3(a) and (b) of the original Property Act, 63 Stat. 378, defined "federal agency" to include "executive agency," which in turn includes "any wholly owned Government corporation." Therefore, the procurement provisions of the Property Act, as amended, apply to wholly owned government corporations unless exempt under 40 U.S.C. § 474 or comparable statutory authority.[190]

[190]The Property Act addresses property management as well as procurement. The property management portions are located in Title 40, along with the definitions, now found in 40 U.S.C. §§ 472(a) and (b). Placing the operative provisions in more than one title of the U.S. Code does not change the application of the statutory definitions.

The Property Act applies to the procurement of property and services, but not to every type of contractual arrangement an agency or corporation may enter into. For example, the Overseas Private Investment Corporation is authorized to enter into arrangements with the private insurance industry for risk-sharing under its foreign investment insurance program. 22 U.S.C. § 2194(f). GAO reviewed one such pooling proposal and found that it was not the procurement of goods or services, but was more in the nature of a cooperative agreement. Therefore, it was not subject to the procurement laws and regulations. B-173240, June 16, 1975.

The statute also addresses the relationship of the Property Act procurement provisions to 41 U.S.C. § 5. Basically, 41 U.S.C. § 5 does not apply to procurements under the Property Act. An agency or wholly owned corporation which is exempt from the Property Act provisions remains subject to 41 U.S.C. § 5 unless it has specific authority to contract without regard to 41 U.S.C. § 5. An entity with such authority must still follow the Property Act provisions for other than sealed-bid procedures unless exempt from that too. 41 U.S.C. §§ 252(a)(2), 260.

(3) Office of Federal Procurement Policy Act

The Office of Federal Procurement Policy Act, Pub. L. No. 93-400, 88 Stat. 796 (1974), established the Office of Federal Procurement Policy in the Office of Management and Budget to "provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies." 41 U.S.C. § 404(a). This Act defines "executive agency" to include "a wholly owned Government corporation fully subject to the provisions of [the Government Corporation Control Act]." 41 U.S.C. § 403(1)(D). Thus, wholly owned government corporations must comply with government-wide procurement polices and procedures.

(4) Federal Acquisition Regulation

The Federal Acquisition Regulation (FAR), found in Title 48 of the Code of Federal Regulations, is the governmentwide body of procurement regulations which implement the Property Act and the Office of Federal Procurement Policy Act. The FAR defines the term "federal agency" as including an "executive agency," and the term "executive agency" as including any wholly owned government

corporation listed in the Government Corporation Control Act. 48 C.F.R. § 2.101.

The Pension Benefit Guaranty Corporation, as a wholly owned corporation, is subject to the FAR for purposes of its administrative activities, but not when serving as trustee for terminated pension plans. Of course, as with any exemption, the corporation can, in its discretion, elect to follow the established procedures. B-217281-O.M., March 27, 1985 (procurement of investment manager services in its trustee capacity).

The procurement statutes and the FAR have no application to corporations which are designated as not agencies or instrumentalities of the United States, even though they may be federally created and funded. B-223852, September 9, 1986 (Legal Services Corporation); Analysis of Amtrak's Acquisition of Office Copying Equipment, GAO/CED-82-111, July 12, 1982.

(5) Competition in Contracting Act

The Competition in Contracting Act (CICA), title VII of the massive Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1175, made a number of revisions in procurement-related provisions. As relevant here, section 2741, 98 Stat. at 1199, gave a statutory basis to GAO's bid protest function (31 U.S.C. §§ 3551-3556). Prior to CICA, GAO's bid protest authority was not explicit but was derived from its account settlement authority. E.g., Wheelabrator Corp. v. Chafee, 455 F.2d 1306, 1313 (D.C. Cir. 1971). CICA divorced the bid protest function from account settlement. CICA applies to procurements by a "federal agency," which it defines by reference to the Property Act, 40 U.S.C. § 472 (see above). In other words, it expressly includes wholly owned government corporations.

Since CICA hinges on the definition of "federal agency," account settlement authority or lack thereof is irrelevant, and GAO has CICA jurisdiction over corporations exempt under the pre-CICA system. 64 Comp. Gen. 756 (1985) (Tennessee Valley Authority). As with the pre-CICA system, the jurisdiction does not extend to mixed-ownership corporations. E.g., B-252085, January 26, 1993.

Also not dispositive is the applicability or non-applicability of the Property Act and the FAR. The Bonneville Power Administration, for

example, is not subject to the Property Act's procurement provisions or to the FAR. See 16 U.S.C. § 832a(f) and 40 U.S.C. § 474(d)(20). Nevertheless, it meets the CICA definition of "federal agency," and is therefore subject to GAO's bid protest jurisdiction. 68 Comp. Gen. 447 (1989); 67 Comp. Gen. 8 (1987). Naturally, as was done in the two cited cases, GAO will apply Bonneville's own regulations rather than the FAR in evaluating the protest.

(6) Other statutes

The laws listed above are the ones we regard as most important to the procurement function. There are, however, several other procurement-related statutes. Some address their applicability. For example, the Walsh-Healey Act (which mandates wage and labor standards for supply or equipment contracts over $10,000) applies to contracts made by "any corporation all the stock of which is beneficially owned by the United States." 41 U.S.C. § 35. Others do not expressly define their applicability as, for example, CICA and the Property Act do. One example is the Brooks Architect-Engineers Act, 40 U.S.C. §§ 541-544, which establishes procedures for the acquisition of architectural and engineering services. It uses, but does not define, the term "agency." 40 U.S.C. § 541(2). In an internal memorandum, B-215818-O.M., August 10, 1984, GAO considered whether this act applies to the Federal Deposit Insurance Corporation, and concluded that it does not, consistent with the clear congressional pattern of excluding mixed-ownership corporations from the coverage of procurement laws.

Another example is the Service Contract Act of 1965, 41 U.S.C. § 351, which prescribes minimum standards for wages and working conditions under contracts "the principal purpose of which is to furnish services in the United States through the use of service employees." 41 U.S.C. § 351(a). Like the Brooks Architect-Engineers Act, it does not define its own applicability. It has been held applicable to Federal Reserve banks. 2 Op. Off. Legal Counsel 211 (1978), approved and followed in Brink's, Inc. v. Board of Governors of the Federal Reserve System, 466 F. Supp. 116 (D.D.C. 1979). It has also been held applicable to a contract between a personnel referral firm and a federally funded research and development center, even though it would not apply to the contract between the center and its sponsoring agency because the latter would not meet the "principal

purpose" qualification quoted above. Menlo Service Corp. v. United States, 765 F.2d 805 (9th Cir. 1985).

c. General Management Laws

We have included under this caption the series of laws, enacted during the last quarter of the 20th century, designed to enhance the management, general and financial, of government entities in the broad sense.

(1) Inspector General Act

The Inspector General Act of 1978 (Pub. L. No. 95-452, 92 Stat. 1101), as amended, is found in 5 U.S.C. Appendix 3. Its purpose is to create independent and objective units to conduct audits and investigations of the agency's programs and operations. 5 U.S.C. App. 3 § 2.

This Act divides the federal government into three categories—establishments, designated federal entities, and other federal entities. The Act defines "establishment" by listing the agencies and instrumentalities covered, starting with the cabinet departments. 5 U.S.C. App. 3 § 11(2). The listing includes a few government corporations, such as the Community Development Financial Institutions Fund, the Federal Deposit Insurance Corporation, and the Corporation for National and Community Service. Id. Each establishment is required to have an Office of Inspector General, the head of which is appointed by the President with the advice and consent of the Senate. 5 U.S.C. App. 3 §§ 2, 3(a).

"Designated federal entity" is similarly defined by listing the entities covered, and includes several more government corporations and several "non-instrumentalities"—Amtrak,[191] Corporation for Public Broadcasting, Legal Services Corporation, Pension Benefit Guaranty Corporation, Tennessee Valley Authority. 5 U.S.C. App. 3 § 8G(a)(2). It also includes the Farm Credit Administration and the National Credit Union Administration, which are not themselves government corporations but which supervise government corporations. A designated federal entity must have an Office of Inspector General,

[191]Amtrak will be dropped from the statutory coverage when it is able to operate for a fiscal year without federal subsidy. Pub. L. No. 105-134, § 409, 111 Stat. 2570, 2586 (1997).

whose head is appointed by the head of the entity. 5 U.S.C. App. 3 § 8G(b), (c).

The term "federal entity" includes government corporations as defined in 5 U.S.C. § 103, which means both wholly owned and mixed-ownership, except for corporations already listed as either establishments or designated federal entities, or which are part of an entity in either of those groups. 5 U.S.C. App. 3 § 8G(a)(1). A "federal entity" is not statutorily required to have an Office of Inspector General, but must report annually on its internal audit structure to the Office of Management and Budget and to the Congress. 5 U.S.C. App. 3 § 8G(h)(2). The corporations selected for "designated federal entity" status are those receiving the largest amounts of federal funds. See H.R. Rep. No. 100-771 at 2 (1988), reprinted in 1988 U.S.C.C.A.N. 3154, 3155.

(2) Federal Managers' Financial Integrity Act of 1982

The Federal Managers' Financial Integrity Act of 1982 (FMFIA), Pub. L. No. 97-255, 96 Stat. 814, establishes a framework for evaluating internal controls. Section 2, 31 U.S.C. §§ 3512(c) and (d), requires each executive agency to develop, in accordance with standards prescribed by the Comptroller General, a system of internal accounting and administrative controls, and to report each year, under Office of Management and Budget guidelines, on the extent of its compliance. The applicable definitional section is 31 U.S.C. § 3501, which excludes "a corporation, agency, or instrumentality subject to [the Government Corporation Control Act]." Therefore, section 2 of FMFIA by its own force has no application to government corporations.

However, the annual management report, added to the Government Corporation Control Act by the Chief Financial Officers Act (see below), requires the inclusion of—

> "a statement on internal accounting and administrative control systems by the head of the management of the corporation, consistent with the requirements for agency statements on internal accounting and administrative control systems under the amendments made by the Federal Managers' Financial Integrity Act of 1982."
> 31 U.S.C. § 9106(a)(2)(E).

Accordingly, while FMFIA does not apply by its own terms, the Control Act contains a parallel requirement.

(3) Chief Financial Officers Act

The Chief Financial Officers Act of 1990, Pub. L. No. 101-576, 104 Stat. 2838, as amended, requires the establishment of Chief Financial Officers in specified agencies, but includes no government corporations. 31 U.S.C. § 901. The act did, however, revise the audit and management reporting provisions of the Government Corporation Control Act, as summarized earlier in our coverage of the Control Act. Section 301 of the act, 31 U.S.C. § 3512(a), requires OMB to include information about government corporations in the financial management status reports and governmentwide five-year financial management plans it must prepare for the Congress.

(4) Government Performance and Results Act

The Government Performance and Results Act of 1993 (GPRA), Pub. L. No. 103-62, 107 Stat. 285, is designed to improve efficiency and effectiveness in the federal government by requiring agencies to set performance goals and to measure results against those goals. Section 3 of GPRA, 5 U.S.C. § 306, requires each agency to submit to Congress and OMB to update periodically, a "strategic plan," which must include a mission statement and the agency's goals and objectives for at least a five-year period. Section 4 of GPRA, 31 U.S.C. §§ 1115 and 1116, requires agencies to prepare annual performance plans and program performance reports. GPRA's definition of "agency" is "an Executive agency defined under [5 U.S.C. §] 105," with several exceptions not relevant here. 5 U.S.C. § 306(f); 31 U.S.C. § 1115(f)(1). Therefore, GPRA applies to corporations owned or controlled by the United States.

(5) Government Management Reform Act of 1994

The Government Management Reform Act of 1994 requires Treasury to prepare annual consolidated financial statements "covering all accounts and associated activities of the executive branch of the United States Government." Pub. L. No. 103-356, § 405(c), 108 Stat. at 3410,3416 (1994), 31 U.S.C. § 331(e). GAO is required to audit these consolidated statements. Id. at 3417. Since the statements are to cover the entire executive branch, they include those government corporations that are in the executive branch. See Financial Audit: 1997 Consolidated Financial Statements of the United States

Government, GAO/AIMD-98-127, Appendix (agencies included and excluded) (March 1998).

(6) Federal Financial Management Improvement Act of 1996

This law concerns agency financial management systems. It does not apply to government corporations because it defines "agency" by incorporating the definition in 31 U.S.C. § 901(b), which does not include any government corporations. 31 U.S.C. § 3512 note (Sec. 806(i)).

d. Property Management

The primary law governing the use and disposal of property is the Federal Property and Administrative Services Act of 1949. The pertinent definitions are found in 40 U.S.C. §§ 472(a) and (b), under which the term "federal agency" includes "executive agency," and executive agency includes "any wholly owned Government corporation." Naturally, there are exceptions. For example, 40 U.S.C. § 474(c) exempts government corporations from the provisions relating to GAO approval of property accounting systems (40 U.S.C. § 486(b)) and GAO audit of property accounts (40 U.S.C. § 487(c)). The Tennessee Valley Authority is partially exempt by virtue of 40 U.S.C. § 474(d)(12). The rule is, therefore, that absent an applicable exemption, provisions of the Property Act applicable to "federal agencies" or "executive agencies" apply to wholly owned government corporations.

Section 481 of 40 U.S.C. gives the General Services Administration a variety of responsibilities with respect to the procurement and storage of personal property, including public utility services. This applies to wholly owned corporations by virtue of 40 U.S.C. § 472(a). The law further directs GSA to provide these services upon request to mixed-ownership corporations as well. 40 U.S.C. § 481(b)(1). This would include such services as the use of federal supply schedules.

The disposition of excess property is covered in 40 U.S.C. § 483. Reimbursement of fair value is required in the case of a transfer from one agency to another when either the transferring agency or the receiving agency is a corporation under the Government Corporation Control Act. 40 U.S.C. § 483(a)(1). The purpose of this provision is to—

"maintain the integrity of the corporate accounts; that is, to prevent the impairment of the capital assets of a corporation disposing of excess property or the unjust enrichment of a corporation receiving such excess property." B-119819, December 1, 1954, at 2.

Transfer may be made without reimbursement in situations where it would not impair a corporation's capital structure—uncommon in the case of a government corporation, but possible nevertheless. Id.; B-129149, September 28, 1956.

Section 484 of 40 U.S.C. addresses surplus property and is also applicable to wholly owned corporations. Under subsection (c), the disposing agency may "execute such documents for the transfer of title or other interest in property" as deemed appropriate. This includes transfers of title to real property from a wholly owned corporation to the United States, as and to the extent required by regulation. 41 Op. Att'y Gen. 15 (1949) (dealing with identical language in predecessor statute).

Proceeds from the sale of surplus property, as well as reimbursements from the transfer of excess property, are governed by 40 U.S.C. § 485, which generally directs their deposit as miscellaneous receipts. 40 U.S.C. § 485(a). However, an exception specified in 40 U.S.C. § 485(c) provides that:

"Where the property transferred or disposed of was acquired by the use of funds either not appropriated from the general fund of the Treasury or appropriated therefrom but by law reimbursable from assessment, tax, or other revenue or receipts, then the net proceeds of the disposition or transfer shall be credited to the reimbursable fund . . . ."

The quoted provision also applies to foreign excess property disposed of for United States currency. 40 U.S.C. § 513. These provisions authorize the crediting of proceeds to the revolving fund of a government corporation, even where the property was originally acquired with appropriated funds. B-99032-O.M., February 9, 1953 (disposal of dredge by former Panama Canal Company).

GSA's leasing authority is found in 40 U.S.C. § 490. It, too, applies to wholly owned corporations by virtue of 40 U.S.C. §§ 472(a) and 129. As with personal property services, GSA may extend its buildings services (operation, maintenance, protection) to a mixed-ownership corporation upon request. 40 U.S.C. § 490(b). An odd situation occurred in 38 Comp. Gen. 565 (1959). The Federal National

Mortgage Association—"Fannie Mae"—started out in life as a wholly owned government corporation, was rechartered as a mixed-ownership government corporation, and is now a government-sponsored enterprise. In 1959, it was a mixed-ownership corporation, but Congress had chosen to retain it in the Government Corporation Control Act as a wholly owned corporation. The question was whether Fannie Mae was required to do its leasing through GSA. The continued listing as a wholly owned corporation, the decision reasoned, was only for purposes of the Control Act. Absent some other definition, the "actual organic structure of the corporation" should determine its status. 38 Comp. Gen. at 567. Therefore, for purposes of leasing authority, Fannie Mae was a mixed-ownership corporation and thus not required to lease office space through GSA. See also B-161531, June 29, 1967.

Another pertinent statute is the Public Buildings Act. It applies to wholly owned corporations and to several specified mixed-ownership corporations, one of which is the Federal Deposit Insurance Corporation. 40 U.S.C. §§ 612(1), (3), (4). Thus, an office building proposed to be constructed by the FDIC would be a "public building" and therefore subject to the Public Buildings Act, except for the prospectus approval requirement. B-143167-O.M., September 27, 1960.

The Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. ch. 61, also applies to wholly owned government corporations. 42 U.S.C. § 4601(1).

e. Freedom of Information, Privacy Acts

The Administrative Procedure Act defines "agency" to mean "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," with a list of exceptions not relevant to this discussion. 5 U.S.C. § 551(1). The Freedom of Information Act (FOIA) provides that "'agency' as defined in section 551(1) of this title includes any . . . Government corporation [or] Government controlled corporation." 5 U.S.C. § 552(f)(1). The Privacy Act provides that "the term 'agency' means agency as defined in section 552(e) of this title." 5 U.S.C. § 552a(a)(1). Thus, the extent to which FOIA and the Privacy Act apply to government corporations should be the same since they use the same definition.

Given the plain statutory language, the "traditional" types of government corporations—wholly owned and mixed-ownership—do not appear to have presented problems. E.g., Jones v. NRC, 654 F. Supp. 130, 131 (D.D.C. 1987) (FOIA applies to TVA); Stephens v. TVA, 754 F. Supp. 579 (E.D. Tenn. 1990) (Privacy Act suit against TVA with no suggestion of any concern over applicability). If these traditional government corporations are at the "clearly covered" extreme, at the other, "clearly not covered" extreme, are private corporations which receive federal financial assistance, even with a slight amount of federal supervision. Forsham v. Harris, 445 U.S. 169 (1980) (holding FOIA inapplicable to a private grantee).

The difficult cases occupy the "gray area" between these poles. The case of Rocap v. Indiek, 539 F.2d 174 (D.C. Cir. 1976), found FOIA applicable to the Federal Home Loan Mortgage Corporation ("Freddie Mac"), a government-sponsored enterprise. The court listed the factors it found relevant, acknowledging that none of them alone would be sufficient:

> "It is federally chartered, its Board of Directors is Presidentially appointed, it is subject to close government supervision and control over its business transactions, and to federal audit and reporting requirements. In addition, the Corporation is expressly designated an 'agency,' and its employees are officers and employees of the United States, for a number of purposes." Id. at 180.

Taken together, these "federal characteristics dictate the conclusion that it is the kind of federally created and controlled entity" that Congress intended to include under the term "Government controlled corporation." Id. at 181.[192]

Amtrak is subject to FOIA by virtue of 49 U.S.C. § 24301(e). However, it is not a government-controlled corporation for purposes of the Privacy Act. Ehm v. National Railroad Passenger Corporation, 732 F.2d 1250 (5th Cir. 1984). The issue had become somewhat clouded by some legislative history that could be used to support applicability, as GAO had done in 57 Comp. Gen. 773 (1978). See also

[192]Legislation in 1989 largely privatized Freddie Mac and severed most of its federal ties. We cite Rocap merely to illustrate the kinds of factors that influenced the court. The holding is no longer directly applicable. See Liberty Mortgage Banking, Ltd. v. Federal Home Loan Mortgage Corp., 822 F. Supp. 956, 958-960 and n.7 (E.D.N.Y. 1993).

63 Comp. Gen. 98 (1983) (declining to consider the matter further in view of the then-pending Ehm litigation). The Ehm court reviewed the legislative history, found it inconclusive, and found Amtrak closer to the Corporation for Public Broadcasting, which was indisputably intended to be excluded. Ehm, 732 F.2d at 1254-55.

A related statute is the Government in the Sunshine Act, 5 U.S.C. § 552b which requires, among other things, that every meeting of an agency be announced in advance and open to the public, unless otherwise excepted. It defines "agency" as an agency (1) within the FOIA/Privacy Act definition, which explicitly includes government corporations and government controlled corporations, and which is (2) "headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President." 5 U.S.C. § 552b(a)(1). A corporation's board of directors is a "collegial body." 57 Comp. Gen. at 775; 63 Comp. Gen. at 99. While Ehm supersedes these cases insofar as they deal with Amtrak, the general points remain valid, and many government corporations are subject to the Sunshine Act.

Of course, as it did with Amtrak, Congress can exclude or include government or quasi-government corporations under these laws. 1 Op. Off. Legal Counsel 126, 131-132 (1977).

A final information-related statute we may mention is the Paperwork Reduction Act of 1980 (which replaced the Federal Reports Act of 1942), 44 U.S.C. ch. 35. It gives OMB certain oversight and regulatory responsibilities with respect to the collection of information from the public. Its definition of "agency" is essentially the same as that of FOIA and the Privacy Act in that it expressly includes government corporations and government controlled corporations. 44 U.S.C. § 3502(1).

f. Printing and Binding

Subject to a few exceptions, all printing and binding for "every executive department, independent office and establishment of the Government, shall be done at the Government Printing Office." 44 U.S.C. § 501. Title 44 does not further define the applicability of this provision. Although the cases must be approached with some caution, the rule is that a government corporation empowered to determine the character and necessity of its expenditures is not required to comply with 44 U.S.C. § 501.

The earliest decision appears to be A-49652, June 28, 1933, in which GAO advised that the Home Owners' Loan Corporation was not required to have its printing done at the Government Printing Office. Yet in 14 Comp. Gen. 695 (1935), GAO held that the Federal Savings and Loan Insurance Corporation was subject to the requirement. The difference was that the Home Owners' Loan Corporation had the statutory "character and necessity" power, whereas the FSLIC did not. FSLIC was given that power shortly thereafter, and GAO then confirmed that it, too, was now exempt. A-60495, October 4, 1938. The two corporations subsequently adopted resolutions to serve as their determination of non-applicability, and GAO concurred. A-98289, January 18, 1939 (HOLC); A-98289/A-60495, January 18, 1939 (FSLIC). See also 18 Comp. Gen. 479 (1938); 14 Comp. Gen. 698 (1935). GAO has applied the same result to other government corporations and similar entities. E.g., B-209585, January 26, 1983 (TVA); B-114829, July 8, 1975 (Postal Service). A corporation not subject to 44 U.S.C. § 501 may still elect to follow it. A-49217, June 5, 1933.

By coincidence, all of the government corporations GAO had considered possessed the variety of "character and necessity" authority which included the "without regard to other provisions of law" clause. A 1986 decision, 65 Comp. Gen. 226, misinterpreted this coincidence and treated the "without regard" clause, rather than the basic "character and necessity" provision, as the basis for the exemption. While the actual holding of 65 Comp. Gen. 226 is correct—that a corporation not possessing the "character and necessity" power must follow 44 U.S.C. § 501—the discussion of the "without regard" clause is not. This is because 44 U.S.C. § 501 is a general statute; it does not expressly apply to government corporations. Therefore, as discussed above under the "Fiscal Autonomy" heading, a "character and necessity" provision is sufficient to permit its avoidance, without the need for the additional "without regard" clause.

As further evidence, again in 1949, the Institute of Inter-American Affairs responded to a budget cut by firing all of its auditors. An angered Congress threatened to respond by repealing its "character and necessity" power. See B-24827, March 24, 1949. As part of this process, GAO was asked to study which laws would be affected by such a repeal. The resulting statement listed the printing statute as one of the laws that had not previously applied but would in the

event of repeal. See General Accounting Office Statement Concerning Effect of "Determine and Prescribe" Language on Conduct of Business by the Institute of Inter-American Affairs, June 22, 1949, 334 MS 1805A.

g. Criminal Code

Regardless of a corporation's autonomy, it is within the power of Congress to provide that a crime against a government corporation is a crime against the United States. The Supreme Court has said:

> "The United States can protect its property by criminal laws, and its constitutional power would not be affected if it saw fit to create a corporation of its own for purposes of the Government, under laws emanating directly or indirectly from itself, and turned the property over to its creature. The creator would not be subordinated to its own machinery." United States v. Walter, 263 U.S. 15, 17 (1932) (Holmes, J.).

Congress has implemented this power through several provisions of the Criminal Code (18 U.S.C.). The definition of "agency" includes—

> "any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense." 18 U.S.C. § 6.

Some statutes in which this definition can come into play are 18 U.S.C. §§ 286 (conspiracy to defraud United States or agency thereof through false claim); 287 (presenting false claim to United States or agency thereof); and 371 (conspiracy to defraud United States or agency thereof "in any manner or for any purpose"). An illustrative case is United States v. Samuel Dunkel & Co., 184 F.2d 894 (2d Cir. 1950), holding that fraud upon the former Federal Surplus Commodities Corporation was the same as fraud upon the United States for purposes of 18 U.S.C. § 371. This was an "easy" case since the corporation in question was statutorily designated as an agency of the United States. Id. at 898. In view of the language of 18 U.S.C. § 6, however, that designation would not appear to be necessary. See Walter, 263 U.S. at 18.

The "proprietary interest" language of 18 U.S.C. § 6 replaced language in prior laws referring to "any corporation in which the United States is a stockholder." See 18 U.S.C. §§ 286, 287 (Revision Notes). No minimum "proprietary interest" is specified to trigger applicability. Thus, the statute would apply to a corporation in which the proprietary interest is slight, the only qualification being

that it must be an instrumentality of the government. Walter, 263 U.S. at 18. This ensures that the statute is restricted to its intended purpose, "government corporations," and eliminates situations in which the United States might, for example, acquire an interest in a private corporation through some sort of forfeiture.

"Proprietary interest" also includes non-stock government corporations. The Revision Note to 18 U.S.C. § 6 makes clear that this phrase "is intended to include those government corporations in which stock is not actually issued." A case applying this concept is Acron Investments, Inc. v. FSLIC, 363 F.2d 236, 239-240 (9th Cir. 1966), dealing with the identical "proprietary interest" language in 28 U.S.C. § 451 which was intended to parallel 18 U.S.C. § 6. Another is Government National Mortgage Association v. Terry, 608 F.2d 614 (5th Cir. 1979), applying Acron to "Ginnie Mae."

8. Claims and Lawsuits

a. Administrative Claims

(1) Claims settlement authority

The structure of administrative claims settlement in the federal government, described in detail in Chapter 12, consists of (1) a series of statutes, one example being the Federal Tort Claims Act, authorizing the final and conclusive settlement of claims either with or without judicial review, and (2) a general claims settlement statute, 31 U.S.C. § 3702(a), which picks up claims not covered by any of the specific statutes.

Government corporations generally have their own claims settlement authority by virtue of specific charter provisions, and are therefore not subject to 31 U.S.C. § 3702(a). The most direct approach is illustrated by section 722(a) of Pub. L. No. 104-127, 110 Stat. 888, 1114, 7 U.S.C. § 5902(f)(15), which provides that the Alternative Agricultural Research and Commercialization Corporation:

> "may make final and conclusive settlement and adjustment of any claim by or against the Corporation or a fiscal officer of the Corporation."

While often cited in conjunction with a sue-and-be-sued clause or a "character and necessity" clause, this provision is sufficient to

permit the corporation to administratively settle its own claims. Government corporations with this type of authority include the Tennessee Valley Authority,[193] the Commodity Credit Corporation,[194] and the corporate functions of the Federal Housing Administration.[195] The Bonneville Power Administration, consistent with its other corporate-like powers, has it too.[196]

GAO also has held that the power to sue and be sued, combined with the power to determine the character and necessity of expenditures, even without the explicit claims settlement power, is still sufficient to remove the corporation from the scope of 31 U.S.C. § 3702(a). B-179464, March 27, 1974; B-109766, January 20, 1959 (both dealing with the former Panama Canal Company).

(2) Federal Tort Claims Act

Prior to the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, whether government corporations were subject to common-law tort suits was somewhat unclear. By 1939, the answer became settled in the affirmative. Keifer & Keifer v. Reconstruction Finance Corporation, 306 U.S. 381 (1939); Prato v. Home Owners' Loan Corporation, 106 F.2d 128 (1st Cir. 1939). See also 25 Comp. Gen. 685 (1946). When the FTCA was enacted in 1946 to remove much of the government's tort immunity, it included most, if not all, of the then-existing government corporations in the waiver. The Act defines "federal agency" as including "corporations primarily acting as instrumentalities or agencies of the United States." 28 U.S.C. § 2671. Far from establishing a black-letter rule, however, the definition raises as many questions as it answers.

[193]E.g., B-124078, June 7, 1955. Naturally, the GAO decisions and opinions we cite involve claims submitted to GAO during the 75-year span that GAO possessed the general claims settlement authority. While GAO is no longer directly involved in the process, the principles themselves remain sound.

[194]B-200654, September 9, 1981; B-142771/B-143782, November 23, 1960; B-138489, March 25, 1959.

[195]53 Comp. Gen. 337 (1973); 27 Comp. Gen. 429, 432 (1948); B-156202, March 9, 1965.

[196]B-129395, January 22, 1957; B-132855-O.M., October 1, 1957.

At a minimum, the definition should pick up wholly owned government corporations. The following have been found subject to the Act:

- The former Inland Waterways Corporation. Wickman v. Inland Waterways Corporation, 78 F. Supp. 284 (D. Minn. 1948). This appears to be the earliest published decision on the applicability of the FTCA to a government corporation.
- The former Federal Savings and Loan Insurance Corporation. FSLIC v. Quinn, 419 F.2d 1014 (7th Cir. 1969); Kohlbeck v. Kis, 651 F. Supp. 1233 (D. Mont. 1987); Colony First Federal Savings and Loan Association v. FSLIC, 643 F. Supp. 410 (C.D. Cal. 1986).
- St. Lawrence Seaway Development Corporation. Handley v. Tecon Corp., 172 F. Supp. 565 (N.D.N.Y. 1959).
- Federal Housing Administration. Edelman v. FHA, 382 F.2d 594 (2d Cir. 1967).
- Federal Prison Industries. See United States v. Demko, 385 U.S. 149 (1966). The Court in that case held that a prisoner injured while working for FPI could not sue under the FTCA because the compensation remedy provided under 18 U.S.C. § 4126 was his exclusive remedy. If the FTCA did not apply to FPI, there would have been no need to tackle the exclusivity question.

Our research has disclosed no case in which the FTCA was found inapplicable to a wholly owned government corporation on the basis of the section 2671 definition.

Turning to mixed-ownership corporations, the situation is less uniform. One court has held a Federal Home Loan Bank not a federal agency for FTCA purposes. Rheams v. Bankston, Wright & Greenhill, 756 F. Supp. 1004 (W.D. Tex. 1991). Another court reached the opposite result for the former Resolution Trust Corporation, influenced largely by the fact that "the RTC is an organization similar to, and in fact replaces the FSLIC," which, as noted above, was an agency under the FTCA. Park Club, Inc. v. Resolution Trust [Corporation], 742 F. Supp. 395, 398 (S.D. Tex. 1990), aff'd in part and rev'd in part on other grounds, 967 F.2d 1053 (5th Cir. 1992).

A sampling of cases involving the Federal Deposit Insurance Corporation (FDIC), another mixed-ownership corporation, indicates some of the consequences of the FTCA's applicability. Numerous cases have held that the FDIC is a "federal agency" for

FTCA purposes. E.g., Davis v. FDIC, 369 F. Supp. 277 (D. Colo. 1974). This is true regardless of whether the FDIC is acting in its receiver capacity or its corporate capacity. FDIC v. Hartford Insurance Co., 877 F.2d 590 (7th Cir. 1989); FDIC v. DiStefano, 839 F. Supp. 110, 121 (D.R.I. 1993). One important consequence is that if the tort is subject to one of the exemptions listed in 28 U.S.C. § 2680, recovery is precluded just as if the agency involved were not a corporation, and the corporation's "sue and be sued" power cannot be used to get in through the back door. FDIC v. Citizens Bank & Trust Co., 592 F.2d 364 (7th Cir. 1979) (exemption for execution of statute or regulation); Safeway Portland Employees' Federal Credit Union v. FDIC, 506 F.2d 1213 (9th Cir. 1974) (misrepresentation and deceit); Freeling v. FDIC, 221 F. Supp. 955 (W.D. Okla. 1962), aff'd, 326 F.2d 971 (10th Cir. 1963) (slander). One possible way around this is a valid recoupment claim. DiStefano, 839 F. Supp. at 123. Another important consequence of applicability is the requirement to attempt administrative resolution before going to court. E.g., FDIC v. Cheng, 787 F. Supp. 625, 631 (N.D. Tex. 1991).

If the seemingly uniform application in the case of wholly owned corporations begins to break down with respect to mixed-ownership corporations, it breaks down even further for the government-sponsored enterprise. For example, the Federal Home Loan Mortgage Corporation ("Freddie Mac") has been held not a "federal agency" under the FTCA. Mendrala v. Crown Mortgage Co., 955 F.2d 1132 (7th Cir. 1992). However, it is not inconceivable that a court could construe the language of 28 U.S.C. § 2671 to encompass some GSEs.

