IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES HOUSE OF REPRESENTATIVES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 1:14-cv-01967-RMC
	)	
SYLVIA MATHEWS BURWELL, in her official capacity as Secretary of Health and Human Services, *et al.*,	)	
	)	
Defendants.	)	
	)	

EXHIBIT 27

1 U.S. Government Accountability Office,
Principles of Federal Appropriations Law at 2-15 (3d ed. 2004)
[EXCERPTS]

United States General Accounting Office

GAO Office of the General Counsel

January 2004

Principles of Federal Appropriations Law

Third Edition

Volume I

This volume supersedes the Volume I, Second Edition of the Principles of Federal Appropriations Law, 1991.

On August 6, 2010, the web versions of the Third Edition of the Principles of Federal Appropriation Law, Volumes I, II and III, were reposted to include updated active electronic links to GAO decisions. Additionally, the Third Edition's web based Index/Table of Authorities (Index/TOA) was replaced by an Index/TOA that incorporated information from Volume I, II and III. These four documents can be used independently or interactively. To use the documents interactively, click on http://www.gao.gov/special.pubs/redbook1.html and you will be directed to brief instructions regarding interactive use.

The Security of this file is set to prevent a situation where linked references are appended to the PDF. If this change prevents an Acrobat function you need (e.g., to extract pages), use the the password "redbook" to revise the document security and enable the additional functions.

GAO-04-261SP

Abbreviations

APA	Administrative Procedure Act
BLM	Bureau of Land Management
CDA	Contract Disputes Act of 1978
CCC	Commodity 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	Government Accountability 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
URA	Uniform Relocation Assistance and Real Property Acquisition Policies Act

d. Classification Based on Availability for New Obligations[27]

1. *Current or unexpired appropriation*: An appropriation that is available for incurring new obligations.

2. *Expired appropriation*: An appropriation that is no longer available to incur new obligations, although it may still be available for the recording and/or payment (liquidation) of obligations properly incurred before the period of availability expired.

3. *Canceled appropriation*: An appropriation whose account is closed, and is no longer available for obligation or expenditure for any purpose.

An appropriation may combine characteristics from more than one of the above groupings. For example, a "permanent indefinite" appropriation is open ended as to both period of availability and amount. Examples are 31 U.S.C. § 1304 (payment of certain judgments against the United States) and 31 U.S.C. § 1322(b)(2) (refunding amounts erroneously collected and deposited in the Treasury).

e. Reappropriation

The term "reappropriation" means congressional action to continue the availability, whether for the same or different purposes, of all or part of the unobligated portion of budget authority that has expired or would otherwise expire. Reappropriations are counted as budget authority in the first year for which the availability is extended.[28]

B. Some Basic Concepts

1. What Constitutes an Appropriation

The starting point is 31 U.S.C. § 1301(d), which provides:

> "A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the

[27] *Glossary* at 24. See also our discussion of the disposition of appropriation balances in Chapter 5, section D.

[28] *Glossary* at 23. *See also* 31 U.S.C. § 1301(b) (reappropriation for a different purpose is to be accounted for as a new appropriation).

> law specifically states that an appropriation is made or that such a contract may be made."

Thus, the rule is that the making of an appropriation must be expressly stated. An appropriation cannot be inferred or made by implication. *E.g.*, 50 Comp. Gen. 863 (1971).

Regular annual and supplemental appropriation acts present no problems in this respect as they will be apparent on their face. They, as required by 1 U.S.C. § 105, bear the title "An Act making appropriations ... ." There are situations in which statutes other than regular appropriation acts may be construed as making appropriations, however. *See, e.g.*, 31 U.S.C. § 1304(a) ("necessary amounts are appropriated to pay final judgments, awards, compromise settlements"); 31 U.S.C. § 1324 ("necessary amounts are appropriated to the Secretary of Treasury for refunding internal revenue collections").

An appropriation is a form of budget authority that makes funds available to an agency to incur obligations and make expenditures.[29] 2 U.S.C. § 622(2)(A)(i). *See also* 31 U.S.C. § 701(2)(C) ("authority making amounts available for obligation or expenditure"). Consequently, while the authority must be expressly stated, it is not necessary that the statute actually use the word "appropriation." If the statute contains a specific direction to pay and a designation of the funds to be used, such as a direction to make a specified payment or class of payments "out of any money in the Treasury not otherwise appropriated," then this amounts to an appropriation. 63 Comp. Gen. 331 (1984); 13 Comp. Gen. 77 (1933). *See also* 34 Comp. Gen. 590 (1955).

For example, a private relief act that directs the Secretary of the Treasury to pay, out of any money in the Treasury not otherwise appropriated, a specified sum of money to a named individual constitutes an appropriation. 23 Comp. Dec. 167, 170 (1916). Another example is B-160998, Apr. 13, 1978, concerning section 11 of the Federal Fire Prevention and Control Act of 1974,[30] which authorizes the Secretary of the Treasury to reimburse local fire departments or districts for costs incurred in fighting fires on federal

[29] We discuss the concept of budget authority and define the term appropriation in section A ("Appropriations and Related Terminology") of this chapter.

[30] Pub. L. No. 93-498, 88 Stat. 1535, 1543 (Oct. 29, 1974).

property. Since the statute directed the Secretary to make payments "from any moneys in the Treasury not otherwise appropriated" (*i.e.*, it contained both the specific direction to pay and a designation of the funds to be used), the Comptroller General concluded that section 11 constituted a permanent indefinite appropriation.

Both elements of the test must be present. Thus, a direction to pay without a designation of the source of funds is not an appropriation. For example, a private relief act that contains merely an authorization and direction to pay but no designation of the funds to be used does not make an appropriation. 21 Comp. Dec. 867 (1915); B-26414, Jan. 7, 1944.[31] Similarly, public legislation enacted in 1978 authorized the U.S. Treasury to make an annual prepayment to Guam and the Virgin Islands of the amount estimated to be collected over the course of the year for certain taxes, duties, and fees. While it was apparent that the prepayment at least for the first year would have to come from the general fund of the Treasury, the legislation was silent as to the source of the funds for the prepayments, both for the first year and for subsequent years. It was concluded that while the statute may have established a permanent authorization, it was not sufficient under 31 U.S.C. § 1301(d) to constitute an actual appropriation. B-114808, Aug. 7, 1979. (Congress subsequently made the necessary appropriation in Pub. L. No. 96-126, 93 Stat. 954, 966 (Nov. 27, 1979).)

The designation of a source of funds without a specific direction to pay is also not an appropriation. 67 Comp. Gen. 332 (1988).

Thus far, we have been talking about the authority to make disbursements from the general fund of the Treasury. There is a separate line of decisions establishing the proposition that statutes, which authorize the collection of fees and their deposit into a particular fund, and, which make the fund available for expenditure for a specified purpose, constitute continuing or permanent appropriations; that is, the money is available for obligation or expenditure without further action by Congress. Often it is argued that a law making moneys available from some source other than the general fund of the Treasury is not an appropriation. This view is wrong. Statutes establishing revolving funds and various special deposit funds and making

[31] A few early cases will be found that appear inconsistent with the proposition stated in the text. *E.g.*, 6 Comp. Dec. 514, 516 (1899); 4 Comp. Dec. 325, 327 (1897). These cases predate the enactment on July 1, 1902 (32 Stat. 552, 560) of what is now 31 U.S.C. § 1301(d) and should be disregarded.

amounts in those funds available for obligation and expenditure are permanent appropriations. The reason is that, under 31 U.S.C. § 3302(b), all money received for the use of the United States must be deposited in the general fund of the Treasury absent statutory authority for some other disposition.; B-271894, July 24, 1997. Once the money is in the Treasury, it can be withdrawn only if Congress appropriates it.[32] Therefore, the authority for an agency to obligate or expend collections without further congressional action amounts to a continuing appropriation or permanent appropriation of the collections. *E.g.*, *United Biscuit Co. v. Wirtz*, 359 F.2d 206, 212 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 971 (1966); 69 Comp. Gen. 260, 262 (1990; 73 Comp. Gen. 321 (1994).

Cases involving the "special fund" principle fall into two categories. In the first group, the question is whether a particular statute authorizing the deposit and expenditure of a class of receipts makes those funds available for the specified purpose or purposes without further congressional action. These cases, in other words, raise the basic question of whether the statute may be regarded as an appropriation. Cases answering this question in the affirmative include 59 Comp. Gen. 215 (1980) (mobile home inspection fees collected by the Secretary of Housing and Urban Development); B-228777, Aug. 26, 1988 (licensing revenues received by the Commission on the Bicentennial); B-204078.2, May 6, 1988, and B-257525, Nov. 30, 1994 (Panama Canal Revolving Fund); B-197118, Jan. 14, 1980 (National Defense Stockpile Transaction Fund); and B-90476, June 14, 1950. *See also* 1 Comp. Gen. 704 (1922) (revolving fund created in appropriation act remains available beyond end of fiscal year where not specified otherwise).

The second group of cases involves the applicability of statutory restrictions or other provisions that by their terms apply to "appropriated funds" or exemptions that apply to "nonappropriated funds." For example, fees collected from federal credit unions and deposited in a revolving fund for administrative and supervisory expenses have been regarded as appropriated funds for various purposes. 63 Comp. Gen. 31 (1983), *aff'd upon reconsideration*, B-210657, May 25, 1984 (payment of relocation expenses); 35 Comp. Gen. 615 (1956) (restrictions on reimbursement for certain telephone calls made from private residences). Other situations applying the "special fund as appropriation" principle are summarized below:

[32] U.S. Const. art. I, § 9, cl. 7, discussed in Chapter 1, section B.

- Various funds held to constitute appropriated funds for purposes of GAO's bid protest jurisdiction:[33] 65 Comp. Gen. 25 (1985) (funds received by National Park Service for visitor reservation services); 64 Comp. Gen. 756 (1985) (Tennessee Valley Authority power program funds); 57 Comp. Gen. 311 (1978) (commissary surcharges).

- Applicability of other procurement laws: *United Biscuit Co., supra* (Armed Services Procurement Act applicable to military commissary purchases); B-217281-O.M., Mar. 27, 1985 (federal procurement regulations applicable to Pension Benefit Guaranty Corporation revolving funds); B-275669.2, July 30, 1997 (American Battle Monuments Commission must comply with the Federal Acquisition Regulations and Federal Property and Administrative Services Act).

- User fee toll charges collected by the Saint Lawrence Seaway Development Corporation are appropriated funds. However, many of the restrictions on the use of appropriated funds will nevertheless be inapplicable by virtue of the Corporation's organic legislation and its status as a corporation. B-193573, Jan. 8, 1979, *modified and aff'd*, B-193573, Dec. 19, 1979; B-217578, Oct. 16, 1986. The December 1979 decision noted that the capitalization of a government corporation, whether a lump-sum appropriation in the form of capital stock or the authority to borrow through the issuance of long-term bonds to the U.S. Treasury, consists of appropriated funds.

- User fees collected under the Tobacco Inspection Act are appropriated funds and as such are subject to restrictions on payment of employee health benefits. 63 Comp. Gen. 285 (1984).

- Customs Service duty collections are appropriations authorized to be used for administration and collection costs. B-241488, Mar. 13, 1991.

- The Prison Industries Fund is an appropriated fund subject to the General Services Administration's surplus property regulations. 60 Comp. Gen. 323 (1981).

Other cases in this category are 50 Comp. Gen. 323 (1970); 35 Comp. Gen. 436 (1956); B-191761, Sept. 22, 1978; and B-67175, July 16, 1947. In

[33] GAO regulations exempt nonappropriated fund procurements. 4 C.F.R. § 21.5(g).

each of the special fund cases cited above, the authority to make payments from the fund involved was clear from the governing legislation.

Finally, the cases cited above generally involve statutes that specify the fund to which the collections are to be deposited. This is not essential, however. A statute that clearly makes receipts available for obligation or expenditure without further congressional action will be construed as authorizing the establishment of such a fund as a necessary implementation procedure. 59 Comp. Gen. 215 (42 U.S.C. § 5419); B-226520, Apr. 3, 1987 (nondecision letter) (26 U.S.C. § 7475). *See also* 13 Comp. Dec. 700 (1907).

Two recent court decisions held that revolving funds do not constitute "appropriations" for purposes of determining whether those courts have jurisdiction over claims against the United States under the Tucker Act (28 U.S.C. § 1491). These decisions—*Core Concepts of Florida, Inc. v. United States*, 327 F.3d 1331 (Fed. Cir. 2003), *petition for cert. filed*, 72 U.S.L.W. 3148 (Aug. 18, 2003), and *AINS, Inc. v. United States*, 56 Fed. Cl. 522 (2002)—concluded that GAO's view of revolving funds as continuing or permanent appropriations does not apply to issues of Tucker Act jurisdiction.[34] The Court of Appeals for the Federal Circuit, the Court of Federal Claims, and their predecessors traditionally hold that Tucker Act jurisdiction does not extend to "nonappropriated fund instrumentalities" that receive no traditional general revenue appropriations derived from the general fund of the Treasury.[35] *Core Concepts* and *AINS* dealt only with the issue of Tucker Act jurisdiction in this context and have no bearing on the status of revolving funds in the broader appropriations law context discussed above.[36]

[34] But see *MDB Communications, Inc. v. United States*, 53 Fed. Cl. 245 (2002), and *American Management Systems, Inc. v. United States*, 53 Fed. Cl. 525 (2002), two other recent decisions that do apply GAO's view that revolving funds are appropriations to support Tucker Act jurisdiction.

[35] *E.g.*, *Furash & Co. v. United States*, 252 F.3d 1336, 1342 (Fed. Cir. 2001); *Denkler v. United States*, 782 F.2d 1003 (Fed. Cir. 1986); *Aaron v. United States*, 51 Fed. Cl. 690 (2002); *L'Enfant Plaza Properties, Inc. v. United States*, 668 F.2d 1211 (Ct. Cl. 1982); *Kyer v. United States*, 369 F.2d 714, 718 (Ct. Cl. 1966), *cert. denied*, 387 U.S. 929 (1967).

[36] See, in this regard, *Core Concepts*, 327 F.3d at 1338, noting that GAO's position and the authorities it cites on the status of revolving funds "are not applicable to the non-appropriated funds doctrine [governing Tucker Act jurisdiction] in the same sense that they are applicable to federal appropriations law."

2. Specific *versus* General Appropriations

a. General Rule

An appropriation for a specific object is available for that object to the exclusion of a more general appropriation, which might otherwise be considered available for the same object, and the exhaustion of the specific appropriation does not authorize charging any excess payment to the more general appropriation, unless there is something in the general appropriation to make it available in addition to the specific appropriation.[37] In other words, if an agency has a specific appropriation for a particular item, and also has a general appropriation broad enough to cover the same item, it does not have an option as to which to use. It must use the specific appropriation. Were this not the case, agencies could evade or exceed congressionally established spending limits.

The cases illustrating this rule are legion.[38] Generally, the fact patterns and the specific statutes involved are of secondary importance. The point is that the agency does not have an option. If a specific appropriation exists for a particular item, then that appropriation must be used and it is improper to charge the more general appropriation (or any other appropriation) or to use it as a "back-up." A few cases are summarized as examples:

- A State Department appropriation for "publication of consular and commercial reports" could not be used to purchase books in view of a specific appropriation for "books and maps." 1 Comp. Dec. 126 (1894). The Comptroller of the Treasury referred to the rule as having been well established "from time immemorial." *Id.* at 127.

- The existence of a specific appropriation for the expenses of repairing the U.S. courthouse and jail in Nome, Alaska, precludes the charging of such expenses to more general appropriations such as "Miscellaneous expenses, U.S. Courts" or "Support of prisoners, U.S. Courts." 4 Comp. Gen. 476 (1924).

[37] *See, e.g.*, B-272191, Nov. 4, 1997.