The original definitional language, quoted in Wickman, 78 F. Supp. at 285 (emphasis added), "corporations whose primary function is to act as, and while acting as, instrumentalities or agencies of the United States," suggests an interesting twist.[197] At least in theory, it seems possible for a government corporation or GSE to be subject to the FTCA with respect to its primary function, but not subject while performing some ancillary or incidental function.

[197]The linguistic change resulting from the 1948 recodification of Title 28 presumably works no substantive change.

As to the remaining types of government-created corporations, applicability of the FTCA would seem quite remote. Earlier in our definitional discussion we noted cases refusing to apply the FTCA to the American Red Cross and to Production Credit Associations. And, the FTCA does not apply to Amtrak. Sentner v. Amtrak, 540 F. Supp. 557, 561 (D.N.J. 1982).

For most government corporations, applicability of the FTCA is determined under the definitional language of 28 U.S.C. § 2671. In a few instances, inclusion or exclusion is the subject of other specific legislation. For example, the Commodity Credit Corporation is subject to the FTCA by virtue of express language in 15 U.S.C. § 714b(c), although it is not clear why the CCC would not qualify under the definitional language in any event. The FTCA itself provides a few exemptions. Under 28 U.S.C. § 2680(n), the law does not apply to claims "arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives."

Another significant exemption is 28 U.S.C. § 2680(l): the FTCA does not apply to "[a]ny claim arising from the activities of the Tennessee Valley Authority." From this, it is clear that the FTCA cannot form the basis of a claim or suit against the TVA. E.g., Robinson v. United States, 422 F. Supp. 121 (M.D. Tenn. 1976); Latch v. TVA, 312 F. Supp. 1069 (N.D. Miss. 1970). However, the TVA still can be sued in tort under its "sue and be sued" clause. Courts have held that, subject to public policy limitations, it is "subject to common law liability and may be sued and held liable as may be a private individual." Brewer v. Sheco Construction Co., 327 F. Supp. 1017 (W.D. Ky. 1971); Smith v. TVA, 436 F. Supp. 151 (E.D. Tenn. 1977) (following Brewer). Well, maybe not exactly like a private individual because the TVA is an agency or instrumentality of the United States, and the Fifth Circuit has held that it cannot be held liable for punitive damages without statutory authority. Painter v. TVA, 476 F.2d 943 (5th Cir. 1973).

(3) Contract Disputes Act

The Contract Disputes Act, 41 U.S.C. §§ 601-13, applies to each "executive agency," which includes "a wholly owned Government corporation as defined by section 9101(3) of Title 31." 41 U.S.C. § 601(2). See APA, Inc. v. FSLIC., 562 F. Supp. 884 (W.D. La. 1983)

(Contract Disputes Act applied to former FSLIC because it was listed as a wholly owned government corporation).

As is often the case, the Tennessee Valley Authority has its own specific provisions. TVA contracts "for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system" are excluded from the CDA. 41 U.S.C. § 602(b). Other TVA contracts are covered only if they include a disputes clause mandating administrative resolution. 41 U.S.C. §602(b). The TVA is authorized to establish its own board of contract appeals, and has its own direct payment authority. 41 U.S.C. §§ 607(a)(2), 612(d).

(4) Assignment of Claims Act

The Assignment of Claims Act (31 U.S.C. § 3727, 41 U.S.C. § 15) does not explicitly define its applicability. Therefore, absent some charter provision resolving the issue, applicability has been determined through case law.

The first wave of cases involved the U.S. Emergency Fleet Corporation, which seems to have spent as much time litigating as shipping cargo. The Comptroller of the Treasury ruled in 1919 that the statute should apply whenever payment is to be made from appropriated funds, and therefore it was not necessary to determine whether claims against the Corporation were claims against the United States. 25 Comp. Dec. 701 (1919). The courts disagreed, however, and held that the Fleet Corporation, because of its distinct corporate entity, was not subject to the Act. Rhodes v. United States, 8 F. Supp. 124 (E.D.N.Y. 1934); Charles Nelson Co. v. United States, 11 F.2d 906 (W.D. Wash. 1926); Providence Engineering Corp. v. Downey Shipbuilding Corp., 3 F.2d 154 (E.D.N.Y. 1924).

What was distinct about the Fleet Corporation, although not spelled out in the cases cited, was that the Shipping Board, which had organized the Fleet Corporation under statutory authority, was authorized to sell Fleet Corporation stock to the public as long as the Shipping Board remained majority stockholder. See Act of September 7, 1916, ch. 451, § 11, 39 Stat. 728, 731. The Corporation had been organized "so that private parties could share stock ownership with the United States." Rainwater v. United States, 356 U.S. 590, 593 (1958). While this may never have actually

happened,[198] the Corporation was, nevertheless, legally designed to be more of a mixed-ownership corporation. Accordingly, the Rainwater Court noted in another context that enactments dealing with corporations like the Fleet Corporation were "of little value" in assessing "wholly owned and closely controlled" government corporations. Id. at 593-594. (A cynic might say that is equally true for case law.)

Later cases involving wholly owned corporations tend to regard the Assignment of Claims Act as applicable. The court in Federal Ins. Co. v. Hardy, 222 F. Supp. 68 (E.D. Mo. 1963), found it applicable to the Federal Housing Administration. Other cases have applied the Assignment of Claims Act to the Tennessee Valley Authority (Sigmon Fuel Co. v. TVA, 709 F.2d 440 (6th Cir. 1983)), and the Export-Import Bank (Balfour Maclaine Int'l, Ltd. v. Hanson, 876 F. Supp. 52, 57 (S.D.N.Y. 1995)). See also In re Sunberg, 35 B.R. 777 (Bankr. S.D. Iowa 1983), aff'd, 729 F.2d 561 (8th Cir. 1984) (CCC).

It is also possible for a government corporation or GSE which qualifies as a "financing institution" to be the assignee of the proceeds of a contract between the contractor and some other government agency. For example, in Peoria Consolidated Manufacturers, Inc. v. United States, 286 F.2d 642 (7th Cir. 1961), the court noted that the plaintiff manufacturing company had obtained a loan from the Reconstruction Finance Corporation and, as security assigned, to the corporation money due under a contract with the Army. Id. at 644.

(5) Estoppel

The classic case on estoppel against the government, Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947), involved a wholly owned government corporation. The Corporation had denied a claim based on the eligibility criteria in its regulations. The Supreme Court upheld the denial, notwithstanding that the farmer had been misled into believing that his crop would be covered. Speaking through Justice Frankfurter, the Court explained:

[198]As of at least 1927, the Shipping Board still held all of the stock. See United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 5 (1927).

"[W]e assume that recovery could be had against a private insurance company. But the Corporation is not a private insurance company. . . . The Government may carry on its operations through conventional executive agencies or through corporate forms especially created for defined ends. . . . Whatever the form in which the Government functions, anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." Id. at 383-84.

The D.C. Circuit has held Freddie Mac—the Federal Home Loan Mortgage Corporation—to be a federal entity for purposes of a promissory estoppel claim. McCauley v. Thygerson, 732 F.2d 978 (D.C. Cir. 1984). (This was the pre-privatization version of Freddie Mac dealt with in Rocap v. Indiek, cited earlier in connection with the Freedom of Information Act.)

(6) Prompt Payment Act

The Prompt Payment Act, 31 U.S.C. §§ 3901-3907, requires the payment of an "interest penalty" when an agency makes late payment for the acquisition of property or services from a business concern. The definition of "agency" in 31 U.S.C. § 3901(a) adopts the definition of the Administrative Procedure Act, 5 U.S.C. § 551(1), which is broad enough to include government corporations but does not explicitly apply to them. GAO has regarded this language as clearly applying, for example, to the Commodity Credit Corporation. B-223857, February 27, 1987. Subsection (b) of 31 U.S.C. § 3901 states that the Act applies to the Tennessee Valley Authority, but that "regulations prescribed under this chapter do not apply" to the TVA, which is authorized to prescribe its own implementing regulations.

Congress amended the Act in 1988 to make it applicable to certain assistance payments to farmers by the Commodity Credit Corporation (CCC) which are not payments for the acquisition of goods or services. 31 U.S.C. § 3902(h). Under 31 U.S.C. § 3907, a claim for an interest penalty may be brought under the Contract Disputes Act but, since that act has its own interest provision, Prompt Payment Act interest is limited to one year. However, by virtue of 31 U.S.C. § 3902(h)(4), section 3907 does not apply to payments owed by the CCC for agricultural commodity pricing and disaster assistance programs. Therefore, the one-year limitation on interest payments does not apply to those payments. Doane v. Espy, 873 F. Supp. 1277 (W.D. Wis. 1995). As with any other statute, and subject, of course, to constitutional restrictions, Congress can

expand or restrict the scope or applicability of 31 U.S.C. § 3902(h). See Huntsman Farms, Inc. v. Espy, 928 F. Supp. 1451 (E.D. Ark. 1996), for one example.

(7) False Claims Act

The False Claims Act, 31 U.S.C. §§ 3729-3731, imposes liability for presenting a false claim to, or conspiring to defraud, "the Government." 31 U.S.C. § 3729(a). The question in the present context is whether defrauding a government corporation is the same as defrauding "the Government" for False Claims Act purposes. With respect to wholly owned corporations at least, the answer appears to be "yes."

One line of cases involves the Commodity Credit Corporation (CCC). The Supreme Court has held that a claim against the CCC is a claim against the government under the False Claims Act. Rainwater v. United States, 356 U.S. 590 (1958). See also United States v. McNinch, 356 U.S. 595 (1958); United States v. Brown, 274 F.2d 107 (4th Cir. 1960). As the Rainwater Court put it:

> "In brief, Commodity is simply an administrative device established by Congress for the purpose of carrying out federal farm programs with public funds.
>
> "In our judgment Commodity is a part of 'the Government of the United States' for purposes of the False Claims Act." 356 U.S. at 592.

Another line of cases says essentially the same thing with respect to the Federal Housing Administration. McNinch, 356 U.S. at 598; United States v. Veneziale, 268 F.2d 504 (3d Cir. 1959); United States v. Globe Remodeling Co., 196 F. Supp. 652 (D. Vt. 1960). However, the McNinch Court held that a lending institution's application for credit insurance from the FHA is not a "claim" under the False Claims Act. 356 U.S. at 598.

Other wholly owned corporations which have been regarded as part of "the Government" under the False Claims Act include the Federal Crop Insurance Corporation (Kelsoe v. Federal Crop Insurance Corp., 724 F. Supp. 448 (E.D. Tex. 1988)), and the former Reconstruction Finance Corporation (United States v. Borin, 209 F.2d 145 (5th Cir. 1954)). Whether there might be any basis for distinguishing these corporations from any other wholly owned corporations does not appear to have been addressed.

The Federal Deposit Insurance Corporation—a mixed-ownership government corporation—has also been treated as part of the government under the False Claims Act. United States ex rel. Prawer & Co. v. Verrill & Dana, 946 F. Supp. 87 (D. Maine 1996), motion for reconsideration denied, 962 F. Supp. 206 (D. Maine 1997). This case involved the so-called "reverse claim" provision of the False Claims Act, 31 U.S.C. § 3729(a)(7), imposing liability for knowingly making or using a false record or statement "to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government."

(8) Interagency claims

The conventional wisdom has traditionally been that an agency of the federal government may not sue the United States or another agency because the same person may not be on both ends of the same lawsuit. E.g., Defense Supplies Corporation v. United States Lines Co., 148 F.2d 311 (2d Cir. 1945). Based in part on this reasoning, GAO had held that an agency's appropriations were not available to pay a claim for damage to the property of a government corporation. 25 Comp. Gen. 49 (1945). This was a straightforward application of the so-called "interdepartmental waiver doctrine" discussed in Chapter 12. However, the "unitary" theory, while still true for the most part, is not an absolute. See, e.g., United States v. ICC, 337 U.S. 426 (1949); Dean v. Herrington, 668 F. Supp. 646 (E.D. Tenn. 1987) (suit by TVA against DOE).

More recent decisions have recognized the availability of an agency's appropriations to pay damage claims to at least certain government corporations and corporate-like entities. For example, the Bonneville Power Administration could charge the National Weather Service for damage resulting from its use of Bonneville property. 71 Comp. Gen. 1 (1991). Under Bonneville's financing structure, the burden otherwise would have fallen on Bonneville's customers through rate increases caused by unrelated activities. Id. at 3-4. The Bonneville decision was followed and applied in B-253613, December 3, 1993, holding that the Federal Highway Administration could pay the Tennessee Valley Authority for damage its construction caused to TVA's electrical transmission towers because the burden would otherwise have fallen on TVA's customers.

The reverse situation—payment by a government corporation to another agency—occurred in 26 Comp. Gen. 235 (1946). GAO concluded that the corporation could pay the claim as long as its funds were available for the payment of damages incurred in the course of its operations. In the cited case, the funds of the former Inland Waterways Corporation were available to operate the business of a common carrier by water, and therefore available to pay any lawful claims arising from that activity. The claimant in the 1946 case happened to be another government corporation. Either way, the fact that the agency or corporation suffering the damage may not have a legally enforceable claim does not prevent administrative settlement. Of course, the charter power to make final and conclusive claim settlements provides this authority too.

b. Debt Collection

In Chapter 13 of this publication we demonstrate, that the United States has inherent authority to recover amounts owed to it and does not need any special statutory authority to do so. There is no apparent reason this should not apply equally to government corporations. See Bechtel v. Pension Benefit Guaranty Corporation, 624 F. Supp. 590 (D.D.C. 1984), aff'd, 781 F.2d 906 (D.C. Cir. 1986).

The typical claims settlement charter provision of government corporations applies to debt claims as well as payment claims. For example, 15 U.S.C. § 714b(k) authorizes the Commodity Credit Corporation to "make final and conclusive settlement and adjustment of any claims by or against the Corporation." Just as with payment claims, this authority removes the corporation from the coverage of 31 U.S.C. § 3702(a), the general claims settlement statute. Since most debt collection became statutory during the last third of the 20th century, this has less significance than it does in the payment context.

Much of the governmentwide debt collection legislation applies expressly to government corporations, which, in the absence of authority to the contrary, we would assume should be interpreted to mean the corporations listed in 31 U.S.C. § 9101. The first governmentwide statute, the Federal Claims Collection Act of 1966, defined "agency" as including government corporations. Pub. L. No. 89-508, § 2(a), 80 Stat. 308. The provisions which originated in the 1966 Act are the duty to pursue collection action and the compromise, suspension, and termination authorities, all of which are now found in 31 U.S.C. § 3711. The Debt Collection Act of 1982

(Pub. L. No. 97-365, 96 Stat. 1749) did not include its own definition, but many of its provisions were cast as amendments to the Federal Claims Collection Act, such as sections 10 (31 U.S.C. § 3716, administrative offset), 11 (31 U.S.C. § 3717, interest), and 13 (31 U.S.C. § 3718, contracts for collection services). Thus, these became subject to the 1966 definition.

The 1982 recodification of Title 31 dropped the definition as unnecessary. While this made no substantive change, it then required several steps of statutory construction to figure out which provisions applied to government corporations. In 1996, as part of the Debt Collection Improvement Act of 1996, the express reference to government corporations was restored. 31 U.S.C. § 3701(a)(4), as amended by Pub. L. No. 104-134, § 31001(c)(2), 110 Stat. 1321, 1321-359. Thus, for example, the Pension Benefit Guaranty Corporation is subject to 31 U.S.C. § 3718 and may contract for collection services to collect delinquent debts, but not for audit services to identify the debts. B-276628, August 19, 1998.

One authority a government corporation has which a regular agency does not (by virtue of either its specific claims settlement power or its sue-and-be-sued power, in conjunction with other charter powers) is the authority to waive indebtedness, independent of the waiver statutes applicable to the rest of the government. B-194628, July 3, 1979 (Government National Mortgage Association); B-190806, April 13, 1978 (Pension Benefit Guaranty Corporation). The power to waive includes the power to rescind a previously granted waiver if found to have been obtained under a material mistake of fact, error of law, fraud, or misrepresentation. B-272467.2, August 28, 1998 (Export-Import Bank).

In the majority of cases in which the fact that a government corporation is involved is relevant, the issue is whether a debt owed to the corporation is the same as a debt owed to the United States. The largest group of cases involves 31 U.S.C. § 3713, which gives priority to government claims under certain circumstances, and the earliest of these dealt with the Emergency Fleet Corporation. The courts held that debts owed to the Fleet Corporation were not entitled to the statutory priority. Sloan Shipyards Corp. v. United

States Shipping Board Emergency Fleet Corp., 258 U.S. 549 (1922);[199] United States v. Wood, 290 F. 109 (2d Cir. 1923), aff'd mem. 263 U.S. 680; West Virginia Rail Co. v. Jewett Bigelow & Brooks Co., 26 F.2d 503 (E.D. Ky. 1928).

As we have seen (under the Assignment of Claims Act heading above), Fleet Corporation cases must be applied with great caution, but this is one instance in which the courts have generally reached the same result. Debts to the following corporations have been held not to constitute debts to the United States for purposes of the priority statute: Government National Mortgage Association or "Ginnie Mae" (United States v. Blumenfeld, 128 B.R. 918 (E.D. Penn. 1991)); Federal Deposit Insurance Corporation (Lapadula & Villani, Inc. v. United States, 563 F. Supp. 782 (S.D.N.Y. 1983)); and the former Reconstruction Finance Corporation (RFC) (RFC v. Brady, 150 S.W.2d 357 (Tex. Civ. App. 1941)). Two cases giving priority to RFC debts are In re Peoria Consol. Mfrs., Inc., 286 F.2d 642 (7th Cir. 1961), and In re Tennessee Cent. Ry., 463 F.2d 73 (6th Cir. 1972). Peoria involved a loan program given to the RFC under the Defense Production Act of 1950, the funds for which "were obtained from the Treasury of the United States and did not involve the capital or assets of RFC." 286 F.2d at 645. The Tennessee litigation occurred long after the RFC had been liquidated and its assets transferred to various government agencies. See RFC Liquidation Act, Pub. L. No. 83-163, 67 Stat. 230 (1953).

Since the fact of corporate identity seems to be the key factor in these cases, the courts have reached a different result with respect to the Federal Housing Administration, which has corporate powers but is not organized as a corporation. Debts owed to the FHA are debts owed to the United States under 31 U.S.C. § 3713. Korman v. Federal Housing Administrator, 113 F.2d 743 (D.C. Cir. 1940); In re Byquist, 168 F. Supp. 483 (D. Kan. 1958). Also, Congress can extend the government's priority to any government corporation by expressly so providing in the charter, as it has done, for example, for the Commodity Credit Corporation. 15 U.S.C. § 714b(e). See Engleman v. CCC, 107 F. Supp. 930 (S.D. Cal. 1952) (recognizing the

[199]The summary treatment in Sloan, 258 U.S. at 570, did not cite the priority statute but the lower court opinion, which Sloan affirmed, did. See In re Eastern Shore Shipbuilding Corp., 274 F. 893 (2d Cir. 1921).

priority but finding the statute inapplicable where the government acquired its claim after an assignment for the benefit of creditors).

In the area of offset, GAO and the courts have mostly recognized the "unitary government" concept and treated debts to government corporations as debts to the United States. Applying the common-law offset inherent under the general settlement authority of 31 U.S.C. § 3702(a), GAO took the position that a refund of certain taxes was subject to offset to collect a debt owed to the Reconstruction Finance Corporation. B-35182, August 16, 1943. The debtor sued, the government filed a counterclaim, and the Supreme Court effectively upheld the offset. Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536 (1946). The Court said:

> "Every reason that could have prompted Congress to authorize the Government to plead counterclaims for debts owed to any of its other agencies applies with equal force to debts owed to the R.F.C. . . . That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is, an agency selected by Government to accomplish purely governmental purposes." Id. at 539.

While the Court was ruling, strictly speaking, on the propriety of the counterclaim and not the propriety of the administrative action, the rationale clearly fits. See also B-35182, November 30, 1945. While there now exists a comprehensive statutory provision for administrative offset, 31 U.S.C. § 3716, which applies to government corporations, the common-law principles remain relevant in cases in which section 3716 does not apply. Just like any non-corporate agency, a government corporation cannot use 31 U.S.C. § 3716 unless it has issued implementing regulations. In re Art Metal U.S.A., Inc., 109 B.R. 74, 81 (Bankr. D.N.J. 1989).

The "unitary government" concept also applies for the most part in setoffs under the Bankruptcy Code. E.g., In re Turner, 84 F.3d 1294 (10th Cir. 1996). The bankruptcy law, 11 U.S.C. § 553, preserves any common-law offset arising before commencement of the bankruptcy case. For purposes of this provision, most government corporations are part of the "unitary" government. This had also been the case under prior versions of the Bankruptcy Code. Luther v. United States, 225 F.2d 495 (10th Cir. 1954); B-120801, July 7, 1955. There is an exception, however, for "certain federal agencies such as the Federal Deposit Insurance Corporation [which] are viewed as separate governmental units when they act in their private

receivership capacity." Doe v. United States, 58 F.3d 494, 498 (9th Cir. 1995); In re Lopes, 211 B.R. 443, 447 n.3 (D.R.I. 1997). Another exception which fits this formulation is the Pension Benefit Guaranty Corporation when serving as trustee for terminated plans. The fact that the Pension Benefit Guaranty Corporation is a wholly owned government corporation had no impact on the court's decision. In re Art Metal U.S.A., Inc., 109 B.R. at 78.

In one early case predating Cherry Cotton Mills, GAO applied the precedents under the priority statute in determining which debts can be collected by offset against judgments under 31 U.S.C. § 3728. A-97085, June 13, 1942, holding that a debt owed to the Federal Deposit Insurance Corporation was not a debt owed to the United States for judgment offset purposes. While the result might still be the same for the corporation under the "private capacity" exception, the analysis probably should start by applying the offset cases rather than the priority cases.

c. Litigation in the Courts

(1) Sovereign immunity

We begin with the well-recognized principle that sovereign immunity protects the Federal Government and its agencies from suit. E.g., FDIC v. Meyer, 510 U.S. 471, 475 (1994). Of course, the United States may waive that immunity by consenting to be sued. The Supreme Court in Meyer described sovereign immunity as being jurisdictional in nature—"the terms of [the United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit." Id. at 475, quoting United States v. Sherwood, 312 U.S. 584, 586 (1941). Since government corporations are not always considered to "be" the United States, we cannot rely solely upon the general theories of sovereign immunity to determine the status of government corporations.

(2) Sue-and-be-sued clauses

Most government corporation charters provide the power to sue and be sued; that is, sue and be sued in the name of the corporation rather than the United States. The simplest charter provision empowers the corporation to "sue and be sued in its corporate name." E.g., 16 U.S.C. § 831c (b) (TVA); 7 U.S.C. § 942 (Rural Telephone Bank). A variation includes one or two additional elements, such as 29 U.S.C. § 1302(b)(1), which authorizes the

Pension Benefit Guaranty Corporation to "sue and be sued, complain and defend, in its corporate name and through its own counsel, in any court, State or Federal." Another version adds a whole paragraph of instructions on such things as jurisdiction, venue, and garnishment. E.g., 15 U.S.C. § 714b(c) (CCC).

The litigative status of a government corporation without a sue-and-be-sued clause is open to some debate. In Keifer & Keifer v. RFC, 306 U.S. 381, 389 (1939), the Supreme Court said that the mere fact that corporations are created by Congress and act as agencies of the United States "would not confer on such corporations legal immunity even if the conventional sue-and-be-sued clause were omitted." Other courts seized upon this proposition and proclaimed that a government corporation does not share the government's sovereign immunity unless Congress expressly grants it. E.g., RFC v. Langham, 208 F.2d 556 (6th Cir. 1953); United States v Edgerton & Sons, 178 F.2d 763 (2d Cir. 1949). Taken to its logical conclusion, this position would render the sue-and-be-sued clause surplusage—the situation would be the same with or without it. In Keifer, however, the Court was dealing with legislation which authorized the RFC to create certain regional corporations, and found that Congress contemplated that the powers of the parent corporation would flow through to its progeny. Many government corporations have come and gone in the decades since the Keifer decision, virtually all possessing the sue-and-be-sued power, and it would seem that the omission of that power from a new statutory charter could not be summarily dismissed. Be that as it may, the question would likely turn on congressional intent (Federal Land Bank v. Priddy, 295 U.S. 229, 231 (1935)) and may well remain academic as Congress seems to include the clause almost automatically.

Regardless of the arguable consequences of silence in a legislative charter, the important starting principle is that Congress has the power to control the matter by including appropriate language, one way or the other, in the charter. As the Supreme Court put it in FHA v. Burr, 309 U.S. 242, 244 (1940):

> "[T]here can be no doubt that Congress has full power to endow [a government corporation] with the government's immunity from suit or to determine the extent to which it may be subjected to the judicial process."

A very similar statement is found in Priddy, 295 U.S. at 231. "Immunity from suit is . . . given up when the language of the organic

statute specifically waives it." Dollar v. Land, 154 F.2d 307, 312 (D.C. Cir. 1946), aff'd, 330 U.S. 731 (1947). The most common legislative device for doing this is the sue-and-be-sued clause. The Supreme Court emphasized in Meyer that sue-and-be-sued clauses could only be limited by implication in certain circumstances where there has been a:

"clea[r] show[ing] that certain types of suits are not consistent with the statutory or constitutional scheme, that an implied restriction of the general authority is necessary to avoid grave interference with the performance of a governmental function, or that for other reasons it was plainly the purpose of Congress to use the 'sue and be sued' clause in a narrow fashion." 309 U.S. at 245, quoting Burr, 510 U.S. at 480.

The fact that a government corporation can sue or be sued does not mean that it can be hauled into court for any perceived wrong. The Supreme Court pointed out in Meyer that the sovereign immunity waiver is only the first step in a two-step process.

"The first inquiry is whether there has been a waiver of sovereign immunity. If there has been such a waiver, as in this case, the second inquiry comes into play—that is, whether the source of substantive law upon which the claimant relies provides an avenue for relief." Id. at 484.

The Meyer Court held that the sue-and-be-sued clause of the former Federal Savings and Loan Insurance Corporation waived its immunity with respect to a constitutional tort claim, but that there was no legal basis—and the Court emphatically refused to create one—for asserting a constitutional tort claim against the agency itself. Thus, a sue-and-be-sued clause does not furnish the legal basis for the suit. See also Young v. FDIC, 763 F. Supp. 485 (D. Colo. 1991); Atchley v. TVA 69 F. Supp. 952 (N.D. Ala. 1947); Grant v. TVA, 49 F. Supp. 564 (E.D. Tenn. 1942). The Atchley court put it this way:

"A distinction must be recognized between the procedural question of whether a government corporation is subject to suit and the substantive question of whether a given set of facts establishes its liability as a matter of substantive law. The sue-and-be-sued clause in the TVA Act does nothing but remove the procedural bar to suit against an agency of the Federal Government. It does not engender liability in a case where liability would not otherwise exist." 69 F. Supp. at 954.

Some conflict has arisen regarding the source of payments for potential judgments and the effect, if any, on jurisdiction. The source of that conflict can be found in the Burr case. In Burr, the Supreme Court held that garnishment was available to litigants against FHA,

but stated that this did not mean "that any funds or property of the United States can be held responsible for this judgment." 309 U.S. at 250. The Supreme Court pointed out that claims against private corporations are normally only collectible against corporate assets and that the same was true for the FHA. The National Housing Act directed that claims against the FHA involved in this case "shall be paid out of funds made available by this Act." Id. at 250. Thus, the Supreme Court concluded that only funds which were actually in the possession of FHA, "severed from Treasury funds and Treasury control, are subject to execution." Id. On the other hand, FHA funds deposited with the Treasury were not subject to execution because there had been no consent to reach them and allowing execution "would be to allow proceedings against the United States where it had not waived its immunity." Id. Recognizing that this restriction on execution deprived it of utility, the Supreme Court emphasized that this was an inherent limitation on the statutory scheme and remedies provided by Congress.

Courts have differed in interpreting the Burr holding. Some courts have held that, in order to establish the government's waiver of sovereign immunity, the party suing a government corporation with a sue-and-be-sued clause must show that a judgment against the government corporation would come from funds in its possession and control. Johnson v. Secretary of HUD, 710 F.2d 1130, 1138 (1983); S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28, 36 (1979); Thomas v. Pierce, 662 F. Supp. 519, 526 (1987); Marcus Garvey Square, Inc. v. Winston Burnett Constr. Co., 595 F.2d 1126 (1979). See also, Oklahoma Mrtg. Co. v. GNMA, 831 F. Supp. 821 (1993) (GNMA has no funds in its possession and control separate from Treasury funds, and statute precludes recovery from its assets, so claims against it were, in reality, claims against the United States barred by sovereign immunity).

Some courts have rejected this approach reasoning that those cases misinterpret Burr. Auction Co. v. FDIC, 132 F.3d 746 (1997) (Auction I). In deciding jurisdictional issues involving the FDIC, the Auction I court criticized the distinction between suits against agencies and those against the United States because "this test was designed to distinguish suits against private individuals from ones against the sovereign," and "[f]ederal agencies or instrumentalities performing federal functions always fall on the 'sovereign' side of the fault line; that is why they possess immunity that requires waiver." Id. at 752.

The Auction I court stated that although the source of funds for recovery may become an issue, "it is not jurisdictional and does not bear on whether a suit against the FDIC as Receiver is a suit against the United States." Id. at 752-753.

Other courts have held that when sovereign immunity is waived by a sue-and-be-sued clause, the court does not need to analyze whether there are funds within the government corporation's control for jurisdictional purposes. C.H. Sanders Co. v BHAP Housing Development Fund, 903 F.2d 114, 120 (1990); Jackson Square Assoc. v. HUD, 797 F. Supp. 242, 245-246 (1992). Upon consideration of the Government's petition for rehearing in the C.H. Sanders case, the Second Circuit addressed the concern that HUD was obliged to satisfy any judgment that might be rendered out of Treasury funds. C.H. Sanders Co. v BHAP Housing Development Fund, 910 F.2d 33 (1990) (denying petition for rehearing). The Second Circuit held that HUD would be obliged to satisfy any judgment only out of non-Treasury funds that are available to it and would have no payment obligation if no such funds were available. Id.

Another court distinguished Burr on the basis that jurisdiction was derived from another source, such as the Tucker Act which does not limit the source of judgment, instead of the FHA's sue-and-be-sued clause. National State Bank of Newark v. United States, 357 F.2d 704, 711 (1966).

Finally, the court in Far West Federal Bank v. OTS, 930 F.2d 883, 890 (1991), recognized the split, but avoided choosing one or the other because it was able to identify funds in control of the government corporation from which any judgments would be paid. In Far West, the government argued that any judgment would be paid from Treasury funds and not funds in control of the government corporation and such a claim could only be asserted in the Claims Court under the Tucker Act. The government's argument was based upon a "Treasury backup" provision stating that the Secretary of Treasury will fund amounts as may be necessary for fund purposes. However, the court held that the liabilities of the fund were to be paid from the fund, the fund was to be administered by the government corporation and the "Treasury backup" provision simply implemented congressional intent that the fund have sufficient resources to carry out its obligations. Id. at 889-890. Thus, the court concluded that the "Treasury backup" provision did not

bar recovery under the sue-and-be-sued clause or impose exclusive Tucker Act jurisdiction.

Notwithstanding the differences discussed above, generally, judgments against a government corporation are paid by the government corporation rather than from the "judgment fund" discussed in Chapter 14.[200] As explained in that chapter, judgments against government corporations are "otherwise provided for". When judgments are obtained against government corporations they can pay them, like private corporations, from those corporate assets. Both GAO and the Attorney General recognize this rule. See, e.g., 13 Op. Off. Legal Counsel 362 (1989); 62 Comp. Gen. 12 (1982).

(3) The Tucker Act

Sue-and-be-sued clauses are not the only waivers of sovereign immunity for government corporations. The Tucker Act waives sovereign immunity of the United States and sets out jurisdictional parameters for certain monetary claims against the United States, including those founded upon the Constitution, any act of Congress, any regulation of an executive department, or any express or implied contract with the United States. 28 U.S.C. § 1491(a)(1). Under the Tucker Act, the Court of Federal Claims has exclusive jurisdiction for suits of more than $10,000 and concurrent jurisdiction with federal district courts for suits not exceeding $10,000. 28 U.S.C. §§ 1346(a)(2) and 1491(a)(1). The Tucker Act provides jurisdiction for suits against the United States whenever "a federal instrumentality acts within its statutory authority to carry out [the government's] purposes" as long as no other specific statutory provision bars jurisdiction. Auction Co. of America v. FDIC, 141 F.3d 1198, 1199 (1998) (Auction II). Several mixed-ownership government corporations, such as the FDIC as receiver, the Office of Thrift Supervision, and the Resolution Trust Corporation have been held to be federal instrumentalities for Tucker Act purposes. Auction I, 132 F.3d at 750; Auction II, 141 F.3d

[200]Under section 1304 of title 31, a permanent appropriation, commonly known as the "Judgment Fund," was created to pay judgments against the United States when, among other things, "the payment is not otherwise provided for." If an appropriation or fund under the control of the agency involved in the litigation is legally available to satisfy a particular judgment, then the judgment appropriation may not be used. See, e.g., 62 Comp. Gen. 12 (1982).

at 1199. See, e,g,, Slattery v. United States, 35 Fed. Cl. 180 (1996); Seuss v. United States, 33 Fed. Cl. 89 (1995).

A wholly-owned government corporation is clearly a federal instrumentality for Tucker Act purposes where it can be demonstrated that it is "an agency selected by the Government to accomplish purely Governmental purposes . . . and that it is doing work of the Government." Breitbeck v. United States, 500 F.2d 556, 558 (1974) (Saint Lawrence Seaway Development Corporation); See also, Oklahoma Mrtg. Co. v. GNMA, 831 F. Supp. 821 (1993) (company's claim was an action founded upon a contract, against the United States, seeking relief in excess of $10,000 which was within the exclusive jurisdiction of the United States Claims Court). Even where wholly owned government corporations carry out commercial activities that can be characterized as private, if their purpose is to further the policy interests of the government, they are considered to be federal instrumentalities for Tucker Act purposes. Optiperu, S.A., v. OPIC, 640 F. Supp. 420, 424 (1986). The Optiperu court reviewed the legislative history of OPIC and found several instances where Congress set out its governmental policy objectives while carrying out transactions that would otherwise normally be characterized as private, such as issuing and guaranteeing loans and insurance. The court noted that OPIC is "an agency of the United States under the policy guidance of the Secretary of State." 22 U.S.C. § 2191. The court also pointed out that OPIC was listed as a wholly owned government corporation in the Government Corporation Control Act, 31 U.S.C. § 9101(3)(H), and noted the various provisions dealing with OPIC's budget submissions, appropriations, financial audits and account requirements with the Government. 640 F. Supp. at 424 n.2. Finally, the court found that even if OPIC had to pay any judgments out of its funds rather than the Treasury, this did not eliminate its status as a federal instrumentality. Id. at 425-426. Rather, the United States would be jointly or severally liable for any money damages obtained against OPIC. Id.

The various waivers of sovereign immunity and jurisdiction al authority may provide plaintiffs with several choices of forum. For example, in Auction I, 132 F.3d at 753, the court pointed out that plaintiffs suing the FDIC in contract could sue in the Court of Federal Claims for Tucker Act suits of more than $10,000, in the Court of Federal Claims or federal district court for Tucker Act

claims of less than $10,000 or in any court of law or equity under the FDIC sue-or-be-sued clause.

(4) Liability for Costs and Remedies of Litigation

Once government corporations sue, or are sued, they can expect to be subject to at least some of the typical costs of litigation. Courts have analyzed the sue-and-be-sued clauses of government corporations in order to determine which costs can be assessed against government corporations. In Burr, 309 U.S. 242, for example, the Supreme Court held that the Federal Housing Administration was subject to all civil process incident to the commencement or continuance of legal proceedings which included the garnishment of the wages of an FHA employee sought in that case. The Supreme Court noted that garnishment is a well-known remedy available to litigants and "[t]o say that Congress did not intend to include such civil process in the words 'sue and be sued' would in general deprive suits of some of their efficacy." Burr, 309 U.S.at 246. The Court pointed out two examples of government agencies with sue-and-be-sued clauses with specific prohibitions against attachment and garnishment, which added weight to the Court's conclusion that Congress ordinarily intended that such civil process apply or it would have specifically prohibited them 309 U.S. at 247 n.10.

The Supreme Court considered whether the Reconstruction Finance Corporation (RFC), as the unsuccessful litigant, could be held liable for costs incident to litigation. RFC v. Menihan Corp., 312 U.S. 81 (1941). The Supreme Court noted that although the RFC acted as a governmental agency "its transactions are akin to those of private enterprises" and Congress provided it with the power to sue-and-be-sued. Id. at 83. The Supreme Court held that sue-and-be-sued clauses "normally include the natural and appropriate incidents of legal proceedings" and that the "payment of costs by the unsuccessful litigant, awarded by the court in the proper exercise of the authority it possesses in similar cases, is manifestly such an incident." Id. at 85. Although this statement was very broad, its application has been somewhat limited.

Generally, interest cannot be recovered in a suit against the United States unless there is an express waiver of sovereign immunity from an award of interest. Library of Congress v. Shaw, 478 U.S. 310 (1986). Where a government corporation does not act like a private

corporation, but acts as an agent for the Government and there is no statute or authority for paying interest, interest cannot be imposed upon the United States directly or indirectly through the agent government corporation. Riverview Packing Co. v. RFC, 207 F.2d 361, 370 (1953).

However, interest can and has been recovered against government corporations under certain circumstances. As discussed in Chapter 14, a "commercial venture" exception to the no-interest rule has developed. Generally this exception recognizes that where an agency of the United States is involved in an essentially commercial and for–profit venture, its sue-and-be-sued clause waives sovereign immunity and may allow liability for pre- or post-judgment interest. Standard Oil Co. of New Jersey v. United States, 267 U.S. 76 (1925); R&R Farm Enterprises v. FCIP, 788 F.2d 1148 (1986). If the party seeking payment of interest is a recipient of government benefits arising out of the agency's noncommercial ventures, courts have refused to award interest because the payment would be in excess of what Congress or the agency have authorized by law or regulation. R&R Farm Enterprises 788 F.2d at 1153. See also, McGhee v. Panama Canal Commission, 872 F.2d 1213 (1989); Pender Peanut Corp.v United States, 21 Cl. Ct. 95 (1990). Those courts held that the waiver of sovereign immunity does not create a new liability upon the government for the payment of interest.

In cases where the government corporation is not engaged in a commercial enterprise, but is acting as a governmental, regulatory entity, it is not subject to prejudgment interest awards even where it has a sue-and be-sued clause. For example, where the FDIC is acting as a regulatory agency protecting the banking system, it is not subject to prejudgment interest awards. Far West Federal Bank v. OTS, 119 F.3d 1358, 1366 (1994); Spawn v. Western Bank-Westheimer, 989 F.2d 830, 833-38 (1993); Gilbert v. FDIC, 950 F. Supp. 1194 (1997).

The award of prejudgment interest may also be imposed against government corporations under the analysis recognized by the Supreme Court in Loeffler v. Frank, 486 U.S. 549, 556 (1988). Under title VII of the Civil rights Act of 1964, Congress waived sovereign immunity for actions against federal agencies, but not for interest

awards. Library of Congress v. Shaw, 478 U.S. at 323. In Loeffler, the Supreme Court identified two factors which waived any existing immunity of the Postal Service.[201] First, the Supreme Court recognized that Congress had designed the Postal Service to be run like a business by "launching" it into the commercial world. Loeffler, 486 U.S. at 556. Second, Congress included a sue-and-be-sued clause in the Postal Service's charter. Id. However, since Congress did not expressly limit the waiver of sovereign immunity effected by the Postal Service's sue-and-be-sued clause, interest could be recovered against the Postal Service in title VII cases even though it could not be recovered against other agencies. The Supreme Court concluded that "Congress is presumed to have waived any otherwise existing immunity of the Postal Service from interest awards" which could be recovered from the Postal Service "to the extent interest is recoverable against a private party as a normal incident of suit." Id. at 556-57.

Finally, like federal agencies, government corporations may not be sued for punitive damages unless expressly authorized by Congress. Springer v. Bryant, 897 f.2d 1085, 1089 (1990).

The Equal Access to Justice Act (EAJA) also authorizes fee awards against the United States, in various administrative and judicial actions which were not previously authorized. See also 63 Comp. Gen. 260, 261 (1984). Prior to the EAJA's implementation, the award of attorney's fees against the government was barred and a sue-and-be-sued clause that did not directly or expressly authorize an award of fees was not sufficient to override that bar. RTC v. Miramon, 935 F. Supp. 838, 842 (1996).

The EAJA addressed judicial fee awards by extensively revising 28 U.S.C. § 2412.[202] Id. Section 2412 applies to the United States or "any agency and any official of the United States acting in his or her official capacity." 28 U.S.C. § 2412(c)(2). The EAJA has been applied to both mixed-ownership and wholly owned government

[201]The United States Postal Service is an independent establishment of the executive branch. 39 U.S.C. § 201. However, it shares many characteristics of government corporations including commercial or business-type operations and a sue-and-be-sued clause.

[202]These provisions are discussed in detail in Chapter 14.

corporations, although without addressing the issue of the EAJA's application to them. See, e,g., RTC v. Eason, 17 F.3d 1126 (1994); RTC v. Miramon, 935 F. Supp. 838 (1996); Olenhouse v. CCC, 922 F. Supp. 489 (1996).

As with other federal agencies, the EAJA operates as a limited waiver of a government corporation's sovereign immunity by permitting courts to award reasonably attorneys' fees to prevailing parties under common law or the terms of a statute, but the waiver must be strictly construed in favor of the government. Eason, 17 F.3d at 1134. In that case, the RTC sued officers of a failed savings and loan association alleging negligence and breach of fiduciary duty. The officers successfully defended against the action and attempted to recover attorney's fees from the RTC relying on a regulation that authorized indemnification for expenses incurred in defending charges arising out of their official conduct. However, that regulation only applied during the "life" of the savings and loan. By the time the RTC brought the action, the entity had failed and the RTC was not deemed to be acting in the capacity of the savings and loan. Thus, the regulation did not apply and the officers could not recover attorney's fees.

The EAJA is specific in the items that may be awarded in a judgment against the United States for costs, fees and expenses, and does not authorize general compensatory damages for embarrassment or loss of reputation. Miramon, 935 F. Supp. at 844. Neither does a "naked" sue-and-be-sued clause, that is, one which does not directly or expressly authorize an award of fees. Id. at 843.

Finally, the terms "common law" and "statute" as used in the EAJA's authorization of fees refers to federal common law or a federal statute, not state law. Eason, 17 F.3d at 1134 n.6; Miramon, 935 F. Supp. at 846.

(5) Sovereign Immunity from State and Local Taxes

The oft-quoted principle that the federal government and its

activities[203] are immune from taxation by state and local governments was recognized by the Supreme Court in a case involving a government corporation. M'Culloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).[204] The application of this principle to government corporations has varied since M'Culloch, but the main debate has centered on whether one should assume that an entity has such immunity due to its status as a corporation carrying out governmental purposes, or whether Congress must expressly grant such immunity by statute.

M'Culloch involved the Second Bank of the United States, which was chartered by Congress, had 20 percent of its capital stock subscribed to by the United States, and several of its directors appointed by the President. The Second Bank of the United States established a branch in Maryland. Maryland imposed a tax on all banks or branches of banks in the state which were not chartered by the Maryland state legislature. The Supreme Court held that the Supremacy Clause of the Constitution prevents a state from exercising any power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the federal government or its constitutional means of carrying out its powers. 17 U.S. at 436. The Supreme Court emphasized that the bank's purpose was to carry out a governmental function, and concluded that any effort to tax the bank directly affected the Government. The Supreme Court put it this way,

> "[b]ut this is a tax on the operations of the bank, and is consequently, a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional." 17 U.S. at 436-37.

Although the act creating the Bank did not expressly prohibit the states from taxing it, the Supreme Court in M'Culloch did not

[203]A federal instrumentality is also immune from state and local taxation if it is "so assimilated by the Government as to become one of its constituent parts." United States v. Township of Muskegon, 355 U.S. 484, 486 (1958). The Supreme Court has added that tax immunity for a federal instrumentality is appropriate when the agency or instrumentality is so closely connected to the government that the two cannot be realistically viewed as separate entities, as least insofar as the activity being taxed is concerned. United States v. New Mexico, 455 U.S. 720, 735 (1982).

[204]The United States' immunity from state and local taxation is discussed in Chapter 4.

address that issue. Five years later, the Supreme Court took up this issue in Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824). In Osborn, the Supreme Court held that although Congress did not expressly prohibit taxing the Bank, immunity was implied as a consequence of Congress' power to create and protect the Bank. Id. at 865.

In later cases, the Supreme Court addressed Congress' power to exempt government corporations from state taxation without relying upon the "implied" immunity of the M'Culloch and Osborn cases. Smith v. Kansas City Title & Trust, 255 U.S. 180 (1920); Federal Land Bank v. Crosland, 261 U.S. 374 (1923). In those cases, Congress created government corporations—federal land banks—and specifically exempted their bonds and mortgages from state and local taxation. The Supreme Court held that Congress not only had the power to create the corporations, but to protect their operations by exempting them from taxation. 255 U.S. at 211-212; 261 U.S. at 377. A few months after it decided Crosland, the Supreme Court returned to the M'Culloch analysis in a case involving state taxation of another government corporation, the Spruce Production Corporation. Clallam County v. United States, 263 U.S. 341 (1923). In the words of the Supreme Court,

> "It is true that no specific words forbid the tax, but the prohibition established by M'Culloch v. Maryland . . . was established on the ground that the power to tax assumed by the State was in its nature 'repugnant to the constitutional laws of the Union' and therefore was one that under the Constitution the State could not use. . . . The immunity is derived from the Constitution in the same sense and upon the same principle that it would be if expressed in so many words." Id. at 344, quoting M'Culloch, 17 U.S. (4 Wheat.) at 425, 426, 430.

A statement by the Clallam court provides a clue as to what appears to be the distinction between these approaches. The Supreme Court noted that, unlike "the case of a corporation having its own purposes, as well as those of the United States and interested in profit on its own account," the Spruce Production Corporation was incorporated only for the convenience of the United States to carry out its ends. Clallam, 263 U.S. at 345. Although not addressed in either the Kansas City Title & Trust or Crosland cases, the federal land banks were mixed-ownership government corporations with private (read profit), as well as government purposes. See also Federal Land Bank v. Priddy, 295 U.S. 229, 234-235 (1935) (noting

that Congress provided a specific grant of immunity from taxation to a corporation having its own, as well as government purposes).

Subsequent decisions by the Supreme Court continued this analysis. For example, recognizing that Congress may grant immunity from state and local taxation to a federal instrumentality or government corporation in Pittman v. Home Owners' Loan Corp., 308 U.S. 21 (1939), the Supreme Court explained that "Congress has not only the power to create a corporation to facilitate the performance of governmental functions, but has the power to protect the operations validly authorized." Id. at 32-33.[205] The Supreme Court held that the creation of the corporation "was a constitutional exercise of congressional power and that the activities of the Corporation through which the national government lawfully acts must be regarded as governmental functionsand as entitled to whatever immunity attaches to those functions when performed by the government itself through its departments." Id. at 32. See also Federal Land Bank v. Bismark Lumber Co., 314 U.S. 95 (1941) (statutory exemption from taxation for federal land banks includes sales taxes).

As seen in the cases discussed above, Congress has specifically prescribed the scope of immunity for many government corporations by wholly or partially exempting them from state and local taxation.[206] In other instances, Congress expressly waived immunity from taxation of any real property belonging to a government corporation. For example, under the provisions of the Act of January 22, 1932, establishing the Reconstruction Finance Corporation (RFC), Congress waived the immunity of real property of the RFC and its subsidiary corporations. Board of County Commissioners v. United States, 123 Ct. Cl. 304 (1952). However, the RFC's authority to pay taxes was contingent upon the corporations holding legal title and having full control and dominion over the

[205]The Pittman case involved the Home Owners' Loan Corporation, a wholly owned and controlled government corporation, upon whose mortgages the state of Maryland imposed a tax. The act establishing the Home Owners' Loan Corporation provided that it, its franchises, capital, reserves, surplus, loans and income shall be exempt from all state and municipal taxes.

[206]Other examples include, but are not limited to, 7 U.S.C. § 1511 (Federal Crop Insurance Corporation); 22 U.S.C. § 2199(j) (OPIC); 33 U.S.C. § 986 (Saint Lawrence Seaway Development Corporation); 29 U.S.C. § 1302(g) (PBGC).

property. 32 Comp. Gen. 164 (1952). Once the RFC declared property to be surplus and transferred the title to the United States, the property was held by and for the use of the United States. Thus, the "cloak of immunity from local taxes descended upon the property" so that no tax liability for state and local taxes could be imposed and agencies could not use appropriated funds to pay such taxes. Id. (property transferred to the Bureau of Mines). See also 36 Comp. Gen. 713 (1957) (property transferred to GSA); 34 Comp. Gen. 319 (1955) (same).

(6) Litigation authority

The question here is whether a government corporation must be represented in litigation by the Justice Department, or whether it can use or hire its own attorneys. The Justice Department has extremely broad authority with respect to litigation involving the federal government. Except as otherwise authorized by law, "the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested" is reserved to the Justice Department. 28 U.S.C. § 516. Further, "the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party." 28 U.S.C. § 519. The term "agency" is defined for purposes of Title 28 as including "any corporation in which the United States has a proprietary interest." Therefore, absent some form of exemption, 28 U.S.C. §§ 516 and 519 apply to wholly owned and at least some mixed-ownership government corporations. In some cases, the authority is reinforced by charter language. For example, 7 U.S.C. § 943(e) expressly makes the Rural Telephone Bank subject to the Attorney General's litigation authority.

The Justice Department has expressed the position that exemptions from the Attorney General's litigation authority should be clear and specific. See Department of Justice, Civil Division Monograph, Compendium of Departments and Agencies With Authority Either by Statute or Agreement to Represent Themselves in Civil Litigation, at 9-10 (October 1982) (hereafter, Civil Litigation Compendium). The Department does not regard a naked sue-and-be-sued clause as enough. Id. at 11. An example of explicit authority is the Pension

Benefit Guaranty Corporation statute noted above. 29 U.S.C. § 1302(b)(1). Even where a corporation has independent litigating authority, Justice believes the corporation should invoke that authority only in programmatic litigation. In non-programmatic litigation which is of government-wide import, like suits under the Freedom of Information Act or Federal Tort Claims Act, Justice urges the corporations to avail themselves of Department representation. Civil Litigation Compendium, at 18-19. The Department's litigating authority does not apply to "non-instrumentality" corporations. Id. at 22 n.13.

The Civil Litigation Compendium recognizes that Justice has acquiesced in self-representation by two corporations, the Federal Deposit Insurance Corporation and the Tennessee Valley Authority, which possess only the simplified version of the sue-and-be-sued clause. Id. at 26-27. The courts have held Justice to that acquiescence and have upheld self-representation authority for the FDIC and the TVA. FDIC v. Irwin, 727 F. Supp. 1073 (N.D. Tex. 1989), aff'd on other grounds, 916 F.2d 1051 (5th Cir. 1990); Cooper v. TVA, 723 F.2d 1560 (Fed. Cir. 1983); Algernon Blair Indus. Contractors, Inc. v. TVA, 540 F. Supp. 551 (M.D. Ala. 1982).

Exemptions may be partial as well as complete. For example, the Export-Import Bank may represent itself "in all legal and arbitral proceedings outside the United States." 12 U.S.C. § 635(a)(1). Under this provision, Justice has advised that it is required to conduct the Bank's litigation inside the United States, and in addition may represent the Bank in stateside arbitration proceedings. 3 Op. Off. Legal Counsel 226 (1979).

One consequence of self-representation is that the corporation must pick up the responsibility of paying the actual representation costs and the various expenses of preparing and presenting the case which would otherwise be borne by the Justice Department's litigation budget. 38 Comp. Gen. 343 (1958) (fees of auctioneer and advertising costs); B-9850, May 23, 1940 (attorney fees, cost of printing appellate brief, other miscellaneous expenses) B-3163, April 24, 1939 (legal services necessary for foreclosing defaulted mortgage or regaining possession of property).

9. Termination of Government Corporations

Unlike a private corporation, a government corporation cannot terminate its existence on its own authority.[207] The power to terminate a government corporation flows from the power to create one, a power clearly held by Congress. Congress may terminate a government corporation for any of a number of reasons. For example, many government corporations were created to address short-term or temporary issues or crises. Logically, once the issue or crisis is resolved, the need for the government corporation is eliminated and it can be terminated. For example, many corporations created to meet the wartime needs of World Wars I and II, and the social and economic crises of the Great Depression, were dissolved once those crises had passed.

Congress terminated government corporations to bring them under its control upon the enactment of the Government Corporation Control Act (GCCA). GCCA required all government corporations then existing to institute dissolution or liquidation proceedings on or before June 30, 1948, subject to reincorporation by act of Congress for such purposes, powers and duties as might be authorized by law. Act of December 6, 1945, Sec. 304(b), 59 Stat. 597, 602.

Sometimes Congress provides itself with a built-in opportunity to determine whether it wants to continue a program carried out by a government corporation. Congress provides a termination date in the enabling legislation or charter of some government corporations, such as the Export-Import Bank, that must be reauthorized if Congress wants them to continue in existence. In other situations, Congress imposes a deadline for a government corporation to fulfill its goals. For example, the Resolution Trust Corporation (RTC), created to manage and resolve failed savings institutions and recover funds by managing and selling the institutions' assets, was directed to terminate no later than December 31, 1995. 12 U.S.C. § 1441a(m). RTC did terminate by that date, having substantially completed its mission. Financial Audit: Resolution Trust Corporation's 1995 Financial Statements, GAO/AIMD-96-123, at 8-9 (July 1996).

Congress may take actions short of termination by converting a government corporation into a private institution. For example,

[207]Moe 1995, supra note 41, at 29.

Congress converted the National Consumer Cooperative Bank from a mixed ownership government corporation to a federally chartered, private banking institution. See B-219801, October 10, 1986. Other government corporations are created with the goal of privatization. For example, the United States Enrichment Corporation (USEC) was directed to operate as a for–profit government corporation and work towards privatization.[208] In 1996, Congress enacted legislation to privatize the USEC.[209]

Congress may also terminate a government corporation due to its dissatisfaction with the corporation's purpose and management. For example, Congress abolished the Synthetic Fuels Corporation in 1985 by rescinding its funding and giving it 60 days to wind up its affairs.[210] Pub. L. No. 99-190, 99 Stat. 1185, 1249 (1985). The Federal Asset Disposition Association met a similar fate. In the face of mounting criticism regarding its method of creation, its purpose, and management, Congress dissolved it as part of the Financial Institutions Reform, Recovery and Enforcement Act of 1989, Pub. L. No. 101-73; 103 Stat. 183.[211]

In other cases, Congress has changed its view and gone back and forth on the form of a government corporation. For example, Congress replaced the Panama Canal Company, a government corporation, with the Panama Canal Commission, an appropriated fund agency, because it wanted to maintain greater oversight of the Canal during the remaining years of U.S. Control. See B-280951, December 3, 1998. Subsequently, Congress granted the Commission greater autonomy and converted it into a revolving-fund agency. Id. at 6. Finally, Congress expanded the Commission's business-like

[208]42 U.S.C. §§ 2297d and 2297d-1

[209]USEC Privatization Act, Pub. L. No. 104-134, tit. III, §§ 3101-3117, 110 Stat. 1321-335 (1996).

[210]For a more detailed discussion on this, see Moe 1995, supra note 41, at 19-22.

[211]For more detailed discussion on this, see Moe 1995, supra note 41, at pages 22-26.

powers to its final status, when the canal was transferred from U.S. control, "as an autonomous entity that [could] compete as a commercial enterprise in international transportation markets." Id. at 8.

C. Nonappropriated Fund Instrumentalities

"Their birth is funded by the Government. The seed money for their creation came from the Government. They are managed by Government people who are paid Government salaries. They usually occupy Government facilities, perhaps on some cost-reimbursable arrangement, but on Government real estate, using Government facilities. They perform essentially a morale-building function for Government personnel, which the Government would otherwise have to appropriate funds for if it weren't having it done in this manner. There is a very close identity between them and the Government people with whom they are working every day. They are providing service to Government people engaged in a Government mission. As I say, this is just off the top of my head." Testimony of Louis Spector, Commissioner of the Court of Claims on nonappropriated fund instrumentalities.[212]

1. Introduction

There are certain items and services that employees and officers of the United States government need to carry out government business. Office supplies, telephones, and computers come to mind. There are other items and services that support the efforts of government employees and officers to carry out the government's business by fulfilling their morale, welfare and recreation needs (commonly referred to as MWR). Often these MWR items and services have been viewed as frivolous and extravagant expenses that are unnecessary to carry out government business and should not be paid from tax dollars. However, bureaucrats do not live by red tape alone. While the private sector can provide some of these MWR needs, it has been unable or unwilling to meet all MWR needs at every location. Thus, the government has turned to other sources, such as non-appropriated fund instrumentalities or activities, to supply MWR items and services. Although non-appropriated fund instrumentalities or NAFIs, as they are commonly referred to, are related to the government and provide a wide range of government-related services and activities, they occupy a unique legal status.

[212]Jurisdiction of U.S. Courts, Nonappropriated Fund Activities: Hearings on S. 980 Before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess. 9 (1969).

Before we turn to the various issues involved in NAFIs as we know them today, it is useful to understand their history and development.

a. Historical Background

The need to provide services and items to fulfill the morale, welfare and recreational needs of officers and employees originated long before the establishment of the United States Government and far from our shores. Persons providing such support have existed since the times of the Roman Legions. "Caesar alludes to the itinerant merchants who followed the legions, selling items not considered necessaries by quartermasters."[213] From the time of the Roman Legions to the European armies and navies of the 17th and 18th centuries, these men, known as sutlers,[214] followed armies and met ships in port in order to supply the soldiers and sailors with provisions and contraband. Id. Due to the monopolistic prices charged by sutlers, sailors organized their own ship cooperatives called "slop chests." Id.

The United States Government has, at times, directly provided items and services to meet the morale, welfare, and recreational needs of its officers and employees while, at other times, it has relied upon private sources, albeit under governmental control, to provide such goods and services. Beginning with the American Articles of War of 1775, sutlers, itinerant or camp-following merchants, were authorized to sell to the troops items not provided by the Government such as "victuals, liquors, or other necessaries of life"[215] for the use of soldiers.[216] The American Articles of War of 1775 also regulated the sutlers' conduct, hours, and quality of items sold.[217]

[213]Michael Francis Noone, Legal Problems of Non-Appropriated Funds, Mil. L. Rev. Bicentennial Issue, 1975 (Army Pamphlet 27-100) 357, 361. This article was originally published as Appendix 1 of the Hearings on S. 3163, Subcommittee on Improvements in Judicial Machinery, Senate Judiciary Committee, 90th Cong. 2d Sess. 201 (1968). We will cite to pages in the Military Law Review.

[214]The term "sutler" means a small vendor, derived from the word "soltelen" which means to befoul or perform mean duties. Id. at 361.

[215]Winthrop's Military Law and Precedents, American Articles of War of 1775, Article LXVI, 953, 958 (2d ed., 1920 reprint) (hereafter cited as Winthrop).

[216]Paul J. Kovar, Legal Aspects of Nonappropriated Fund Activities, 1 Mil. L. Rev. 95, 96 (Army Pamphlet 27-100-1) (1958).

[217]Winthrop, supra note 215, Art. XXXII, LXIV, LXV, and LXVI, at 953.

For example, although sutlers were not a component part of the Army, they were subject to the orders and regulations of the Continental Army and later the United States Army and local commanders.[218] Sutlers were not permitted to sell liquor, victuals or provide entertainment after nine at night, before the beating of the reveilles, or during Sunday religious services.[219] Commanding officers had duties relating to suttling which required them to see that sutlers supplied soldiers with good and wholesome provisions at a reasonable price.[220] Commanding officers were prohibited from charging exorbitant prices for houses or stalls let out to sutlers or charging any duty upon sales or having any financial interest in sales.[221] The American Articles of War of 1775 also established a fund for fines collected from soldiers and officers for behaving indecently or irreverently during religious services.[222] The fund was to be used to aid sick soldiers of the troop or company to which the offenders belonged.[223] This is the first record we have of a United States Government nonappropriated fund activity.[224]

Sutlers were permitted to sell to the soldiers on credit and the paymaster could deduct the amount from the soldier's pay and pay the sutler directly.[225] In 1847, Congress abolished sutlers' rights to have such a lien on a soldier's pay. Act of March 3, 1847, 9 Stat. 185. Congress reinstated and abolished the sutlers' right to have a lien on a soldier's pay several times throughout the next decades.[226] In 1862,

[218]Id., Art. XXXII, at 956.

[219]Id., Art. LXIV, at 958.

[220]Id., Art. LXV, at 958.

[221]Id., Art LXVI, at 958.

[222]Id., Art. II, at 953.

[223]Id.

[224]Stephen Castlen, Let the Good Times Role: Morale, Welfare, and Recreation Operations, Army Law., 3, 6 (June 1996) (Army Pamphlet 27-50-283).

[225]Id. at 6.

[226]E.g., Act of June 12, 1858, 11 Stat. 332, 336 (repealed the legislation depriving sutlers of the right to have a lien on a soldier's pay); Act of December 24, 1861, 12 Stat. 331 (abolished the sutlers right to have a lien on a soldier's pay).

Congress enacted a bill which provided for the appointment of sutlers in the Volunteer Service, set out their duties, and authorized sutlers to have a lien on part of a soldier's pay. Act of March 19, 1862, 12 Stat. 371. This act established guidelines for the activities and service of sutlers to the Army and their regulation by the War Department. The commanding officer of each brigade was required to have the commissioned officers of each regiment in the brigade select a sutler for their regiment, who would be the sole sutler for that regiment. Id. The act listed specific articles that sutlers could sell to soldiers including food, toiletries, reading materials, tobacco, stationery and other items which in the judgment of the inspectors general were for the good of the service. Id. However, the sale of liquor was prohibited. Id.

The sutlers were assessed fees for the privilege of doing business. The fees were based upon the average number of soldiers in a unit. Fines were assessed for violation of regulations. Both were deposited into the "post fund" administered by a group of officers, known as the "Council of Administration," along with the post commander. Kovar, supra note 216, at 97. The post fund, analogous to what we now call a NAFI, was used to aid indigent widows or children of deceased soldiers, disabled soldiers discharged without pensions, to buy books and periodicals for the post library, and to support the post school and band. Id. In 1835, company funds, subject to the control of the post commander, were authorized by Army regulations to derive income from rental of billiard tables, the sale of grease from the company mess and savings from the economical use of food. Noone, supra note 213, at 363.

The sutler system was subject to many abuses; soldiers were cheated, charged usurious interest, and military officials and the merchants were involved in fraud and corruption. Appropriated Fund Support for Nonappropriated Fund and Related Activities in the Department of Defense, GAO/FPCD-77-58, 4 (August 31, 1977). In 1866, Congress responded to these abuses by abolishing the office of sutler effective July 1, 1867. Id.; 14 Stat. 328, 336 (1866). With the abolishment of sutlers, Congress required the subsistence department of the Army to sell articles, designated by the inspectors general, at cost. 14 Stat. 328, 336 (1866). In 1867, Congress authorized the Commanding General of the Army to permit the establishment of trading posts on certain military posts. Joint Resolution of 30 March 1867, 15 Stat. 29. Where the commissary

department was prepared to supply stores to soldiers (in compliance with the 1866 act, 14 Stat. 328), traders were not permitted to remain at such posts or sell any goods kept by the commissary department. Id.

In 1870, Congress repealed the Joint Resolution of March 30, 1867, and enacted legislation which authorized the establishment of post traders in certain locations to be under the protection and control of the military as camp followers and subject to the War Department's regulations.[227] Act of July 15, 1870, 16 Stat. 315, 319-20. The War Department established general policies regulating the post traders which were carried out by a council of administration for the post. Kovar, supra note 216, at 100 n.28. Unlike the sutlers before them, the post traders did not have the right to a lien on a soldier's pay. Id.

The Secretary of War did not appoint a post trader at all military posts. Kovar supra note 216, at 101. At posts where there were no post traders, commanders were authorized to establish canteens to supply troops with articles for their entertainment and comfort at moderate prices. The following year, in 1890, all posts were authorized to establish canteens. Post commanders were permitted to make government buildings available to house canteens and its activities. An officer "in charge of canteen" managed the canteen assisted by a "canteen council" and its profits were distributed among the participating companies. Id. A canteen was established either on credit or from funds of the companies benefiting from the canteen. To promote and expand canteens, the War Department prohibited company fund activities from selling any item sold by the canteen. Id. Canteens were authorized to use profits to purchase sporting equipment and any items that would contribute to the "rational enjoyment and contentment of the soldiers." Id.

Canteens evolved into the post exchanges which performed essentially the same functions. Kovar, supra note 216, at 102; Noone, supra note 213, at 365. By 1893, the post exchange had taken over the services provided by the post trader and Congress prohibited the

[227]This act authorized the establishment of post traders at certain posts on the frontier not in the vicinity of any city or town when, in the Secretary of War's judgment, such posts were necessary to accommodate emigrants, freighters and other citizens. In 1876, Congress authorized the Secretary of War to appoint post traders at all military posts regardless of location. Act of July 24, 1876, 19 Stat. 100.

Secretary of War from making further appointments of post traders or from filling vacancies. Act of January 28, 1893, 27 Stat. 426. In 1895, the War Department established post exchanges at all military posts. Kovar, supra note 216, at 102, citing General Order No. 46, July 25, 1895. The post exchanges were to provide a reading and recreation room, a store, a restaurant, and other facilities to supply at reasonable prices, articles (not supplied by the Government) for rational recreation and amusement. Id. Post exchanges were authorized to use government buildings and were managed by an "officer in charge" and a council which reported to the post commander. Id.