[38] A few are 64 Comp. Gen. 138 (1984); 36 Comp. Gen. 526 (1957); 17 Comp. Gen. 974 (1938); 5 Comp. Gen. 399 (1925); B-289209, May 31, 2002; B-290011, Mar. 25, 2002.

- A specific appropriation for the construction of an additional wing on the Navy Department Building could not be supplemented by a more general appropriation to build a larger wing desired because of increased needs. 20 Comp. Gen. 272 (1940). *See* B-235086, Apr. 24, 1991 (a specific appropriation for the construction and acquisition of a building precludes the Forest Service from using a more general appropriation to pay for such a purchase). *See also* B-278121, Nov. 7, 1997.

- Appropriations of the District of Columbia Health Department could not be used to buy penicillin to be used for Civil Defense purposes because the District had received a specific appropriation for "all expenses necessary for the Office of Civil Defense." 31 Comp. Gen. 491 (1952).

Further, the fact that an appropriation for a specific purpose is included as an earmark in a general appropriation does not deprive it of its character as an appropriation for the particular purpose designated, and where such specific appropriation is available for the expenses necessarily incident to its principal purpose, such incidental expenses may not be charged to the more general appropriation. 20 Comp. Gen. 739 (1941). In the cited decision, a general appropriation for the Geological Survey contained the provision "including not to exceed $45,000 for the purchase and exchange ... of ... passenger-carrying vehicles." It was held that the costs of transportation incident to the delivery of the purchased vehicles were chargeable to the specific $45,000 appropriation and not to the more general portion of the appropriation. Similarly, a general appropriation for the Library of Congress contained the provision, "$9,619,000 is to remain available until expended for the acquisition of books, periodicals, newspapers and all other materials... ." The Comptroller General held that the $9,619,000 was an earmark requiring the Library to set aside that money to purchase books and other library materials. The earmark barred the Library from transferring or using those funds for another purpose. B-278121, *supra*. In deciding the proper appropriation to charge for administrative costs for Oil Pollution Act claims, the Comptroller General stated, "As a general rule, an appropriation for a specific object is available for that object to the exclusion of a more general appropriation which might otherwise be considered for the same object." B-289209, *supra* (citing 65 Comp. Gen. 881 (1986)); B-290005, July 1, 2002.

The rule has also been applied to expenditures by a government corporation from corporate funds for an object for which the corporation

had received a specific appropriation, where the reason for using corporate funds was to avoid a restriction applicable to the specific appropriation. B-142011, June 19, 1969.

Of course, the rule that the specific governs over the general is not peculiar to appropriation law. It is a general principle of statutory construction and applies equally to provisions other than appropriation statutes. *E.g.*, 62 Comp. Gen. 617 (1983); B-277905, Mar. 17, 1998; B-152722, Aug. 16, 1965. However, another principle of statutory construction is that two statutes should be construed harmoniously so as to give maximum effect to both wherever possible. In dealing with nonappropriation statutes, the relationship between the two principles has been stated as follows:

> "Where there is a seeming conflict between a general provision and a specific provision and the general provision is broad enough to include the subject to which the specific provision relates, the specific provision should be regarded as an exception to the general provision so that both may be given effect, the general applying only where the specific provision is inapplicable."

B-163375, Sept. 2, 1971. *See also* B-255979, Oct. 30, 1995.

As stated before, however, in the appropriations context, this does not mean that a general appropriation is available when the specific appropriation has been exhausted. Using the more general appropriation would be an unauthorized transfer (discussed later in this chapter) and would improperly augment the specific appropriation (discussed in Chapter 6).

b. Two Appropriations Available for Same Purpose

Although rare, there are situations in which either of two appropriations can be construed as available for a particular object, but neither can reasonably be called the more specific of the two. The rule in this situation is this: Where two appropriations are available for the same purpose, the agency may select which one to charge for the expenditure in question. Once that election has been made, the agency must continue to use the same appropriation for that purpose unless the agency at the beginning of the fiscal year informs the Congress of its intent to change for the next fiscal year. *See* U.S. General Accounting Office, *Unsubstantiated DOE Travel Payments*, GAO/RCED-96-58R (Washington, D.C.: Dec. 28, 1995). Of course, where statutory language clearly demonstrates congressional intent to make one appropriation available to supplement or increase a

different appropriation for the same type of work, both appropriations are available. *See* B-272191, Nov. 4, 1997 (Army permitted to use Operations and Maintenance (O&M) funds for property maintenance and repair work in Germany even though Real Property Maintenance, Defense (RPM,D) funds were available for the same work because Congress said the O&M funds were "in addition to the funds specifically appropriated for real property maintenance under the heading [RPM,D]").

3. Transfer and Reprogramming

For a variety of reasons, agencies have a legitimate need for a certain amount of flexibility to deviate from their budget estimates. Two ways to shift money are transfer and reprogramming. While the two concepts are related in this broad sense, they are nevertheless different.

a. Transfer

Transfer is the shifting of funds between appropriations.[39] For example, if an agency receives one appropriation for Operations and Maintenance and another for Capital Expenditures, a shifting of funds from either one to the other is a transfer.

The basic rule with respect to transfer is simple: Transfer is prohibited without statutory authority. The rule applies equally to (1) transfers from one agency to another,[40] (2) transfers from one account to another within the same agency,[41] and (3) transfers to an interagency or intra-agency working fund.[42] In each instance, statutory authority is required. An agency's erroneous characterization of a proposed transfer as a "reprogramming" is irrelevant. *See* B-202362, Mar. 24, 1981. Moreover, informal congressional approval of an unauthorized transfer of funds

[39] U.S. General Accounting Office, *A Glossary of Terms Used in the Federal Budget Process (Exposure Draft)*, GAO/AFMD-2.1.1 (Washington, D.C.: Jan. 1993), at 80.

[40] 7 Comp. Gen. 524 (1928); 4 Comp. Gen. 848 (1925); 17 Comp. Dec. 174 (1910). A case in which adequate statutory authority was found to exist is B-217093, Jan. 9, 1985 (transfer from Japan-United States Friendship Commission to Department of Education to partially fund a study of Japanese education).

[41] 70 Comp. Gen. 592 (1991); 65 Comp. Gen. 881 (1986); 33 Comp. Gen. 216 (1953); 33 Comp. Gen. 214 (1953); 17 Comp. Dec. 7 (1910); B-286661, Jan. 19, 2001; B-206668, Mar. 15, 1982; B-178205.80, Apr. 13, 1976; B-164912-O.M., Dec. 21, 1977.

[42] 26 Comp. Gen. 545, 548 (1947); 19 Comp. Gen. 774 (1940); 6 Comp. Gen. 748 (1927); 4 Comp. Gen. 703 (1925).

between appropriation accounts does not have the force and effect of law. B-248284.2, Sept. 1, 1992.

The rule applies even though the transfer is intended as a temporary expedient (for example, to alleviate a temporary exhaustion of funds) and the agency contemplates reimbursement. Thus, without statutory authority, an agency cannot "borrow" from another account or another agency. 36 Comp. Gen. 386 (1956); 13 Comp. Gen. 344 (1934); B-290011, Mar. 25, 2002. An exception to this proposition is 31 U.S.C. § 1534, under which an agency may temporarily charge one appropriation for an expenditure benefiting another appropriation of the same agency, as long as amounts are available in both appropriations and the accounts are adjusted to reimburse the appropriation initially charged during or as of the close of the same fiscal year. This statute was intended to facilitate "common service" activities. For example, an agency procuring equipment to be used jointly by several bureaus or offices within the agency funded under separate appropriations may initially charge the entire cost to a single appropriation and later apportion the cost among the appropriations of the benefiting components. *See generally* S. Rep. No. 89-1284 (1966).

The prohibition against transfer is codified in 31 U.S.C. § 1532, the first sentence of which provides:

> "An amount available under law may be withdrawn from one appropriation account and credited to another or to a working fund only when authorized by law."

In addition to the express prohibition of 31 U.S.C. § 1532, an unauthorized transfer would violate 31 U.S.C. § 1301(a) (which prohibits the use of appropriations for other than their intended purpose); would constitute an unauthorized augmentation of the receiving appropriation; and could, if the transfer led to overobligating the receiving appropriation, result in an Antideficiency Act (31 U.S.C. § 1341) violation as well. *E.g.*, B-286929, Apr. 25, 2001; B-248284.2, Sept. 1, 1992; B-222009-O.M., Mar. 3, 1986; 15 Op. Off. Legal Counsel 74 (1991).

Some agencies have limited transfer authority either in permanent legislation or in appropriation act provisions. Such authority will commonly set a percentage limit on the amount that may be transferred from a given appropriation and/or the amount by which the receiving appropriation may be augmented. A transfer pursuant to such authority is, of course, entirely proper. B-290659, Oct. 31, 2002; B-167637, Oct. 11, 1973.

An example is 7 U.S.C. § 2257, which authorizes transfers between Department of Agriculture appropriations. The amount to be transferred may not exceed 7 percent of the "donor" appropriation, and the receiving appropriation may not be augmented by more than 7 percent except in extraordinary emergencies. Cases construing this provision include 33 Comp. Gen. 214; B-218812, Jan. 23, 1987; B-123498, Apr. 11, 1955; and B-218812-O.M., July 30, 1985. *See also* B-279886, Apr. 28, 1998 (noting 5 percent limit on transfer in Department of Justice appropriation).

If an agency has transfer authority of this type, its exercise is not precluded by the fact that the amount of the receiving appropriation had been reduced from the agency's budget request. B-151157, June 27, 1963. Also, the transfer statute is an independent grant of authority and, unless expressly provided otherwise, the percentage limitations do not apply to transfers under any separate transfer authority the agency may have. B-239031, June 22, 1990.

Another type of transfer authority is illustrated by 31 U.S.C. § 1531, which authorizes the transfer of unexpended balances incident to executive branch reorganizations, but only for purposes for which the appropriation was originally available. Cases discussing this authority include 31 Comp. Gen. 342 (1952) and B-92288 *et al.*, Aug. 13, 1971.

Statutory transfer authority does not require any particular "magic words." Of course the word "transfer" will help, but it is not necessary as long as the words that are used make it clear that transfer is being authorized. B-213345, Sept. 26, 1986; B-217093, *supra*; B-182398, Mar. 29, 1976 (letter to Senator Laxalt), *modified on other grounds by* 64 Comp. Gen. 370 (1985).

Some transfer statutes have included requirements for approval by one or more congressional committees. In light of the Supreme Court's decision in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), such "legislative veto" provisions are no longer valid. Whether the transfer authority to which the veto provision is attached remains valid depends on whether it can be regarded as severable from the approval requirement. This in turn depends on an evaluation, in light of legislative history and other surrounding circumstances, of whether Congress would have enacted the substantive authority without the veto provision. *See, e.g.*, 15 Op. Off. Legal Counsel 49 (1991) (the Justice Department Office of Legal Counsel (OLC) concluded that an unconstitutional legislative veto provision of the Selective Service Act was severable from the statute's grant of authority to

the President to obtain expedited delivery of military contracts); 6 Op. Off. Legal Counsel 520 (1982) (OLC concluded that a Treasury Department transfer provision was severable and therefore survived a legislative veto provision).

The precise parameters of transfer authority will, of course, depend on the terms of the statute which grants it. The analytical starting point is the second sentence of 31 U.S.C. § 1532:

> "Except as specifically provided by law, an amount authorized to be withdrawn and credited [to another appropriation account or to a working fund] is available for the same purpose and subject to the same limitations provided by the law appropriating the amount."

In a 2001 decision, the Comptroller General found that funds withdrawn from other agencies' appropriations and credited to the Library of Congress FEDLINK[43] revolving fund retained their time character and did not assume the time character of the FEDLINK revolving fund. B-288142, Sept. 6, 2001. The Library of Congress proposed retaining in the fund amounts of fiscal year money advanced by other agencies in earlier fiscal years when orders were placed and, to the extent the advances were not needed to cover the costs of the orders, applying the excess amounts to new orders placed in subsequent fiscal years. The Library pointed out that the law establishing the revolving fund made amounts in the fund available without fiscal year limitation. The Comptroller General concluded that "amounts withdrawn from a fiscal year appropriation and credited to a no year revolving fund, such as the FEDLINK revolving fund, are available for obligation only during the fiscal year of availability of the appropriation from which the amount was withdrawn." *Id.* The Comptroller General noted that section 1532 is a significant control feature protecting Congress's constitutional prerogatives of the purse. Placing time limits on the availability of appropriations is a fundamental means of congressional control because it permits Congress to periodically review a given agency's programs and activities. Given the significance of time restrictions in preserving congressional powers of the purse, GAO looks for clear

[43] Library of Congress Fiscal Operations Improvement Act of 2000, Pub. L. No. 106-481, § 103, 114 Stat. 2187, 2189 (Nov. 9, 2000), amended by the fiscal year 2002 Legislative Branch Appropriations, Pub. L. No. 107-68, 115 Stat. 560, 588–89 (Nov. 12, 2001), *codified at* 2 U.S.C. § 182c.

legislative expressions of congressional intent before interpreting legislation to override time limitations that Congress, through the appropriations process, has imposed on an agency's use of funds. The Comptroller General rejected the Library's view that the language in the FEDLINK statute overrode the time limitation imposed on funds transferred into FEDLINK because, until the Library had earned those amounts by performing the services ordered from the Library, these transferred amounts were not a part of the *corpus* of FEDLINK. *Id.*

The FEDLINK decision references a situation that GAO addressed in 1944 with regard to a no-year revolving fund called the Navy Procurement Fund. 23 Comp. Gen. 668 (1944). The Navy incorrectly believed that because the revolving fund was not subject to fiscal year limitation, advances to the fund made from annual appropriations were available until expended. A number of other GAO decisions, several predating the enactment of 31 U.S.C. § 1532, have made essentially the same point—that, except to the extent the statute authorizing a transfer provides otherwise, transferred funds are available for purposes permissible under the donor appropriation and are subject to the same limitations and restrictions applicable to the donor appropriation. An example of this is the Economy Act, 31 U.S.C. § 1535.[44]

Restrictions applicable to the receiving account but not to the donor account may or may not apply. Where transfers are intended to accomplish a purpose of the source appropriation (Economy Act transactions, for example), transferred funds have been held not subject to such restrictions. *E.g.*, 21 Comp. Gen. 254 (1941); 18 Comp. Gen. 489 (1938); B-35677, July 27, 1943; B-131580-O.M., June 4, 1957. However, for transfers intended to permit a limited augmentation of the receiving account (7 U.S.C. § 2257, for example), this principle is arguably inapplicable in view of the fundamentally different purpose of the transfer.

As noted above, in the context of working funds, the prohibition against transfer applies not only to interagency funds, but to the consolidation of all or parts of different appropriations of the same agency into a single fund as well. In a few instances, the "pooling" of portions of agency unit

[44] *E.g.*, 31 Comp. Gen. 109, 114–15 (1951); 28 Comp. Gen. 365 (1948); 26 Comp. Gen. at 548; 18 Comp. Gen. 489; 17 Comp. Gen. 900 (1938); 17 Comp. Gen. 73 (1937); 16 Comp. Gen. 545 (1936); B-167034-O.M., Jan. 20, 1970. We discuss the Economy Act in detail in Chapter 12, Volume III of the third edition of *Principles of Federal Appropriations Law.*

appropriations has been found authorized where necessary to implement a particular statute. In B-195775, Sept. 10, 1979, the Comptroller General approved the transfer of portions of unit appropriations to an agencywide pool to be used to fund the Merit Pay System established by the Civil Service Reform Act of 1978. The transfers, while not explicitly authorized in the statute, were seen as necessary to implement the law and carry out the legislative purpose. Following this decision, the Comptroller General held in 60 Comp. Gen. 686 (1981) that the Treasury Department could pool portions of appropriations made to several separate bureaus to fund an Executive Development Program also authorized by the Civil Service Reform Act. However, pooling that would alter the purposes for which funds were appropriated is an impermissible transfer unless authorized by statute. *E.g.*, B-209790-O.M., Mar. 12, 1985. It is also impermissible to transfer more than the cost of the goods or services provided to an ordering agency. 70 Comp. Gen. 592, 595 (1991).