Although the Army regulated post exchanges and provided direct support through free government space and the use of military officers to manage their operations, the post exchanges were not considered to be an agency or instrumentality of the United States. Noone, supra note 213, at 365. The Judge Advocate General of the Army described the legal status of the post exchange in an 1893 opinion:

> "Now the Post Exchange is not a United States institution or branch of the United States military establishment, but a trading store permitted to be kept at a military post for the convenience of the soldiers. It is set up and stocked, not by means of an appropriation of public moneys, but by means of the funds of companies, etc.; the officers ordering the purchases [are] responsible for the payment, not the Government." Noone, supra note 213, at 365, citing 61 JAG Record Book, 1882-1895, 479 (1893).

Congress limited the aid that the Army could provide to the post exchanges in the Army's Appropriations Act for Fiscal Year 1893 as follows:

> "And provided further, That hereafter no money appropriated for the support of the Army shall be expended for post gardens or exchanges, but this proviso shall not be construed to prohibit the use by post exchanges of public buildings or public transportation when, in the opinion of the Quartermaster-General, not required for other purposes." Act of July 16, 1892, 27 Stat. 174, 178.[228]

The post exchange and post and company funds continued to carry out MWR functions until after World War I. Kovar, supra note 216, at 102. After World War I, the War Department created and expanded

[228]This law is now codified at 10 U.S.C. § 4779.

organizations and functions to provide services such as motion pictures and library facilities, recreation centers and programs, child care centers, restaurants and other services for both service members and their family members. Castlen, supra note 224, at 8; Kovar, supra note 216, at 102-103. The War Department established a Morale Branch in 1941 to provide MWR services. Id. During World War II, the post exchanges were reorganized into a central organization known as the Army Exchange Service (currently in operation and now known as the Army and Air Force Exchange Service or AAFES) within the Morale Branch of the War Department. Id.

The military nonappropriated fund activities have grown in size and complexity. There are also nonappropriated fund activities serving civilian officers and employees of the government. However, their basic purpose is the same; to provide for the morale, welfare and recreation of government officers and employees.

b. Defining the Nonappropriated Fund Activity

"I am worried about the definition of 'nonappropriated funds.' Every time I think of one, you give me another one; then I think of another possibility." Rep. Wiggins, House of Representatives (1969).[229]

While defining the term "nonappropriated funds" may pose some challenges, we can agree that the term appropriated funds refers to funds provided in a regular annual appropriation act or a continuing or permanent appropriation created when a statute authorizes the obligation and expenditure of funds and designates the funds to be used. 63 Comp. Gen. 331 (1984). An exception to this general rule occurs when Congress designates funds by statute to be nonappropriated funds, which are not subject to the statutory controls and restrictions applicable to appropriated funds. See, B-217578, October 16, 1986; 12 U.S.C. § 481 (1982) (funds available to the Comptroller of the Currency); 12 U.S.C. § 244 (1982) (funds available to the Board of Governors of the Federal Reserve). However, the term "nonappropriated funds" in those examples describe the status of those funds and not the instrumentalities which are the subject of our discussion. NAFIs are different from

[229]Nonappropriated Fund Activities: Hearings on S. 980 Before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess. 18-19 (1969), quoted in McDonald's Corporation v. United States, 926 F.2d 1126, 1130 (Fed. Cir. 1991).

both the agencies funded by appropriations and those financed by funds deemed to be "nonappropriated."

As recognized by Representative Wiggins, it is difficult to define what NAFIs are, since even the few characteristics generally used to describe them are not absolute. While NAFIs act in their own name, federal agencies create them and regulate their activities. However, NAFIs are not federal agencies or government corporations. They are not typical private or commercial enterprises, although they may operate on a for-profit basis. GAO views their operation with mainly nonappropriated funds as the defining characteristic of NAFIs:

"NAFIs encompass a wide range of activities and resist a general definition. They share common characteristics in that they are associated with governmental entities, and, to some extent, are controlled by and operated for the benefit of those Governmental entities. However, the essence of a NAFI is that it is operated with the proceeds of its activities, rather than with appropriated funds." 64 Comp. Gen. 110, 111 (1984).

The Department of Defense defines a nonappropriated fund instrumentality as:

"An integral DoD organizational entity that performs an essential government function. It acts in its own name to provide or assist other DoD organizations in providing MWR programs for military personnel and authorized civilians. It is established and maintained individually or jointly by the Heads of DoD Components. As a fiscal entity, it maintains custody of and control over its NAFs [nonappropriated funds]. It is also responsible for the exercise of reasonable care to administer, safeguard, preserve, and maintain prudently those appropriated fund resources made available to carry out its function. It contributes, with its NAFs to the MWR programs of other authorized organizational entities, when so authorized. It is not incorporated under the laws of any state or the District of Columbia and it enjoys the legal status of an instrumentality of the United States." "Establishment, Management, and Control of Nonappropriated Fund Instrumentalities," Department of Defense Directive 1015.1, Encl. 2, ¶ 2, August 19, 1981 (hereafter DoDI 1015.1).

One court described NAFIs as follows:

A non-appropriated fund activity is one to which the government has initially provided funds to permit it to begin operation. The governmental loan is repaid out of the profits earned by the activity. Thus, the activity is created by the government with governmental funds for governmental personnel, and is administered by governmental employees for the use and benefit of the United States. Bowen v. Culotta, 294 F. Supp. 183, 185 (E.D. Va. 1968).

From the Bowen case, GAO identified the following characteristics for determining whether a particular activity is a nonappropriated fund activity:

"1. The activity is established under the authority or sanction of a Government agency with or without an initial advance of Government funds.

"2. The activity is created and run by Government officers or employees and/or their dependents.

"3. The activity is operated for the benefit of Government officers or employees and/or their dependents.

"4. The operations of the activity are financed by the proceeds therefrom rather than by appropriations." B-167710-O.M., May 6, 1976.

Although many NAFIs share these characteristics, GAO noted that they are not absolute and should be applied on a case-by-case basis in order to determine whether an entity is a NAFI. Id.

One important characteristic that defines NAFIs, and also distinguishes them from federal agencies or private commercial enterprises is the purposes for which they are created. That is, to meet the morale, welfare and recreational needs of government officers and employees. DoD articulates the importance of MWR programs, many of which are carried out by NAFIs, as follows:

"MWR programs are vital to mission accomplishment and form an integral part of the non pay compensation system. These programs provide a sense of community among patrons and provide support services commonly furnished by other employers, or other State and local governments to their employees and citizens. MWR programs encourage positive individual values, and aid in the recruitment and retention of personnel. They provide for the physical, cultural, and social needs and general well-being of Service members and their families, providing community support systems that make DoD bases temporary hometowns for a mobile military population." "Morale, Welfare, and Recreation (MWR), DOD Instruction No. 1015.10" ¶ 4.2, November 3, 1995.

While many MWR needs are met by profitable commercial-type operations, such as the post exchanges, child care centers, golf courses, restaurants, and gyms, profits are not the overriding goal. Although they are defined as using nonappropriated funds, in cases where NAFIs have not been profitable or self-sustaining, the Government has subsidized their operations with appropriated funds in order to ensure the MWR needs are met. Where profitable,

the disposition of NAFI profits also differs from typical commercial enterprises which would normally benefit owners or stockholders. For example, DoD NAFIs use their profits to support MWR programs.

Although some are capable of providing services or goods needed by the Government, the Comptroller General has held that as a general rule, nonappropriated fund activities "are not in the business of supplying the Government with its procurement needs," unless there are exigent circumstances or situations where it is impracticable to obtain services from others. 58 Comp. Gen. 94, 98 (1978).

Serving the needs of government officers and employees with goods and merchandise purchased through NAFIs is not limitless. NAFIs provide government officers and employees with items and services for their personal consumption, not for their business, profit making motives. Covill v. United States, 959 F.2d 58 (6th Cir. 1992) (Coast Guard Warrant Officer received a punitive letter of reprimand because he purchased merchandise from a NAFI purportedly for personal use, but instead, used the merchandise in his restaurant where he sold it at retail to the general public.)

2. Legal Status

a. Authority for Creation

Statutory authority is not needed to create nonappropriated fund activities.[230] In fact, many NAFIs were created and regulated by governmental agencies, and only later received congressional approval and, sometimes, statutory authority for their operations. See B-167710-O.M., May 6, 1976. This lack of congressional authority for their creation and regulation does not, however, invalidate their legal status. See Dugan v. United States, 34 Ct. Cl. 458, 466-67 (1899). In a case involving nonappropriated fund activities, specifically the military post exchanges, the Supreme Court stated:

[230]Compare 31 U.S.C. § 9102, which provides that: "[a]n agency may establish or acquire a corporation to act as an agency only by or under a law of the United States specifically authorizing the action."

"That the establishment and control of post exchanges have been in accordance with regulations rather than specific statutory directions does not alter their status, for authorized War Department regulations have the force of law." Standard Oil Co. v. Johnson, 316 U.S. 481, 484 (1942).

Of course, this does not mean that Congress cannot legislate to create a nonappropriated fund activity or to approve one already in existence. E.g., 7 U.S.C. § 2279b (operation of Graduate School of Department of Agriculture as a nonappropriated fund instrumentality).

b. Relationship to the United States Government

"It would not be an exaggeration to call their legal status bizarre. They are operations of the federal government, yet they are not."[231]

Despite their peculiarities, NAFIs are now recognized as being federal instrumentalities, albeit "a special breed of federal instrumentality which cannot be fully analogized to the typical federal agency supported by federal funds." Cosme Nieves v. Deshler, 786 F.2d 445, 448 (1986).

The Standard Oil decision, 316 U.S. 481 (1942), involved a tax levied upon sales to NAFIs. The California Motor Vehicle Fuel License Tax Act imposed a license tax on the privilege of distributing motor vehicle fuel. By its terms, the tax was inapplicable to fuel sold to the United States government. California insisted that Standard Oil levy the tax on sales it made to the U.S. Army Post Exchanges in California. In the suit to recover payment, Standard Oil (with the United States as "amicus curiae") claimed the sales to the Post Exchanges were exempt under the Act. Standard Oil also argued that if the Act were construed to require payment on such sales, it would impose an unconstitutional burden upon instrumentalities or agencies of the United States. The California courts found for the state on both issues. Id. at 482.

Upon appeal to the Supreme Court, the determining issue was the relationship between post exchanges and the United States government. The Supreme Court recognized several factors as important indicia of governmental status: The post exchanges were established pursuant to regulations of the Secretary of War

[231]Noone, supra note 213, at 359.

statutorily sanctioned by Congress. The commanding officer of an army post had virtually total authority to establish and manage the exchange. The supervisory councils for the exchanges consisted of the commanding officers of the post units and they served in that capacity without any compensation other than their regular pay. The purpose of the post exchanges was to provide a convenient source of low priced goods for soldiers. The Government did not assume any of the financial obligations of the post exchanges, but was responsible for the funds obtained. Profits were used only for the welfare, pleasure and comfort of the troops.

"These regulations and the practices under them establish the relationship between the post exchange and the United States government, and together with the relevant statutory and constitutional provisions from which they derive, afford the data upon which the legal status of the post exchange may be determined . . . .

"[W]e conclude that post exchanges as now operated are arms of the Government deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties entrusted to it, and partake of whatever immunities it may have under the Constitution and federal statutes." Standard Oil v. Johnson, 316 U.S. at 483, 485.

For this reason, the Supreme Court concluded, the state could not tax the fuel sold to the post exchanges. Id. at 485. The relationship of NAFIs to the Government has also been considered in cases involving contract matters. For example, in Nimro v. Davis, 204 F.2d 734 (D.C. Cir. 1953), suit was brought against the board members of a Naval Gun Factory Lunchroom Committee for "services rendered and expenses incurred." Id. at 734. The committee was composed of naval officers and civilian employees who argued that the board, as an instrumentality of the Navy Department, was immune from suit to the same extent as the Department itself. To counter this defense, the plaintiff maintained that he was suing the members of the board in their representative capacity as custodians of a private fund, not as government employees. Id. at 735.

The court held that the Naval Gun Factory Lunchroom Committee was a nonappropriated fund instrumentality because it was made up of the Department's own personnel, acting officially under authority and direction of the Secretary in accordance with his instructions, to carry out a purpose declared by him to be an integral part of the Department. The court found the individuals comprising the NAFI's board to be acting for and on behalf of the United States, and not in

any private capacity. As such, the suit comprised an action against the United States that could not be maintained without its consent. Id. at 736.

Another contract case concerned a company which agreed with a Post Office Employee Welfare Committee to install vending machines in the Post Office for a term of five years. The Employee Welfare Committee notified the vending machine company of its intent to terminate the contract before the end of the five year term. The company sued the employees to enforce the contract. In reply, the employees moved to dismiss the case, arguing that the suit was not against them in their individual capacities, but against the Employee Welfare Committee—an instrumentality of the United States Government which was entitled to governmental immunity.

Applying the elements set forth in the Standard Oil decision, the court held that the Post Office employee welfare committee constituted an integral part of the Postal Service and was an instrumentality of the United States for purposes of suit. Automatic Retailers v. Ruppert, 269 F. Supp. 588 (S.D. Ia. 1967). Since the United States had not consented to suit, the court dismissed the case. Id. at 592. See also Employees Welfare Comm. v. Daws, 599 F.2d 1375 (5th Cir. 1979). The court found that the committee was established pursuant to regulatory authority, the Postal Service appointed employees to carry out the contractual and managerial duties of the committees, the Postal Service regulated and controlled vending stands and machines, and the primary objective of the committees was to further the interests of the Postal Service. Automatic Retailers of America, 269 F. Supp. at 591.

However, there are also times when NAFIs are not considered government instrumentalities; hence, their bizarre legal status. For example, the actions of nonappropriated fund employees are not always attributable to the government, as seen in cases involving government mishandling in receipt of bids. There was a time when, under contract with base exchanges, telegraph offices were routinely operated on military bases by nonappropriated fund activity employees. On occasion, prospective government contract bidders telegraphed their bids within the required time frame for bid acceptance, but the bids were nevertheless delivered late to the contracting office by the telegraph office. Since the government's mishandling of bids provided a basis for accepting an otherwise late

bid, prospective bidders have argued that the delay in delivery by the base exchange telegraph office was attributable to the government. 50 Comp. Gen. 76 (1970); B-186794, November 11, 1976. GAO held that where the nonappropriated fund activity acts as the agent for the telegraph company, as the contract stipulated in those cases, the activity was not an instrumentality of the government, and the NAFI's actions were not attributable to the government.

3. Sources of Funding: The Use of Appropriated Funds for Nonappropriated Fund Instrumentalities

"Although for some purposes nonappropriated fund activities are considered instrumentalities of the Government, they are generally self-supporting and do not receive appropriated funds from the Congress." B-215398, October 30, 1984.

a. Self-Supporting or Subsidized?

The name suggests that a NAFI is "operated with the proceeds of its activities, rather than with appropriated funds." 64 Comp. Gen. 110, 111 (1984). That sounds simple enough, but the reality is not so simple. Part of the reason for this is that some people think the government should fund MWR using appropriated funds, while others find that suggestion outrageous. Some argue for direct government support for the MWR services provided by NAFIs because there is a legitimate business need to provide MWR support for government officers and employees. Others, like private retailers in competition with NAFIs, argue that recreational expenses should be paid for by the government through traditional procurement from the private sector, not by making NAFIs compete with the private sector. Others still argue that the taxpayers should not pay for any employee recreational expenses. That group advocates that NAFIs should be self-supporting and their profits used for MWR expenses. The tension between these factions has led to a complicated mix of appropriated and nonappropriated funding for "nonappropriated fund instrumentalities."

b. Appropriated Funds for Morale and Welfare: The Early Rule

Whether appropriated funds are legally available to support NAFIs depends on whether appropriated funds are legally available for MWR expenses. The general rule, established in early decisions, is that expenses associated with employee morale, welfare and recreation cannot be paid from appropriated funds unless specifically authorized by law. 18 Comp. Gen. 147 (1938) (River and harbor appropriation not available to provide recreational activities for workers); 27 Comp. Gen. 679 (1948) (Navy appropriations not

available to hire full-time or part-time employees for recreational programs for civilian employees of Navy). The rationale for the rule was that those types of expenditures would only have an indirect bearing on the purposes for which the appropriations were made, while simultaneously satisfying entirely personal expenses. E.g., 18 Comp. Gen. 147.

In addition, several laws specifically prohibited the use of appropriated funds for certain MWR expenses. As early as 1892, Congress passed legislation prohibiting the use of appropriated funds of the various armed forces for the exchanges. Act of July 16, 1892, 27 Stat. 174, 178, now codified at 10 U.S.C. §§ 4779, 9779 (Army and Air Force, respectively). More recently, Congress passed a law expressly prohibiting the Department of Defense from using appropriated funds for equipping, operating, or maintaining golf courses at DOD facilities or installations. 10 U.S.C. § 2246(a).[232] In 1998, GAO interpreted this prohibition as precluding the use of appropriated funds to install or maintain pipelines for watering an Army golf course. B-277905, March 17, 1998. Although other laws permitted DOD to participate in water conservation projects, or federal agency cooperative efforts to resolve water resource issues in concert with conservation of endangered species, those laws did not override the prohibition of section 2246. Id.

The rule appears to be simple—that appropriated funds may not be used to support NAFIs unless specifically provided by law. However, again, like many things in law, and life, it is not, in fact, that simple. Both the analysis described in the general rule and congressional action have evolved.

c. The Current Trend: Use of Appropriated Funds

Agencies have used the necessary expense doctrine in order to analyze whether to pay for certain morale, welfare and recreation expenses. The test evaluates whether the agency has a legitimate interest in the MWR needs of its employees. The cases have increasingly recognized that certain items or services contribute directly to an agency's mission by enhancing employee morale and productivity. For example, in cases where employees are located at a remote site where MWR facilities would not otherwise be available

[232]Section 2246(b) exempts golf courses at installations outside the United States or at remote and isolated locations as designated by the Secretary of Defense.

and such expenses would be necessary for recruitment and retention of personnel, GAO has held that appropriated funds may be used to pay for MWR expenditures. See, e.g., 54 Comp. Gen. 1075 (1975) (purchase of television set for crew on Environmental Protection Agency ship gathering and evaluating water samples on multi-day cruises); B-144237, November 7, 1960 (transportation of musical instruments, sports and recreational equipment to isolated Weather Bureau installations in the Arctic); B-61076, February 25, 1947 (purchase of ping pong paddles and balls by Corps of Engineers to equip recreation room on a seagoing dredge justified by policy in War Department regulations and necessary expense for the recruitment and retention of employees).

The military's use of appropriated funds for MWR expenses has differed from civilian agencies for several reasons. First, in both the context of the necessary expense rule and in obtaining congressional action, it is easier for the military to justify MWR expenses due to the nature of its mission, the remoteness of many of its locations, and hardships imposed on military members and families. Congress has also specifically permitted the military to assist NAFIs in several respects. For example, the same law that in 1892 prohibited the use of appropriated funds for the post exchanges, authorized those NAFIs to use public buildings or transportation not required by the military.[233]

Congress has specifically authorized the use of certain appropriated funds for MWR expenses. See 10 U.S.C. § 2241 (authorizing the use of Operation and Maintenance appropriations for MWR). While this provision was made permanent in 1983, GAO cases have referred to annual appropriation acts making O&M appropriations available for morale and welfare expenses since at least 1965. See B-154547-O.M., July 7, 1965. Congress has appropriated advances for the establishment of NAFIs which were to be repaid to the Treasury. See B-156167, July 18, 1967 (Advances to Midshipmen's Store Fund). In some cases, Congress repealed the statutory authority requiring the repayment to the Treasury of sums advanced to NAFIs. Id. at 2.

[233]Act of July 16, 1892, 27 Stat. 174, 178, codified at 10 U.S.C. §§ 4779, 9779 (Army and Air Force, respectively).

GAO decisions have recognized all of these factors in determining the propriety of using appropriated funds to support NAFIs. In internal memorandum, GAO considered whether travel relating to business of the Army and Air Force Exchange Service (AAFES) could be paid from appropriated funds. B-120139-O.M., August 16, 1954. Since expenses for travel involving public business could be paid from appropriated funds, GAO analyzed whether travel involving AAFES business qualified as public business. The Comptroller General noted that AAFES is a government instrumentality under the executive control of officers of the services, who receive pay and allowances from appropriated funds while assigned to the exchanges. Thus, travel involving command supervision of exchanges is public business and the use of appropriated funds is reasonable. For example, travel for the purposes of inspecting, auditing, or investigating exchange activities, attending exchange conferences, coordinating exchange matters or attending exchange schools involve command supervision and may be paid from appropriated funds as travel in connection with public business. However, the Comptroller General said that travel for the purpose of purchasing exchanges supplies for resale did not relate to command supervision and could not be considered as travel on public business. Id.

A few years later, GAO considered whether travel by a member of the Army in order to participate in a field artillery basketball tournament as a nonparticipating coach was travel for public business which could be paid from appropriated funds. B-133763, November 13, 1957. Army regulations provided that nonappropriated funds could be used to pay the expenses of military members participating in sports program activities. However, nonappropriated funds could not be used to pay expenses of official travel of military personnel when performing command supervision of the Army sports programs. Applicable travel regulations provided that travel conducted for public business (defined as relating to activities or functions of the service to which the traveler was attached) would be paid. So, was the nonparticipating coach engaged in official government business or not? GAO held that while a tournament was recognized as part of athletic or recreational programs of the Army, it did not appear to be an activity or function of a field artillery battalion and would not constitute public business under the regulations. GAO advised the requestor to seek reimbursement from nonappropriated funds. Id.

GAO has considered whether appropriated funds could be used to pay other expenses on behalf of NAFIs, such as construction, repairs or leasing of buildings and facilities. Generally, those expenses can be paid from appropriated funds. For example, in B-147516-O.M., January 24, 1962, the Comptroller General was asked whether it was proper for the Air Force to use appropriated funds to pay for the modification, alteration, or repair of buildings or facilities used by NAFIs. Both the Secretary of Defense's authority and Air Force regulations supported the maintenance of MWR programs with appropriated funds. The memorandum noted that Congress had recognized the use of public buildings by exchanges in a permanent provision in the Army's appropriation act since fiscal year 1893.[234] As early as 1903, Congress had authorized the use of appropriated funds of the Army for construction, equipment and maintenance of buildings for exchange activities. Id. at 3.

While more current appropriations did not include specific authorization for such expenses, GAO deferred to the interpretation of the military departments that the general authorization of appropriated funds for repair and maintenance of facilities included those used of MWR activities. Finally, Congress had been notified of the military departments' interpretation. For these reasons, the Air Force could use appropriated funds to pay for the repair and alteration of NAFI facilities. Id.

In other cases, GAO addressed whether military departments could use appropriated funds for leasing and other property services on behalf of nonappropriated fund activities. In effect, GAO was asked whether DOD could use appropriated funds to lease hotel facilities for a nonappropriated fund activity. GAO answered, "yes," albeit with some hesitation. In B-154547-O.M., October 20, 1964, DOD cited its authority to conduct all affairs for the department, including welfare activities, in addition to the availability of Operation and Maintenance (O&M) appropriation for welfare and morale, to justify leasing buildings and space for NAFIs. GAO said "not good enough," noting that DOD had no specific authority to lease a building for a nonappropriated fund activity. Unless the Department of Defense could provide another interpretation of its authority to lease

[234]Act of July 16, 1892, 27 Stat. 174, 178, codified at 10 U.S.C. §§ 4779, 9779 (Army and Air Force, respectively).

facilities for nonappropriated fund activities, GAO would conclude that DOD could not do so. Id. In a subsequent memorandum, GAO altered course, deferring to DOD's interpretation since DOD was authorized to lease buildings for military purposes and MWR use could reasonably be construed to constitute a military purpose. B-154547-O.M., July 7, 1965. In another office memorandum dated February 21, 1975,[235] GAO analyzed whether the Air Force could acquire land solely for recreational purposes. GAO looked to the Air Force's authority to conduct welfare functions and the availability of DOD O&M appropriations for welfare and recreation in conjunction with the availability of appropriations to acquire land by lease or purchase. Id. Deferring to DOD's discretion in interpreting the extent of its authority and responsibilities, GAO agreed that sponsoring recreational and social activities could be considered activities with a military purpose and the Air Force could acquire land interests for such activities. Id.

While GAO decisions increasingly recognized the use of appropriated funds for expenses related to MWR, GAO also reported on the improper use of appropriated funds to support nonappropriated fund activities, such as restaurants, stores, golf courses, and theaters, and recommended changes in accounting, billing, reimbursements and legislation. In a 1949 report on nonappropriated funds, GAO reported that there was a "widespread and growing practice . . . of withholding from the Treasury and diverting to unauthorized purposes substantial sums of money coming into the hands of persons in the service of the United States in connection with the performance of their official duties." B-45101, August 10, 1949, p.1. GAO had several concerns: (1) whether these activities were authorized to withhold revenues, donations and contributions arising from such activities; (2) the unreimbursed or "free" use of public property and funds in connection with revenue producing activities; and (3) GAO's lack of specific authority to audit NAFIs. Id. at 5-7. While not questioning the validity of NAFI purposes, to meet MWR needs, GAO questioned whether Congress had by law authorized these types of expenditures, and whether they should not be self-supporting. Id. at 7-8.

[235]Unnumbered case dated February 21, 1975, found in GAO Manuscript Volume 642, February 1975, Pt. B, Appendix 10.

In 1975, Congress authorized GAO to audit the operations and accounts of nonappropriated fund activities.[236] In a 1977 report, GAO listed those NAFIs, a brief description of each one, their assets, and gross revenues. Magnitude of Nonappropriated Fund and Related Activities in the Executive Branch, GAO/FPCD-77-28, April 25, 1977. The report noted that some agencies maintained that their programs were not NAFIs, but rather, private associations not officially a part of the government. "Varying interpretations are understandable," the report stated, "since there is no official definition of what is or is not a nonappropriated fund activity." Id. at i. GAO cited an earlier OMB study which found that the lack of a government-wide definition of NAFIs caused confusion and precluded a reliable review of all NAFIs. Id., citing OMB, Study of Procurement Payable for Nonappropriated Funds (August 1975).

Later that same year, GAO reported on NAFIs in DOD and concluded that, while NAFIs operated mainly with self-generated revenue, DOD was providing some appropriated fund support, including funding transportation which should have been funded by the NAFIs. Unauthorized and Questionable Use of Appropriated Funds to Pay Transportation Costs of Non-Appropriated Fund Activities, Department of Defense, GAO/LCD-76-233, June 3, 1977. While GAO noted that annual DOD appropriation acts had generally provided funds for welfare and recreation, Congress had not specifically provided funds for transportation of merchandise for resale through NAFIs. Id. at 1. Thus, the use of appropriated funds for transportation of exchange goods was only permitted when the goods were carried on conveyances, owned, leased or chartered by the Government, where the Government was already obligated to pay for the space whether used or not. Id. GAO recommended that the Secretary of Defense: (1) direct the NAFIs to reimburse the paying appropriation for excess transportation costs; (2) institute procedures for properly charging NAFIs for transportation services; and (3) recover costs for improper appropriated fund support provided to NAFIs. Id. at ii - iii.

Later in 1977, GAO reported that the government spent over $600 million each year to subsidize DOD NAFIs. Appropriated Fund

[236]Pub. L. No. 93-604, January 2, 1975, § 301, 88 Stat. 1959, 1961-62, codified at 31 U.S.C. § 3525.

Support for Nonappropriated Fund and Related Activities in the Department of Defense, GAO/FPCD-77-58, August 31, 1977. GAO also reported that appropriated fund support was understated because of the failure to include certain costs, such as personnel costs, indirect costs, and other unrecognized costs. Id. at 30. Further complicating matters, GAO reported that other costs were overstated. Id. In testimony on the findings of this report, GAO stated that the three major concerns with appropriated fund support were: (1) the use of military personnel to perform non-military duties in NAFI activities; (2) the lack of a system for accurately reporting appropriated fund support; and (3) the lack of specific guidelines for providing appropriated fund support. Appropriated Fund Support for Nonappropriated Fund and Related Activities of the Department of Defense, Testimony before the Nonappropriated Fund Panel of the Subcommittee on Investigations of the Committee on Armed Services, September 27, 1977.

The House Armed Services Committee, in its report on the National Defense Authorization Act for fiscal year 1987, directed DOD to use appropriated funds primarily to support MWR activities that do not generate revenues and to minimize the use of appropriated funds for MWR activities that generate revenues. H.R. Rep. No. 99-718, at 165-66 (1986). DOD divided its MWR activities into three categories receiving varying degrees of appropriated fund support. DOD categorized activities considered essential in meeting the services' military objectives, such as physical fitness facilities and libraries, as Category A, mission-sustaining programs. Mission-sustaining activities are not expected to generate revenues and are supported primarily with appropriated funds. DOD categorized activities that are closely related to supporting military missions, such as outdoor recreation, child care centers and youth activities, as Category B, community support programs. Community support programs are generally able to generate revenues, but also receive some appropriated fund support. Activities in Category C, revenue-generating programs, are as their name suggests business-type activities that can generate enough income to cover most of their operating expenses. Category C programs may receive some minimal appropriated fund support, such as maintenance and repair of real property, but are expected to be primarily self-supporting.

The Senate Committee on Appropriations and the Committee of Conference on DOD's appropriation for fiscal year 1988, reviewed DOD's policy and directed DOD to implement it.[237]

d. Other Issues in Appropriated Fund Support

In addition to direct appropriated fund support, NAFIs also receive support through the unreimbursed use of government employees in their operations. For example, see B-215580, December 31, 1984 where the Army operated a child care center using both appropriated and nonappropriated funds. Appropriated funds were used to pay the salaries of supervisory personnel, apparently employed by the Army, and nonappropriated funds were used to pay the salaries of teachers, food service workers and other subordinate personnel, apparently employed by the NAFI.

In B-192859, April 17, 1979, the Comptroller General considered whether the Army could reimburse a NAFI for services provided. The NAFI in question, a consolidated post housing fund, provided maid and custodian services, yard cutting and watering services, maintenance of roads, snow removal and general policing services for common use areas in post housing. Although the Army was responsible for providing those services, it did not. The NAFI decided to provide the services and pay for them by charging the housing residents. Later, the NAFI decided to bill the Army for those services and seek reimbursements from the Army for the residents. The Comptroller General stated that without specific statutory authority, appropriated funds are not available to support activities of a nonappropriated fund instrumentality. Since most of the services provided were actually the Army's responsibility rather than the responsibility of the NAFI, the NAFI could be partially reimbursed. The decision noted that obtaining services from a NAFI is tantamount to obtaining them from a nongovernmental source and that regular purchase orders should be used. In that case, the documents prepared and actions taken by the Army and the NAFI did not create a binding contract and no binding obligation on the Government was created. For those services for which the Army was responsible and had received the benefit of the services, the NAFI could be reimbursed on a quantum meruit basis, if ratified by a contracting official of the Army. For those services that were not the

[237]S. Rep. No. 100-235, at 60-1 (1987); H.R. Rep. No. 100-498, at 518-19 (1987).

responsibility of the Army, the NAFI could not be reimbursed with appropriated funds.

A related issue affecting NAFIs is the proper disposal or deposit of receipts from the sale of NAFI property or resulting from NAFI operations. In B-156167, July 18, 1967, the Navy asked whether the proceeds from a contemplated sale of the Naval Academy dairy farm could be credited to the Midshipmen's Store Fund. The dairy farm was originally purchased using an advance of appropriated funds to be repaid to the Treasury. While the NAFI remained obliged to eventually reimburse the Treasury for the advanced funds, once the funds had been advanced, they became NAFI funds and the farm, NAFI property. Thus, the sale of the farm realized a gain for the NAFI that had nothing to do with its debt to the Treasury. The proceeds of the sale could be credited to the NAFI. Id.

A different result is obtained when the proceeds of a transaction derive not from NAFI operations, but from official business of the Government. The Miscellaneous Receipts Act (as discussed in Chapter 6 of this work) requires Government officials receiving money for the use of the United States to deposit the money in the Treasury. 31 U.S.C. § 3302(b). In Reeve Aleutian Airways, Inc. v. Rice, 789 F. Supp. 417 (D.D.C. 1992), the Air Force awarded a contract to a commercial air carrier to provide passenger and cargo service to a remote base in the Aleutian Islands. Fares purchased directly or reimbursed by the Government by its personnel, dependents, and contractor employees would provide the carrier's revenue. In return for landing rights and ground support the contractor would pay a "concession fee" (i.e., a rebate) for deposit to the base MWR fund, a NAFI. The court concluded that the Miscellaneous Receipts Statute requires the deposit of funds to the Treasury and there was no authority in this case to divert those funds to an MWR fund. Id. at 421.

In Scheduled Airlines Traffic Offices, Inc. v. Department of Defense, 87 F.3d 1356 (D.C. Cir. 1996) (SATO), the Defense Construction Supply Center, a DOD agency, awarded a commercial travel office contract requiring the contractor to offer both official (government business) and unofficial (personal travel for government employees and dependents) travel services. The contractor was required to pay the government concession fees on both official and unofficial travel. Concession fees for official travel were deposited to the

Treasury and fees for unofficial travel were deposited to the local MWR fund, a NAFI. The travel agency, SATO, had bid unsuccessfully on similar contracts in the past. Through informal channels, it learned that the agency made its award determinations "largely to maximize payments to the local Morale Funds." Id. at 1358. Realizing that the agency planned to continue its previous award policies, SATO sought an injunction to force the agency to change its policy. Among other things, SATO claimed that the Miscellaneous Receipts Statute did not permit the deposit of the concession fees into MWR funds, but compelled their deposit into the Treasury. The Government argued that this contract was different from the one in the Reeve Aleutian: The concession fees were derived solely from unofficial travel paid for by private funds and were not government funds.

The Court of Appeals for the District of Columbia Circuit concluded that the fees were government funds. The travel agents paid them in consideration for government resources, such as the right to occupy agency space, utilize government services associated with the space and serve as an exclusive on-site travel agent. SATO, 87 F.3d at 1362. Since the Miscellaneous Receipts Statute requires the deposit into Treasury of "money for the Government from any source," the government's argument about the private source of funds was rejected. The SATO Court noted that the concession fees were derived from procurements administered by a government agency in which the Morale Fund played no role. Id. at 1363. The Court observed that "not only does the travel scheme at issue here divert to Morale Funds revenues that should be deposited in the Treasury, but it also creates incentives for government officials to reduce even those funds that are deposited in the Treasury." Id. Depositing the fees into MWR funds violated the Miscellaneous Receipts Act. Id. The decision left open the question of whether unofficial travel concession fees could be retained by an MWR fund if a NAFI administers the contract. The decision also may have other potential implications for revenues generated by NAFIs that are supported in any manner or at any level by the government.

e. Borrowing by Nonappropriated Fund Activities

GAO has determined that NAFIs have the authority to borrow funds from commercial sources. In B-148581-O.M., December 18, 1970, GAO found that no federal law specifically prohibited AAFES (the military post exchange NAFI in question) from borrowing funds. GAO observed that the general laws governing borrowing by the

United States, the use of appropriated funds and other financial transactions of the government have not been applied to NAFIs. Moreover, the United States is not a party to nor is it legally bound or obligated by the financial transactions of NAFIs, notwithstanding their status as federal instrumentalities immune from state taxation. GAO had previously noted that an Army regulation authorizes the borrowing of funds by post restaurants. 9 Comp. Gen. 411 (1930). Then current DOD regulations granted AAFES implied authority to borrow funds from private sources and such authority was considered a normal practice for a business operation like AAFES. B-148581-O.M., December 18, 1970. However, GAO emphasized that such loans could not be on the credit of the United States.

4. Transactions with Federal Agencies

Since they are so closely involved with the Federal Government, it is not surprising that NAFIs and the agencies they are associated with want to enter into transactions for the provision of goods and services. This section addresses these practices and the legal authority for such transactions.

a. Economy Act and Intra-Agency Orders

As a general matter, the federal government is one entity (or "person") for legal purposes. So, when agencies wish to obtain items or services from one another, they do not enter into contracts per se—a person can't contract with himself, or so theory holds. One source of authority for agencies to obtain services from one another is by entering into reimbursable interagency agreements under the Economy Act. 31 U.S.C. § 1535. However, although NAFIs are instrumentalities of the United States Government, the Economy Act does not apply to nonappropriated fund activities. 64 Comp. Gen. 110 (1984) (Department of Agriculture Graduate School, a NAFI, could not enter into Economy Act agreement with a federal agency); 58 Comp. Gen. 94 (1978) (Army and NAFIs could not enter into intra-agency orders for services provided to Army).

The Comptroller General explained the rationale for this result in 58 Comp. Gen. 94 which involved the Army's use of intra-Army orders for obtaining goods and services from NAFIs. GAO emphasized that the Economy Act authority involves the transfer of moneys from one appropriation account to another for services provided. In the case of a NAFI, by definition, the transfer would not involve an appropriation account. (While part of the Government, NAFIs are not federal agencies and don't have appropriated fund

accounts.) Recognizing their connection to the Government, the Comptroller General noted that "they differ significantly from other Governmental activities, particularly with respect to budgetary and appropriation requirements" and he believed that it was those differences, rather than their status as Government instrumentalities, which were controlling. 58 Comp. Gen. at 97. The Comptroller General further noted that Congress has no direct control, through appropriations, over the accounts of the nonappropriated fund activities (and neither did GAO, through its account settlement authority). Thus, obtaining goods and services from a nonappropriated fund activity is "tantamount to obtaining them from non-Governmental, commercial sources." Id. at 98.

Similarly, when considering the use of inter-agency agreements between federal agencies and the Graduate School of the Department of Agriculture, the Comptroller General again determined that the Economy Act did not apply to nonappropriated fund instrumentalities. 64 Comp. Gen. at 113, (Decision also concluded that the Government Employees Training Act, 5 U.S.C. § 4104, did not constitute authority for inter-agency agreements between federal agencies and nonappropriated fund activities for the same reasons).

b. Contracting to Sell Goods and Services to Agencies

Although obtaining goods and services from NAFIs is "tantamount to obtaining them from non-Governmental, commercial sources," the Comptroller General has questioned whether it is appropriate for them to provide services to federal agencies at all—noting that NAFIs exist to help foster the morale and welfare of military personnel and their dependents. 58 Comp. Gen. 94, 98 (1978). Providing the Department of Defense with goods or services to carry out its regular operating activities is not directly related to that purpose. Thus, the Comptroller General would normally view the sale of goods and services by NAFIs to regular governmental operating activities to be outside the scope of the NAFIs proper functions. Accordingly, the Comptroller General opined that, as a general rule, there should be no competition between nonappropriated fund activities and commercial sources simply because NAFIs normally sell to military personnel, not government agencies. Id.

However, there are circumstances in which agencies and NAFIs do engage in the exchange of goods and services and there may be

situations where procurement through a nonappropriated fund activity might be proper. For example, where it is impracticable for an agency to obtain goods or services from sources other than NAFIs, or where only a NAFI could provide the urgently required goods or services. 58 Comp. Gen. at 98. Perhaps, even a sole source contract might be proper. Id.; B-235742, April 24, 1990 (proposed sole-source award to nonappropriated fund activity for lunchroom monitoring services at Department of Defense dependent schools was proper). On the other hand, in 58 Comp. Gen. 94, it was improper for a nonappropriated fund activity to provide mattresses to the Army, but GAO did not have enough information on the record to determine whether the provision of janitorial and dry-cleaning services was also inappropriate.

Subsequently, the Comptroller General has stated broadly that NAFIs may compete to provide goods or services to agencies in the competitive procurement process without addressing whether exigent, urgent circumstances existed or whether it was impracticable for a source other than a NAFI to provide the goods. 68 Comp. Gen. 62, 66 (1988) (Department of Agriculture Graduate School may compete in competitive procurement for operation and maintenance of a federal agency's training laboratory); 64 Comp. Gen. 110, 111-12 (1984) (Department of Agriculture Graduate School may be an appropriate recipient of sole source or competitive contract for training of federal employees); B-215580, December 31, 1984 (Army could not purchase child care services from nonappropriated fund activity via intra-agency order, but could use a regular purchase order). The Comptroller General has also stated that "a NAFI may compete in, and be awarded a contract under a competitive procurement unless otherwise precluded by its charter from doing so." 64 Comp. Gen. at 112; B-274795 January 6, 1997.

Sole-sourcing, however, is another matter. In one case, the Army wanted to purchase "health and comfort kits" (shampoo, razors, chewing gum and shoe polish) for soldiers in Korea from the Army and Air Force Exchange Service on a sole-source basis. B-190650, September 2, 1980. GAO noted that the Army had not alleged that other sources were not capable of furnishing the items (nor could it make that statement since other sources were currently providing the items) and held that the fact that a NAFI is able to perform a contract with greater ease or at less cost than any other concern does not justify a non-competitive procurement. Id. See also

58 Comp. Gen. at 98-99. ("In such cases, appropriate sole-source justifications should be prepared.").

Where nonappropriated fund activities provided services to federal agencies under inter or intra-agency orders later found to be improper, GAO has allowed the activities to be reimbursed on a quantum meruit or quantum valebant basis, if ratified by an authorized contracting official. 58 Comp. Gen. 94, 100 (1978); B-199533, August 25, 1980; B-192859, April 17, 1979.

c. Authority under 10 U.S.C. § 2482a

Congress has recently provided statutory authority for certain nonappropriated fund activities to enter into contracts and agreements with other Federal agencies or instrumentalities.

In 1990, Congress authorized the Graduate School of the Department of Agriculture to enter into agreements to provide training and other services incidental to training to Federal agencies under the provisions of the Economy Act.[238]

As part of the 1997 National Defense Authorization Act,[239] Congress authorized agencies and instrumentalities of the Department of Defense that support operation of the exchange system, or a morale, welfare and recreation system to enter into contracts or other agreements with other Federal agencies or instrumentalities. That statute specifically provides:

> "An agency or instrumentality of the Department of Defense that supports the operation of the exchange system, or the operation of a morale, welfare, and recreation system, of the Department of Defense may enter into a contract or other agreement with another element of the Department of Defense or with another Federal department, agency, or instrumentality to provide or obtain goods and services beneficial to the efficient management and operation of the exchange system or that morale, welfare, and recreation system." Pub. L. No. 104-201, supra note 239.

Congress noted that exchanges and the MWR programs need to become more efficient, and determined that this could be achieved

[238]Pub. L. No. 101-624, § 1669, 104 Stat. 3359, 3768 (1990), codified at 7 U.S.C. § 5922(a).

[239]Pub. L. No. 104-201, Div. A, tit. III, § 341(a)(1), 110 Stat. 2488 (1996), codified at 10 U.S.C. § 2482a.

by permitting contracting between those activities and federal agencies. H.R. Rep. No. 104-563 at 278 (1996), reprinted in 1996 U.S.C.C.A.N. 2948, 2989.

5. Nonappropriated Fund Contracting

Obviously, NAFIs have to procure goods and services for MWR programs. This section addresses the applicable procurement policies and procedures.

a. Federal Procurement Laws and Regulations

As a general rule, the procurement laws and regulations applicable to the federal government do not apply to nonappropriated fund instrumentalities because these laws generally apply to federal agencies or contracts for the government and NAFIs do not fall within either category.

41 U.S.C. § 5—This law specifies that, subject to other authority or stated exceptions, "purchases and contracts for supplies or services for the government may be made or entered into only after advertising a sufficient time previously for proposals." 41 U.S.C. § 5. As we have discussed, NAFI contracts are made for the benefit of government officers or employees in their individual personal capacity, not in their official capacity, and not for the operations of the government.

Competition in Contracting Act—The Competition in Contracting Act of 1984 (CICA)[240] made several changes to procurement provisions, including GAO's bid protest authority (which we will discuss later). Its applicability depends on the definition of "federal agency" found in the Federal Property and Administrative Services Act, 40 U.S.C. § 472. Federal agency includes an executive branch agency. 40 U.S.C. § 472(b). An executive branch agency includes any executive department or independent establishment, including wholly-owned government corporations. 40 U.S.C. § 472(a). However, it does not include nonappropriated fund instrumentalities which, although recognized as government instrumentalities associated with and supervised by government entities, operate without appropriated funds and are not federal agencies. B-270109, February 6, 1996; B-228895, December 29, 1987.

[240]Pub. L. No. 98-369, Title VII, 98 Stat. 494, 1175 (1984).

Armed Services Procurement Act of 1947—Although many NAFIs are related to the Department of Defense, where appropriated funds are not directly involved, the Armed Services Procurement Act and armed services and defense acquisition regulations do not apply. Ellsworth Bottling Company v. United States, 408 F. Supp. 280 (W.D. Okla. 1975); 58 Comp.Gen. 94, 98 (1978). See also 10 U.S.C. § 2303(a) (chapter applies to procurements for which payments are to be made from appropriated funds).

Federal Property and Administrative Services Act of 1949—As discussed under the CICA provisions, NAFIs are not "federal agenc[ies]" for purposes of the Federal Property and Administrative Services Act of 1949 (FPASA). Also, the provisions of the FPASA would not apply to military NAFIs since section 302 of the FPASA excludes defense agencies from the provisions of title III of that Act. 41 U.S.C. § 252(a) (1982). See 66 Comp. Gen. 231, 235 (1987). Ellsworth Bottling Co. v. United States, 408 F. Supp. 280, 283-84 (1975). (Army and Air Force Exchange Service (AAFES) is not subject to the FPASA as it is part of the Departments of Army and Air Force and is not an executive department or independent establishment).

Federal Acquisition Regulation—The Federal Acquisition Regulation (FAR), the government wide regulation which implements the Federal Property and Administrative Services Act, applies to federal agencies and acquisitions with appropriated funds. This would not include NAFI procurements with nonappropriated funds. 48 C.F.R. 2.101. However, there are circumstances in which appropriated funds are used for NAFI purchases. In those situations, the FAR and applicable agency regulations apply to the purchase. See, e.g., Army Regulation 215-1, para. 7-34. For example, when nonappropriated funds are used for NAFI contracting, Army regulations apply. Army Regulation 215-1, para. 7-34 and Army Regulation 215-4.

b. Use of Federal Agency Procurement Process

Although NAFIs are not required to use the federal procurement process for their nonappropriated fund procurements, in some cases federal agencies conduct procurements on their behalf. For example, for Army NAFIs, Army regulations provide that appropriated fund contracting officers will award and administer NAFI contracts in excess of $25,000 and may award and administer NAFI contracts regardless of dollar amount if the NAFI contracting

office cannot. Army Regulation 215-4, para. 1-7(a). However, since the decision in Scheduled Airlines Traffic Offices, Inc. v. Department of Defense,[241] discussed previously, there are open questions as to whether the Government should administer NAFI contracts and other potential implications for revenues generated by NAFIs that are supported in any manner or at any level by the Government.

6. Debts Due Nonappropriated Fund Activities

Despite their close association with the government, debts owed nonappropriated fund activities are not debts owed the United States. Kenny v. United States, 62 Ct.Cl. 328 (1926). Until recently, this had a profound impact on the debt collection tools available to NAFIs. For example, Thomas Kenny was an Army officer assigned to serve as superintendent of a post exchange. A post exchange civilian employee lost post exchange receipts in the amount of $2,557.60. Superintendent Kenny was ultimately held responsible for payment of the amount not recovered and the amount was withheld from his pay. The court held that the receipts of a post exchange were not the property of the United States, the superintendent was not in arrears to the United States, and therefore, the loss could not be deducted from his statutory pay as an Army officer. Kenny, 62 Cl. Ct. 328.

Similarly, in 43 Comp. Gen. 431 (1963), GAO held that a debt owed to a nonappropriated fund activity could not be set off against an enlisted member's final pay because it did not constitute a debt to the United States. The result was the same in B-170400, September 21, 1970, where GAO held that a debt owed by a former employee of the Defense Supply Agency to a nonappropriated fund activity could not be set off against his final compensation or the amount to his credit in the Civil Service Retirement Fund. B-170400, February 2, 1971 (reaffirming the holding in B-170400, September 21, 1970).

Various federal laws, including the Federal Claims Collection Act of 1966, as amended by the Debt Collection Act of 1982 and the Debt Collection Improvement Act of 1996, 31 U.S.C. ch. 37, provide federal agencies, including instrumentalities of the government, with methods to collect their debts, such as salary offset and administrative offset of monies otherwise payable to debtors. The

[241] 87 F.3d 1356 (D.C. Cir. 1996).

Debt Collection Improvement Act of 1996 amended the terms "claim" or "debt" to include "expenditures of nonappropriated funds." NAFIs also have recourse to other federal collection resources. For example, section 1007 of title 37 of the United States Code authorizes the Department of Defense to collect debts owed by service members to its instrumentalities, including nonappropriated fund instrumentalities, by deducting that amount from the member's pay in monthly installments.

Courts have held that for purposes of setoff under the Bankruptcy Code, where a debtor to a NAFI is owed a refund from the IRS, the refund may be set off against a debt owed to the nonappropriated fund activity. In Re Hanssen, 203 B.R. 149 (Bankr. E.D. Ark. 1996).

7. Nonappropriated Fund Activity Property

While a NAFI is not a federal agency and in many cases is not supported by appropriated funds, its property is under government control. 40 Comp. Gen. 587 (1961). This case involved the commercial aircraft purchased by "military aero clubs" or "flying clubs", nonappropriated fund activities which provide flying instruction, practice and recreation for active duty and retired military personnel, Department of Defense civilian personnel, their families and other personnel designated by the Department of Defense. GAO held that the aero club, as a nonappropriated fund instrumentality, owned and used equipment in its capacity as a government enterprise and may own and use property and equipment only in that capacity. Thus, GAO concluded that commercial aircraft purchased by the aero club were to be regarded as government conveyances under government travel regulations and government travelers could be reimbursed for the expenses of their operation in the circumstances specified by those regulations.

In other cases involving their property, the courts have held that nonappropriated fund activities are departments or agencies of the United States for purposes of a statute prohibiting theft of anything of value from the United States or any department or agency thereof. United States v. Towns, 842 F.2d 740 (4th Cir. 1988); United States v. Sanders, 793 F.2d 107 (5th Cir. 1986).

8. Management of Nonappropriated Fund Activities

a. Regulation and Oversight

Traditionally, since nonappropriated fund activities were generally created by agencies, those agencies also provided for their operations and carried out their oversight by regulation. As with other issues involving nonappropriated fund activities, the Department of Defense's extensive regulations are the best examples of this process of administrative regulation and oversight.[242] These regulations cover everything from the creation of nonappropriated fund activities, their purpose, funding, contracting, employment, audits, financial management, property management, to their dissolution.

Congress has also approved regulations of nonappropriated fund activities, required specific departments to regulate such entities and imposed specific requirements by statute. For example, by Act of March 2, 1821, 3 Stat. 615, Congress approved the General Regulations for the Army which contained specific regulations regarding sutlers. Under 10 U.S.C. § 2783, the Secretary of Defense is required to establish regulations for nonappropriated fund instrumentalities governing the purposes for which nonappropriated funds may be expended and the financial management of such funds to prevent, waste, loss or unauthorized use. Section 2783 also establishes penalties for violations of the financial management regulations for civilian employees of the Department of Defense and members of the armed forces. Under 10 U.S.C. § 136, Congress established the position of the Under Secretary of Defense for Personnel and Readiness who is to perform duties which include

[242]See, for example: (1) Department of Defense Directive, Establishment 1015.1, Management, and Control of Nonappropriated Fund Instrumentalities, August 19, 1981; (2) Department of Defense Directive 1015.8, DoD Civilian Employee Morale, Welfare, and Recreation Activities and Supporting Nonappropriated Fund Instrumentalities, October 22, 1985; (3) Financial Management Regulation DOD 7000.14-R, Vol. 13, Nonappropriated Funds Policy and Procedures, August 1994; (4) Army Regulation 215-1, Nonappropriated Fund Instrumentalities and Morale, Welfare, and Recreation Activities, September 29, 1995; (5) Department of Defense Directive 1015.2, Military Morale, Welfare, and Recreation, June 14, 1995; Army Regulation 215-4, Morale, Welfare, and Recreation: Nonappropriated Fund Contracting, October 10, 1990.

exchange, commissary and nonappropriated fund activities. Under 10 U.S.C. § 4779, 9779, Congress specified that no money appropriated for the support of the Army and the Air Force, respectively, may be spent for exchanges, but added that this does not prevent exchanges from using public buildings or public transportation that are not needed for other purposes.

b. Authority to Audit NAFIs

(1) GAO Jurisdiction

A 1975 law authorized GAO to audit the operations and accounts of nonappropriated fund activities authorized or operated by the head of an executive agency to sell goods or services to government personnel and their dependents.[243] Several questions came up regarding what type of NAFIs were covered under this authority. In an internal memorandum answering these questions, GAO made several points. B-167710-O.M., May 6, 1976. First, GAO explained that the scope of the audit authority was not intended to apply to every nonappropriated fund activity since "the primary responsibility should rest with the operating agencies concerned." GAO pointed out that the 1974 Act listed the military and NASA exchanges and similar entities as examples of the types of NAFIs to be audited under this authority.[244] Since GAO could not identify a workable definition of a NAFI, it relied on the case law and statutes dealing with NAFI operations to identify the applicable elements used for determining whether a particular activity is a NAFI.[245]

Under the 1975 Act, the Comptroller General may also audit the accounting systems and internal controls of NAFIs as well as

[243]Pub. L. No. 93-604, § 301, 88 Stat. 1962 (1975), codified at 31 U.S.C. § 3525.

[244]In the recodification of this provision in Pub. L. No. 97-258, 96 Stat. 963 (1982), the words "military or other . . . such as the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, Exchange Councils of the National Aeronautics and Space Administration, commissaries, clubs, and theaters" were omitted as surplus.

[245]These elements include whether: (1) the activity was established under the authority or sanction of a Government agency with or without an initial advance of Government funds; (2) the activity is created and run by Government officers or employees and/or their dependents; (3) the activity is operated for the benefit of Government officers or employees and/or their dependents; and (4) the operations of the activity are financed by the proceeds therefrom rather than by appropriations. B-167710-O.M., May 6, 1976.

internal or independent audits or reviews of those funds. 31 U.S.C. § 3525(a)(1)-(3). In order to carry out this authority, records and property of NAFIs are to be made available to the Comptroller General. 31 U.S.C. § 3525(c). The Comptroller General is also authorized to audit NAFIs which receive income from vending machines on Federal property and has access to any records necessary to conduct such audits. 20 U.S.C. § 107b-3.

(2) Other Auditors

GAO has also concluded that the Secretary of Defense was authorized by statute and regulations to require DOD internal auditors to audit NAFIs. B-148581.14-O.M., August 17, 1976. Military audit agencies or certified public accountants may audit NAFIs in accordance with DOD regulations and instructions. DOD Instruction No. 7600.6 (Audit of Nonappropriated Fund Instrumentalities and Related Activities); Army Regulation
No. 215-1, para. 13-2.

(3) Settlement of Accounts

Under 31 U.S.C. § 3526 (formerly 31 U.S.C. §§ 71, 72, 74), the Comptroller General is authorized to adjust and settle the accounts of the United States Government and to certify balances in the accounts of accountable officers. Under its account settlement authority, the Comptroller General can take exception to an improper transaction and hold the certifying or disbursing officer personally liable for the amount of money erroneously or improperly expended. 62 Comp. Gen. 40, 41 (1982). GAO can exercise its account settlement authority over government agencies, departments or independent establishments. While the General Accounting Office Act of 1974 provided GAO with audit authority over nonappropriated fund activities, it did not provide account settlement authority for them. B-183034, April 18, 1975; B-187004, August 12, 1976. In one case in which a bid protest decision was sought from GAO concerning a NAFI procurement, GAO replied that it could not consider the matter under its account settlement authority, but it would retain the correspondence for audit consideration. B-186542, June 17, 1976.

(4) Bid Protests

Prior to the enactment of the Competition in Contracting Act,[246] GAO's account settlement authority was also the basis for its bid protest jurisdiction. Stated slightly differently, GAO viewed its authority to consider protests of contract awards as an extension of its authority to settle appropriated funds accounts of the Government. B-185084, November 28, 1975. The fact that an agency labeled funds as nonappropriated was not determinative of whether GAO exercises jurisdiction over a bid protest. For example, 57 Comp. Gen. 311 (1978) involved the protest of a procurement for the design and construction of a commissary which was to be paid from a trust revolving fund account in which commissary surcharges were deposited. Originally, GAO had been advised that these funds were nonappropriated. Since its bid protest jurisdiction was based upon its authority to settle appropriated funds accounts, GAO dismissed the protest. B-188770, April 14, 1977. Upon reconsideration, GAO determined that the commissary surcharge funds were appropriated funds because Congress had authorized the collection of the surcharge and its use for commissary construction. GAO noted that this was consistent with its prior analysis that statutes authorizing the collection and credit of fees to a particular fund and making the fund available for specified expenditures constituted appropriations of funds. 57 Comp. Gen. at 313. Since these were in fact appropriated funds, GAO did have account settlement authority for the funds and bid protest jurisdiction for the protest. Id. at 315.

Since the enactment of the Competition in Contracting Act, GAO's jurisdiction over bid protests is no longer based upon its account settlement authority; rather it is limited to procurements by federal agencies as defined in the Federal Property and Administrative Services Act of 1949.[247] The definition of federal agency includes an executive branch agency. 40 U.S.C. § 472(b). The definition of an executive branch agency includes any executive department or independent establishment, including wholly-owned government corporations. 40 U.S.C. § 472(a). However, it does not include

[246]31 U.S.C. §§ 3551-3556.

[247]40 U.S.C. § 472.

nonappropriated fund instrumentalities which, although recognized as government instrumentalities associated with and supervised by government entities, operate without appropriated funds and are not, in that sense, federal agencies. B-270109, February 6, 1996; B-228895, December 29, 1987.

This does not mean that GAO will never consider a protest involving a procurement by a nonappropriated fund instrumentality. GAO will review a NAFI procurement where it finds that the NAFI is acting as a conduit for the federal agency to circumvent applicable procurement statutes. In 73 Comp. Gen. 213 (1994), GAO considered a protest concerning a procurement by an employees' association, a nonappropriated fund instrumentality. The protester alleged that the agency was diverting its needs for procurement of vending machines to the NAFI in order to avoid applying procurement statutes and regulations. Id. at 215. However, the protester must show that the nonappropriated fund instrumentality is acting as a conduit for the agency in order to circumvent procurement statutes or GAO will decline to exercise its jurisdiction. B-270109, February 6, 1996. That GAO considers the protest upon that showing does not guarantee the protester's success; the facts must support the allegation. In 73 Comp. Gen. 213, GAO determined that the agency was not, in fact, diverting the procurement of vending machine services needed by the agency to the nonappropriated fund instrumentality and denied the protest.

The fact that an agency will receive some incidental benefit from a NAFIs' procurement does not confer bid protest jurisdiction on GAO. B-270109, February 6, 1996. In B-270109, the protester argued that GAO should consider its protest because government agencies were going to receive benefits from the services to be procured and, as such, their appropriations would be improperly augmented. GAO determined that even though government agencies were going to benefit to some extent from the services procured, that benefit was incidental to the fundamental purpose of the procurement which was to provide personal, unofficial telecommunications services arranged by the nonappropriated fund instrumentality. Id.

9. Sovereign Immunity

As federal instrumentalities, nonappropriated fund activities are subject to and entitled to various duties and privileges of the federal government. One of these is the principle of sovereign immunity:

The United States, as "sovereign," cannot be sued without its consent.

a. Immunity From State and Local Taxation

Under the doctrine of sovereign immunity, the federal government of the United States is immune from taxation by the States; a principle recognized by the Supreme Court in M'Culloch v. Maryland, 17 U.S.(4 Wheat.) 316 (1819). This constitutional immunity extends to protect federal instrumentalities, including nonappropriated fund instrumentalities. Standard Oil v. Johnson, 316 U.S. 481, 485 (1942). This immunity prohibits a state taxing authority from imposing a markup on the purchases of federal nonappropriated fund instrumentalities. United States v. State Tax Commission of the State of Mississippi, 421 U.S. 599, 604-05 (1975). This is so even where that markup is not collected directly from the nonappropriated fund instrumentality, but is collected by suppliers. Id. at 608-09.

The United States may consent to state taxation of its instrumentalities. Under the Hayden-Cartwright Act, Congress permits collection of state taxes on gasoline and other fuels sold through post exchanges and other retail sales agencies of the federal government on military installations when such fuels are not for the exclusive use of the United States. 4 U.S.C. § 104. Under the Buck Amendment to the Hayden-Cartwright Act, Congress permitted states to levy taxes within federal areas to the same extent as though the area were not a federal area, with certain exceptions not relevant here. 4 U.S.C. § 105-107.[248]

b. Immunity From Suit

Although nonappropriated fund activities are instrumentalities of the United States Government, the courts have traditionally held that suit will not lie against the United States to enforce NAFI contractual obligations. Jaeger v. United States, 394 F.2d 944 (D.C. Cir. 1968); Kyer v. United States, 369 F.2d 714 (Ct. Cl. 1966); Keetz v. United States, 168 Ct. Cl. 205 (1964); Pulaski Cab Co. v. United States, 157 F. Supp. 955 (Ct. Cl. 1958); Borden v. United States, 116 F. Supp. 873 (Ct. Cl. 1953). The most famous of these decisions, the Borden case, involved a chief accountant employed by the American

[248]This also had the effect of removing any immunity previously enjoyed by private concessionaires located on military installations since they are not instrumentalities of the United States. Castlen, supra note 224, at 11 n.69.

Army Exchange Service. He brought suit against the United States to recover salary withheld to recoup the loss of money stolen from a safe at the post exchange. Mr. Borden had contracted with the American Army Exchange Service to serve as a senior accountant. His contract stipulated that the employer could withhold salary for claims against him on account of fraud, breach of contract, or negligence. Army regulations regarding nonappropriated fund activities stated that: "Exchange contracts are solely the obligation of the exchange. They are not Government contracts and the distinction between exchange contracts and Government contracts will be observed and clearly indicated at all times." Id. at 877.

The Court of Claims held that, under the Standard Oil decision,[249] Mr. Borden could not sue the Exchange Service because it was part of the Government and the Government had not consented to a suit against the Exchange Service. Id. In addition, Mr. Borden was precluded from suing the Government because exchange contracts were not contracts of the United States and the United States was not liable on such contracts. Id.

The unfair result in this case was not lost on the Court of Claims. The fact that Mr. Borden did not have a suit against the Exchange Service, let alone the United States, was one thing; the fact that the Court of Claims found that Mr. Borden had not been negligent in connection with the loss was quite another. The court put its concerns this way:

"The Army officers are given complete supervision of these Post Exchanges. They handle the money. They have control of the funds. The funds are used to make the Army more effective. In other words the officers run the show. The Exchanges are established and maintained for the benefit of Army personnel. That is their major, in fact their sole purpose. Even the civilian employees are subject to the Articles of War. For the Army to contend and to provide by regulation that it is not liable since it did not act in its official capacity would be like a man charged with extra-marital activity pleading that whatever he may have done was done in his individual capacity and not in his capacity as a husband.

" . . . .

"We think it is proper that this situation should be called to the attention of the Congress. It seems fair that either the Post Exchanges or the Government should be

[249]Standard Oil v. Johnson, 316 U.S. 481 (1942).

subject to suit and liable for any breach of contract that had been duly signed by the Army Exchange Service." Id. at 877-78.

Some civilian NAFIs have benefitted from this same paradox. For example, several courts have held that Post Office employee welfare committees constitute integral parts of the Postal Service and were instrumentalities of the United States immune from suit without the United States' consent. Automatic Retailers v. Ruppert, 269 F. Supp. 588 (S.D. Ia. 1967); Employees Welfare Committee v. Daws, 599 F.2d 1375 (5th Cir. 1979).

In response to these decisions, Congress in 1970 amended the Tucker Act to waive sovereign immunity for claims arising from post exchange contracts. The amendment to the Tucker Act provided that express or implied contracts with the specified nonappropriated fund instrumentalities are considered express or implied contracts with the United States. Pub. L. No. 91-350, 84 Stat. 449 (1970). However, that waiver of sovereign immunity only applied to the NAFIs specifically designated in the amendment to the Tucker Act.[250] See McDonald's Corp. v. United States, 926 F.2d 1126, 1132-1133 (Fed. Cir. 1991); Denkler v. United States, 782 F.2d 1003, 1007 (Fed. Cir. 1986); Hopkins v. United States, 513 F.2d 1360, 1363 (Ct. Cl. 1975). See also Research Triangle v. Board of Governors of the Federal Reserve System, 962 F. Supp. 61 (M.D.N.C. 1997); Wolverine Supply, Inc. v. United States, 17 Cl.Ct. 190 (1989). The purpose of the amendment was to afford contractors a federal forum in which to sue nonappropriated fund instrumentalities by "doing away with the inequitable 'loophole' in the Tucker Act." United States v. Hopkins, 427 U.S. 123, 126 (1976).

c. Payment of Judgments

Assuming a party overcomes the jurisdictional barriers to suing a NAFI and prevails in the action, who pays the judgment? One of the most commonly cited principles regarding NAFIs is that the United

[250]As originally proposed, the amendment would have applied to all nonappropriated fund activities. It was changed to include only contracts of certain Department of Defense and other nonappropriated fund activities specifically named in the amendment. Some government agencies protested that certain activities that operated incidentally to them, like bowling leagues or baseball teams, should not be covered by the amendment. Congress decided to include only those military activities which would have sufficient assets to pay costs resulting from the expanded jurisdiction. H.R. Rep. No. 91-933, at 6-7 (1970), reprinted in 1970 U.S.C.C.A.N. 3477, 3482.

States "assumes none of the financial obligations" of NAFIs. Standard Oil Co. v. Johnson, 316 U.S. 481, 485 (1942). The same is true of judgments against NAFIs. This topic is covered in detail in chapter 14 of this work so we will only summarize the highlights here.