The reappropriation of an unexpended balance for a different purpose is a form of transfer. Such funds cease to be available for the purposes of the original appropriation. 18 Comp. Gen. 564 (1938); A-79180, July 30, 1936. *Cf.* 31 U.S.C. § 1301(b) (reappropriation for different purpose to be accounted for as a new appropriation). If the reappropriation is of an amount "not to exceed" a specified sum, and the full amount is not needed for the new purpose, the balance not needed reverts to the source appropriation. 18 Comp. Gen. at 565.

The prohibition against transfer would not apply to "transfers" of an agency's administrative allocations within a lump-sum appropriation since the allocations are not legally binding.[45] This is a reprogramming, which we discuss below. Thus, where the then Department of Health, Education, and Welfare received a lump-sum appropriation covering several grant programs, it could set aside a portion of each program's allocation for a single fund to be used for "cross-cutting" grants intended to serve more than one target population, as long as the grants were for projects within the scope or purpose of the lump-sum appropriation. B-157356, Aug. 17, 1978.

b. Reprogramming

In 1985, the Deputy Secretary of Defense made the following statement:

[45] The agency must be careful that a transfer of administrative allocations does not, under its own fund control regulations, produce a violation of 31 U.S.C. § 1517(a), discussed further in Chapter 6.

> "The defense budget does not exist in a vacuum. There are forces at work to play havoc with even the best of budget estimates. The economy may vary in terms of inflation; political realities may bring external forces to bear; fact-of-life or programmatic changes may occur. The very nature of the lengthy and overlapping cycles of the budget process poses continual threats to the integrity of budget estimates. Reprogramming procedures permit us to respond to these unforeseen changes and still meet our defense requirements."[46]

The thrust of this statement, while made from the perspective of the Defense Department, applies at least to some extent to all agencies.

Reprogramming is the utilization of funds in an appropriation account for purposes other than those contemplated at the time of appropriation.[47] In other words, it is the shifting of funds from one object to another *within* an appropriation. The term "reprogramming" appears to have come into use in the mid-1950s although the practice, under different names, predates that time.[48]

The authority to reprogram is implicit in an agency's responsibility to manage its funds; no statutory authority is necessary. *See Lincoln v. Vigil*, 508 U.S. 182, 192 (1993) ("After all, the very point of a lump-sum appropriation is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way."). *See also* 4B Op. Off. Legal Counsel 701 (1980) (discussing the Attorney General's authority to reprogram to avoid deficiencies); B-196854.3, Mar. 19, 1984 (Congress is "implicitly conferring the authority to reprogram" by enacting lump-sum appropriations). Indeed, reprogramming is usually a nonstatutory arrangement. This means that there is no general statutory provision either authorizing or prohibiting it,

[46] *Reprogramming Action Within the Department of Defense: Hearing Before the House Armed Services Committee* (Sept. 30, 1985) (remarks prepared for delivery by The Honorable William H. Taft IV, Deputy Secretary of Defense, unprinted).

[47] U.S. General Accounting Office, *A Glossary of Terms Used in the Federal Budget Process (Exposure Draft)*, GAO/AFMD-2.1.1 (Washington, D.C.: Jan. 1993), at 74; B-164912-O.M., Dec. 21, 1977.

[48] Louis Fisher, *Presidential Spending Power*, 76–77 (1975). Fisher also briefly traces the evolution of the concept.

and it has evolved largely in the form of informal (*i.e.*, nonstatutory) agreements between various agencies and their congressional oversight committees. These informal arrangements do not have the force and effect of law. *Blackhawk Heating & Plumbing Co. v. United States*, 622 F.2d 539, 548 (Ct. Cl. 1980). See also 56 Comp. Gen. 201 (1976), holding that the Navy's failure to complete a form required by Defense Department reprogramming regulations was not sufficient to support a claim for proposal preparation costs by an unsuccessful bidder upon cancellation of the proposal.

Thus, as a matter of law, an agency is free to reprogram unobligated funds as long as the expenditures are within the general purpose of the appropriation and are not in violation of any other specific limitation or otherwise prohibited. *E.g.*, B-123469, May 9, 1955; B-279338, Jan. 4, 1999. This is true even though the agency may already have administratively allotted the funds to a particular object. 20 Comp. Gen. 631 (1941). In some situations, the agency's discretion may rise to the level of a duty. *E.g.*, *Blackhawk Heating & Plumbing*, 622 F.2d at 552 n.9 (satisfaction of obligations under a settlement agreement).

There are at present no reprogramming guidelines applicable to all agencies. As one might expect, reprogramming policies, procedures, and practices vary considerably among agencies.[49] In view of the nature of its activities and appropriation structure, the Defense Department has detailed and sophisticated procedures.[50]

In some cases, Congress has attempted to regulate reprogramming by statute, and of course any applicable statutory provisions control. B-283599.2, Sept. 29, 1999; B-279886, Apr. 28, 1998; B-164912-O.M., *supra*. For example, a provision in the fiscal year 2002 Defense Department appropriation act prohibits the use of funds to prepare or present a

[49] GAO reports in this area include: U.S. General Accounting Office, *Information on Reprogramming Authority and Trust Funds*, AIMD-96-102R (Washington, D.C.: June 7, 1996); *Economic Assistance: Ways to Reduce the Reprogramming Notification Burden and Improve Congressional Oversight*, GAO/NSIAD-89-202 (Washington, D.C.: Sept. 21, 1989) (foreign assistance reprogramming); *Budget Reprogramming: Opportunities to Improve DOD's Reprogramming Process*, GAO/NSIAD-89-138 (Washington, D.C.: July 24, 1989); *Budget Reprogramming: Department of Defense Process for Reprogramming Funds*, GAO/NSIAD-86-164BR (Washington, D.C.: July 16, 1986).

[50] *See* Department of Defense Financial Management Regulation 7000.14-R, vol. 3 ch. 6, *Reprogramming of DoD Appropriated Funds* (Aug. 1, 2000).

reprogramming request to the Appropriations Committees "where the item for which reprogramming is requested has been denied by the Congress."[51] The Comptroller General has construed this provision as prohibiting a reprogramming request that would have the effect of restoring funds which had been specifically deleted in the legislative process; that is, the provision is not limited to the denial of an entire project. *See* U.S. General Accounting Office, *Legality of the Navy's Expenditures for Project Sanguine During Fiscal Year 1974*, LCD-75-315 (Washington, D.C.: Jan. 20, 1975).

Under Defense's arrangement as reflected in its written instructions, reprogramming procedures apply to funding shifts between program elements, but not to shifts within a program element. Thus, the denial of a request to reprogram funds from one program element to another does not preclude a military department from shifting available funds within the element. 65 Comp. Gen. 360 (1986). The level at which reprogramming procedures and restrictions will apply depends on applicable legislation, if any, and the arrangements an agency has worked out with its respective committees.

In the absence of a statutory provision such as the Defense provision noted above, a reprogramming that has the effect of restoring funds deleted in the legislative process has been held not legally objectionable. B-195269, Oct. 15, 1979.

Reprogramming frequently involves some form of notification to the appropriations and/or legislative committees. In a few cases, the notification process is prescribed by statute. However, in most cases, the committee review process is nonstatutory and derives from instructions in committee reports, hearings, or other correspondence. Sometimes, in addition to notification, reprogramming arrangements also provide for committee approval. As in the case of transfer, under the Supreme Court's decision in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), statutory committee approval or veto provisions are no longer permissible. However, an agency may continue to observe committee approval procedures as part of its informal arrangements, although they would not be legally binding. B-196854.3, *supra*.

[51] Department of Defense and Emergency Supplemental Appropriations for Recovery from and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8005, 115 Stat. 2230, 2247–48 (Jan. 10, 2002).

In sum, reprogramming procedures provide an element of congressional control over spending flexibility short of resort to the full legislative process. They are for the most part nonbinding, and compliance is largely a matter of "keeping faith" with the pertinent committees.

4. General Provisions: When Construed as Permanent Legislation

Appropriation acts, in addition to making appropriations, frequently contain a variety of provisions either restricting the availability of the appropriations or making them available for some particular use. Such provisions come in two forms: (a) "provisos" attached directly to the appropriating language and (b) general provisions. A general provision may apply solely to the act in which it is contained ("No part of any appropriation contained in this Act shall be used ..."), or it may have general applicability ("No part of any appropriation contained in this or any other Act shall be used ...").[52] General provisions may be phrased in the form of restrictions or positive authority.

Provisions of this type are no less effective merely because they are contained in appropriation acts. It is settled that Congress may repeal, amend, or suspend a statute by means of an appropriation bill, so long as its intention to do so is clear. *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992); *McHugh v. Rubin*, 220 F.3d 53, 57 (2nd Cir. 2000); *see also United States v. Dickerson*, 310 U.S. 554 (1940); *Cella v. United States*, 208 F.2d 783, 790 (7th Cir. 1953), *cert. denied*, 347 U.S. 1016 (1954); *NLRB v. Thompson Products, Inc.*, 141 F.2d 794, 797 (9th Cir. 1944); B-300009, July 1, 2003; 41 Op. Att'y Gen. 274, 276 (1956).

Congress likewise can enact general or permanent legislation in appropriation acts, but again its intent to do so must be clear. This point was made as follows in *Building & Construction Trades Department, AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C. Cir.), *cert. denied*, 506 U.S. 915 (1992):

[52] In recent decades, general provisions of governmentwide applicability—the "this or any other act" provisions—have often been consolidated in the annual Treasury and General Government appropriation acts. *E.g.*, Pub. L. No. 108-7, div. J, title I, § 104, 117 Stat. 11, 437 (Feb. 20, 2003) (fiscal year 2003). Beginning in 2004, these provisions are now part of what is called the Transportation, Treasury, and Independent Agencies Appropriations Act. *See* H.R. 2989, 108th Cong. (passed by the House on September 9, 2003, and the Senate on October 23, 2003).

> "While appropriations are 'Acts of Congress' which can substantively change existing law, there is a very strong presumption that they do not ... and that when they do, the change is only intended for one fiscal year."

In *Atlantic Fish Spotters Ass'n v. Evans*, 321 F.3d 220, 224 (1st Cir. 2003), the court cautioned:

> "Congress may create permanent, substantive law through an appropriations bill only if it is clear about its intentions. Put another way, Congress cannot rebut the presumption against permanence by sounding an uncertain trumpet."

As noted in Chapter 1, rules of both the Senate and the House of Representatives prohibit "legislating" in appropriation acts. However, this merely subjects the provision to a point of order and does not affect the validity of the legislation if the point of order is not raised, or is raised and not sustained. Thus, once a given provision has been enacted into law, the question of whether it is "general legislation" or merely a restriction on the use of an appropriation, that is, whether it might have been subject to a point of order, is academic.

This section deals with the question of when provisos or general provisions appearing in appropriation acts can be construed as permanent legislation.

Since an appropriation act is made for a particular fiscal year, the starting presumption is that everything contained in the act is effective only for the fiscal year covered. Thus, the rule is: A provision contained in an annual appropriation act is not to be construed to be permanent legislation unless the language used therein or the nature of the provision makes it clear that Congress intended it to be permanent. The presumption can be overcome if the provision uses language indicating futurity or if the provision is of a general character bearing no relation to the object of the appropriation. 65 Comp. Gen. 588 (1986); 62 Comp. Gen. 54 (1982); 36 Comp. Gen. 434 (1956); 32 Comp. Gen. 11 (1952); 24 Comp. Gen. 436 (1944); 10 Comp. Gen. 120 (1930); 5 Comp. Gen. 810 (1926); 7 Comp. Dec. 838 (1901).

In analyzing a particular provision, the starting point in ascertaining Congress's intent is, as it must be, the language of the statute. The question to ask is whether the provision uses "words of futurity." The most common word of futurity is "hereafter" and provisions using this term have often been construed as permanent. For specific examples, see *Cella v. United*

States, 208 F.2d at 790; 70 Comp. Gen. 351 (1991); 26 Comp. Gen. 354, 357 (1946); 2 Comp. Gen. 535 (1923); 11 Comp. Dec. 800 (1905); B-108245, Mar. 19, 1952; B-100983, Feb. 8, 1951; B-76782, June 10, 1948. However, use of the word hereafter may not guarantee that an appropriation act provision will be found to constitute permanent law. Thus, in *Auburn Housing Authority v. Martinez*, 277 F.3d 138 (2nd Cir. 2002), the court declined to give permanent effect to a provision that included the word hereafter. The court acknowledged that hereafter generally denoted futurity, but held that this was not sufficient to establish permanence in the circumstances of that case. To read hereafter as giving permanence to one provision would have resulted in repealing another provision enacted in the same act.[53] The court concluded that this result was not what Congress had intended.

As *Auburn Housing Authority* indicates, mere use of the word hereafter may not be adequate as an indication of future effect to establish permanence. Other facts such as the precise location of the word hereafter and the sense in which it is used are also important. Moreover, the use of the word hereafter may not be sufficient, for example, if it appears only in an exception clause and not in the operative portion of the provision, B-228838, Sept. 16, 1987, or if it is used in a way that does not necessarily connote futurity beyond the end of the fiscal year. *Williams v. United States*, 240 F.3d 1019, 1063 (Fed. Cir. 2001).

Words of futurity other than hereafter have also been deemed sufficient. Thus, there is no significant difference in meaning between hereafter and "after the date of approval of this act." 65 Comp. Gen. at 589; 36 Comp. Gen. at 436; B-209583, Jan. 18, 1983. Using a specific date rather than a general reference to the date of enactment produces the same result. B-287488, June 19, 2001; B-57539, May 3, 1946. "Henceforth" may also do the job. B-209583, *supra*. So may specific references to future fiscal years. B-208354, Aug. 10, 1982. On the other hand, the word "hereinafter" was not considered synonymous with hereafter by the First Circuit Court of Appeals and was not deemed to establish a permanent provision. *Atlantic Fish Spotters Ass'n*, *supra*. Rather, the court held that hereinafter is

[53] The appropriation provision in *Auburn Housing Authority* was aimed at countering another provision in the very same act. Thus, the court reasoned that the presumption against repeal by implication was particularly strong in this case. *Id.* at 146. The court also contrasted the hereafter provision with another provision in the same act that was more explicit as to permanence. The latter provision read in part: "[T]his subsection shall apply to fiscal year 1999 and each fiscal year thereafter." *Id.* at 146–47.

universally understood to refer only to what follows in the same writing (*i.e.*, statute). 321 F.3d at 225–26.

In 24 Comp. Gen. 436, the Comptroller General viewed the words "at any time" as words of futurity in a provision which authorized reduced transportation rates to military personnel who were "given furloughs at any time." In that decision, however, the conclusion of permanence was further supported by the fact that Congress appropriated funds to carry out the provision in the following year as well and did not repeat the provision but merely referred to it.

The words "or any other act" in a provision addressing funds appropriated in or made available by "this or any other act" are not words of futurity. They merely refer to any other appropriation act for the same fiscal year. *Williams v. United States*, 240 F.3d at 1063; 65 Comp. Gen. 588; B-230110, Apr. 11, 1988; B-228838, *supra*; B-145492, Sept. 21, 1976.[54] *See also* A-88073, Aug. 19, 1937 ("this or any other appropriation"). Similarly, the words "notwithstanding any other provision of law" are not words of futurity and, standing alone, offer no indication as to the duration of the provision. B-271412, June 13, 1996; B-208705, Sept. 14, 1982.