NAFIs generally pay tort judgments against them from nonappropriated funds. They may not use appropriated funds and have no access to the permanent indefinite appropriation known as the Judgment Fund, 31 U.S.C. § 1304. See B-204703, September 29, 1981. See also Mignogna v. Sair Aviation, Inc., 937 F.2d 37 (2nd Cir. 1991).

Contract judgments on express or implied contracts by the NAFIs covered in the Tucker Act are paid initially from the Judgment Fund, which is then reimbursed by the contracting activity, i.e., the NAFI. 31 U.S.C. § 1304(c). The Tucker Act and the applicable provisions of the Judgment Fund only apply to the specified NAFIs, not other nonappropriated fund activities. Swiff-Train Co. v. United States, 443 F.2d 1140 (5th Cir. 1971).

10. Status of Nonappropriated Fund Activity Employees

Nonappropriated fund activities pay their employees primarily from income generated by the activities themselves. Perez v. AAFES, 680 F.2d 779, 780 (D.C. Cir. 1982). Employees of nonappropriated fund activities are neither employees of federal agencies, nor employees of the United States Government. Rather, they are employees of the instrumentality. United States v. Hopkins, 427 U.S. 123, 127 (1976). Congress never intended that nonappropriated fund activity employees receive the same level of protection as other federal employees. McAuliffe v. Rice, 966 F.2d 979, 980 (5th Cir. 1992). When Congress passed the Act of June 19, 1952, Ch. 444, § 1, Pub. L. No. 82-397, 66 Stat. 138, Congress acceded to the Department of Defense's desire to make civilian employment of nonappropriated fund activities as flexible as possible and not subject to then existing Civil Service type protections. The 1952 Act provided that employees of nonappropriated fund activities "shall not be held and considered as employees of the United States for the purpose of any

laws administered by the Civil Service Commission."[251] Id. Where Congress has made nonappropriated fund activity employees subject to laws applicable to other federal employees, it has done so by expressly including them within the coverage of specific statutes. See Perez, 680 F.2d at 787.

a. Applicability of Civil Service Laws

Nonappropriated fund employees are generally not deemed to be employees of the United States except as specifically provided by statute. 5 U.S.C. § 2105(c). Section 2105(c) provides:

> "An employee paid from nonappropriated funds of the Army and Air Force Exchange Service, Army and Air Force Motion Picture Service, Navy Ship's Stores Ashore, Navy exchanges, Marine Corps exchanges, Coast Guard exchanges, and other instrumentalities of the United States under the jurisdiction of the armed forces conducted for the comfort, pleasure, contentment, and mental and physical improvement of personnel of the armed forces is deemed not an employee for the purpose of —
>
> "(1) laws administered by the Office of Personnel Management, except —
>
> "(A) section 7204;
>
> "(B) as otherwise specifically provided in this title;
>
> "(C) the Fair Labor Standards Act of 1938;
>
> "(D) for the purpose of entering into an interchange agreement to provide for the noncompetitive movement of employees between such instrumentalities and the competitive service; or
>
> "(E) subchapter V of chapter 63, which shall be applied so as to construe references to benefit programs to refer to applicable programs for employees paid from nonappropriated funds; or
>
> "(2) subchapter I of chapter 81, chapter 84 (except to the extent specifically provided therein), and section 7902 of this title."

The final sentence of 5 U.S.C. 2105 (c) states that it does not affect the status of the specified NAFIs as Federal instrumentalities.

[251]The 1952 Act is recodified at 5 U.S.C. § 2105(c) and incorporated within the Civil Service Reform Act of 1978.

(1) Civil Service Reform Act of 1978

The Civil Service Reform Act of 1978 and the Supreme Court in United States v. Fausto, 484 U.S. 439 (1988), streamlined and simplified the remedies available to federal employees for adverse employment actions. McAuliffe v. Rice, 966 F.2d 979, 981 (5th Cir. 1992). The Civil Service Reform Act of 1978 created a comprehensive framework providing substantive and procedural rights and remedies for federal employees for performance actions, removals or other adverse actions.[252] In Fausto, the Supreme Court held that the Civil Service Reform Act was the exclusive substantive and procedural framework for federal employee actions, and precluded judicial review of an employee's action under other laws. To conclude otherwise, said the Court, would allow such claims to undermine the goals of unitary decision making and consistency intended by the Act. Thus, the Supreme Court held that the Civil Service Reform Act precluded an employee who otherwise did not qualify for review under the Act from bringing a claim under the Back Pay Act.

Congress deliberately exempted nonappropriated fund activity employees from federal civil service rules. This enabled the armed forces to carry out the missions of nonappropriated fund activities with the maximum possible personnel flexibility. McAuliffe, 966 F.2d at 981. With a few exceptions, nonappropriated fund activity employees are not covered by laws which apply to employees within the general Federal Service, including the Civil Service Reform Act. McAuliffe, 966 F.2d at 980-981; Perez v. AAFES, 680 F.2d 779 (1982). See 5 U.S.C. § 2105(c). Thus, the remedies available to nonappropriated fund activity employees are established by regulation of the agency employing them. See McAuliffe, 966 F.2d at 981; Castella v. Long, 701 F. Supp. 578 (N.D. Tex. 1988). Accordingly, nonappropriated fund activity employees are not entitled to appeal adverse actions to the Merit Systems Protection Board. Perez, 680 F.2d at 787; Taylor v. Department of the Navy, 1 M.S.P.R. 591 (1980). In the McAuliffe case, a former civilian employee of a nonappropriated fund activity sought review of the decision to terminate her employment under the Administrative

[252]For a detailed discussion of the Civil Service Reform Act, see United States v. Fausto, 484 U.S. at 443-47.

Procedure Act, 5 U.S.C. § 701 et seq. The court held that the exclusivity of the Civil Service Reform Act precluded judicial review under the Administrative Procedure Act.[253] 966 F.2d 979.

Since they are not covered by the Civil Service Reform Act, nonappropriated fund activity employees have attempted to challenge actions taken against them through other statutory and constitutional rights. These include invoking Tucker Act jurisdiction for certain nonappropriated fund activity contracts, and seeking damages for constitutional deprivations by a government official, as established in Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

As we previously discussed, the Tucker Act waives sovereign immunity for claims arising from contracts of certain post exchanges. The Supreme Court has recognized that Tucker Act jurisdiction may be premised on an employment contract, as well as on one for goods or other services. Id. at 126; AAFES v. Sheehan, 456 U.S. 728, 735 (1982). Relying on this theory, nonappropriated fund activity employees sued their employers alleging that they were employed by contract. Sheehan, 456 U.S. at 735; Moore v. United States, 21 Cl.Ct. 537 (1990); Orona v. United States, 4 Cl.Ct. 81 (1983). However, the courts found that the specific employees in those cases were not, in fact, serving under employment contracts but had been appointed to their positions. Consequently, the courts lacked jurisdiction over their claims. Sheehan, 456 U.S. at 736-37; Moore, 21 Cl. Ct. at 539-40; Orona, 4 Cl. Ct. at 84.

Feeling confused about NAFI's? This next case is not going to make you feel a whole lot better. In Castella v. Long, 701 F. Supp. 578 (N.D. Tex. 1988), a former AAFES[254] employee sued for damages after he

[253]But compare Helsabeck v. United States, 821 F. Supp. 404 (E.D.N.C. 1993), in which the District Court held that the Civil Service Reform Act did not preclude judicial review of a claim for nonmonetary damages against the Government by a nonappropriated fund instrumentality employee for procedures used to discharge him. While the court permitted the plaintiff to amend his complaint with respect to nonmonetary claims, it did not specify what the nature of the review would be. There is no subsequent history of the case to determine what, if anything, the plaintiff did as a result, so we are unable to infer what effect this would have on NAFI employee rights.

[254]Army and Air Force Exchange Service.

was fired for making false claims for travel expense reimbursements. The court recognized that AAFES is a NAFI and not technically part of the Government. Thus, AAFES employees were not federal employees with rights under the Civil Service System. Instead, AAFES employees fall under the Army and Air Force regulations. Id. at 581. Based on sovereign immunity, the court dismissed those claims which sought relief from the NAFI, the government, and the individuals who acted in their official capacities to fire the claimant. Id. at 582. The court then dismissed those claims against the individuals acting in their personal capacities,[255] based on Bush v. Lucas, 462 U.S. 367 (1983). See 701 F. Supp. at 583-84.

Bush held that Bivens-type constitutional damage claims could not be brought for alleged constitutional violations associated with a claimant's employment in the federal government. The reason for this was that Congress had established "an elaborate remedial system" which was intended to address employment related claims by federal employees. Bivens-type actions would unduly disrupt that statutory scheme. 462 U.S. at 388.

The Castella court realized that Bush involved federal employees subject to the Civil Service System, not NAFI employees. Castella, 701 F. Supp. at 583. (As we noted earlier, Congress intentionally exempted NAFI employees from that system.) Nevertheless, it noted that some other courts (including its own circuit court) had applied (or endorsed applying) Bush to NAFI employee claims. The courts rationalized their position with the explanation that while the Army and Air Force regulations were not approved by Congress, they were, nevertheless, "an elaborate remedial system" that should not be disrupted by Bivens-style constitutional claims. Castella, 701 F. Supp. at 584.

In other words, by setting up a comprehensive regulation, the Army, Air Force, and AAFES were able to preclude a claimant from pursuing constitutional claims! Strange as it may seem, by treating

[255]In the Bivens case, the Supreme Court held that an individual citizen was entitled to sue for damages for alleged constitutional deprivations by a government official. 403 U.S. 488. The Bivens remedy, it should be noted, runs against the offending official in his private capacity, not against the government. See chapter 14, "Payment of Judgments," supra at 14-21 and 14-23.

NAFI employees the same as federal employees under Bush, the courts may actually have reinforced the congressional intention that NAFI employees be treated differently than federal employees, since absent a Bivens-type claim, the NAFI employees are left more to the regulatory mercy of the agencies than are federal employees under the statutory Civil Service rules.

The Castella court also held that the nonappropriated fund activity employee could not use the Privacy Act challenging the correctness of the records that supported the decision to remove him, to attack the removal decision. The court explained that the purpose of the Privacy Act was to allow for the correction of factual or historical errors. It was not intended to permit a plaintiff to reopen consideration of unfavorable federal agency decisions. The court found that the plaintiff was really alleging only a wrongful personnel decision. Id. at 584-585.

(2) Other Employment Related Laws

The following canvass of laws typically associated with federal employment discusses their applicability to NAFIs.

Whistleblower Protection Act—Nonappropriated fund activity employees are not protected by the Whistleblower Protection Act because they are excluded from the definition of employee for purposes of Title 5. Clark v. Army and Air Force Exchange Service, 57 M.S.P.R. 43 (1993). However, under 10 U.S.C. § 1587, nonappropriated fund activity employees are protected from reprisal for whistleblowing pursuant to procedures adopted by the Secretary of Defense.

Classification and Pay Rates and Systems—As stated in section 2105(c), nonappropriated fund activity employees are federal employees for purposes of section 7204 which prohibits discrimination because of race, color, creed, sex or marital status against individuals in the classification of employees, administration of pay rates and systems of employees, appointments to positions above GS-15 and the systematic agency review of operations.

Fair Labor Standards Act of 1938—Nonappropriated fund activity employees under the jurisdiction of the Armed Forces fall within the coverage of the Fair Labor Standards Act of 1938. 29 U.S.C.

§ 203(e)(2)(A)(iv). Unlike federal employees in the competitive or excepted service, nonappropriated fund activity employees are under another personnel system pursuant to 5 U.S.C. § 2105(c). Since nonappropriated fund activity employees are not covered by the laws which apply to federal employees, procedural protections for removals or other adverse actions affecting those employees are established by regulation of the agency supervising the NAFI. AFES and AFGE, Region Council 236, 33 F.L.R.A. 815, 817-18 (1988). A claim may be brought against a NAFI since the Government has waived immunity with regard to wage claims under the FLSA. Cosme Nieves v. Deshler, 786 F.2d 445, 450 (1st Cir. 1986) (a FLSA claim does not come within the limited exceptions of the Tucker Act); Morales v. Senior Petty Officers' Mess, 366 F. Supp. 1305 (D.P.R. 1973).

Family and Medical Leave Act of 1993—Nonappropriated fund activity employees are federal employees for purposes of Title II of the Family and Medical Leave Act of 1993. 5 U.S.C. § 2105(c). Title II of the Family Medical Leave Act grants federal employees, including nonappropriated fund employees, rights to leave from work in enumerated circumstances, but no private right of action to enforce the leave rights. Mann v. Haigh, 120 F.3d 34, 37 (4th Cir. 1997). In the Mann decision, since the plaintiff was not a federal employee covered by the Civil Service Reform Act of 1978, and he was not entitled to a judicial review under the Administrative Procedure Act, his right to appeal his termination was limited to procedural safeguards provided by the nonappropriated fund activity. Id. at 38.

Civil Service Retirement Act—The Civil Service Retirement Act, 5 U.S.C. §§ 8331 - 8351, entitles certain government employees to deferred retirement annuities. Typically, in order to be eligible for a retirement annuity under the Civil Service Retirement Act, an individual must complete at least five years of "creditable" civilian service and must complete at least one year of "covered" civilian service in the final two years of employment. 5 U.S.C. §§ 8333(a), (b); Dupo v. OPM, 69 F.3d 1125, 1128 (Fed. Cir. 1995). Although most service in the federal government is creditable, service with a nonappropriated fund activity is not, as a general rule, creditable service for purposes of the Civil Service Retirement Act. Nonappropriated fund activity employees are excluded from the definition of an "employee" for purposes of laws administered by the Office of Personnel Management which includes the Civil Service

Retirement Act. 5 U.S.C. § 2105(c). See also, Dupo, 69 F.3d at 1128. However, Congress has provided that in limited circumstances, service with a nonappropriated fund activity may be creditable for purposes of the Civil Service Retirement Act. The Nonappropriated Fund Instrumentalities Employees' Retirement Credit Act of 1986, Pub. L. No. 99-638, 100 Stat. 3535 (1986), codified at 5 U.S.C. § 8332(b)(16), provides that the following service is creditable:

> "service performed by any individual as an employee described in section 2105(c) of this title after June 18, 1952, and before January 1, 1966, if (A) such service involved conducting an arts and crafts, drama, music, library, service club, youth activities, sports or recreation program (including any outdoor recreation program) for personnel of the armed forces, and (B) such individual is an employee subject to this subchapter on the day before the date of the enactment of the Nonappropriated Fund Instrumentalities Employees' Retirement Credit Act of 1986."

Therefore, nonappropriated fund activity employees are entitled to civil service retirement credit for that service only if they meet the following criteria: (1) the service to be credited was performed for a nonappropriated fund activity between June 18, 1952, and January 1, 1966; (2) the service performed during that period involved conducting certain activities as listed in 5 U.S.C. § 8332(b)(16); and (3) the individual was an employee subject to the Civil Service Retirement Act on November 9, 1986. Dupo, supra at 1128. In the Dupo case, the Federal Circuit found that Mr. Dupo was employed by a nonappropriated fund activity for the time periods required for creditable service. However, he had not conducted the activities listed in section 8332(b)(16). The Dupo court held that for purposes of section 8332(b)(16), "conducting" means "to lead from a position of command" or "to direct the performance of" and employees who were administrative or support workers, such as Mr. Dupo, generally did not satisfy this requirement. Id. at 1129. Furthermore, Mr. Dupo had been separated from service prior to November 9, 1986 and did not meet the third requirement. Thus, he was not entitled to a civil service retirement annuity.

Relocation Expenses—Sections 5724 and 5724a of title 5, United States Code, authorize an agency to pay transferred employees travel and transportation expenses, various allowances, and relocation expenses. However, these expenses are allowable only for "an individual employed in or under an agency". 5 U.S.C. § 5721(2). Thus, an individual is entitled to these expenses if the agency from which he transfers and the agency to which he

transfers are within this coverage. Nonappropriated fund activities are not considered federal agencies for the purpose of receipt and disbursement of funds, including payments to their employees. B-215398, October 30, 1984. Employees of a nonappropriated fund activity are not employed by an "agency" within the meaning of section 5721(1) and are not entitled to relocation expenses under section 5724 and 5724a when they transfer to a federal agency. Id. However, when they transfer to positions in the DOD or Coast Guard, employees of DOD or Coast Guard NAFIs are authorized travel, transportation and relocation expenses under the same conditions and to the same extent authorized for transferred employees. 5 U.S.C. § 5736.

Dual Compensation Laws—The dual compensation laws were intended to preclude "double dipping" in other words, to protect the taxpayer from paying the same individual two salaries. One way this has been manifested is in a provision which dictated that the retired pay of a regular retired officer be reduced if he held a position with the United State Government or if his retired pay together with his civilian pay exceeded level V of the Executive Schedule. 5 U.S.C. §§ 5531, 5532.[256] In this, "position" is defined as:

> "a civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (including a Government corporation and a nonappropriated fund instrumentality under the jurisdiction of the armed forces) or in the government of the District of Columbia." 5 U.S.C. § 5531(2) (emphasis added).

Thus, for example the retired pay of retired regular officers of the armed forces who are employed with Department of Defense nonappropriated fund activities was subject to reduction in order to avert dual compensation.

There are nonappropriated fund activities outside the Department of Defense that employ retired officers of the armed forces and the

[256]Section 5532 was repealed, effective October 1, 1999. Pub. L. No. 106-65, Div. A, tit, VI, § 656 (a) (1), 113 Stat. 664 (October 5, 1999). We mention this provision nevertheless because the cases which apply it also apply other dual compensation provisions. Both those cases and the other dual compensation statutory provisions remain valid—in their own right, and in their usefulness in determining whether and when an entity is a NAFI or not.

courts have considered the applicability of the dual compensation laws to them. In Denkler v. United States, 782 F.2d 1003 (Fed. Cir. 1986), the Federal Circuit considered whether the phrase "including . . . a nonappropriated fund instrumentality under the jurisdiction of the armed forces" was intended to include other nonappropriated fund activities such as the Federal Reserve Board. The Federal Circuit concluded that although there did not appear to be a reason for Congress to limit the purpose of the dual compensation laws, Congress had limited the provision to retired military officers employed by nonappropriated fund activities of the armed forces and the court would not legislate in its stead. Id. at 1008. Thus, in the Denkler case, employment with the Federal Reserve Board, a nonappropriated fund instrumentality not under the jurisdiction of the armed forces, was not a position under the dual compensation principles.

GAO followed the Denkler decision in 67 Comp. Gen. 437 (1988) in a case involving three retired military officers who were employed by the Federal Reserve System (FRS). GAO deferred to the weight of judicial opinion holding that the FRS was a nonappropriated fund instrumentality not under the jurisdiction of the armed forces and therefore not subject to the dual compensation pay reduction. Id. at 440. In that decision, GAO also analyzed the laws governing the Office of Civilian Radioactive Waste Management, an organization within the Department of Energy, to determine whether this entity was a nonappropriated fund instrumentality. Because its funds came from user fees which were deposited in the Treasury for use in paying the Office's expenses, GAO concluded that it was not a NAFI. Id. at 441. Thus, the Denkler decision was not applicable and employees of the Office of Civilian Radioactive Waste Management were subject to the dual compensation provisions. See also B-236979, April 19, 1990 (since its funds are collected by the Commission and deposited into a revolving fund in the Treasury and withdrawn from the fund pursuant to appropriation acts, Panama Canal Commission is not a nonappropriated fund activity and its employees are subject to the dual compensation reductions).

Title VII of the Civil Rights Act and Age Discrimination In Employment Act—Nonappropriated fund employees are entitled to maintain actions under Title VII of the Civil Rights Act. 42 U.S.C. § 2000e-16(a). See B-234746-O.M., March 10, 1989. Nonappropriated fund employees are entitled to maintain actions under the Age

Discrimination Act. 29 U.S.C. § 633a. The proper defendant to be sued under these statutes is the head of the department, agency or unit, which (in the case of AAFES) is the Secretary of Defense or the Secretary of the Air Force and the Secretary of the Army jointly. Honeycutt v. Long, 861 F.2d 1346, 1349 (5th Cir. 1988) (AAFES is not an executive department, agency, or unit; it is an instrumentality of the United States operating under the Department of Defense).

Employment for Purposes of Immigration Laws—Nonappropriated fund activity employees have been considered as employees of the United States for other purposes. For example, the Office of Legal Counsel of the Department of Justice considered whether nonappropriated fund activity employees were considered employees of the United States under the Immigration and Nationality Act. 1 U.S. Op. Off. Legal Counsel 258 (1977). Under the Immigration and Nationality Act, an employee of the United States, upon the completion of 15 years of service, is eligible for classification as a special immigrant entitled to special consideration with his application for admission to the United States. The Office of Legal Counsel concluded that the Act of June 19, 1952, which we discussed above, demonstrated that Congress assumed that in the absence of an express statutory exclusion, nonappropriated fund activity employees were regarded as employees of the United States. The Office of Legal Counsel stated that as a general rule, nonappropriated fund activity employees should be regarded as employees of the United States unless a Federal statute provides otherwise. In the case of the Immigration and Nationality Act, the Office of Legal Counsel concluded that neither the language or history of the Act suggested that employee of the United States was intended to have a restricted meaning. Further, since Congress' primary intention was to facilitate the immigration of persons serving the Government abroad and nonappropriated fund activity employees were not excluded, they were eligible for classification as special immigrants under the Act.

Criminal Statutes—Since nonappropriated fund employees are not federal employees for many purposes, several employees tried to use this as a defense when charged with bribery under a federal statute. Harlow v. United States, 301 F.2d 361 (5th Cir. 1962). Mr. Harlow and his co-conspirators were employed by the European Exchange System, a nonappropriated fund activity. They were responsible for contracting for the exchange. They established

various Swiss bank accounts, solicited bribes from vendors seeking to do business with the exchange, and deposited the bribes into those accounts. In appealing their convictions for corruption, the defendants argued that, as nonappropriated fund employees, they were not federal employees and could not be charged under a federal statute making it a crime for any employee or person acting for or on behalf of the United States to solicit or receive bribes. Although the court agreed that they were not federal employees, it declined to dismiss those charges because the defendants could be included under the term "person acting for or on behalf of the United States." The court reasoned that nonappropriated fund activities are instrumentalities of the United States Government and the employees, acting on behalf of the exchange in making contracting decisions, were acting on behalf of the United States. Id. at 370-71.

Tort Claims—The Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680, waived most of the government's sovereign immunity from torts. While the FTCA does not specifically refer to nonappropriated fund instrumentalities, courts in certain instances have interpreted the FTCA's coverage to include certain NAFIs that the courts consider to be federal instrumentalities. See, e.g., Brucker v. United States, 338 F.2d 427 (9th Cir. 1964) (military flying club); United States v. Hainline, 315 F.2d 153, (10th Cir. 1963) (military flying club); United States v. Holcombe, 277 F.2d 143 (4th Cir. 1960) (Naval Officers' Mess). However, an equestrian club on an Army base was not covered under the FTCA. Scott v. United States, 226 F. Supp. 864 (M.D. Ga. 1963); aff'd, 337 F.2d 471 (5th Cir. 1964).

Injuries to military service members when they are involved in NAFI activities, such as social or flying clubs, are considered to be in connection with their military service and the Feres Doctrine bars recovery under the FTCA. Pringle v. United States, 44 F. Supp.2d 1168 (D. Kan. 1999); Eckles v. United States, 471 F. Supp. 108 (M.D. Pa. 1979) and cases cited therein.

However, injuries to employees of NAFIs arising in the course of employment are covered under the Longshoremen's and Harbor

Workers' Compensation Act (33 U.S.C. Ch. 18, see 5 U.S.C. § 8173), and not the Federal Employees Compensation Act or the FTCA. Traywick v. Juhola, 922 F.2d 786 (11th Cir. 1991); Vilanova v. United States, 851 F.2d 1 (1st Cir. 1988).

D. Trust Funds

On June 27, 1829, an English chemist and mineralogist, James Smithson, died in Genoa, Italy. In 1835, in Pisa, Italy, James Smithson's nephew died without heirs. Smithson's will had stipulated that, if his nephew died without heirs, his estate should go, in trust, "to the United States of America, to found at Washington, under the name of the Smithsonian Institution, an Establishment for the increase and diffusion of knowledge."

The President expressed doubts about the legality of accepting the gift and sought statutory authority to do so. In Congress, the decision to accept Mr. Smithson's gift was not open and shut. Senator John C. Calhoun led a determined minority that opposed accepting the gift. Senator Calhoun argued that the gift abridged states' rights and was beneath the dignity of the government to accept. Federalism and dignity aside, money was then, and still is, a useful commodity. Accordingly, by Act of July 1, 1836, ch. 252, 5 Stat. 64, Congress authorized the acceptance of the Smithson bequest. Shortly thereafter, President Andrew Jackson appointed Mr. Richard Rush to pursue the claim of the United States in the Court of Chancery of England. Two years later, the Chancery Court awarded Smithson's estate to the United States.

Mr. Rush sold Mr. Smithson's properties, converting the proceeds into gold sovereigns. On July 17, 1838, he sailed for home, taking with him 11 boxes containing 104,960 sovereigns, 8 shillings, and 7 pence, as well as Mr. Smithson's mineral collection, library, scientific notes, and personal effects. Arriving in New York after a six-week voyage, Mr. Rush transferred the gold coins to the Treasury to be melted down.

Eight years passed before the Congress resolved what should be done with Smithson's bequest. Suggestions included a national university, a public library, common schools, and an astronomical observatory. Congress settled the matter by Act of August 10, 1846, ch. 178, 9 Stat. 102, creating the Smithsonian Institution and leaving it up to the new Institution's Board of Regents to decide on the

specific activities to undertake for the faithful execution of the Smithson trust. Congress directed that the principal of the Smithson bequest, "being the sum of $541,379.63," be lent to the United States Treasury and invested in public debt securities. 20 U.S.C. § 54. Congress provided an appropriation of the interest from the securities for the perpetual maintenance and support of the Smithsonian Institution. Id.

The legislative history surrounding acceptance of the Smithson Bequest and the founding of the Smithsonian Institution suggests that this may well have been one of the earliest instances of the United States accepting the role and responsibilities of "trustee" for private funds.[257] Today, the United States has many different "trust funds."

As a general proposition, the United States holds funds or property "in trust" in three different situations. Like the Smithson bequest, the federal government may hold funds in trust that are donated to (and accepted by) the United States. Second, the United States may have a trust obligation with respect to property of others that it controls and manages. Third, the United States holds dedicated receipts appropriated to statutorily designated trust funds.

These days, it is clear that the federal government may hold funds "in trust" for any number of reasons and for any number of groups. Equally clear is that further generalizations are fraught with danger. In particular, care needs to be exercised with respect to the scope of the government's legal obligations to trust beneficiaries.

Usually, the creation, terms, and conditions of a trust depend solely upon the statute creating or authorizing the trust. However, from a fiscal law perspective, there can be other factors in the equation. The source of the funds held in trust is one of those factors. As the discussion below shows, sometimes the source of the funds determines whether the United States has a trust obligation with

[257]See Smithsonian Legacy, National Intelligencer, May 2, 1836 (congressional debates focused on whether sovereign governments can accept funds in trust), reproduced in "From Smithson to Smithsonian," http://www.sil.si.edu/Exhibitions/Smithson-to-Smithsonian/labels/027_high.html

respect to the funds it holds. It can also be significant where statutory restrictions on the use of appropriated funds are at issue.

Another factor is the "common law." The decisions of the accounting officers of the government, as well as those of the courts, frequently refer to or use common law trust concepts to analyze or resolve issues concerning property of others that the government holds or possesses. In this way, common law trust concepts inform the decision makers' judgment as they give meaning to the governing statutes. However, sometimes, it is the common law alone which creates and controls the government's obligations with respect to property it holds "in trust." Cf., e.g., United States v. Mitchell, 463 U.S. 206, 225 (1983) (discussed below). As the court observed in Cobell v. Norton, 240 F.3d 1081, 2001 WL 173299, at *19 (D.C. Cir. 2001), "[t]he general "contours" of the government's obligations may be defined by statute, but the interstices must be filled in through reference to general trust law."

One further word of caution: As suggested earlier, there is no one model of a federal trust fund. In certain situations the federal government may act and may have the legal obligation to act as a fiduciary with respect to funds or property it holds for the benefit of specified groups or individuals. In dollar terms, the amounts held in these "true" trusts are relatively small. There are, however, a relatively small number of statutorily designated "trust fund" accounts. While these accounts are designated trust funds for bookkeeping and accounting purposes, they are not trusts in the sense that Congress may not redefine eligibility of beneficiaries, alter benefit amounts or redirect receipts to other programs or purposes. Cf. OMB Circ. No. A-11, § 20.11(c) (1999) (2d paragraph). It is these statutorily designated trust accounts that contain the overwhelming amount of federal trust fund dollars. The use of the term "trust" in connection with these funds, however, implies greater rights in the "beneficiaries" and obligations in the "trustee," vis-à-vis the trust corpus, than the law actually recognizes.

1. Federal Funds and Trust Funds

The federal government holds funds in over 1,000 accounts. Budget Account Structure: A Descriptive Overview, GAO/AIMD-95-179 (September 1995). At the highest level of generality, these accounts

are divided into two[258] major groups: federal funds and trust funds. OMB Circ. No. A-34, Instructions on Budget Execution, § 11.13(c)(2) (October 1999). Within each of these two groups there are several types of accounts.

a. Federal Funds

Federal funds include general fund expenditure and receipt accounts, special fund expenditure and receipt accounts, and intragovernmental, management, and public enterprise revolving fund accounts. Id. Of these accounts only the general fund receipt accounts are used to account for collections that are not earmarked by law for a specific purpose. Budget Issues: Earmarking in the Federal Government, GAO/AIMD-95-216FS (August 1995).

Public enterprise revolving funds and special funds also are financed by earmarked receipts. Public enterprise revolving funds are credited with receipts generated by a cycle of business-type operations with the public. A Glossary of Terms Used in the Federal Budget Process: Exposure Draft, GAO/AFMD-2.1.1, at 5 (Rev. January 1993). The Postal Fund is an example of such a fund. 39 U.S.C. § 2003. Its receipts come primarily from mail and service revenues and are available for authorized activities and functions of the Postal Service without further appropriation action. 39 U.S.C. § 2003(a).

Special fund accounts are established to record receipts collected from a specific source and earmarked by law for a specific purpose or program. OMB Circ. No. A-11, §§ 20.3, 20.11 (1999). As a general proposition, special funds operate like statutorily designated trust fund accounts with little substantive difference other than that the authorizing legislation does not designate them as trust funds.[259] Budget Issues: Earmarking in the Federal Government, GAO/AIMD-95-216FS (August 1995). The Nuclear Waste Fund, 42 U.S.C. § 10222(c), is an example. It receives mainly two kinds of receipts: fees collected from civilian nuclear power operators and interest

[258]Compare 1 T.F.M. 2-1520, November 16, 1999, which breaks down the accounts into three classifications: general funds, trust funds and special funds.

[259]The fact that other general authority would provide for the moneys in the fund to be accounted for and disbursed as trust funds does not affect their classification where Congress has specifically provided for deposit of the funds in a special deposit account. 16 Comp. Gen. 940 (1937).

income from investments in United States securities. 42 U.S.C. § 10222(a),(e). The amounts in this fund are only available for radioactive waste disposal activities including the development, construction, and operation of authorized facilities for the disposal of high-level nuclear waste. 42 U.S.C. § 10222(d).

b. Trust Funds

The trust fund group is comprised of trust fund expenditure accounts, trust fund receipt accounts, and trust revolving fund accounts.[260] OMB Circ. No. A-34, § 11.13(c)(2) (October 1999). The distinguishing characteristic of these accounts is that they represent accounts, designated by law as trust funds, for receipts earmarked for specific purposes and sometimes, but not always, for the expenditure of these receipts. Id. Trust fund expenditure and receipt accounts are nonrevolving.[261] Trust fund expenditure accounts record appropriated amounts of trust fund receipts used to finance specific purposes or programs under a trust agreement or statute. Trust fund receipt accounts capture collections generated by the terms of the trust agreement or statute. I T.F.M. 2-1520 (November 16, 1999). See also GAO, Policy and Procedures Manual for Guidance of Federal Agencies, title II, § 2.2. These include non-revolving accounts finance programs such as the Social Security and Medicare programs.[262]

The other type of trust account, trust revolving fund accounts, cover the permanent appropriation and expenditure of collections used to carry out a cycle of business-type operations in accordance with a statute that designates the fund as a trust fund. One example is the Commissary Funds, Federal Prisons, 31 U.S.C. § 1321(a)(22), which uses profits earned on sales of goods and articles not regularly

[260]See Federal Trust and other Earmarked Funds, GAO-01-199SP (January 2001), for a discussion of the composition of trusts and other earmarked funds, including their treatment in the federal budget process.

[261]In other words, money deposited in, or spent from, these accounts generally may not be removed or replenished, respectively, without further legal authority. (See the general discussion of revolving funds in chapter 6, supra, at 6-130.)