The words "this or any other act" may be used in conjunction with other language that makes the result, one way or the other, indisputable. The provision is clearly not permanent if the phrase "during the current fiscal year" is added. *Norcross v. United States*, 142 Ct. Cl. 763 (1958). Addition of the phrase "with respect to any fiscal year" makes the provision permanent. B-230110, *supra*.

If words of futurity indicate permanence, it follows that a proviso or general provision that does not contain words of futurity will generally not be construed as permanent. 65 Comp. Gen. 588; 32 Comp. Gen. 11; 20 Comp. Gen. 322 (1940); 10 Comp. Gen. 120; 5 Comp. Gen. 810; 3 Comp. Gen. 319 (1923); B-209583, *supra*; B-208705, *supra*; B-66513, May 26, 1947; A-18614, May 25, 1927. The courts have applied the same analysis. *See United States v. Vulte*, 233 U.S. 509, 514 (1914); *Minis v. United States*, 40 U.S. (15 Pet.) 423 (1841); *Bristol-Myers Squibb Company v. Royce*

[54] One early case found the words "or any other act" sufficient words of futurity. 26 Comp. Dec. 1066 (1920). A later decision, B-37032, Oct. 5, 1943, regarded their effect as inconclusive. Both of these cases must be regarded as implicitly modified by the consistent position expressed in the more recent decisions.

Laboratories, Inc., 69 F.3d 1130, 1136 (Fed. Cir. 1995); *United States v. International Business Machines Corp.*, 892 F.2d 1006, 1009 (Fed. Cir. 1989); *NLRB v. Thompson Products, Inc.*, *supra*; *City of Hialeah v. United States Housing Authority*, 340 F. Supp. 885 (S.D. Fla. 1971).

In particular, the absence of the word hereafter is viewed as telling evidence that Congress did not intend a provision to be permanent. *E.g.*, *Building & Construction Trades Department*, 961 F.2d at 273; *International Business Machines Corp.*, *supra*; Department of Justice, Office of Legal Counsel Memorandum for James S. Gilliland, General Counsel, Department of Agriculture, *Severability and Duration of Appropriations Rider Concerning Frozen Poultry Regulations*, June 4, 1996. For example, the court in *Building & Construction Trades Department* concluded that the absence of the word hereafter in an appropriation provision was more significant than the inclusion of other language that might have indicated permanence.

As the preceding paragraphs indicate, the language of the statute is the crucial determinant. However, other factors may also be taken into consideration. Thus, the repeated inclusion of a provision in annual appropriation acts indicates that it is not considered or intended by Congress to be permanent. 32 Comp. Gen. 11; 10 Comp. Gen. 120; B-270723, Apr. 15, 1996; A-89279, Oct. 26, 1937; 41 Op. Att'y Gen. at 279–80. However, where adequate words of futurity exist, the repetition of a provision in the following year's appropriation act has been viewed simply as an "excess of caution." 36 Comp. Gen. at 436. This factor is of limited usefulness, since the failure to repeat in subsequent appropriation acts a provision that does not contain words of futurity can also be viewed as an indication that Congress did not consider it to be permanent and simply did not want it to continue. *See* 18 Comp. Gen. 37 (1938); A-88073, *supra*. Thus, if the provision does not contain words of futurity, then repetition or nonrepetition lead to the same result—that the provision is not permanent. If the provision does contain words of futurity, then nonrepetition indicates permanence but repetition, although it suggests nonpermanence, is inconclusive.

The inclusion of a provision in the United States Code is relevant as an indication of permanence but is not controlling. 36 Comp. Gen. 434; 24 Comp. Gen. 436. Failure to include a provision in the Code would appear to be of no significance. A reference by the codifiers to the failure to reenact a provision suggests nonpermanence. 41 Op. Att'y Gen. at 280–81.

Legislative history is also relevant, but has been used for the most part to support a conclusion based on the presence or absence of words of futurity. *See Cella v. United States*, 208 F.2d at 790 n.1; *NLRB v. Thompson Products*, 141 F.2d at 798; 65 Comp. Gen. 588; B-277719, Aug. 20, 1997; B-209583, *supra*; B-208705, *supra*; B-108245, *supra*; B-57539, *supra*. In B-192973, Oct. 11, 1978, a general provision requiring the submission of a report "annually to the Congress" was held not permanent in view of conflicting expressions of congressional intent. Legislative history by itself has not been used to find futurity where it is missing in the statutory language. *See Building & Construction Trades Department*, 961 F.2d at 274.

The degree of relationship between a given provision and the object of the appropriation act in which it appears or the appropriating language to which it is appended is a factor to be considered. If the provision bears no direct relationship to the appropriation act in which it appears, this is an indication of permanence. For example, a provision prohibiting the retroactive application of an energy tax credit provision in the Internal Revenue Code was found sufficiently unrelated to the rest of the act in which it appeared, a supplemental appropriations act, to support a conclusion of permanence. B-214058, Feb. 1, 1984. *See also* 62 Comp. Gen. at 56; 32 Comp. Gen. 11; 26 Comp. Gen. at 357; B-37032, *supra*; A-88073, *supra*. The closer the relationship, the less likely it is that the provision will be viewed as permanent. A determination under rules of the Senate that a proviso is germane to the subject matter of the appropriation bill will negate an argument that the proviso is sufficiently unrelated as to suggest permanence. B-208705, *supra*.

The phrasing of a provision as positive authorization rather than a restriction on the use of an appropriation is an indication of permanence, but usually has been considered in conjunction with a finding of adequate words of futurity. 36 Comp. Gen. 434; 24 Comp. Gen. 436. An early decision, 17 Comp. Dec. 146 (1910), held a proviso to be permanent based solely on the fact that it was not phrased as a restriction on the use of the appropriation to which it was attached, but this decision seems inconsistent with the weight of authority and certainly with the Supreme Court's decision in *Minis v. United States*, cited above.

Finally, a provision may be construed as permanent if construing it as temporary would render the provision meaningless or produce an absurd result. 65 Comp. Gen. 352 (1986); 62 Comp. Gen. 54; B-200923, Oct. 1, 1982. These decisions dealt with a general provision designed to prohibit cost-of-

living pay increases for federal judges "except as may be specifically authorized by Act of Congress hereafter enacted." Pub. L. No. 97-92, § 140, 95 Stat. 1183, 1200 (Dec. 15, 1981). The provision appeared in a fiscal year 1982 continuing resolution, which expired on September 30, 1982. The next applicable pay increase would have been effective October 1, 1982. Thus, if the provision were not construed as permanent, it would have been meaningless "since it would have been enacted to prevent increases during a period when no increases were authorized to be made." 62 Comp. Gen. at 56–57.[55] Similarly, a provision was held permanent in 9 Comp. Gen. 248 (1929) although it contained no words of futurity, because it was to become effective on the last day of the fiscal year and an alternative construction would have rendered it effective for only 1 day, clearly not the legislative intent. *See also* 65 Comp. Gen. at 590; B-214058, *supra*; B-270723, *supra*.

In sum, the six additional factors mentioned above are all relevant indicia of whether a given provision should be construed as permanent. However, the presence or absence of words of futurity remains the crucial factor, and the additional factors have been used for the most part to support a conclusion based primarily on this presence or absence. Four of the factors—occurrence or nonoccurrence in subsequent appropriation acts, inclusion in United States Code, legislative history, and phrasing as positive authorization—have never been used as the sole basis for finding permanence in a provision without words of futurity. The two remaining factors—relationship to rest of statute and meaningless or absurd result—can be used to find permanence in the absence of words of futurity, but the conclusion is almost invariably supported by at least one of the other factors, such as legislative history.

[55] In *Williams v. United States*, 240 F.3d at 1026, the Court of Appeals for the Federal Circuit held that the provision addressed in these decisions was not permanent, referring to the "unmistakable language of Public Law 97-92 ... terminating the effect of Section 140 in 1982." The court did not address the consequence, if any, of Congress's use of the word hereafter. The court did concede, however, that "even if Section 140 did not expire as of September 30, 1982, the 1989 Act falls well within the specific exception in that statute for an 'Act of Congress hereafter enacted.'" *Id.* at 1027. The 1989 Act the court referred to is the Ethics Reform Act, Pub. L. No. 101-194, 103 Stat. 1716 (Nov. 30, 1989), which entitled federal judges to cost-of-living pay increases whenever federal employees received a cost-of-living increase. The 1989 Act was enacted after the series of GAO decisions was issued that addressed the fiscal year 1982 law.

C. Relationship of Appropriations to Other Types of Legislation

> "As usual, this court has been dealt the difficult hand which results when Congress does not get its 'Act[s]' together."
>
> *American Federation of Government Employees, Local 1945 v. Cheney*, CV92-PT-2453-E, (N.D. Ala., Dec. 21, 1992) (Propst, J.), Slip Op at 8.

1. Distinction between Authorization and Appropriation

Appropriation acts must be distinguished from two other types of legislation: "enabling" or "organic" legislation and "appropriation authorization" legislation. Enabling or organic legislation is legislation that creates an agency, establishes a program, or prescribes a function, such as the Department of Education Organization Act or the Federal Water Pollution Control Act. While the organic legislation may provide the necessary authority to conduct the program or activity, it, with relatively rare exceptions, does not provide any money.

Appropriation authorization legislation, as the name implies, is legislation which authorizes the appropriation of funds to implement the organic legislation. It may be included as part of the organic legislation or it may be separate. As a general proposition, it too does not give the agency any actual money to spend. With certain exceptions (discussed in section B.1 of this chapter), only the appropriation act itself permits the withdrawal of funds from the Treasury. The principle has been stated as follows:

> "The mere authorization of an appropriation does not authorize expenditures on the faith thereof or the making of contracts obligating the money authorized to be appropriated."

16 Comp. Gen. 1007, 1008 (1937). Restated, an authorization of appropriations does not constitute an appropriation of public funds, but contemplates subsequent legislation by Congress actually appropriating the funds. 35 Comp. Gen. 306 (1955); 27 Comp. Dec. 923 (1921).[56]

Like the organic legislation, authorization legislation is considered and reported by the committees with legislative jurisdiction over the particular

[56] *See also* 67 Comp. Gen. 332 (1988); 37 Comp. Gen. 732 (1958); 26 Comp. Gen. 452 (1947); 15 Comp. Gen. 802 (1936); 4 Comp. Gen. 219 (1924); A-27765, July 8, 1929.

subject matter, whereas the appropriation bills are exclusively within the jurisdiction of the appropriations committees.

There is no general requirement, either constitutional or statutory, that an appropriation act be preceded by a specific authorization act. *E.g.*, 71 Comp. Gen. 378, 380 (1992). The existence of a statute (organic legislation) imposing substantive functions upon an agency that require funding for their performance is itself sufficient authorization for the necessary appropriations. B-173832, July 16, 1976; B-173832, Aug. 1, 1975; B-111810, Mar. 8, 1974. However, statutory requirements for authorizations do exist in a number of specific situations. An example is section 660 of the Department of Energy Organization Act, 42 U.S.C. § 7270 ("Appropriations to carry out the provisions of this chapter shall be subject to annual authorization"). Another example is 10 U.S.C. § 114(a), which provides that no funds may be appropriated for military construction, military procurement, and certain related research and development "unless funds therefor have been specifically authorized by law."

In addition, rules of the House of Representatives prohibit appropriations for expenditures not previously authorized by law. *See* Rule XXI(2), Rules of the House of Representatives. The effect of this Rule is to subject the offending appropriation to a point of order. A more limited provision exists in Rule XVI, Standing Rules of the Senate.

The majority of appropriations today are preceded by some form of authorization although, as noted, it is not statutorily required in all cases.

Authorizations take many different forms, depending in part on whether they are contained in the organic legislation or are separate. Authorizations contained in organic legislation may be "definite" (setting dollar limits either in the aggregate or for specific fiscal years) or "indefinite" (authorizing "such sums as may be necessary to carry out the provisions of this act"). An indefinite authorization serves little purpose other than to comply with House Rule XXI. Appropriation authorizations enacted as separate legislation resemble appropriation acts in structure, for example, the annual Department of Defense Authorization Acts.

An authorization act is basically a directive to Congress itself, which Congress is free to follow or alter (up or down) in the subsequent appropriation act. A statutory requirement for prior authorization is also essentially a congressional mandate to itself. Thus, for example, if Congress appropriates money to the Defense Department in violation of 10 U.S.C.

§ 114, there are no practical consequences. The appropriation is just as valid, and just as available for obligation, as if section 114 had been satisfied or did not exist.

In sum, the typical sequence is: (1) organic legislation; (2) authorization of appropriations, if not contained in the organic legislation; and (3) the appropriation act. While this may be the "normal" sequence, there are deviations and variations, and it is not always possible to neatly label a given piece of legislation. Consider, for example, the following:

> "The Secretary of the Treasury is authorized and directed to pay to the Secretary of the Interior ... for the benefit of the Coushatta Tribe of Louisiana ... out of any money in the Treasury not otherwise appropriated, the sum of $1,300,000."[57]

This is the first section of a law enacted to settle land claims by the Coushatta Tribe against the United States and to prescribe the use and distribution of the settlement funds. Applying the test described above in section B.1, it is certainly an appropriation—it contains a specific direction to pay and designates the funds to be used—but, in a technical sense, it is not an appropriation act. Also, it contains its own authorization. Thus, we have an authorization and an appropriation combined in a statute that is neither an authorization act (in the sense described above) nor an appropriation act. General classifications may be useful and perhaps essential, but they should not be expected to cover all situations.

2. Specific Problem Areas and the Resolution of Conflicts

a. Introduction

Appropriation acts, as we have seen, do not exist in a vacuum. They are enacted against the backdrop of program legislation and, in many cases, specific authorization acts. This section deals with two broad but closely related issues. First, what precisely can Congress do in an appropriation act? Is it limited to essentially "rubber stamping" what has previously been

[57] Pub. L. No. 100-411, § 1(a)(1), 102 Stat. 1097 (Aug. 22, 1988).

authorized? Second, what does an agency do when faced with what it perceives to be an inconsistency between an appropriation act and some other statute?

The remaining portions of this section raise these issues in a number of specific contexts. In this introduction, we present four important principles. The resolution of problems in the relationship of appropriation acts to other statutes will almost invariably lie in the application of one or more of these principles.

First, as a general proposition, appropriations made to carry out authorizing laws "are made on the basis that the authorization acts in effect constitute an adjudication or legislative determination of the subject matter." B-151157, June 27, 1963. Thus, except as specified otherwise in the appropriation act, appropriations to carry out enabling or authorizing laws must be expended in strict accord with the original authorization both as to the amount of funds to be expended and the nature of the work authorized. 36 Comp. Gen. 240, 242 (1956); B-258000, Aug. 31, 1994; B-220682, Feb. 21, 1986; B-204874, July 28, 1982; B-151157, *supra*; B-125404, Aug. 31, 1956. While it is true that one Congress cannot bind a future Congress, nor can it bind subsequent action by the same Congress, an authorization act is more than an academic exercise and its requirements must be followed unless changed by subsequent legislation.

Second, Congress is free to amend or repeal prior legislation as long as it does so directly and explicitly and does not violate the Constitution. It is also possible for one statute to implicitly amend or repeal a prior statute, but it is firmly established that "repeal by implication" is disfavored, and statutes will be construed to avoid this result whenever reasonably possible. *E.g.*, *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 189–90 (1978); *Morton v. Mancari*, 417 U.S. 535, 549 (1974); *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936); 72 Comp. Gen. 295, 297 (1993); 68 Comp. Gen. 19, 22–23 (1988); 64 Comp. Gen. 142, 145 (1984); 58 Comp. Gen. 687, 691–92 (1979); B-290011, Mar. 25, 2002; B-261589, Mar. 6, 1996; B-258163, Sept. 29, 1994; B-236057, May 9, 1990. Repeals by implication are particularly disfavored in the appropriations context. *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992).

A repeal by implication will be found only where "the intention of the legislature to repeal [is] clear and manifest." *Posadas*, 296 U.S. at 503; B-290011, *supra*; B-236057, *supra*. The principle that implied repeals are disfavored applies with special weight when it is asserted that a general

statute repeals a more specific statute. 72 Comp. Gen. at 297 and cases cited.

A corollary to the "cardinal rule" against repeal by implication, or perhaps another way of saying the same thing, is the rule of construction that statutes should be construed harmoniously so as to give maximum effect to both wherever possible. *E.g.*, *Posadas*, 296 U.S. at 503; *Strawser v. Atkins*, 290 F.3d 720 (4th Cir.), *cert. denied*, 537 U.S. 1045 (2002); 53 Comp. Gen. 853, 856 (1974); B-290011, *supra*; B-208593.6, Dec. 22, 1988. See B-258000, *supra*, for an example of harmonizing ambiguous appropriation and authorization provisions in order to effectuate congressional intent.

Third, if two statutes are in irreconcilable conflict, the more recent statute, as the latest expression of Congress, governs. As one court concluded in a statement illustrating the eloquence of simplicity, "[t]he statutes are thus in conflict, the earlier permitting and the later prohibiting," so the later statute supersedes the earlier. *Eisenberg v. Corning*, 179 F.2d 275, 277 (D.C. Cir. 1949). In a sense, the "last in time" rule is yet another way of expressing the repeal by implication principle. We state it separately to highlight its narrowness: it applies only when the two statutes cannot be reconciled in any reasonable manner, and then only to the extent of the conflict. *E.g.*, *Posadas*, 296 U.S. at 503; B-203900, Feb. 2, 1989; B-226389, Nov. 14, 1988; B-214172, July 10, 1984, *aff'd upon reconsideration*, 64 Comp. Gen. 282 (1985).

We will see later in this section that while the last in time rule can be stated with eloquent simplicity, its application is not always so simple.

The fourth principle we state in two parts:

First, despite the occasional comment to the contrary in judicial decisions (a few of which we will note later), Congress can and does "legislate" in appropriation acts. *E.g.*, *Preterm, Inc. v. Dukakis*, 591 F.2d 121 (1st Cir.), *cert. denied*, 441 U.S. 952 (1979); *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973), *cert. denied*, 414 U.S. 1171 (1974); *Eisenberg v. Corning*, *supra*; *Tayloe v. Kjaer*, 171 F.2d 343 (D.C. Cir. 1948). *See also* the *Dickerson*, *Cella*, and *Thompson Products* cases cited above in section B.4, and the discussion of the congressional power of the purse in Chapter 2, section B. It may well be that the device is "unusual and frowned upon." *Preterm*, 591 F.2d at 131; *Building & Construction Trades Department, AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C. Cir.), *cert. denied*, 506 U.S. 915 (1992) ("While appropriations are 'Acts of Congress'

which can substantively change existing law, there is a very strong presumption that they do not ... and that when they do, the change is only intended for one fiscal year."). It also may well be that the appropriation act will be narrowly construed when it is in apparent conflict with authorizing legislation. *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000); *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547, 1558 (D.C. Cir. 1984). Nevertheless, appropriation acts are, like any other statute, passed by both Houses of Congress and either signed by the President or enacted over a presidential veto. As such, and subject of course to constitutional strictures, they are "just as effective a way to legislate as are ordinary bills relating to a particular subject." *Friends of the Earth*, 485 F.2d at 9; *Envirocare of Utah Inc. v. United States*, 44 Fed. Cl. 474, 482 (1999).

Second, legislative history is not legislation. As useful and important as legislative history may be in resolving ambiguities and determining congressional intent, it is the language of the appropriation act, and not the language of its legislative history, that is enacted into law. *E.g.*, *Shannon v. United States*, 512 U.S. 573, 583 (1994) (declining to give effect to "legislative history that is in no way anchored in the text of the statute."). As the Supreme Court stated in a case previously cited, which we will discuss in more detail later:

> "Expressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress ... ."

Tennessee Valley Authority v. Hill, 437 U.S. at 191; *see also Lincoln v. Vigil*, 508 U.S. 182, 192 (1993); *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075 (Fed. Cir. 2003).

These, then, are the "guiding principles" that will be applied in various combinations and configurations to analyze and resolve the problem areas identified in the remainder of this section. For the most part, our subsequent discussion will merely note the applicable principle(s). A useful supplemental reference on many of the topics we discuss is Louis Fisher, *The Authorization-Appropriation Process in Congress: Formal Rules and Informal Practices*, 29 Cath. U.L. Rev. 51 (1979).

b. Variations in Amount

(1) Appropriation exceeds authorization

Generally speaking, Congress is free to appropriate more money for a given object than the amount previously authorized. As the Comptroller General stated in a brief letter to a Member of Congress:

> "While legislation providing for an appropriation of funds in excess of the amount contained in a related authorization act apparently would be subject to a point of order under rule 21 of the Rules of the House of Representatives, there would be no basis on which we could question otherwise proper expenditures of funds actually appropriated."

B-123469, Apr. 14, 1955.

The governing principle was stated as follows in 36 Comp. Gen. 240, 242 (1956):

> "It is fundamental ... that one Congress cannot bind a future Congress and that the Congress has full power to make an appropriation in excess of a cost limitation contained in the original authorization act. This authority is exercised as an incident to the power of the Congress to appropriate and regulate expenditures of the public money."

If we are dealing with a line-item appropriation or a specific earmark in a lump-sum appropriation, the quoted statement would appear beyond dispute. However, complications arise where the authorization for a given item is specific and a subsequent lump-sum appropriation includes a higher amount for that item specified only in legislative history and not in the appropriation act itself. In this situation, the rule that one Congress cannot bind a future Congress or later action by the same Congress must be modified somewhat by the rule against repeal by implication. The line of demarcation, however, is not precisely defined.

In 36 Comp. Gen. 240, Congress had authorized the construction of two bridges across the Potomac River "at a cost not to exceed" $7 million. A subsequent appropriation act made a lump-sum appropriation that included funds for the bridge construction (specified in legislative history but not in the appropriation act itself) in excess of the amount authorized. The decision concluded that the appropriation, as the latest expression of Congress on the matter, was available for expenditure. Similarly, it was

held in B-148736, Sept. 15, 1977, that the National Park Service could expend its lump-sum appropriation for planning and construction of parks even though the expenditures for specific parks would exceed amounts authorized to be appropriated for those parks.

Both of these cases were distinguished in 64 Comp. Gen. 282 (1985), which affirmed a prior decision, B-214172, July 10, 1984. Authorizing legislation for the Small Business Administration (SBA) provided specific funding levels for certain SBA programs. SBA's 1984 appropriation act contained a lump-sum appropriation for the programs which, according to the conference report, included amounts in excess of the funding levels specified in the authorization. Relying in part on *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), GAO concluded that the two statutes were not in conflict, that the appropriation did not implicitly repeal or amend the authorizations, and that the spending levels in the authorization were controlling. The two prior cases were distinguished as being limited in scope and dealing with different factual situations. 64 Comp. Gen. at 285. For example, it was clear in the prior cases that Congress was knowingly providing funds in excess of the authorization ceilings. In contrast, the SBA appropriation made explicit reference to the authorizing statute, thus suggesting that Congress did not intend that the appropriation be inconsistent with the authorized spending levels. *Id.* at 286–87.

(2) Appropriation less than authorization

Congress is free to appropriate less than an amount authorized either in an authorization act or in program legislation, again, as in the case of exceeding an authorization, at least where it does so directly. *E.g.*, 53 Comp. Gen. 695 (1974). This includes the failure to fund a program at all, that is, not to appropriate any funds. *United States v. Dickerson*, 310 U.S. 554 (1940).

A case in point is *City of Los Angeles v. Adams*, 556 F.2d 40 (D.C. Cir. 1977). The Airport and Airway Development Act of 1970 authorized airport development grants "in aggregate amounts not less than" specified dollar amounts for specified fiscal years, and provided an apportionment formula. Pub. L. No. 91-258, title I, 84 Stat. 219 (May 21, 1970). Subsequent appropriation acts included specific limitations on the aggregate amounts to be available for the grants, less than the amounts authorized. The court concluded that both laws could be given effect by limiting the amounts available to those specified in the appropriation acts, but requiring that

they be distributed in accordance with the formula of the authorizing legislation. In holding the appropriation limits controlling, the court said:

> "According to its own rules, Congress is not supposed to use appropriations measures as vehicles for the amendment of general laws, including revision of expenditure authorization.... Where Congress chooses to do so, however, we are bound to follow Congress's last word on the matter even in an appropriations law."

Id. at 48–49.

Relying on *City of Los Angeles v. Adams*, the court in *Ramah Navajo School Board, Inc. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), held that, while appropriations in amounts less than envisioned in authorization acts control, an agency must still adhere as much as possible to the authorizing statute in distributing such funds:

> "[I]t is clear that the Congress responsible for the ISDA [Indian Self-Determination Act] did not intend, in the case of insufficient funding, for the numerous detailed provisions of the Act to be shunted aside by a Secretary exercising total discretion in allocation of the funds. Nor, as the legislative history shows, did the 1995 Congress which appropriated insufficient funds intend for its shortfall to eviscerate the substantive provisions of the earlier Act."

87 F.3d at 1349 (emphasis in original).

Where the amount authorized to be appropriated is mandatory rather than discretionary, Congress can still appropriate less, or can suspend or repeal the authorizing legislation, as long as the intent to suspend or repeal the authorization is clear. The power is considerably diminished, however, with respect to entitlements that have already vested. The distinction is made clear in the following passage from the Supreme Court's decision in *United States v. Larionoff*, 431 U.S. 864, 879 (1977):

> "No one disputes that Congress may prospectively reduce the pay of members of the Armed Forces, even if that reduction deprived members of benefits they had expected to be able to earn.... It is quite a different matter, however,

> for Congress to deprive a service member of pay due for services already performed, but still owing. In that case, the congressional action would appear in a different constitutional light."

Several earlier cases provide concrete illustrations of what Congress can and cannot do in an appropriation act to reduce or eliminate a nonvested mandatory authorization. In *United States v. Fisher*, 109 U.S. 143 (1883), permanent legislation set the salaries of certain territorial judges. Congress subsequently appropriated a lesser amount, "in full compensation" for that particular year. The Court held that Congress had the power to reduce the salaries, and had effectively done so. "It is impossible that both acts should stand. No ingenuity can reconcile them. The later act must therefore prevail... ." *Id.* at 146. *See also United States v. Mitchell*, 109 U.S. 146 (1883). In the *Dickerson* case cited above, the Court found a mandatory authorization effectively suspended by a provision in an appropriation act prohibiting the use of funds for the payment in question "notwithstanding the applicable portions of" the authorizing legislation.

In the cases in the preceding paragraph, the "reduction by appropriation" was effective because the intent of the congressional action was unmistakable. The mere failure to appropriate sufficient funds is not enough. In *United States v. Langston*, 118 U.S. 389 (1886), for example, the Court refused to find a repeal by implication in "subsequent enactments which merely appropriated a less amount ... and which contained no words that expressly, or by clear implication, modified or repealed the previous law." *Id.* at 394. A similar holding is *United States v. Vulte*, 233 U.S. 509 (1914). A failure to appropriate in this type of situation will prevent administrative agencies from making payment, but, as in *Langston* and *Vulte*, is unlikely to prevent recovery by way of a lawsuit. *See also Wetsel-Oviatt Lumber Co., Inc. v. United States*, 38 Fed. Cl. 563, 570–571 (1997); *New York Airways, Inc. v. United States*, 369 F.2d 743 (Ct. Cl. 1966); *Gibney v. United States*, 114 Ct. Cl. 38 (1949).

Thus, appropriating less than the amount of a nonvested mandatory authorization, including not appropriating any funds for it, will be effective under the "last in time" rule as long as the intent to suspend or repeal the authorization is clear. However, by virtue of the rule against repeal by implication, a mere failure to appropriate sufficient funds will not be construed as amending or repealing prior authorizing legislation.

Another complication arises when an authorization act creates what would otherwise be an entitlement to funds, but then makes that entitlement "subject to the availability of appropriations." A case in point is the Indian Self-Determination and Education Assistance Act, 25 U.S.C. §§ 450–450n. The complex provisions of the Act in effect guarantee Indian tribes a certain level of reimbursement for their costs in administering federal programs. However, the Act makes this guarantee subject to the availability of appropriations and further provides that the Secretary of the Interior is not required to reduce program funding for other tribes or tribal organizations in order to satisfy this guarantee. *See* 25 U.S.C. § 450j-1(a) and (b). These provisions have spawned much litigation, including the *Ramah Navajo School Board* case, discussed previously.

The courts have agreed that the "subject to the availability of appropriations" language conditions the Act's entitlement, so that the reimbursement amounts intended by the Act must be reduced where Congress has clearly appropriated insufficient funds to meet them in full. See in addition to *Ramah*: *Thompson v. Cherokee Nation of Oklahoma*, 334 F.3d 1075 (Fed. Cir. 2003) (Cherokee Nation II); *Cherokee Nation of Oklahoma v. Thompson*, 311 F.3d 1054 (10th Cir. 2002) (Cherokee Nation I); *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Thompson*, 279 F.3d 660 (9th Cir. 2002); and *Babbitt v. Oglala Sioux Tribal Public Safety Department*, 194 F.3d 1374 (Fed. Cir. 1999), *cert. denied*, 530 U.S. 1203 (2000). However, the courts differ on whether Congress did or did not provide insufficient funds for particular fiscal years. *Compare Cherokee Nation II* with *Cherokee Nation I* and *Shoshone-Bannock*.

(3) Earmarks in authorization act

In Chapter 6, section B, we set forth the various types of language Congress uses in appropriation acts when it wants to "earmark" a portion of a lump-sum appropriation as either a maximum or a minimum to be spent on some particular object. These same types of earmarking language can be used in authorization acts.

A number of cases have considered the question of whether there is a conflict when an authorization establishes a minimum earmark ("not less than," "shall be available only"), and the related appropriation is a lump-sum appropriation which does not expressly mention the earmark. Is the agency in this situation required to observe the earmark? Applying the principle that an appropriation must be expended in accordance with the related authorization unless the appropriation act provides otherwise, GAO

has concluded that the agency must observe the earmark. 64 Comp. Gen. 388 (1985); B-220682, Feb. 21, 1986 ("an earmark in an authorization act must be followed where a lump sum is appropriated pursuant to the authorization"); B-207343, Aug. 18, 1982; B-193282, Dec. 21, 1978. *See also* B-131935, Mar. 17, 1986. This result applies even though following the earmark will drastically reduce the amount of funds available for nonearmarked programs funded under the same appropriation. 64 Comp. Gen. at 391. (These cases can also be viewed as another application of the rule against repeal by implication.)

If Congress expressly appropriates an amount at variance with a previously enacted authorization earmark, the appropriation will control under the last in time rule. For example, in 53 Comp. Gen. 695 (1974), an authorization act had expressly earmarked $18 million for the United Nations International Children's Emergency Fund (UNICEF) for specific fiscal years. A subsequent appropriation act provided a lump sum, out of which only $15 million was earmarked for UNICEF. The Comptroller General concluded that the $15 million specified in the appropriation act was controlling and represented the maximum available for UNICEF for that fiscal year.

c. Variations in Purpose

As noted previously, it is only the appropriation, and not the authorization by itself, that permits the incurring of obligations and the making of expenditures. It follows that an authorization does not, as a general proposition, expand the scope of availability of appropriations beyond what is permissible under the terms of the appropriation act. The authorized purpose must be implemented either by a specific appropriation or by inclusion in a broader lump-sum appropriation. Thus, an appropriation made for specific purposes is not available for related but more extended purposes contained in the authorization act but not included in the appropriation. 19 Comp. Gen. 961 (1940). *See also* 37 Comp. Gen. 732 (1958); 35 Comp. Gen. 306 (1955); 26 Comp. Gen. 452 (1947).