[262]The Social Security and Medicare programs are funded out of two trust funds each—the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Trust Fund, and the Federal Supplementary Medical Insurance Trust Fund and the Federal Hospital Insurance Trust Fund, respectively. 42 U.S.C. §§ 405, 1395ii.

provided to inmates by the federal prisons for recreational and general welfare items. This category also includes a number of small trusts created to account for the expenditure of funds in accordance with a trust agreement where the government may act as a fiduciary. See 31 U.S.C. §§ 1321(b), 1323(c).

Data reported by the Congressional Research Service (CRS) indicated that there were 110 federal trust funds in fiscal year 1997. CRS, Federal Trust Funds: How Many, How Big, and What Are They For (updated June 30, 1998) (hereafter Federal Trust Funds). The number is small because a number of related funds were grouped together for reporting purposes. See also Trust Funds and Their Relationship to the Federal Budget, GAO/AFMD-88-55 (September 1988). Whatever the absolute number of trust funds held by the government, for fiscal year 1997, CRS reported that the 110 trust funds accounted for 38 percent of the federal government's receipts. Federal Trust Funds, supra. Of these, 15 accounted for 99 percent of the aggregate balances of all trust funds. This should not come as a surprise, considering that the Social Security Trust Funds and the Civil Service Retirement and Disability Trust Fund accounted for 69 percent of the aggregate trust fund balances and held 20 percent of the aggregate debt of the government. Id.

c. Congressional Prerogatives

Generally accepted governmental definitions do not constrain Congress in its designation of an account as a trust fund or special fund account.[263] Congress may and does approach the matter on a case-by-case basis. As a result, it is possible to find trust funds that share features of special funds and vice versa. For example, Congress designated the Environmental Protection Agency's Hazardous Substance Superfund as a trust fund, 26 U.S.C. § 9507, while it established the Department of Energy's similar Nuclear Waste Fund as a special fund on the books of the Treasury. Budget Issues: Trust Funds and Their Relationship to the Federal Budget, GAO/AFMD-88-55 (September 1988).

[263]"When I use a word . . . it means just what I choose it to mean—neither more nor less." Spoken by Humpty Dumpty in Lewis Carroll, Alice's Adventures in Wonderland and Through the Looking Glass 213 (Holt Rinehart, and Winston, 1961) (1871).

2. The Government as Trustee—Creation of a Trust

In governmental parlance, the term "trust funds" covers a lot of territory. Of course, it is applied in the classical sense to nongovernmental funds entrusted to the government. But it is also applied to certain governmental funds held by the government that have been designated as "trust funds" by statute. In addition, it is applied to funds that are donated to the government for specified purposes. Each of these uses of the term are discussed below.

a. Property of Others Controlled by the United States

At common law, a trust is "a fiduciary relationship with respect to property." Under it, the person holding title to the property has "equitable duties" to manage the property for the benefit of another person. This fiduciary relationship arises as a result of an expressed intention to create it. Restatement (Second) of Trusts, § 2 (1959). Clearly, the United States can act as a trustee. E.g., 1995 O.L.C. LEXIS 18 (May 22, 1995) ("[A]s sovereign, the United States has the capacity to act as a common law trustee.") (citing 2 Scott's Law of Trust and Trustees § 95 (4th ed. 1987)). Equally clear is that the terms on which the United States agrees to act as trustee vary widely. Thus, the initial questions are when does a "trust" arise and what are the conditions under which the government, as trustee, operates. The discussion that follows examines these issues.

Two Supreme Court decisions involving claimed breaches by the United States of trust obligations owed to Quinault Reservation Indian allottees address when an actionable trust may arise. In United States v. Mitchell, 445 U.S. 535 (1980), reh'g denied, 446 U.S. 992 (Mitchell I), Indian allottees sued the United States for damages for mismanagement of forest resources. The Indian allottees argued that the General Allotment Act imposed on the United States a fiduciary obligation to manage the forest resources for their benefit. The Indian allottees claimed that the breach of the fiduciary obligation created by the General Allotment Act entitled them to money damages for a breach of trust. The General Allotment Act required the United States to "hold the land . . . in trust for the sole use and benefit" of the allottees. Mitchell I at 541 (quoting the General Allotment Act, codified as amended, at 25 U.S.C. § 348). The Supreme Court rejected the Indian allottee's argument, reasoning that Congress used the trust language of the General Allotment Act for the limited purpose of preventing alienation of allotted lands and immunizing the lands from state taxation. The Act created only a "limited trust relationship" for those purposes, and did not "unambiguously provide that the United States has undertaken full

fiduciary responsibilities as to the management of allotted lands." Id. at 542. Absent such responsibilities, the United States was not answerable for damages. Id. "[A]ny right of the [allottees] to recover money damages for Government mismanagement of timber resources must be found in some source other than the [General Allotment Act]." Id. at 546.

Fortunately for the Indian allottees, another source of authority was available to support their claim, and Mitchell I was not the last word on the matter. In United States v. Mitchell, 463 U.S. 206 (1983) (Mitchell II), the Supreme Court found that a trust duty did arise under several other statutes and regulations which, unlike the General Allotment Act, did expressly authorize or direct the Secretary of Interior to manage forests on Indian lands. Id. at 224. The Court explained that:

> "a fiduciary relationship necessarily arises when the Government assumes such elaborate control over forests and property belonging to Indians. All of the necessary elements of a common-law trust are present: a trustee (the United States), a beneficiary (the Indian Allottees), and a trust corpus (Indian timber, lands, and funds)." Id. at 225.

Quoting from the Court of Claims decision in Navajo Tribe of Indians v. United States, 224 Ct. Cl. 171, 183 (1980), the Court emphasized that "where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists." Mitchell II, at 225. This remains true even if "nothing is said expressly in the authorizing or underlying statute . . . about a trust fund, or a trust or fiduciary connection." Id. Of course, where Congress has provided otherwise with respect to such moneys or property, those directions will control. Id. In other words, to recover for a breach of trust, the beneficiaries must be able to establish a trust responsibility that mandates monetary relief by statute, treaty, or the government's assumption of management and control over the funds or assets.

Consistent with Mitchell II, one court recently observed, "The federal government has substantial trust responsibilities toward Native Americans. This is undeniable." Cobell v. Norton, 240 F.3d 1081, 2001 WL 173299 at *1 (D.C. Cir. 2001). In recent years, Indian claimants have sought to compel the government to properly account for the funds it holds for them. For its part, the government has had to acknowledge that it doesn't know how many accounts it

is responsible for, is uncertain of the balances in them, and lacks the records necessary to determine that information. See, e.g., Financial Management: Status of BIA's Efforts to Reconcile Indian Trust Fund Accounts and Implement Management Improvements, GAO/T-AIMD-94-99 (1994); Financial Management: BIA's Management of the Indian Trust Funds, GAO/T-AIMD-93-4 (1993).

The claimants in Cobell v. Norton brought a class action for injunctive relief and damages. (The district court bifurcated the proceedings and placed the reconciliation of the accounts and the claims for damages on hold pending completion of the court's investigation into the claims of inadequate accounting.) Finding that the government had breached its fiduciary duties, the trial court remanded the matter to the government with orders to promptly discharge its fiduciary duties in accord with the court's delineation of them. The court also retained jurisdiction over the matter and directed the government to file quarterly reports. Cobell, 2001 WL 173299, at *1-*4. The government appealed. Citing Mitchell II, the Circuit Court of Appeals for the District of Columbia agreed that the government owes common law fiduciary obligations to the Indians. The court noted that those obligations have been reaffirmed in a number of statutory provisions which specify how those duties are to be carried out. Id. at *17-*19. Those obligations include, the circuit court held, a "duty to account" which can be compelled by the courts, if unreasonably delayed or withheld. Id. at *20-*23. The circuit court agreed it had been, and affirmed and remanded the matter to the district court. Id. at *29.

In Fors v. United States, 14 Cl. Ct. 709 (1988), the Claims Court rejected claimant's argument that the Marine Corps had a fiduciary duty to invest[264] the accumulated back pay of a deceased Marine Corps pilot either as a result of the Missing Persons Act or the common law. The court pointed out that essential to the holding in Mitchell II was the Supreme Court's finding that the statutes and regulations at issue established fiduciary obligations of the United

[264]For more on a trustee's "duty to invest," see chapter 17(d)(4), below.

States in the management of Indian resources.[265] For the period at issue in Fors v. United States, there was no statutory or regulatory basis to charge the government with the fiduciary duties of a common law trustee. Id. at 718-19. To the contrary, the applicable statutes and regulations limited the Marine Corps authority to pay interest to 90 days after a determination of death. Id.

The Department of Veterans Affairs "personal funds of patients" trust fund, discussed earlier in chapter 9, contains moneys of patients who, as a matter of convenience, deposit money with VA for safekeeping and use during their stay at VA hospitals. See 38 U.S.C. § 5504. The money is patient money, not government money, and the Comptroller General has treated such funds as held in trust by the United States. 68 Comp. Gen. 600 (1989).

The Attorney General has applied a Mitchell II analysis with respect to moneys contained in inmates' Prisoners' Trust Accounts. Op. Off. Legal Counsel, Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund, 1995 O.L.C. LEXIS 18 (May 22, 1995). In the 1930s, the Department of Justice established Prisoners' Trust Funds at each federal prison for inmates to deposit money earned or sent to them while in prison. Inmates could use amounts in their accounts to purchase articles from prison commissaries. In the Permanent Appropriation Repeal Act, 1934, ch. 756, 48 Stat. 1224, Congress classified the Prisoners' Trust Fund (and the related Commissary Fund discussed below) as a "trust fund" and provided a permanent appropriation to disburse money from the fund in compliance with the terms of the trust. See 31 U.S.C. §§ 1321(a)(21), 1321(b).

The Office of Legal Counsel (OLC) found the reasons to conclude that 31 U.S.C. § 1321 and the rules set forth in the Justice Department circular establishing the funds impose fiduciary obligations on the Bureau of Prisons with respect to amounts held in

[265]See also Hohri v. United States, 782 F.2d 227, 243 (D.C. Cir. 1986) (neither narrow regulatory obligations or alleged contractual commitments impose fiduciary obligations on United States with respect to Japanese-American internees during World War II), vacated and remanded on jurisdictional grounds, United States v. Hohri, 482 U.S. 64 (1987); Han v. United States, 45 F.3d 333 (9th Cir. 1995) (United States has no general fiduciary obligation to bring suit against the State of Hawaii for alleged breach of trust obligations owed by the state to native Hawaiians).

The Prisoners Trust Funds. First, the money in the Prisoners' Trust Fund account is the inmate's property even though the Bureau of Prisons has assumed control over the property. Second, the circular establishing the funds requires the Bureau of the Prisons to act in the best interest of the prisoners in managing their funds, and third, the Bureau has always viewed their relationship to the Prisoners' Trust Funds as a fiduciary one.[266]

The Thrift Savings Fund established by the Federal Employees' Retirement System Act of 1986, 5 U.S.C. §§ 8401-8479, is also a trust in the classic sense of the term. The act provides federal employees a capital accumulation plan similar to those found in the private sector. Employees and the employing agencies contribute to the Thrift Savings Fund. Earnings on investments augment amounts contributed to the fund. 5 U.S.C. §§ 8432(a), (c), and 8437(b). All sums contributed to the Thrift Savings Fund by or on behalf of an employee as well as earnings on those contributions are held in trust for the employee. 5 U.S.C. § 8437(g). The Thrift Savings Fund is managed in accordance with the investment policies established by the Federal Retirement Thrift Investment Board. 5 U.S.C. § 8472. The members of the Board are specifically designated fiduciaries. 5 U.S.C. §§ 8477(a), (b). Any fiduciary who breaches the responsibilities, duties and obligations set out in the authorizing statute is personally liable to the Thrift Savings Fund for any losses

[266]There can be no doubt that the government has fiduciary obligations with respect to the Prisoners Trust Fund and VA Patient Funds mention above. Yet, we wonder: Do those funds really constitute "trust" or "bailments"? Cf. B-153479, April 15, 1964 (re: Prisoners Trust Fund). As OLC observed, fiduciary relations can arise in many different contexts. This is important because, as OLC also observed, quoting Restatement (Second) of Trusts § 2, comment b, at 7 (1959), "[t]he duties of a trustee are more intensive than the duties of some other fiduciaries." For one thing, no one has held—so far—that the government has a duty to invest those funds and make them productive. See chapter 17(D)(4), supra. Cf. note 6 and related text, supra.

and profits realized as a result of a breach of trust. 5 U.S.C. § 8477(e).[267]

Claimants have sought to use trust concepts to recoup funds in the Treasury. In Stitzel-Weller Distillery v. Wickard, 118 F.2d 19 (D.C. Cir. 1941), distillers sought to recover contributions paid into the Treasury pursuant to marketing agreements authorized by the Agricultural Adjustment Act. Previously, in United States v. Butler, 297 U.S. 1 (1936), the Supreme Court had declared related provisions of the act unconstitutional. Then, given the constitutional defects of the authorizing legislation, the Comptroller General concluded that the moneys could no longer be applied to the agreed upon purposes and had to be deposited into the general fund of the Treasury. 15 Comp. Gen. 681 (1936). In response, the distillers claimed that their contributions were impressed with a trust by virtue of section 20 of the Permanent Appropriation Repeal Act, 1934. That act recognized the existence of trust funds "analogous" to those specified in it and provided a permanent appropriation for payment of amounts held in such trust accounts. 31 U.S.C. § 1321(b). The claimants also argued that the contributions should be returned to them based on the general equitable doctrine that upon the failure of a trust, the trustee must return the trust corpus to the creator of the trust, in this case, the contributors. The court in Stitzel-Weller rejected the notion that the marketing agreement either explicitly or by analogy to other funds classified as trusts by the Permanent Appropriation Repeal Act, 1934, created a trust for the benefit of the contributors. Since there was no trust, there was no appropriation nor other authority to return the funds from the Treasury to the contributing distilleries. 118 F.2d at 21 (citing 15 Comp. Gen. 681).

Similarly, in United States v. $57,480.05 United States Currency and Other Coins, 722 F.2d 1457 (9th Cir. 1984), a claimant sought recovery of $57,480.05 forfeited and paid into the Treasury. In

[267]Given the nature of these accounts, GAO recommended removal of the fund from the federal budget. B-227344, May 29, 1987. And, it was done! See Budget of the United States Government, Fiscal Year 2001: Analytical Perspectives, at 377. Beginning in fiscal year 2000, the federal budget also excludes funds owned by Indian tribes, but held in trust by the government. As the notes to the federal budget explains, "the transactions of these funds are not transactions of the Government itself." Id. The Budget notes refer to these (and the Thrift Savings Fund moneys) as "deposit Funds." Id.

dismissing the case for lack of jurisdiction over the res, the court pointed out that a judgment for the claimant "would require an impermissible payment of public funds not appropriated by Congress." Id. at 1459. The court rejected the claimant's suggested solution of "[e]nforcing a constructive trust on the Government," noting that such a trust "would violate sovereign immunity in the absence of statutes or regulations clearly establishing fiduciary obligations." Id.

The two proceeding cases involved unsuccessful attempts to recover funds in the Treasury by impressing them with an implicit common law trust. However, other cases have held the government liable for funds received in trust for others. For example, as discussed in chapters 6(E)(2)(h) and 9(B)(3)(d) above, the Government receives moneys to reimburse injured or overcharged consumers or residents that the government holds in trust to disburse to the injured parties. Emery, et al. v. United States, 186 F.2d 900 (9th Cir. 1951); 60 Comp. Gen. 15 (1980). Since these moneys are not received for the use of the United States, they are not for deposit in the Treasury of the United States, nor is an appropriation needed for the Treasurer to disburse such funds. Cf. Varney v. United States, 147 F.2d 238 (6th Cir. 1945), cert. denied, 325 U.S. 882 (1945), reh'g denied, 326 U.S. 805 (1945) (moneys received by War Food Administrator were "trust funds" retained and disbursed by market agents appointed by Administrator without deposit into the Treasury of the United States).

Simply because a government official has custody of non-government funds does not mean that they are held in a trust capacity. In B-164419-O.M., May 20, 1969, GAO distinguished between funds of a foreign government held by the United States incident to a co-operative agreement (trust funds), and funds of a private contractor held by a government official for safekeeping as a favor to the contractor. The latter situation was a mere bailment for the benefit of the contractor. Although the United States may have an obligation to exercise ordinary care with respect to bailed funds

in its custody,[268] 55 Comp. Gen. 356 (1975); 23 Comp. Gen. 907 (1944), the government official with custody of the funds is not an accountable officer with respect to those funds. See also White House: Travel Office Operations GAO/GGD-94-132, App. I: 1.5 (May 1994) (government would be "morally or legally" liable for loss of funds collected by White House staff from press corps members to pay for press corps members' travel expenses as they accompany the President on trips; therefore, those funds shall be deposited in a Treasury account for safekeeping).

b. Trust Funds Designated by Statute

Earmarking alone does not create a trust fund since earmarked receipts can finance other types of accounts such as special funds. For example, Congress created the Vaccine Injury Compensation Trust Fund to compensate victims of vaccine-related injury or death. 26 U.S.C. § 9510. The Fund is financed by a tax on certain vaccines. Id. On the other hand, the North Pacific Fishery Observer Fund covers the cost of observers stationed on fishing vessels to collect information for fish management and conservation. Congress finances the program by assessing fees on fishing vessels and fish processors. 16 U.S.C. § 1862(d). Since Congress did not by statute designate the Observer Fund as a "trust fund," Treasury classified it as a special fund.

The fact that money is held in a "trust account" does not necessarily create fiduciary obligations where they do not otherwise exist. See B-274855, January 23, 1997. Most federal trust funds are trust funds simply because Congress says so, or, euphemistically, because the

[268]A bailment is a "species" of trust. 8 C.J.S. Bailments 2 (1988). A bailment arises when the owner delivers personal property to another for some particular purpose upon an express or implied contract to redeliver the property when the purpose of the bailment has been fulfilled. 53 Comp. Gen. 607, 609 (1974). Unlike a trust where title to the trust corpus passes to the trustee, in a bailment, title to the bailed property does not transfer. 8 C.J.S. Bailments § 13 (1988). The level of care required of a bailee depends on whether the bailment is for the benefit of the bailee, the bailor, or for their mutual benefit. 8 C.J.S. Bailments § 48 (1988). As "one who holds a thing in trust for another," 36A C.J.S. Fiduciary (1961), a bailee qualifies generally as a "fiduciary." Though not treated as fiduciaries for all purposes, bailees have long been included within "the more general class of fiduciaries." E.g., In re Holman, 42 B.R. 848, 851 (1984). See also United States v. Kehoe, 365 F. Supp. 920, 922 (S.D. Tex. 1973) ("It was this failure of the common law to provide any remedy for these breaches of trust . . . on the part of . . . bailees, trustees, and other persons occupying fiduciary positions that led to the enactment of the present Penal Code provision dealing with embezzlement."), quoting 21 Tex. Jur.2d Embezzlement and Conversion § 2 at 579-80 (1961) (emphasis added).

law designates them as such. Typically, the enabling legislation will earmark receipts or other money generated by a program for deposit in a fund designated by the program legislation as a "trust fund." See the Trust Fund Code of 1981, 26 U.S.C. Subtitle I, for a listing of trust funds. These trust funds serve as accounting devices to distinguish the funds earmarked for deposit to the trust funds from general funds. The scope of the trustee's duties with respect to a trust fund will necessarily depend on the substantive law creating those duties. See, e.g., United States v. Mitchell, 463 U.S. 206, 224 (1983) (statutes and regulations "establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.")

The fact that Congress has designated a fund which finances a social service, public works, or revenue sharing program as a "trust fund" does not mean that the administering agency has a full range of fiduciary obligations. A leading case on this matter (not involving Indian lands or property) is National Ass'n of Counties v. Baker, 842 F.2d 369 (D.C. Cir. 1988), rev'g National Ass'n of Counties v. Baker, 669 F. Supp. 518 (D.D.C. 1987), cert. denied National Ass'n of Counties v. Brady, 488 U.S. 1005 (1989). In that case a number of local governments sued the Secretary of the Treasury seeking an order requiring the Treasury to release $180 million of Revenue Sharing Trust Fund moneys sequestered pursuant to the Gramm–Rudman–Hollings Act, Pub. L. No. 99-177, 99 Stat. 1038 (1985). The district court issued an order requiring the Secretary to disburse the funds, and the Secretary appealed.

The Secretary argued that the district court lacked subject matter jurisdiction because the local governments were in effect asserting a money damage claim that only may be brought in the Claims Court. 842 F.2d at 372. To sustain this argument the Secretary had to establish that substantive law mandated compensation for damages. The Secretary argued that because the Revenue Sharing Act created a trust fund with the Secretary as trustee, the statute was similar to the statutes found by the Supreme Court in Mitchell II to create a fiduciary duty in the United States, the breach of which mandated compensation.

The court of appeals rejected the Secretary's reliance on Mitchell II. The court concluded instead that the Revenue Sharing Act created only a limited trust relationship similar to the General Allotment Act trust in Mitchell I. Id. at 375. Congress created the Revenue Sharing

Trust Fund for budgetary reasons, not to subject the Secretary to actions for mismanagement of the trust. Id. at 376. "Indeed, there is no indication in the Revenue Sharing Act or its legislative history that the Secretary owes any common law fiduciary obligations to Trust Fund recipients." Id. The Court rejected an implied right of action in favor of trust recipients based on a generalized common law trust theory because the substantive statute at issue did not make the United States expressly liable for mismanagement of the trust.

Applying the analysis used in Mitchell I and II and in National Ass'n of Counties v. Baker, the Office of Legal Counsel (OLC) has construed the Bureau of Prison's obligations for the Commissary trust fund, classified as a trust fund under 31 U.S.C. § 1321, to not include common law fiduciary duties. Op. Off. Legal Counsel, Fiduciary Obligations Regarding Bureau of Prisons Commissary Fund, May 22, 1995. OLC discerned no indication in the legislative history of the Permanent Appropriation Repeal Act, 1934, the source statute for 31 U.S.C. § 1321, that Congress intended to subject the United States to suit for breach of fiduciary obligations in the management of the Commissary fund. Unlike the Prisoners' Trust Fund accounts discussed earlier in this part, the moneys in the Commissary fund were not the personal funds of the inmates, but resulted from a continuous cycle of business operations. The Bureau of Prisons retained the authority to decide whether and how much of any profits were to be disbursed through the welfare fund for the benefit of the inmate population. See Washington v. Reno, 35 F.3d 1093 (6th Cir. 1994) (district court did not abuse discretion in preliminarily enjoining Bureau of Prisons from alleged misappropriation of Commissary funds for purchase of telephone system to support prison security).

c. Donated Funds

As noted earlier in this publication, a number of departments and agencies have specific statutory authority to accept gifts. (See section E, 3(a) in chapter 6). The level of detail addressed by these statutory authorities varies. Compare, e.g., 22 U.S.C. § 2697 (acceptance of unconditional and conditional gifts by the Secretary of State) with 31 U.S.C. § 3113 (acceptance of gifts to reduce the public debt). Section 19 of the Permanent Appropriation Repeal Act, 1934, 31 U.S.C. § 1323(c), provides general guidance concerning accounting for gifts and donations. Pursuant to this statute, donations or gifts are treated as trust funds and must be deposited in

the Treasury as such. Like the statutory trust funds catalogued at 31 U.S.C. § 1321(a) and the analogous trust funds established pursuant to 31 U.S.C. § 1321(b), Congress has provided a permanent appropriation for donated funds. 31 U.S.C. § 1323(c) ("Donations . . . shall be deposited in the Treasury as trust funds and are appropriated for disbursement under the terms of the trusts").

Before a government officer may accept a donation that would require the management of a trust, the officer must have the authority to bind the government to act as a trustee, with the attendant responsibilities and cost.[269] This was the issue in 11 Comp. Gen. 355 (1932). The Secretary of the Navy asked whether he was authorized to accept a bequest to the United States Naval Hospital in Brooklyn, New York, to be invested in a memorial fund. The proceeds of the trust were to be used for the maintenance and comfort of sailors in that hospital. The Comptroller General concluded that the President's gift acceptance authority was limited to hospitals for merchant seamen, not naval hospitals. Observing that if the testamentary gift was accepted, the United States would "become, in effect, a trustee for charitable uses," the Comptroller General ruled "that such an obligation could not legally be assumed by an officer of the United States without express statutory authority therefor." Id. at 356. To drive home the point, the Comptroller General further noted that without such authority, there would be no basis to use any appropriations to cover the necessary expenses of administering such a trust fund. Id.

A similar issue was touched on in 27 Comp. Gen. 641 (1948). In that decision, the issue was whether the Department of State creation of a trust fund for the education of Persian students in the United States as part of a settlement of claims of the United States against the Persian government. The answer to that question seems to have been that the President acting through the State Department had the authority to agree to the creation of trust. However, the decision ultimately turned not on the scope of the President's authority, but on "precisely what the terms of the agreement were." Id. at 645. The Comptroller General concluded that the agreement reached did not

[269]Cf. 4 First Comp. Dec. 457, 458 (1883) ("The Government cannot, without its authorized express consent, be forced to occupy the position of a trustee."), citing United States V. Morris, 23 U.S. (10 Wheat.) 246, 303 (1825).

include the use of the funds for the benefit of the Persian students. Accordingly, the Secretary could not later, without additional consideration, modify the agreement to create a trust obligation on the part of the United States. Id. at 646.

3. Application of Fiscal Laws

a. Permanent Appropriation Repeal Act, 1934

Prior to 1934, government officials held a number of trust fund accounts outside the Treasury. The Comptroller General had directed the deposit of the funds to the accounts of Treasury officials in order to ensure that a proper accounting and audit was made of all disbursements. The Comptroller General permitted the withdrawal of trust funds, after deposit in the Treasury, without an express appropriation from the Congress. The Congress objected to the Comptroller General's approval of withdrawals of trust fund moneys without an appropriation as a violation of the constitutional prohibition that "no moneys shall be drawn from the Treasury but in consequence of an appropriation made by law." H.R. Rep. No. 73-1414 at 12 (1934). Ironically the solution, was to provide a permanent appropriation for trust funds as part of legislation designed to repeal permanent appropriations in general. Id. Accordingly, in section 20 of the Permanent Appropriation Repeal Act, 1934, ch. 756, 48 Stat. 1233 (codified at 31 U.S.C. § 1321(a)), Congress listed all funds of a trust nature that Congress wanted to maintain on the books of the government and provided a permanent appropriation for these funds. See also S. Rep. No. 73-1195, at 1-3 (1934); H.R. Rep. No. 73-2039, at 6 (1934) (conference report). See B-226801, May 4, 1988 for a comprehensive discussion of the Permanent Appropriation Repeal Act.

Section 20 of this act also provides prospective guidance. Any amounts received by the United States as trustee which are analogous to the funds listed in subsection (a) are for deposit in a trust account of the Treasury. Amounts "accruing to these funds" are permanently appropriated for expenditure in accordance with the terms of the trust. 31 U.S.C. § 1321(b). See also 31 U.S.C. § 1323(c).

b. Available Uses of Trust Funds

(1) Donated funds

Funds held in trust are available only for trust purposes. Where an agency is authorized to accept a donation of funds for specified purposes, the funds may only be used for purposes necessary to carry out the trust. 17 Comp. Gen. 732 (1938). For the accepting agency to do otherwise would be a clear breach of the terms of the agreement governing the gift. 47 Comp. Gen. 314 (1967). (Of course, an agency's authority to agree to any particular use of donated funds is limited by the terms of its statutory authority to accept donations. 11 Comp. Gen. 355 (1932).)

Appropriated funds are subject to many use restrictions. (See chapter 6 below.) Depending on the terms of the donation, some of those restrictions may not apply to donations accepted by authorized officers of the United States. In several cases GAO has held that:

> "where the Congress authorizes federal officers to accept private gifts or bequests for a specific purpose, authority must of necessity be reposed in the custodians of the trust fund to make expenditures for administration in such a manner as to carry out the purposes of the trust . . . without reference to general regulatory and prohibitory statutes applicable to public funds." 16 Comp. Gen. 650, 655 (1937).

See also 36 Comp. Gen. 771 (1957); 46 Comp. Gen. 379 (1966) (although funds appropriated directly to the National Science Foundation were not available for conference expenses, donated funds were); B-131278, September 9, 1957; B-135255, March 21, 1958; B-170938, October 30, 1972. While all the restrictions on the use of appropriated funds may not apply, donated funds are available only for use in furtherance of authorized agency purposes consistent with the terms of the trust. B-195492, March 18, 1980.

In 23 Comp. Gen. 726 (1944), the Comptroller General was asked what the National Park Trust Fund Board could do with the principal of gifts received in trust for the benefit of the National Park Service where the donor had not prescribed a particular purpose for the gift. The Board's statutory authority, the Act of July 10, 1935, sec. 2, 49 Stat. 477, was silent on this point. The act did direct the Secretary of Treasury to invest donations for the account of the Board consistent with the laws applicable to a trust company in the District of Columbia and to credit the income from such investments to the National Park Trust Fund. Since the Board's statute did not

authorize use of the principal of a gift, the Board could not invade the principal. However, to give "some effect to the action of the respective donors" in making a gift, the Board could use investment income for the presumed purpose of the gift—the general benefit of the National Park Service, its activities or its services.

Another decision, B-274855, January 23, 1997, discussed the range of permissible uses of donated funds available to the now defunct United States Advisory Commission on Intergovernmental Relations (ACIR). Congress created the ACIR to give continuing attention to intergovernmental problems. To finance its activities, Congress authorized ACIR to solicit and receive contributions from, among others, state governments. In 1995, Congress terminated ACIR effective September 30, 1996. Two months prior to termination, Congress directed the National Gambling Impact Study Commission to contract with ACIR for research and authorized ACIR to continue in existence solely to perform the contract.

The question was whether prior unconditional state contributions were available to cover ACIR's salaries and expenses until the National Gambling Commission awarded ACIR a contract. The states contributed funds to support ACIR's authorized activities. The Comptroller General viewed the funds as unrestricted gifts. As unrestricted gifts, they were available for ACIR activities authorized by Congress at the time of obligation and expenditure regardless of the activities contemplated by ACIR and the states at the time the gifts were made. The Comptroller General further concluded that after ACIR completed its authorized study, any unused contributions were for deposit in the Treasury as miscellaneous receipts. Cf. 15 Comp. Gen. 681 (1936) (moneys received that could no longer be applied to agreed upon purposes due to constitutional defects of authorizing legislation are for deposit as miscellaneous receipts.

Like direct appropriations, moneys donated in trust are available for expenses reasonably related to the purpose of the trust. That is the message of 23 Comp. Gen. 726 (1944) and B-274855, January 23, 1997. In 55 Comp. Gen. 1059 (1976), we held that the Forest Service could not transfer funds donated to establish and operate a research facility to a private foundation to invest and use for a purpose other than establishing and operating a research facility.

We also have considered whether a trust fund could be used for expenses that the Comptroller General has traditionally viewed as personal. In 47 Comp. Gen. 314 (1967), we concluded that the purchase of seasonal greeting cards remained unallowable regardless of the fact that the Interior Department would pay for the cards from a trust fund for donations to the National Park Service. Trust funds are no more available for personal expenditures than appropriated funds.

While the rule seems simple enough, complexity appears in its application. In B-195492, March 18, 1980, Senator Proxmire questioned Interior's use of amounts held in its Cooperating Association Fund, established by 16 U.S.C. § 6 (1994), for contest entry fees, receptions for VIP guests, gifts and refreshments. While we reiterated that trust funds are not available for personal expenses, we noted that the strictures on the use of trust funds do not mirror those applicable to the use of appropriated funds. With respect to the "'entertainment,' 'gifts,' and other so called 'personal' items," we pointed out that the restrictions on the use of general agency appropriations for these purposes derived not from the idea that these could never be "official" expenses but that "such purposes are so subject to abuse as to require specific Congressional authorization before general agency appropriations may be so used." Since those expenses are not prohibited, where agencies can justify the use of trust funds as incident to the terms of the trust for what would otherwise be viewed as an improper personal use of general agency appropriations, we would not object. On the other hand, we noted that the availability of donated funds for travel and subsistence expenses is subject to the same rules as govern the use of appropriated funds because of statutory language that precluded the use of "funds appropriated for any purpose" for travel expenses of the kind at issue there.

(2) Property of others

General use restrictions have less applicability to the property of others being held in trust. In B-33020, April 1, 1943, we did not object to use of Osage Indian Trust Funds to cover the cost of telegrams sent to members of Congress concerning pending legislation affecting the Tribe that would have been prohibited by legislation concerning the use of appropriated funds to influence Congress. We did not object to these expenditures since Congress had

appropriated the funds to be used for the benefit of Tribe and authorized the tribe to organize for its common welfare and to negotiate with federal, state, and local governments.

A slightly different twist on these concepts occurred in 20 Comp. Gen. 581 (1941). In that decision, the Library of Congress Trust Board held, as trustee, legal title to some improved real estate that the Federal Works Administrator wanted to lease. Standing in the way of the transaction was the longstanding rule of the accounting officers of the government that, absent statutory authority, the payment of rent by one agency to another for premises under the control of another is unauthorized. Since the United States did not in its own right hold legal title to, or have the beneficial right to the use of, the property, there was no objection to the payment of rent to the Library of Congress Trust Board in its capacity as trustee.