In addition to simply failing to appropriate funds for an authorized purpose, Congress can expressly restrict the use of an appropriation for a purpose or purposes included in the authorization. *E.g.*, B-24341, Apr. 1, 1942 ("whatever may have been the intention of the original enabling act it must give way to the express provisions of the later act which appropriated funds but limited their use").

Similarly, by express provision in an appropriation act, Congress can expand authorized purposes. In 67 Comp. Gen. 401 (1988), for example, an appropriation expressly included two mandatory earmarks for projects beyond the scope of the related authorization. Noting that "the appropriation language provides its own expanded authorization for these programs," GAO concluded that the agency was required to reserve funds for the two mandatory earmarks before committing the balance of the appropriation for discretionary expenditures.

Except to the extent Congress expressly expands or limits authorized purposes in the appropriation act, the appropriation must be used in accordance with the authorization act in terms of purpose. Thus, in B-125404, Aug. 31, 1956, it was held that an appropriation to construct a bridge across the Potomac River pursuant to a statute authorizing construction of the bridge and prescribing its location was not available to construct the bridge at a slightly different location even though the planners favored the alternate location. Similarly, in B-193307, Feb. 6, 1979, the Flood Control Act of 1970 authorized construction of a dam and reservoir for the Ellicott Creek project in New York. Subsequently, legislation was proposed to authorize channel construction instead of the dam and reservoir, but was not enacted. A continuing resolution made a lump-sum appropriation for flood control projects "authorized by law." The Comptroller General found that the appropriation did not repeal the prior authorization, and that therefore, the funds could not properly be used for the alternative channel construction.

d. Period of Availability

An authorization of appropriations, like an appropriation itself, may authorize appropriations to be made on a multiple year or no-year, as well as fiscal year, basis. The question we address here is the extent to which the period of availability specified in an authorization or enabling act is controlling. Congress can, in an appropriation act, enact a different period of availability than that specified in the authorization. The implications for an appropriation of language in the authorization of that appropriation specifying a period of availability for the appropriation being authorized is a matter of statutory construction.

Thus, an appropriation of funds "to remain available until expended" (no-year) was found controlling over a provision in the authorizing legislation that authorized appropriations on a 2-year basis. B-182101, Oct. 16, 1974. *See also* B-149372, B-158195, Apr. 29, 1969 (2-year appropriation of presidential transition funds held controlling notwithstanding provision in Presidential Transition Act of 1963, which authorized services and facilities

to former President and Vice President only for 6 months after expiration of term of office). In a 1982 decision, 61 Comp. Gen. 532, GAO reconciled an authorization act and an appropriation act by finding the appropriation to be a no-year appropriation, except to the extent the related authorization specified a lesser period of availability. The authorization act had authorized funds to be appropriated for a particular project "for fiscal year 1978." The fiscal year 1978 funds for that project were included in a larger lump sum appropriated "as authorized by law, to remain available until expended." In reconciling the two statutes, GAO concluded that funds for the project in question from the lump-sum appropriation were available for obligation only during fiscal year 1978.

Until 1971, the test GAO applied in cases like these was whether the appropriation language specifically referred to the authorization. If it did, then GAO considered the provisions of the authorization act—including any multiple year or no-year authorizations—to be incorporated by reference into the provisions of the appropriation act. This was regarded as sufficient to overcome 31 U.S.C. § 1301(c), which presumes that an appropriation is for one fiscal year unless the appropriation states otherwise, and to overcome the presumption of fiscal year availability derived from the enacting clause of the appropriation act. If the appropriation language did not specifically refer to the authorization act, the appropriation was held to be available only for the fiscal year covered by the appropriation act. 45 Comp. Gen. 508 (1966); 45 Comp. Gen. 236 (1965); B-147196, Apr. 5, 1965; B-127518, May 10, 1956; B-37398, Oct. 26, 1943. The reference had to be specific; the phrase "as authorized by law" was not enough. B-127518, May 10, 1956.

By 1971, however, Congress was enacting (and continues to enact) a general provision in all appropriation acts: "[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." Now, if an appropriation act contains the provision quoted in the preceding paragraph, it will not be sufficient for an appropriation contained in that act to merely incorporate a multiple year or no-year authorization by reference. The effect of this general provision is to require the appropriation language to expressly provide for availability beyond one year in order to overcome the enacting clause. 50 Comp. Gen. 857 (1971).

The general provision resulted from the efforts of the House Committee on Appropriations in connection with the 1964 foreign aid appropriations bill.

In its report on that bill, the Committee first described then-existing practice:

> "The custom and practice of the Committee on Appropriations has been to recommend appropriations on an annual basis unless there is some valid reason to make the item available for longer than a one-year period. The most common technique in the latter instances is to add the words 'to remain available until expended' to the appropriation paragraph.
>
> "In numerous instances, ... the Congress has in the underlying enabling legislation authorized appropriations therefor to be made on an 'available until expended' basis. When he submits the budget, the President generally includes the phrase 'to remain available until expended' in the proposed appropriation language if that is what the Executive wishes to propose. The Committee either concurs or drops the phrase from the appropriation language."

H.R. Rep. No. 88-1040, at 55 (1963). The Committee then noted a situation in the 1963 appropriation that had apparently generated some disagreement. The President had requested certain refugee assistance funds to remain available until expended. The report goes on to state:

> "The Committee thought the funds should be on a 1-year basis, thus the phrase 'to remain available until expended' was not in the bill as reported. The final law also failed to include the phrase or any other express language of similar import. Thus Congress took affirmative action to limit the availability to the fiscal year 1963 only."

Id. at 56. The Committee then quoted what is now 31 U.S.C. § 1301(c), and stated:

> "The above quoted 31 U.S.C. [§ 1301(c)] seems clearly to govern and, in respect to the instant class of appropriation, to require *the act making the appropriation to expressly* provide for availability longer than 1 year if the enacting clause limiting the appropriations in the law to a given fiscal year is to be overcome as to any specific appropriation

> therein made. And it accords with the rule of reason and ancient practice to retain control of such an elementary matter wholly within the terms of the law making the appropriation. The two hang together. But in view of the question in the present case and the possibility of similar questions in a number of others, consideration may have to be given to revising the provisions of 31 U.S.C. [§ 1301(c)] to make its scope and meaning crystal clear and perhaps update it as may otherwise appear desirable."

Id. (emphasis in original).

Section 1301(c) was not amended, but soon after the above discussion appeared, appropriation acts started including the general provision stating 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." This added another ingredient to the recipe that had not been present in the earlier decisions, although it took several years before the new general provision began appearing in almost all appropriation acts.

When the issue arose again in a 1971 case, GAO considered the new appropriation act provision and the 1963 comments of the House Appropriations Committee. In that decision, GAO noted that "it seems evident that the purpose [of the new general provision] is to overcome the effect of our decisions ... regarding the requirements of 31 U.S.C. [§ 1301(c)]," and further noted the apparent link between the discussion in House Report 1040 and the appearance of the new provision. 50 Comp. Gen. at 859. *See also* 58 Comp. Gen. 321 (1979); B-207792, Aug. 24, 1982. Thus, the appropriation act will have to expressly repeat the multiple year or no-year language of the authorization, or at least expressly refer to the specific section of the authorizing statute in which it appears.

Changes in the law from year to year may produce additional complications. For example, the National Historic Preservation Act, Pub. L. No. 89-665, § 103(b), 80 Stat. 915, 916 (Oct. 15, 1966) (authorization), provided that funds appropriated and apportioned to states would remain available for obligation for three fiscal years, after which time any unobligated balances would be reapportioned. This amounted to a no-year authorization. For several years, appropriations to fund the program were made on a no-year basis, thus permitting implementation of the authorization provision. Starting with fiscal year 1978, however, the appropriation act was changed and the funds were made available for two

fiscal years. *See* Pub. L. No. 95-74, 91 Stat. 289 (July 26, 1977). This raised the question of whether the appropriation act had the effect of overriding the apparently conflicting authorizing language, or if it meant merely that reapportionment could occur after two fiscal years instead of three, thus effectively remaining a no-year appropriation.

GAO concluded that the literal language and plain meaning of the appropriation act must govern. In addition to the explicit appropriation language, the appropriation acts contained the general provision restricting availability to the current fiscal year unless expressly provided otherwise therein. Therefore, any funds not obligated by the end of the 2-year period would expire and could not be reapportioned. B-151087, Feb. 17, 1982; B-151087, Sept. 15, 1981.

For purposes of the rule of 50 Comp. Gen. 857 and its progeny, it makes no difference whether the authorization is in an annual authorization of appropriations act or in permanent enabling legislation. It also appears to make no difference whether the authorization merely authorizes the longer period of availability or directs it. See, for example, 58 Comp. Gen. 321, *supra*, in which the general provision restricting availability to the current fiscal year, as the later expression of congressional intent, was held to override 25 U.S.C. § 13a, which provides that the unobligated balances of certain Indian assistance appropriations "shall remain available for obligation and expenditure" for a second fiscal year. *See also* 71 Comp. Gen. 39, 40 (1991); B-249087, June 25, 1992. Similarly, in *Dabney v. Reagan*, No. 82 Civ. 2231-CSH (S.D. N.Y. June 6, 1985), the court held that a 2-year period of availability specified in appropriation acts would override a "mandatory" no-year authorization contained in the Solar Energy and Energy Conservation Bank Act.

e. Authorization Enacted After Appropriation

Our discussion thus far has, for the most part, been in the context of the normal sequence—that is, the authorization act is passed before the appropriation act. Sometimes, however, consideration of the authorization act is delayed and it is not enacted until *after* the appropriation act. Determining the relationship between the two acts involves application of the same general principles we have been applying when the acts are enacted in the normal sequence.

The first step is to attempt to construe the statutes together in some reasonable fashion. To the extent this can be done, there is no real conflict, and the reversed sequence will in many cases make no difference. Earlier, for example, we discussed the rule that a specific earmark in an

authorization act must be followed when the related appropriation is an unspecified lump sum. In two of the cases cited for that proposition—B-220682, Feb. 21, 1986, and B-193282, Dec. 21, 1978—the appropriation act had been enacted prior to the authorization, a factor that did not affect the outcome.

In B-193282, for example, the 1979 Justice Department authorization act authorized a lump-sum appropriation to the Immigration and Naturalization Service (INS) and provided that $2 million "shall be available" for the investigation and prosecution of certain cases involving alleged Nazi war criminals. The 1979 appropriation act made a lump-sum appropriation to the INS but contained no specific mention of the Nazi war criminal item. The appropriation act was enacted on October 10, 1978, but the authorization act was not enacted until November. In response to a question as to the effect of the authorization provision on the appropriation, the Comptroller General advised that the two statutes could be construed harmoniously, and that the $2 million earmarked in the authorization act could be spent only for the purpose specified. It was further noted that the $2 million represented a minimum but not a maximum. B-193282, *supra*, *amplified by* B-193282, Jan. 25, 1979. This is the same result that would have been reached if the normal sequence had been followed.

Similarly, in B-226389, Nov. 14, 1988, a provision in the 1987 Defense Appropriation Act prohibited the Navy from including certain provisions in ship maintenance contracts. The 1987 authorization act, enacted after the appropriation, amended a provision in Title 10 of the United States Code to require the prohibited provisions. Application of the last in time rule would have negated the appropriation act provision. However, it was possible to give effect to both provisions by construing the appropriation restriction as a temporary exemption from the permanent legislation in the authorization act. Again, this is the same result that would have been reached if the authorization act were enacted first.

If the authorization and appropriation cannot be reasonably reconciled, the last in time rule will apply just as it would under the normal sequence, except here the result will be different because the authorization is the later of the two. A 1989 case will illustrate. The 1989 Treasury Department appropriation act contained a provision prohibiting placing certain components of the Department under the oversight of the Treasury Inspector General. A month later, Congress enacted legislation placing those components under the Inspector General's jurisdiction and

transferring their internal audit staffs to the Inspector General "notwithstanding any other provision of law." But for the "notwithstanding" clause, it might have been possible to use the same approach as in B-226389 and find the appropriation restriction a temporary exemption from the new permanent legislation. In view of that clause, however, GAO found that the two provisions could not be reconciled, and concluded that the Inspector General legislation, as the later enactment, superseded the appropriation act provision. B-203900, Feb. 2, 1989.

Two other examples of invoking the last in time rule can be found in dueling Defense Department authorization and appropriation act provisions. In one case, the Defense appropriations act for 1992 directed the Defense Department to extend a contract relating to the Civilian Heath and Medical Program for Uniformed Services (CHAMPUS) program for another year. However, the defense authorization act for 1992 countermanded that mandate and permitted the Defense Department to award a new contract. In B-247119, Mar. 2, 1992, the Comptroller General had little difficulty concluding that the two provisions were irreconcilably in conflict. Indeed, the legislative history demonstrated that the drafters of the appropriation and authorization acts sought to trump each other on this point as their two bills proceeded through Congress. The more difficult issue was how to apply the last in time rule to the case. The complication was that, while Congress had completed action on the authorization bill first (1 day before the appropriation bill), the President acted in the opposite order—signing the appropriation bill into law 9 days before he signed the authorization bill. Noting that the date on which the President signs a bill is clearly the date it becomes law, the Comptroller General held that the authorization act was the later in time, and thus, its provisions controlled.

The other case involved competing provisions in the Defense authorization and appropriation acts for fiscal year 1993. Section 351(a) of the authorization act (Pub. L. No. 102-484, 106 Stat. 2377), which the President signed into law on October 23, 1992, required the use of competitive procedures before Defense took action to consolidate certain maintenance activities at a single depot. Section 9152 of the appropriation act (Pub. L. No. 102-396, 106 Stat. 1943), which the President had signed several weeks earlier on October 6, provided that, notwithstanding section 351(a) of the authorization act, no funds could be used to prevent or delay the depot consolidation. In the ensuing litigation, the court ultimately determined that the two provisions could be reconciled. *American Federation of Government Employees, Local 1945 v. Cheney*, CV92-PT-2453-E (N.D.

Ala., Dec. 21, 1992). However, citing B-247119 among other sources, the court added that if the provisions were irreconcilable, the later in time would prevail. In this connection, the court noted that the tension between the two provisions apparently stemmed from efforts by individual Members of Congress to protect federal facilities within their districts and observed:

> "There is perhaps even more reason to apply the more objective standards of 'last enacted prevails' and/or the requirement of a 'clear manifestation of intent to repeal' when the legislation is more significantly influenced by individual Congressmen than by the 'intent' of Congress."

AFGE, Local 1945, Slip Op. at 24.

Just as with any other application of the last in time rule, the later enactment prevails only to the extent of the irreconcilable conflict. B-61178, Oct. 21, 1946 (specific limitations in appropriation act not superseded by after-enacted authorization absent indication that authorization was intended to alter provisions of prior appropriation).

Sometimes, application of the standard principles fails to produce a simple answer. For example, Congress appropriated $75 million for fiscal year 1979 for urban formula grants "as authorized by the Urban Mass Transportation Act of 1964." When the appropriation was enacted, legislation was pending—and was enacted 3 months after the appropriation—repealing the existing formula and replacing it with a new and somewhat broader formula. The new formula provision specified that it was to be applicable to "sums appropriated pursuant to subparagraph (b) of this paragraph." On the one hand, since the original formula had been repealed, it could no longer control the use of the appropriation. Yet on the other hand, funds appropriated 3 months prior to passage of the new formula could not be said to have been appropriated "pursuant to" the new act. Hence, neither formula was clearly applicable to the $75 million. The Comptroller General concluded that the $75 million earmarked for the grant program had to be honored and that it should be distributed in accordance with those portions of the new formula that were "consistent with the terms of the appropriation," that is, the funds should be used in accordance with those elements of the new formula that had also been reflected in the original formula. B-175155, July 25, 1979.

f. Two Statutes Enacted on Same Day

The Supreme Court has said that the doctrine against repeal by implication is even more forceful "where the one act follows close upon the other, at

the same session of the Legislature." *Morf v. Bingaman*, 298 U.S. 407, 414 (1936); *see also Auburn Housing Authority v. Martinez*, 277 F.3d 138, 145 (2nd Cir. 2002); B-277905, Mar. 17, 1998. This being the case, the doctrine reaches perhaps its strongest point, and the "last in time" rule is correspondingly at its weakest, when both statutes are enacted on the same day. Except in the very rare case in which the intent of one statute to affect the other is particularly manifest, it makes little sense to apply a last in time concept where the time involved is a matter of hours, or as in one case (B-79243, Sept. 28, 1948), 7 minutes. Thus, the starting point is the presumption—applicable in all cases but even stronger in this situation—that Congress intended both statutes to stand together. 67 Comp. Gen. 332, 335 (1988); B-204078.2, May 6, 1988.

When there is an apparent conflict between an appropriation act and another statute enacted on the same day, the approach is to make every effort to reconcile the statutes so as to give maximum effect to both. In some cases, it will be found that there is no real conflict. In 67 Comp. Gen. 332, for example, one statute authorized certain Commodity Credit Corporation appropriations to be made in the form of current, indefinite appropriations, while the appropriation act, enacted on the same day, made line-item appropriations. There was no conflict because the authorization provision was a directive to Congress itself that Congress was free to disregard, subject to a possible point of order, when making the actual appropriation. Similarly, there was no inconsistency between an appropriation act provision, which required that Panama Canal Commission appropriations be spent only in conformance with the Panama Canal Treaty of 1977 and its implementing legislation, and an authorization act provision, enacted on the same day, requiring prior specific authorizations. B-204078.2, *supra*.

In other cases, applying traditional rules of statutory construction will produce reconciliation. For example, if one statute can be said to be more specific than the other, they can be reconciled by applying the more specific provision first, with the broader statute then applying to any remaining situations. *See* B-231662, Sept. 1, 1988; B-79243, *supra*.

Legislative history may also help. In B-207186, Feb. 10, 1989, for example, authorizing legislation extended the life of the Solar Energy and Energy Conservation Bank to March 15, 1988. The 1988 appropriation, enacted on the same day, made a 2-year appropriation for the Bank. Not only were there no indications of any intent for the appropriation to have the effect of extending the Bank's life, there were specific indications to the contrary.

Thus, GAO regarded the appropriation as available, in theory for the full 2-year period, except that the authority for anyone to obligate the appropriation would cease when the Bank went out of existence.

The most extreme situation, and one in which the last in time rule by definition cannot possibly apply, is two conflicting provisions in the same statute. Even here, the approaches outlined above will usually prove successful. *See, e.g.*, B-211306, June 6, 1983. We have found only one case, 26 Comp. Dec. 534 (1920), in which two provisions in the same act were found irreconcilable. One provision in an appropriation act appropriated funds to the Army for the purchase of land; another provision a few pages later in the same act expressly prohibited the use of Army appropriations for the purchase of land. The Comptroller of the Treasury concluded, in a very brief decision, that the prohibition nullified the appropriation. The advantage of this result, although not stated this way in the decision, is that Congress would ultimately have to resolve the conflict and it is easier to make expenditures that have been deferred than to recoup money after it has been spent.

The fact that two allegedly conflicting provisions were contained in the same statute influenced the court to reconcile them in *Auburn Housing Authority, supra*. The funding restriction provision used the word "hereafter," which, as the court acknowledged, ordinarily connotes permanence. However, the court nonetheless held that this provision applied only for the duration of the fiscal year and did not constitute an implied repeal of the other provision. The opinion observed in this regard:

> "Given the unique circumstances of this case, the court is not convinced that the mere presence of the word 'hereafter' in section 226 clearly demonstrates Congress's intent to repeal section 519(n). This could be a different case if sections 226 and 519(n) appeared in separate statutes, but that is not the question we consider in the instant appeal."

277 F.3d at 146.

g. Ratification by Appropriation

"Ratification by appropriation" is the doctrine by which Congress can, by the appropriation of funds, confer legitimacy on an agency action that was questionable when it was taken. Clearly Congress may ratify that which it could have authorized. *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 301–02 (1937). It is also settled that Congress may manifest its ratification by the appropriation of funds. *Greene v. McElroy*, 360 U.S. 474,

504–06 (1959); *Ex Parte Endo*, 323 U.S. 283, 303 n.24 (1944); *Brooks v. Dewar*, 313 U.S. 354, 360–61 (1941).

Having said this, however, we must also emphasize that "ratification by appropriation is not favored and will not be accepted where prior knowledge of the specific disputed action cannot be demonstrated clearly." *District of Columbia Federation of Civic Ass'ns v. Airis*, 391 F.2d 478, 482 (D.C. Cir. 1968); *Associated Electric Cooperative, Inc. v. Morton*, 507 F.2d 1167, 1174 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 830 (1975); *American Legion v. Derwinski*, 827 F. Supp. 805, 809 (D.D.C. 1993), *aff'd*, 54 F.3d 789 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1041 (1996).

Thus, a simple lump-sum appropriation, without more, will generally not afford sufficient basis to find a ratification by appropriation. *Endo*, 323 U.S. at 303 n.24; *Airis*, 391 F.2d at 481–82; *Wade v. Lewis*, 561 F. Supp. 913, 944 (N.D. Ill. 1983); B-213771, July 10, 1984. The appropriation "must plainly show a purpose to bestow the precise authority which is claimed." *Endo*, 323 U.S. at 303 n.24. *Accord: Schism v. United States*, 316 F.3d 1259, 1289–1290 (Fed. Cir. 2002), *cert. denied*, ___ U.S. ___, 123 S. Ct. 2246 (2003) ("ratification ordinarily cannot occur in the appropriations context unless the appropriations bill itself expressly allocates funds for a specific agency or activity"); *A-1 Cigarette Vending, Inc. v. United States*, 49 Fed. Cl. 345, 354 (2001), *aff'd sub nom.* 304 F.3d 1349 (Fed. Cir. 2002), *cert. denied sub nom.* ___ U.S. ___, 123 S. Ct. 1570 (2003) ("[S]imply because the lack of an appropriation demonstrates a lack of authority does not mean that an appropriation by itself will create such authority.... [A] general appropriation of funds for an overall program is not sufficient to bestow authority upon a particular aspect of an agency's program.").

Some courts have used language which, when taken out of context, implies that appropriations cannot serve to ratify prior agency action. *E.g.*, *Concerned Residents of Buck Hill Falls v. Grant*, 537 F.2d 29, 35 n.12 (3rd Cir. 1976); *University of the District of Columbia Faculty Ass'n v. Board of Trustees of the University of the District of Columbia*, 994 F. Supp. 1, 10 (D.D.C. 1998). Nevertheless, while the doctrine may not be favored, it does exist. The courts demonstrate their reluctance to apply this doctrine by giving extra scrutiny to alleged ratifications by appropriation. Their reluctance to find such ratifications probably stems from a more general judicial aversion to interpreting appropriation acts as changing substantive law. Thus, the court observed in *Thomas v. Network Solutions, Inc.*, 2 F. Supp. 2d 22, 32 at n.12 (D.D.C. 1998), *aff'd*, 176 F.3d 500 (D.C. Cir. 1999), *cert. denied*, 528 U.S. 1115 (2000) (citations omitted):

> " [I]t is well recognized that Congress does not normally perform legislative functions—such as ratification—through appropriations bills.... This does not mean that Congress cannot effect a ratification through an appropriations bill, but it does mean that Congress must be especially clear about its intention to do so."

We turn now to some specific situations in which the doctrine of ratification by appropriation has been accepted or rejected.

Presidential reorganizations have generated perhaps the largest number of cases. Generally, when the President has created a new agency or has transferred a function from one agency to another, and Congress subsequently appropriates funds to the new agency or to the old agency for the new function, the courts have found that the appropriation ratified the presidential action. *Fleming v. Mohawk Wrecking & Lumber Co.*, 331 U.S. 111, 116 (1947); *Isbrandtsen-Moller Co. v. United States*, 300 U.S. 139, 147 (1937). The transfer to the Equal Employment Opportunity Commission (EEOC) in 1978 of enforcement responsibility for the Age Discrimination in Employment Act and the Equal Pay Act produced a minor flood of litigation. The cases were complicated by the existence of a legislative veto issue, with the ratification issue having to be faced only if the reorganization authority were found severable from the legislative veto. Although the courts were not uniform, a clear majority found that the subsequent appropriation of funds to the EEOC ratified the transfer. *EEOC v. Dayton Power & Light Co.*, 605 F. Supp. 13 (S.D. Ohio 1984); *EEOC v. Delaware Dept. of Health & Social Services*, 595 F. Supp. 568 (D. Del. 1984); *EEOC v. New York*, 590 F. Supp. 37 (N.D. N.Y. 1984); *EEOC v. Radio Montgomery, Inc.*, 588 F. Supp. 567 (W.D. Va. 1984); *EEOC v. City of Memphis*, 581 F. Supp. 179 (W.D. Tenn. 1983); *Muller Optical Co. v. EEOC*, 574 F. Supp. 946 (W.D. Tenn. 1983), *aff'd on other grounds*, 743 F.2d 380 (6th Cir. 1984). *Contra EEOC v. Martin Industries*, 581 F. Supp. 1029 (N.D. Ala.), *appeal dismissed*, 469 U.S. 806 (1984); *EEOC v. Allstate Insurance Co.*, 570 F. Supp. 1224 (S.D. Miss. 1983), *appeal dismissed*, 467 U.S. 1232 (1984). Congress resolved any doubt by enacting legislation in 1984 to expressly ratify all prior reorganization plans implemented pursuant to any reorganization statute.[58]

[58] Pub. L. No. 98-532, 98 Stat. 2705 (Oct. 19, 1984), *codified at* 5 U.S.C. § 906 note.

Another group of cases that has refused to find ratification by appropriation concern proposed construction projects funded under lump-sum appropriations where the effect would be either to expand the scope of a prior congressional authorization or to supply an authorization required by statute but not obtained. *Libby Rod & Gun Club v. Poteat*, 594 F.2d 742 (9th Cir. 1979); *National Wildlife Federation v. Andrus*, 440 F. Supp. 1245 (D.D.C. 1977); *Atchison, Topeka & Santa Fe Railway Co v. Callaway*, 382 F. Supp. 610 (D.D.C. 1974); B-223725, June 9, 1987.

A few additional cases in which ratification by appropriation was found are summarized below:

- The Tennessee Valley Authority (TVA) had asserted the authority to construct power plants. TVA's position was based on an interpretation of its enabling legislation that the court found consistent with the purpose of the legislation although the legislation itself was ambiguous. The appropriation of funds to TVA for power plant construction ratified TVA's position. *Young v. Tennessee Valley Authority*, 606 F.2d 143 (6th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980).

- The authority of the Postmaster General to conduct a mail transportation experiment was ratified by the appropriation of funds to the former Post Office Department under circumstances showing that Congress was fully aware of the experiment. The court noted that existing statutory authority was broad enough to encompass the experiment and that nothing prohibited it. *Atchison, Topeka & Santa Fe Railway Co. v. Summerfield*, 229 F.2d 777 (D.C. Cir. 1955), *cert. denied*, 351 U.S. 926 (1956).

- The authority of the Department of Justice to retain private counsel to defend federal officials in limited circumstances, while not explicitly provided by statute, is regarded as ratified by the specific appropriation of funds for that purpose. 2 Op. Off. Legal Counsel 66 (1978).

- Another Office of Legal Counsel opinion described instances in which Congress has ratified by appropriation the use of United States combat forces. The opinion concludes on this point:

> "In sum, basic principles of constitutional law—and, in particular, the fact that Congress may express approval through the appropriations process—and historical practice in the war powers area, as well as the bulk of the case law

> and a substantial body of scholarly opinion, support the conclusion that Congress can authorize hostilities through its use of the appropriations power. Although it might be the case that general funding statutes do not necessarily constitute congressional approval for conducting hostilities, this objection loses its force when the appropriations measure is directly and conspicuously focused on specific military action."[59]

Note that in all of the cases in which ratification by appropriation was approved, the agency had at least an arguable legal basis for its action. *See also Airis*, 391 F.2d at 481 n.20; B-232482, June 4, 1990. The doctrine has not been used to excuse violations of law. Also, when an agency action is constitutionally suspect, the courts will require that congressional action be particularly explicit. *Greene v. McElroy*, 360 U.S. at 506–07; *Martin Industries*, 581 F. Supp. at 1033–37; *Muller Optical Co.*, 574 F. Supp. at 954.

In B-285725, Sept. 29, 2000, the Comptroller General condensed the foregoing principles into this test for ratification by appropriation:

> "To conclude that Congress through the appropriations process has ratified agency action, three factors generally must be present. First, the agency takes the action pursuant to at least arguable authority; second, the Congress has specific knowledge of the facts; and third, the appropriation of funds clearly bestows the claimed authority."

The opinion in B-285725 rejected an assertion by the District of Columbia government that Congress had ratified certain funding practices that otherwise violated the Antideficiency Act, 31 U.S.C. § 1341. Specifically, it held that information contained in the District's budget justifications and said to constitute notice to Congress (1) lacked clarity and precision, (2) did not create any awareness that could be imputed to Congress as a whole, and (3) was not reflected in any legislative language that could reasonably be viewed as authorizing the practices in question.

[59] *Authorization for Continuing Hostilities in Kosovo*, unpublished OLC opinion, Dec. 19, 2000.

h. Repeal by Implication

We have on several occasions referred to the rule against repeal by implication. The leading case in the appropriations context is *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978) (hereafter *TVA v. Hill*). In that case, Congress had authorized construction of the Tellico Dam and Reservoir Project on the Little Tennessee River, and had appropriated initial funds for that purpose. Subsequently, Congress passed the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 *et seq.* Under the provisions of that Act, the Secretary of the Interior declared the "snail darter," a 3-inch fish, to be an endangered species. It was eventually determined that the Little Tennessee River was the snail darter's critical habitat and that completion of the dam would result in extinction of the species. Consequently, environmental groups and others brought an action to halt further construction of the Tellico Project. In its decision, the Supreme Court held in favor of the plaintiffs, notwithstanding the fact that construction was well under way and that, even after the Secretary of the Interior's actions regarding the snail darter, Congress had continued to make yearly appropriations for the completion of the dam project.

The appropriation involved was a lump-sum appropriation that included funds for the Tellico Dam but made no specific reference to it. However, passages in the reports of the appropriations committees indicated that those committees intended the funds to be available notwithstanding the Endangered Species Act. The Court held that this was not enough. The doctrine against repeal by implication, the Court said, applies with even greater force when the claimed repeal rests solely on an appropriation act:

> "When voting on appropriations measures, legislators are entitled to operate under the assumption that the funds will be devoted to purposes which are lawful and not for any purpose forbidden."

Id. at 190. Noting that "[e]xpressions of committees dealing with requests for appropriations cannot be equated with statutes enacted by Congress" (*id.* at 191), the Court held that the unspecified inclusion of the Tellico Dam funds in a lump-sum appropriation was not sufficient to constitute a repeal by implication of the Endangered Species Act insofar as it related to that project.[60] In other words, the doctrine of ratification by appropriation

[60] Less than 4 months after the Court's decision, Congress enacted legislation exempting the Tellico project from the Endangered Species Act. Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 5, 92 Stat. 3751, 3761 (Nov. 10, 1978).

we discussed in the preceding section does not apply, at least when the appropriation is an otherwise unspecified lump sum, where the effect would be to change an existing statutory requirement.