Similarly, the authority of the Pension Benefit Guaranty Corporation (PBGC), when acting as a trustee for terminated pension plans, is not constrained by laws applicable to contracting by federal agencies or the expenditure of public funds. B-223146, October 7, 1986. One issue addressed by the decision was PBGC's authority to modify to a contingent fee arrangement the fee provision of an existing contract with outside litigation counsel. Since PBGC was authorized by law to serve as a trustee for terminated pension plans, possessing all the rights and duties to act as a private trustee similarly situated, we could find no legal or public policy considerations which precluded PBGC's modifications of its contracts with outside counsel. Also, since any recoveries resulting from the litigation accrued to the terminated pension plan, the use by PBGC (in its capacity as trustee) of a portion of the recoveries to pay its contingent fee obligation would not violate the deposit requirements of the miscellaneous receipts statute.

(3) Statutory trust funds

Like donated funds held in trust, where Congress designates a trust account to receive dedicated tax receipts, the corpus of the trust is only available for trust purposes. The rationale for this axiom differs from cases where the government holds donated-funds accepted in trust. As noted earlier, in the latter case, the limitation on the use of funds derives in the first instance from the agreement with the donor. While an agency's statutory authority to accept a gift is

relevant in prescribing the range of uses to which an agency may agree, it is the donor's action in making a restricted gift, i.e., one for designated purposes, that controls the particular use.[270]

Where the corpus of the trust account consists of dedicated tax receipts, the rationale for the rule is a function of Congress' constitutional prerogative to allocate resources for the general welfare. In other words, the limitation on the use of the funds for other than trust purposes derives from the terms of the statute creating the trust account and the Purpose Statute, 31 U.S.C. § 1301(a), limiting the use of appropriated funds only to purposes for which appropriated. One consequence of this distinction concerning the source of the limitation on use manifests itself when Congress decides to modify the authorized uses of the trust funds. In the case of trust funds designed to serve as accounting mechanisms for dedicated tax receipts, Congress as the creator of the "trust" can change or modify the permissible uses of the trust funds. Cf. 36 Comp. Gen. 712 (1957). For examples of Congress changing the uses of a statutory trust fund filled with tax revenues, see the legislative history recounted in B-289779, February 12, 1999.

As the prior discussion suggests, when resolving issues involving the application of statutory restrictions to this type of trust fund the Comptroller General will treat them more like a direct appropriation. In B-191761, September 22, 1978, an agency of the Department of Agriculture wanted to dip into a user fee trust fund to provide a uniform allowance to its employees. Section 5901, title 5, United States Code, requires that before an agency may use appropriated funds for uniforms, it must have specific statutory authority to do so. We resolved the issue on the basis of authority in Agriculture's appropriation act, which provided that "funds available to the Department" may be used for employee uniforms. Arguably, if donated trust funds were involved, the Department would have had

[270]An argument has been made that funds held in trust and expended pursuant to the permanent appropriation of moneys "accruing to these trust funds" contained in the Permanent Appropriation Repeal Act, 1934, 31 U.S.C. § 1321(b), are appropriated funds subject to the laws governing the obligation and expenditure of any other appropriated funds. See Soboleski v. Commissioner, 88 T.C. 1024, 1034 (1987), aff'd, 842 F.2d 1292 (4th Cir. 1988). This argument may go too far given the language of 31 U.S.C. § 1323 providing that "[d]onations . . . shall be deposited in the Treasury as trust funds and are appropriated for disbursement under the terms of the trusts . . . ."

a greater ability to use the funds for trust purposes unfettered by general regulatory statutes applicable to appropriated funds.

The essential point is that, if viewed like any other appropriation, amounts in a trust fund account may only be used for the purposes for which they were appropriated. As suggested above, depending on the source of funds, this may translate to mean no more than the authorized purposes of the trust.

c. Intergovernmental Claims

Another consequence of the distinction is seen in decisions involving intergovernmental claims. As a general proposition, a federal agency or establishment that damages public property, real or personal, under the control of another federal agency or establishment may not pay a claim for that damage. Put another way, federal agencies may not assert damage claims against one another. E.g., 60 Comp. Gen. 710, 714 (1981). (See earlier discussion in Chapter 12, Section D, Interagency Claims.)

Claims involving property or funds held by the government in a trust capacity are an exception to this rule. In 41 Comp. Gen. 235 (1961), GAO found that the Bureau of Indian Affairs (BIA) could present a claim against the Air Force for damage to the San Carlos Irrigation Project caused by the crash of a Civil Air Patrol plane. Although the San Carlos Irrigation Project was an instrumentality of the United States, the project benefited the Pima Indians and was funded from moneys held in trust by the government for the Pima. The question was whether the BIA claim against the Air Force for damage to the project would constitute a claim by one government agency against another. The decision held that it would not. As BIA was acting in a trust capacity on behalf of the Pima, if the general rule were applied, the expense of repairing the damage would be borne not by the government but by the Pima. Thus, the claim was not that of one agency against another.

Applying similar reasoning, the Comptroller General found Navy appropriations available to pay a claim for damage to property of the Ryukyu Electric Power Corporation. B-159559, August 12, 1968. The corporation, while an instrumentality of the United States Civil Administration of the Ryukyu Islands, was not an instrumentality of the United States government. Further, while funds available to the Civil Administration were government funds, they were in the nature of a trust account held for the sole benefit of the Ryukyu

people. Another case applying the trust reasoning is B-35478, July 24, 1943 (since timberland was held in trust for counties, Bonneville Power Administration should pay for timber destroyed).

The "trust exception" of cases like 41 Comp. Gen. 235 and B-159559 has its limits and does not apply where the trust fund is more in the nature of an accounting or bookkeeping device. An illustrative case is 65 Comp. Gen. 464 (1986). A Navy plane had crashed into and destroyed a Federal Aviation Administration instrument landing system. Although the FAA used funds from the Airport and Airway Trust Fund to repair its facility, the Comptroller General viewed this "trust fund" as little more than an earmarked appropriation, not involving the same kind of trust relationship as in the San Carlos and Ryukyu cases. Accordingly, the general rule controlled, and Navy appropriations were not available to reimburse the FAA.

4. Concepts of Amount and Time

Concepts of amount and time which are so important to general appropriations law (see chapters 5 and 6 of this publication) also come into play with trust funds. With respect to "amount," this would include concerns that trust funds are being used to augment regular appropriations. In B-107662, April 23, 1952, GAO reviewed a Commerce Department procedure for charging trust funds with the cost of employees assigned full time to activities funded by regular appropriations, but assigned intermittently for short periods to activities financed by trust funds. GAO had no objection to the Commerce procedure, but cautioned that the proper records needed to be kept to ensure that trust funds did not augment general fund appropriations. See also B-138841, September 18, 1959 (payment of regular weather bureau employees from Department of Commerce trust fund for intermittent services performed on trust fund projects).

As with other types of accounts, errors can and do occur that affect the amount properly credited to trust fund balances. When they do, the obvious solution is to correct them. GAO generally recognizes that an act of Congress is not necessary to correct clerical or administrative errors when dealing with the non-trust fund accounts of the government. 41 Comp. Gen. 16, 19 (1961). Where the evidence of an error is unreliable or inconclusive, the Comptroller General has objected to administrative adjustment of account balances. B-236940, October 17, 1989. This is particularly true where (as in the

immediately preceding decision) the adjustment would result in additional budget authority being available to an agency.

In B-275490, December 5, 1996, we concluded that Treasury could credit to the Highway Trust Fund $1.59 billion mistakenly not credited to that account. Each month, Treasury transferred from the general fund of the Treasury amounts appropriated to the Trust Fund based on Treasury estimates of the specified excise taxes for the month. The Treasury then adjusted the amounts originally credited to the fund to the extent the estimates differed from actual receipts. Due to a change in reporting format and a resulting transcription error, Treasury substantially understated the adjustments to the income credited to the trust fund. The Department of Transportation and Treasury discovered the error when the year end statement was prepared. GAO agreed with Treasury that, as trustee of the Fund, Treasury should adjust the fiscal year 1994 and 1995 Trust Fund income statements to credit the Fund with the excise taxes originally not included in the Highway Trust Fund income statements' just as if Treasury had credited such amounts upon receipt of the reports from the IRS. The Comptroller General made the following observation:

> "Apart from whatever responsibilities the Secretary may have to accurately state the accounts of the United States, the Secretary in his capacity as trustee of the [Highway Trust] Fund has the duty to accurately account for the amounts in the Fund consistent with the terms of the appropriation made thereto and the applicable administrative procedures adopted to effectuate his statutory responsibilities." Id.

See also 67 Comp. Gen. 342 (1988) (Bureau of Indian Affairs has duty to make prompt corrective payments to trust account beneficiary before collecting from an erroneous payee. To avoid overdraft of an Individual Trust Account, BIA could use funds from its Operation of Indian Programs appropriations to correct the erroneous payment from the Individual Trust Account;) 65 Comp. Gen. 533 (1986) (Funds returned to Individual Indian Money Account, which were earlier improperly recovered, should be repaid from appropriations currently available for the activity involved.); 41 Comp. Gen. 16 (1961) (Incorrect allocation of federal highway funds to states was an act in excess of statutory authority and consequently must be corrected through appropriate adjustments). In addition see earlier discussion of restoration in Chapter 9, section H.2., Restoration.

The Comptroller General has recognized that the Miscellaneous Receipts statute does not apply to trust funds. 60 Comp. Gen. 15, 26 (1980); 27 Comp. Gen. 641 (1948). See discussion in Chapter 6 at section E.2h. The Miscellaneous Receipts statute directs that all moneys received for the use of the United States must be deposited in the general fund of the Treasury. 31 U.S.C. § 3302(b). The very terms of the statute call into question its application to moneys the government receives in trust. As a practical matter, in most instances, it is clear when the United States has received funds for its use. Occasionally a question does arise whether the funds are for credit to the general fund of the Treasury as a miscellaneous receipt or to a trust account. In 25 Comp. Gen. 637 (1946), we concluded that payments made in conjunction with making movies in national parks were payments made in consideration of the privilege to film in the park and, hence, were properly accounted for as miscellaneous receipts, not donations to the National Park Trust Fund. On the other hand, in B-195492, March 18, 1980, we found no elements of an exchange and accordingly held that payments by nonprofit associations operating in national parks of one-half of one percent of their gross sales were properly treated as contributions to the Cooperating Associations Trust Fund, not as miscellaneous receipts.

In 60 Comp. Gen. 15 (1980) the Comptroller General expanded on the concept of "received in trust." The Department of Energy had received $25 million under the terms of a consent order settling disputes between Energy and the Getty Oil Company concerning compliance with oil price and allocation regulations. The order provided that Getty would deposit $25 million into a bank escrow account. The order did not specify how the money was to be distributed. Energy announced that the money would be distributed to state governments in proportion to the oil company's sales in that state and directed that the states use the money to defray the heating oil costs of low-income persons. GAO found that, to the extent the money would be returned as restitution to victims of Getty's alleged violation of oil and price allocation regulations, Energy was acting as a trustee and the funds need not be deposited to the Treasury as miscellaneous receipts. However, to the extent that Energy sought to distribute funds to a class of individuals other than to those overcharged, those funds were not held in trust and must be deposited in the Treasury as miscellaneous receipts. (This opinion was the first of several to address this matter. See 62 Comp.

Gen. 379 (1983); B-200170, April 1, 1981; 63 Comp. Gen. 189 (1984); B-210176, October 4, 1984.)

For other cases treating amounts received as trust funds exempt from the Miscellaneous Receipts statute, see 51 Comp. Gen. 506 (1972) (National Zoo receipts are for deposit to the credit of the Smithsonian Institution, not as miscellaneous receipts, even though activities in question were supported mostly by appropriated funds because the Zoo operates under a trust charter); B-192035, August 25, 1978 (income derived from local currency trust fund operations not for deposit as miscellaneous receipts since Agency for International Development is merely a trustee of host country funds); B-166059, July 10, 1969 (recovery for damage to property purchased with trust funds credited to trust fund account); B-4906, October 11, 1951 (recoveries for lost or damaged property financed from Federal Old-Age and Survivors Insurance Trust Fund are creditable to the trust fund).

One decision applying "time" concepts to a statutory trust fund reached a predictable result. In B-171277, April 2, 1971, amounts in the trust fund, which consisted of fees received from commercial testing labs for testing agricultural products, were available until expended. The "available until expended" language made the trust fund a no-year appropriation and thus available for multi-year contracts. So long as the fund contained amounts sufficient to cover all obligations under the contract, there would be no Antideficiency Act concerns. See Chapter 5 for a general discussion of no-year funds and multi-year contracts.

5. Duty to Invest

Under the common law, it is the trustee's duty to make the trust corpus productive. Restatement (Third) of Trusts, § 181 (1990). Obviously the issue is of more than passing importance to the trust beneficiaries. For amounts held in trust by the United States, the trustee's duty to make the trust corpus productive, and the trustee's corresponding liability to the beneficiary for failure to do so, are limited by the concept of sovereign immunity. As a general rule, the United States is not liable for interest unless it has consented to the payment of interest. Library of Congress v. Shaw, 478 U.S. 310, 314-17 (1986); United States v. Alcea Band of Tillamooks, 341 U.S. 48, 49 (1951). The Supreme Court has insisted that any such consent be express and clear:

"[T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute . . . to permit recovery of interest suffice where the intent is not translated into affirmative statutory . . . terms." United States v. N.Y. Rayon Importing Co., 329 U.S. 654, 659 (1947).

See also B-272979, August 23, 1996, 65 Comp. Gen. 533,539-40 (1986) (no difference whether interest is characterized as "damages, loss, earned increment, just compensation, discount, offset, penalty or any other term"); and B-241592.3, December 13, 1991 (no authority to pay interest on funds held by Customs on behalf of the Virgin Islands, absent an agreement or statute).

Various arguments have been made that 31 U.S.C. § 9702 provides the requisite authority to pay interest on trust funds. Section 9702 provides that "Except as required by a treaty of the United States, amounts held in trust by the United States Government (including annual interest earned on the amounts)—(1) shall be invested in Government obligations; and (2) shall earn interest at an annual rate of at least 5 percent." This statute was intended to end the practice of investing United States trust funds in state obligations. Despite its seemingly straightforward language, this statute applies only where a statute, treaty, or contract requires trust funds to be invested. It is not an independent authorization for the payment of interest. B-241592.3, December 13, 1991.

A comprehensive discussion of 31 U.S.C. § 9702 is contained in United States v. Mescalero Apache Tribe, 518 F.2d 1309, 1324 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976) and the cases cited therein. In Mescalero, the Court of Claims explained the purpose of the Act of September 11, 1841, ch. 25, sec. 2, 5 Stat. 465, now codified at 31 U.S.C. § 9702. Congress wanted to prohibit the investment of United States trust funds, otherwise required by treaty or statute to be invested, in state bonds and to require instead their investment in safer United States securities. The court held that the 1841 act did not require the payment by the United States of interest on any fund that was not expressly required to be invested by a contract, treaty, or a statute. The lesson of Mescalero and subsequent cases is that one must examine the statute or other legal source for the fund to determine whether any requirement to invest the trust fund exists. United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951) (interest on amount of compensation awarded for taking of original Indian title by United States in 1855 not allowed where jurisdictional act contained no provision authorizing award of interest);

B-226801-O.M., May 4, 1988 (section 9702 did not require the Veteran's Administration to invest the Post-Vietnam Era Veterans Education Account, listed as a trust fund at 31 U.S.C. § 1321(a)(82)). See also the general discussion of the No-Interest Rule in chapter 12 above.

An example of a specific requirement for investment and the payment of interest is found at 25 U.S.C. § 161a. It requires that all funds held in trust by the United States to the credit of Indian tribes or individual Indians be invested by the Secretary of the Treasury, with interest at rates determined by the Secretary of the Treasury. GAO has considered the payment of interest on government held Indian funds numerous times. E.g., 52 Comp. Gen. 248 (1972); 8 Comp. Gen. 625 (1929); B-272979, August 23, 1996; B-243029, March 25, 1991; B-108439, December 28, 1973; B-126459, February 20, 1956. The obligation to invest under section 161a does not arise prior to the date that Congress has specified for deposit of funds to the trust. B-108439, April 13, 1978.

6. Liability for Loss of Trust Funds

Where the government acts in the capacity of a trustee with respect to a fund it holds, the government must see to the proper application of the trust funds like a private trustee. Julia A. L. Burnell v. United States, 44 Ct. Cl. 535 (1909). In the cited case, the Treasury paid the wrong party through a mistake of law. The Claims Court held that the government remained responsible to the rightful owner of the securities. Id.

The decisions of the Comptroller General are to the same effect. For example, the Department of Veterans Affairs holds "personal funds of patients" for safekeeping and use during their stay at VA hospitals. The government is accountable to the patients for these funds like a private trustee would be.[271] 68 Comp. Gen. 600, 603 (1989). Accordingly, where an erroneous payment is made, the government is chargeable with any loss resulting from the breach of trust. In this case, VA was advised to make the trust fund whole by charging the deficiency to the VA's operating appropriation as a necessary expense of administering the "trust." Id. To the same

[271] Cf. B-153479, April 15, 1964 (prisoners'" trust funds).

effect is 67 Comp. Gen. 342 (1988) (use of Bureau of Indian Affairs operating appropriation to adjust deficiency in BIA trust fund).

The liability of an accountable officer for loss of funds in a trust account is no different than any other loss of government funds. Although the funds are not strictly speaking public funds, they are nevertheless funds for which the government is accountable. The absence of a beneficial interest in the funds does not alter the liability equation; by accepting custody of them, the United States assumes a trust responsibility for their care and safekeeping. B-200108, B-198558, January 23, 1981. If a trustee commits a breach of trust, the trustee is chargeable with any loss resulting from that breach. B-248715, January 13, 1993. See generally United States v. Mitchell, 463 U.S. 206, 226 (1983); Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. United States, 175 Ct. Cl. 451 (1966) (misuse of trust funds is a breach of trust, not Fifth Amendment taking). The responsibility of the accountable officer has been described as follows:

> "[T]he same relationship between an accountable officer and the United States is required with respect to trust funds of a private character obtained and held for some particular purpose sanctioned by law as is required with respect to public funds." 6 Comp. Gen. 515, 517 (1927) (funds in retirement account of embezzling employee used to satisfy loss of private trust funds).

See also, Osborn v. United States, 91 U.S. 474 (1875) (court can summarily compel restitution of funds improperly withdrawn from registry account by former officers).

Other situations involving accountability for funds held in trust or trust-like circumstances include:

- VA patient funds: 68 Comp. Gen. 371 (1989); B-226911, October 19, 1987; B-221447, April 2, 1986; B-215477, November 5, 1984; B-208888, September 28, 1984.
- Erroneous payment to Individual Indian Money Account: 65 Comp. Gen. 533 (1986).
- Registry accounts of courts of the United States: 64 Comp. Gen. 535 (1985); 63 Comp. Gen. 489, 490 n.1 (1983); B-198558, B-200108, January 23, 1981.
- United States Naval Academy laundry fund: 17 Comp. Gen. 786 (1938)

- Prisoners' money held in Brig Officer's Safekeeping Fund: B-248715, January 13, 1993;
- Mutilated and worn currency sent by private bank to Treasury for redemption: B-239955, June 18, 1991;
- Overseas Consular Service Trust Fund holding private funds to pay for funeral expenses: B-238955, April 3, 1991;
- Foreign currencies accepted in connection with accommodation exchanges: B-190205, November 14, 1977.

7. Claims

a. Setoff and Levy against Trust Funds

In 38 Comp. Gen. 23 (1958), GAO held that a delinquent taxpayer's postal savings deposits are property subject to IRS levy and the fact that the postmaster held the deposits as a trust fund does not protect them from levy. Similarly, in B-165138, March 12, 1969, we advised the Bureau of Prisons that prisoners' funds it held as "trust funds" under 31 U.S.C. § 1321, are property subject to tax lien and levy under sections 6321 and 6331, respectively, of the Internal Revenue Code of 1954. The literal language of section 6334(c) of the IRC compelled this result. That section provides that no property rights would be exempt from levy unless specifically exempted in section 6334(a). See also 63 Comp. Gen. 498 (1984) (honoring a levy against a judgment award did not give rise to a breach of trust); 34 Comp. Gen. 152 (1954) (government may take setoff against funds held by it in trust to recoup a debt owed to the government as sovereign).

Contrast the preceding decisions (involving the collection of taxes from trust funds held by the government) with 48 Comp. Gen. 249 (1968) (reversing B-72968, April 21, 1948), where the Comptroller General held that the Bureau of Prisons could not set off prisoners' trust funds to satisfy claims of the United States arising from an inmate's destruction of government property. In reversing his earlier decision, the Comptroller General pointed out that he had not known at the time of his 1948 decision that the terms of the trust expressly required the prisoner's consent prior to a withdrawal of funds. Accordingly, given the new information, the Comptroller General held that absent a change in the terms of the trust agreement, the Bureau could not use prisoner trust funds to satisfy a writ of execution issued pursuant to a court judgment against the inmate. Id. Cf. 65 Comp. Gen. 533 (1986) (strict moral obligations of

United States in dealing with Indians require United States to absorb the loss for moneys erroneously paid from an Individual Indian Money account and forego collection from the erroneous payee—another Indian).

b. Unclaimed Moneys

At the end of each fiscal year, money which has been in any of the trust accounts identified in or established pursuant to 31 U.S.C. § 1321 for more than a year and which represents money belonging to individuals whose location is unknown is transferred to a Treasury trust fund receipt account entitled "Unclaimed Moneys of Individuals Whose Whereabouts are Unknown." 31 U.S.C. § 1322(a). Subsection 1322(b)(1) establishes a permanent, indefinite appropriation to pay claims from the Unclaimed Moneys account. Instructions to implement 31 U.S.C. § 1322 are contained in the Treasury Financial Manual, 1 T.F.M. 6-3000. (See also, Chapter 12, above, Section J, Unclaimed Money/Property.)

Under 31 U.S.C. § 3702(b), a claim against the government ordinarily cannot be considered unless the claim is received within 6 years of the date it accrues. The Comptroller General has held that the 6-year statute of limitations in 31 U.S.C. § 3702 (b) does not bar claims to recover moneys held in trust. See B-201669, November 26, 1985 and decisions cited therein. Since the trustee holds property for the beneficiary's benefit, unless there is a breach of some duty owed by the trustee to a beneficiary, such as a repudiation of the trust, there is no claim or cause of action that would trigger the running of the statute. Id. See Bogert, Trusts and Trustees, 951 (2nd Ed. 1983). In keeping with the general rule, GAO has deemed the statute inapplicable to claims of beneficiaries payable from money held in trust. See 70 Comp. Gen. 612 (1991); 66 Comp. Gen. 40 (1986); 55 Comp. Gen. 1234 (1976); B-201669, November 26, 1985; B-155963, March 19, 1965 (special deposit account for the proceeds of withheld foreign checks); B-139963, July 6, 1959 (soldiers' deposit savings accounts); and B-103575, August 27, 1951 (unclaimed moneys of individuals whose whereabouts are unknown).

The agency that received and transferred the funds to the Treasury handles any claims relating to those funds. If a claim is determined to be valid, the agency may certify a payment voucher to Treasury. If the money was transferred to the trust account, payment is made directly from that account. See Unclaimed Money: Proposals for

Transferring Unclaimed Funds to States, GAO/AFMD-89-44, at 10 (May 1989).

8. Federal Trust Funds and the Budget

As suggested earlier, many of the federal trust funds are bookkeeping devices to capture receipts earmarked for certain programs or purposes. They do not hold cash separate from the Treasury—all moneys received by the Treasury are commingled and used to pay government obligations as they come due. In effect, Treasury borrows the earmarked receipts in exchange for interest-bearing, nonmarketable Treasury securities. As a result, a trust fund balance reflects federal debt, i.e., debt held by a government account.[272] To the extent that the receipts credited to a trust fund (that is, fees, employee contributions, tax receipts and interest earned on Treasury securities) exceed expenditures charged to the fund, the trust fund balance grows. The converse, of course, is also true—to the extent that expenditures exceed receipts, the balance decreases.

The Social Security trust funds are the largest federal trust funds both in terms of annual spending and account balance. They are also the largest single item in the federal budget. See, Social Security Financing, GAO/AIMD/HEHS-98-74, at 29 (April 1998). Congress created the Social Security program in 1935 in response to the economic deprivations of the Depression. Originally created as a benefit system for retired workers, over time, Congress has expanded Social Security to insure disabled workers and the families of retired, disabled, and deceased workers. Social Security: Different Approaches for Addressing Program Solvency, GAO/HEHS-98-33, at 4 (July 1998).

Social Security consists of two separate trust funds, the Federal Old-Age and Survivors Insurance Trust Fund which covers retirement and survivor benefits and the Federal Disability Insurance Trust Fund which provides benefits to disabled workers and their families. Congress has provided a permanent indefinite

[272]Debt held by the government, about $1.8 trillion at the end of 1998, primarily reflects debt owned by federal trust funds, such as the Social Security trust funds. Federal Debt: Answers to Frequently Asked Questions—An Update, GAO/AIMD-99-87, at 5 (May 1999).

appropriation from the general fund of the Treasury to the Trust Funds of an amount determined by applying the applicable employment tax rate to wages reported to the Secretary of Treasury or his delegate. 42 U.S.C. §401(a)(3). As a check on the amount credited to the Trust Funds, the Commissioner of Social Security is to certify the amount of wages (or self- employment income) reported to IRS. Id. See B-261522, September 29, 1995 (Social Security Administration may use wage data collected by IRS in certifying to Treasury the amount of wages reported by employers and the amount of funds appropriated to the Social Security trust funds).

A Board of Trustees holds the Social Security Trust Funds. 42 U.S.C. § 401(c). The Board of Trustees is composed of the Secretary of the Treasury as Managing Trustee, the Commissioner of Social Security, the Secretary of Labor, the Secretary of Health and Human Services, all ex officio, and two members of the public nominated by the President and confirmed by the Senate. Id. In addition to holding the fund, it is the duty of the Board of Trustees to report to the Congress on the operation and status of the Funds and to review and recommend improvements in the administrative procedures and policies followed in managing the Funds. Id. A "person serving on the Board of Trustees" does not have a fiduciary duty vis-à-vis the Trust Funds and "shall not be personally liable for actions taken [as a member of the Board of Trustees] with respect to the Trust Funds." Id.

There are a number of large trust funds that finance public works, notably transportation, programs. A prominent example is the Federal Aid Highway Program which distributes billions of dollars of federal funding annually to the 50 states, the District of Columbia, and Puerto Rico for highway construction, repair, and related activities. To finance the highway program, Congress established the Highway Trust Fund account in the Treasury, 26 U.S.C. § 9503 (a) (1994), designating the Secretary of Treasury as trustee, 26 U.S.C. § 9602(a).[273] Congress has provided the fund with a permanent indefinite appropriation of amounts received in the Treasury from

[273]The Highway Trust Fund actually contains two accounts. The oldest and most well-known of the two accounts is the highway account. The other, more recent account is the Mass Transit Account. 26 U.S.C. § 9503(e).

certain gasoline, diesel fuel, and other excise taxes paid by highway users. 26 U.S.C. § 9503(b). (In fiscal year 1996, these earmarked revenues brought in $24.7 billion to the fund. Dept. of Transportation, Highway Trust Fund Primer (January 1999).) The Secretary of the Treasury is responsible for holding the Trust Fund, reporting annually to Congress on the financial condition and operation of the Fund, and investing any amounts in the Fund not needed to meet current needs in interest-bearing Treasury securities. 26 U.S.C. § 9602. See B-275490, December 5, 1996 (Treasury, as trustee, could credit Highway Trust Fund income statements with $1.59 billion in excise taxes mistakenly not credited to the Fund as the result of accounting and reporting errors).[274]

Chapter 98 of title 26, United State Code, contains a number of other trust funds established to finance social insurance, public works or environmental programs. For example, the Black Lung Disability Trust Fund finances the payment of benefits to eligible miners under the Black Lung Benefits Act. 26 U.S.C. § 9501. Another social insurance fund is the Vaccine Injury Compensation Trust Fund, 26 U.S.C. § 9510. In addition to the Highway Trust Fund, other public works trust funds include the Airport and Airway Trust Fund, 26 U.S.C. § 9502, the Harbor Maintenance Trust Fund, 26 U.S.C. § 9505, and the Inland Waterways Trust Fund, 26 U.S.C. § 9506. Examples of trust funds designed to finance environmental remediation programs are the Hazardous Substance Superfund, 26 U.S.C. § 9507, and the Leaking Underground Storage Tank Trust Fund, 26 U.S.C. § 9508.

There has been an ongoing debate over whether the trust funds, particularly Social Security and the large infrastructure trust funds such as the Federal Highway Trust Fund and the Airport and Airways Development Trust Fund should be included in the budget.

[274]For more information on the history and operation of the Highway Trust Fund, see CRS, Federal Excise Taxes on Gasoline and the Highway Trust Fund: A Short History, No. 96-394 (May 3, 1996); Highway Trust Fund: Condition and Outlook for the Highway Account, GAO/RCED-89-136 (May 1989); Highway Trust Fund: Revenue Sources, Uses, and Spending Controls, GAO/RCED-92-48FS (October 1991); Highway Trust Fund: Strategies for Safeguarding Highway Financing, GAO/RCED-92-245 (September 1992); and Transportation Trust Funds, GAO/AIMD-95-95R (March 1995).

In other words, whether they should be "off budget."[275] Since fiscal year 1969 the President has submitted a unified budget that covers both trust and non-trust fund activities. The unified budget merges trust and non-trust outlays and receipts into a consolidated budget surplus or deficit. As a result, the growing positive trust fund balances, particularly in the Social Security trust funds, "[mask] the basic imbalance in the government's financial affairs." Statement of Charles A. Bowsher, Comptroller General of the United States, The Budget Treatment of Trust Funds, GAO/T-AFMD-90-3, at 5, before the Subcommittee on Legislation and National Security, Committee on Government Operations, House of Representatives (October 1989) (hereafter Bowsher Testimony). In other words, the trust fund surpluses disguise the severity of the deficit (or the amount of surplus) on the non-trust fund side of the government's ledgers.

Related to the on or off budget issue are allegations of misuse of the major trust funds such as the Highway and the Airport and Airway trust funds. Proponents of this view charge that, while the trust funds have a steady dedicated stream of tax receipts, budgeting actions have restricted fund outlays to create trust fund surpluses for budgetary reasons, namely, to lower the deficit. Budget Issues: Trust Funds and their Relationship to the Federal Budget, GAO/AFMD 88-55, at 4, (September 30, 1988). This practice, proponents argue, breaks the implied agreement underlying the original enactment of the "trust fund"—full use of dedicated tax receipts for the trust fund program. This simply highlights the tension that Congress faces between the collection and expenditure of earmarked revenues, whether trust funds or special funds, and the tradeoffs Congress must make with respect to spending priorities in general. Budget Issues: Trust Funds in the Budget, GAO/T-AIMD-99-110, at 1 (March 9, 1999).

[275]A loose definition of "off budget" is the exclusion of receipts and disbursements from consideration as part of the budget. A better sense of what it means to be "off budget" can be gleaned from the statutory provision prescribing the budgetary treatment of the Postal Service Fund. 39 U.S.C. § 2009a. Section 2009a directs that the receipts and disbursements of the Postal Service Fund shall be excluded from the budget totals, exempt from any statutory budget limitations, and exempt from sequestration orders under the Balanced Budget and Emergency Deficit Control Act of 1985. For additional discussion, see the CRS reports, Transportation Trust Funds: Budgetary Treatment, No. 98-63 (April 1998) and Social Security and the Federal Budget: What Does Social Security's Being "Off Budget" Mean?, No. 98-422 (October 15, 1998).

A number of different approaches have been offered to solve the "problem." One proposed solution is to insulate a trust fund from the normal budgetary pressures by taking the fund "off budget." See, e.g., H.R. 798, 106th Cong., § 7 (1999), (a bill to provide funding and off-budget treatment for the protection and enhancement of natural and cultural resources); H.R. 4, 105th Cong., § 2 (1997) (a bill proposing to provide off-budget treatment for the Highway, Airport and Airway, Inland Waterways and Harbor Maintenance Trust Funds). GAO has suggested that Congress could address the matter in the context of the unified budget by separately displaying trust funds, federal funds and government sponsored enterprises in the budget. Bowsher Testimony, supra. In the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107 (1998), Congress took yet a different approach with respect to the highway and mass transit programs. In TEA-21 Congress established outlay caps that apply separately to the highway and mass transit programs for fiscal years 1999 through 2003. In addition to carving out outlay caps for these programs separate from the dollar caps applicable to discretionary spending in general, Congress also specified annual guaranteed minimum spending levels tied, in the case of highways, to Highway Trust Fund receipts. For a discussion of the implications of this approach, see Statement of Susan J. Irving, Associate Director, Budget Issues, AIMD, Cap Structure and Guaranteed Funding, GAO/T-AIMD-99-210, before the Committee on Rules, House of Representatives (July 1999).