TVA v. Hill is important because it is a clear and forceful statement from the Supreme Court. In terms of the legal principle involved, however, the Court was breaking little new ground. A body of case law from the lower courts had already laid the legal foundation. One group of cases, for example, had established the proposition that the appropriation of funds does not excuse noncompliance with the National Environmental Policy Act. *Environmental Defense Fund v. Froehlke*, 473 F.2d 346 (8th Cir. 1972); *Committee for Nuclear Responsibility v. Seaborg*, 463 F.2d 783 (D.C. Cir. 1971); *National Audubon Society v. Andrus*, 442 F. Supp. 42 (D.D.C. 1977); *Environmental Defense Fund v. Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971). Cases supporting the general proposition of *TVA v. Hill* in other contexts were also not uncommon. *See Associated Electric Cooperative, Inc. v. Morton*, 507 F.2d 1167 (D.C. Cir.), *cert. denied*, 423 U.S. 830 (1974); *District of Columbia Federation of Civic Ass'ns v. Airis*, 391 F.2d 478 (D.C. Cir. 1968); *Maiatico v. United States*, 302 F.2d 880 (D.C. Cir. 1962).

Some subsequent cases applying the concept of *TVA v. Hill* (although not all citing that case) include *Donovan v. Carolina Stalite Co.*, 734 F.2d 1547 (D.C. Cir. 1984); 64 Comp. Gen. 282 (1985); B-208593.6, Dec. 22, 1988; B-213771, July 10, 1984; B-204874, July 28, 1982; and B-193307, Feb. 6, 1979. In B-204874, for example, the Comptroller General advised that the otherwise unrestricted appropriation of coal trespass receipts to the Bureau of Land Management did not implicitly amend or repeal the provisions of the Federal Land Policy and Management Act prescribing the use of such funds.

In reading the cases, one will encounter the occasional sweeping statement such as "appropriations acts cannot change existing law," *National Audubon Society v. Andrus*, 442 F. Supp. at 45. Such statements can be misleading, and should be read in the context of the facts of the particular case. It is clear from *TVA v. Hill*, together with its ancestors and its progeny, that Congress cannot legislate by legislative history. It seems equally clear that the appropriation of funds, without more, is not sufficient to overcome a statutory requirement. If, however, instead of an unrestricted lump sum, the appropriation in *TVA v. Hill* had provided a specific line-item appropriation for the Tellico project, together with the words "notwithstanding the provisions of the Endangered Species Act," it is

difficult to see how a court could fail to give effect to the express mandate of the appropriation.

Thus, the message is not that Congress cannot legislate in an appropriation act. It can, and we have previously cited a body of case law to that effect. The real message is that, if Congress wants to use an appropriation act as the vehicle for suspending, modifying, or repealing a provision of existing law, it must do so advisedly, speaking directly and explicitly to the issue.

The Supreme Court conveyed this message succinctly in *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992) (citations omitted), holding that—

> "[A]lthough repeals by implication are especially disfavored in the appropriations context, Congress nonetheless may amend substantive law in an appropriations statute, as long as it does so clearly."

In *Robertson*, the Court found an implied repeal by appropriation act to be clear and explicit.

Subsequent judicial decisions, of course, apply the *Robertson* approach to alleged implied repeals by appropriation. Since the issue is one of basic statutory construction, the courts naturally reach different results depending on the particular statutory language involved. For example, *Pontarelli v. United States Department of the Treasury*, 285 F.3d 216 (3rd Cir. 2002), held that an annual appropriation restriction enacted for many years stating that "[n]one of the funds appropriated herein shall be available to investigate or act upon applications for relief from Federal firearms disabilities under 18 U.S.C. § 925(c)" clearly superseded the provision in Title 18 of the United States Code. *Pontarelli* cites many other decisions that reached the same conclusion with respect to this particular appropriation language. Another case finding a clear implied repeal by appropriation is *Bald Eagle Ridge Protection Ass'n, Inc. v. Mallory*, 119 F. Supp. 2d 473 (M.D. Pa. 2000), *aff'd*, 275 F.3d 33 (3rd Cir. 2001).

Examples of cases that reconciled the appropriation and other statutory provisions, and thus found no implied repeal include: *Strawser v. Atkins*, 290 F.3d 720 (4th Cir.), *cert. denied*, 537 U.S. 1045 (2002); *Auburn Housing Authority v. Martinez*, 277 F.3d 138 (2nd Cir. 2002); *Firebaugh Canal Co. v. United States*, 203 F.3d 568 (9th Cir. 2000); *Ramey v.*

Stevedoring Services of America, 134 F.3d 954 (9th Cir. 1998); *Environmental Defense Center v. Babbitt*, 73 F.3d 867 (9th Cir. 1995).

Still other cases hold that appropriation restrictions alleged to be permanent in superseding other laws were effective only for a fiscal year. *E.g.*, *Auburn Housing Authority, supra*; *Building & Construction Trades Department, AFL-CIO v. Martin*, 961 F.2d 269, 273 (D.C. Cir.), *cert. denied*, 506 U.S. 915 (1992). In a related context, the court in *Williams v. United States*, 240 F.3d 1019 (Fed. Cir. 2001), *cert. denied*, 535 U.S. 911 (2002), disagreed with a series of Comptroller General decisions and held that appropriation language enacted in 1982 that required specific congressional authorization for pay raises for judges was not permanent legislation but expired at the end of fiscal year 1982.

i. Lack of Authorization

As we have previously noted, there is no general statutory requirement that appropriations be preceded by specific authorizations, although they are required in some instances. Where authorizations are not required by law, Congress may, subject to a possible point of order, appropriate funds for a program or object that has not been previously authorized or which exceeds the scope of a prior authorization, in which event the enacted appropriation, in effect, carries its own authorization and is available to the agency for obligation and expenditure. *E.g.*, 67 Comp. Gen. 401 (1988); B-219727, July 30, 1985; B-173832, Aug. 1, 1975.

It has also been held that, as a general proposition, the appropriation of funds for a program whose funding authorization has expired, or is due to expire during the period of availability of the appropriation, provides sufficient legal basis to continue the program during that period of availability, absent indication of contrary congressional intent. 65 Comp. Gen. 524 (1986); 65 Comp. Gen. 318, 320–21 (1986); 55 Comp. Gen. 289 (1975); B-131935, Mar. 17, 1986; B-137063, Mar. 21, 1966. The result in these cases follows in part from the fact that the total absence of appropriations authorization legislation would not have precluded the making of valid appropriations for the programs. *E.g.*, B-202992, May 15, 1981. In addition, as noted, the result is premised on the conclusion, derived either from

legislative history or at least the absence of legislative history to the contrary, that Congress did not intend for the programs to terminate.[61]

There are limits on how far this principle can be taken, depending on the particular circumstances. One illustration is B-207186, Feb. 10, 1989. A 1988 continuing resolution provided funds for the Solar Bank, to remain available until September 30, 1989. Legislation enacted on the same day provided for the Bank to terminate on March 15, 1988. Based in part on legislative history indicating the intent to terminate the Bank on the specified sunset date, GAO distinguished prior decisions in which appropriations were found to authorize program continuation and concluded that the appropriation did not authorize continuation of the Solar Bank beyond March 15, 1988.

The Comptroller General's decision in 71 Comp. Gen. 378 (1992) provides another variant. Section 8 of the Civil Rights Commission's authorizing act stated that "the provisions of this Act shall terminate on September 30, 1991." While Congress was actively working on reauthorization legislation for the Commission toward the end of fiscal year 1991, this legislation was not enacted until after September 30, 1991. Nevertheless, Congress had enacted a continuing resolution for the early part of fiscal year 1992 that specifically included funding for the Commission. The Comptroller General first observed that the line of cases discussed above permitting programs to continue after expiration of their authorization did not apply. Unlike the mere authorization lapse in those cases, the statute here provided that the Commission would "terminate" on September 30. The Comptroller General also distinguished the Solar Bank case, discussed above, since the provision for termination of the Commission was enacted long before the continuing resolution that provided for the Commission's funding after September 30. In the final analysis, the decision held that the funding provision for the Commission was irreconcilable with the section 8 termination provision and effectively suspended the operation of section 8. In reaching this conclusion, the decision noted the clear intent of Congress that the

[61] Congressional practice also firmly supports this conclusion since Congress appropriates huge sums each year to fund programs with expired authorizations. According to the Congressional Budget Office (CBO), appropriations for which specific authorizations had expired have ranged between about $90 billion and about $120 billion in recent fiscal years. *Unauthorized Appropriations and Senate Resolution 173: Hearing Before the Senate Committee on Rules and Administration*, 108th Cong. 3 (July 9, 2003) (statement by CBO Director Douglas Holtz-Eakin).

Commission continue to operate without interruption after September 30, 1991.

A device Congress has used on occasion to avoid this type of problem is an "automatic extension" provision under which funding authorization is automatically extended for a specified time period if Congress has not enacted new authorizing legislation before it expires. An example is discussed in B-214456, May 14, 1984.

Questions concerning the effect of appropriations on expired or about-to-expire authorizations have tended to arise more frequently in the context of continuing resolutions. The topic is discussed further, including several of the cases cited above, in Chapter 8.

Where specific authorization is statutorily required, the case may become more difficult. In *Libby Rod & Gun Club v. Poteat*, 594 F.2d 742 (9th Cir. 1979), the court held that a lump-sum appropriation available for dam construction was not, by itself, sufficient to authorize a construction project for which specific authorization had not been obtained as required by 33 U.S.C. § 401. The court suggested that *TVA v. Hill* and similar cases do not "mandate the conclusion that courts can never construe appropriations as congressional authorization," although it was not necessary to further address that issue in view of the specific requirement in that case. *Poteat*, 594 F.2d at 745–46. The result would presumably have been different if Congress had made a specific appropriation "notwithstanding the provisions of 33 U.S.C. § 401." It should be apparent that the doctrines of repeal by implication and ratification by appropriation are relevant in analyzing issues of this type.

D. Statutory Interpretation: Determining Congressional Intent

> "[T]his is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute."
>
> *Greenwood v. United States*, 350 U.S. 366, 374 (1956) (Frankfurter, J.).

1. The Goal of Statutory Construction[62]

As we have noted elsewhere, an appropriation can be made only by means of a statute. In addition to providing funds, the typical appropriation act includes a variety of general provisions. Anyone who works with appropriations matters will also have frequent need to consult authorizing and program legislation. It should thus be apparent that the interpretation of statutes is of critical importance to appropriations law.[63]

The objective of this section is to provide a brief overview, designed primarily for those who do not work extensively with legislative materials. The cases we cite are but a sampling, selected for illustrative purposes or for a particularly good judicial statement of a point. The literature in the area is voluminous, and readers who need more than we can provide are encouraged to consult one of the established treatises such as Sutherland's *Statutes and Statutory Construction* (hereafter "Sutherland").[64]

The goal of statutory construction is simply stated: to determine and give effect to the intent of the enacting legislature. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 542 (1940); 55 Comp. Gen. 307, 317 (1975); 38 Comp. Gen. 229 (1958). While the goal may be simple, the means of achieving it are complex and often controversial. The primary vehicle for determining legislative intent is the language of the statute itself. There is an established body of principles, known as "canons" of construction, that are designed to aid in arriving at the best interpretation of statutory language. The statute's legislative history also is usually consulted to aid in the effort.

At this point, it is important to recognize that the concept of "legislative intent" is in many cases a fiction. Where not clear from the statutory language itself, it is often impossible to ascribe an intent to Congress as a

[62] There is a technical distinction between "interpretation" (determining the meaning of words) and "construction" (application of words to facts). 2A Sutherland, *Statutes and Statutory Construction* § 45.04 (6th ed. 2000). The distinction, as Sutherland points out, has little practical value. We use the terms interchangeably, as does Sutherland.

[63] "But if Congress has all the money of the United States under its control, it also has the whole English language to give it away with... ." 9 Op. Att'y Gen. 57, 59 (1857).

[64] We will refer to the 6th edition, edited by Professor Norman J. Singer and published in 2000.

whole.[65] As we will note later, a committee report represents the views of that committee. Statements by an individual legislator represent the views of that individual. Either may, but do not necessarily or inherently, reflect a broader congressional perception.

Even interpretive aids that rely on the statutory language itself do not provide hard and fast rules that can pinpoint congressional intent with scientific precision. One problem is that, more often than not, a statute has no obvious meaning that precisely answers a particular issue in dispute before the courts, the Comptroller General, or another decision maker. If the answers were that obvious, most of the cases discussed in this section would never have arisen.

The reality is that there probably is (and was) no actual "congressional intent" with respect to most specific issues that find their way to the courts, GAO, or other forums. In all likelihood, Congress did not affirmatively consider these specific issues for purposes of forming an intent about them. Necessarily, Congress writes laws in fairly general terms that convey broad concepts, principles, and policies. It leaves administering agencies and courts to fill in the gaps. Indeed, Congress sometimes deliberately leaves issues ambiguous because it lacks a sufficient consensus to resolve them in the law.

To point out the challenges in statutory interpretation, however, is by no means to denigrate the process. Applying the complex maze of interpretive aids, imperfect as they may be, serves the essential purpose of providing a common basis for problem solving and determining what the law is.

This in turn is important for two reasons. First, everyone has surely heard the familiar statement that our government is a government of laws and not of men.[66] This means that you have a right to have your conduct governed and judged in accordance with identifiable principles and standards, not by the whim of the decision maker. The law should be reasonably predictable. A lawyer's advice that a proposed action is or is not permissible amounts to

[65] *E.g., United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 318 (1897): "Looking simply at the history of the bill from the time it was introduced in the Senate until it was finally passed, it would be impossible to say what were the views of a majority of the members of each house in relation to the meaning of the act."

[66] "The government of the United States has been emphatically termed a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

a reasoned and informed judgment as to what a court is likely to do if the action is challenged. While this can never be an absolute guarantee, it once again must be based on identifiable principles and standards. Conceding its weaknesses, the law of statutory construction represents an organized approach for doing this.

Second, predictability is important in the enactment of statutes as well. Congress legislates against the background of the rules and principles that make up the law of statutory construction, and must be able to anticipate how the courts will apply them in interpreting the statutes it enacts.[67]

2. The "Plain Meaning" Rule

> "The Court's task is to construe not English but congressional English."
>
> *Commissioner of Internal Revenue v. Acker*, 361 U.S. 87, 95 (1959) (Frankfurter, J., dissenting).

a. In General

By far the most important rule of statutory construction is this: You start with the language of the statute. Countless judicial decisions reiterate this rule. *E.g.*, *Hartford Underwriters Insurance Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992); *Mallard v. United States District Court for the Southern District of Iowa*, 490 U.S. 296, 300 (1989). The primary vehicle for Congress to express its intent is the words it enacts into law. As stated in an early Supreme Court decision:

> "The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself; and we must gather their intention from the language there used .... ."

[67] *See McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction."); *Finley v. United States*, 490 U.S. 545, 556 (1989) ("What is of paramount importance is that Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts.").

Aldridge v. Williams, 44 U.S. (3 How.) 9, 24 (1845). A somewhat better known statement is from *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940):

> "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."

If the meaning is clear from the language of the statute, there is no need to resort to legislative history or any other extraneous source. As the Supreme Court observed in *Connecticut National Bank v. Germain*:

> "[I]n interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete."

503 U.S. at 253–254 (citations and quotation marks omitted). *See also Hartford Underwriters Insurance Co., supra*; *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997); *Mallard*, 490 U.S. 296; *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978); 56 Comp. Gen. 943 (1977); B-287158, Oct. 10, 2002; B-290021, July 15, 2002; B-288173, June 13, 2002; B-288658, Nov. 30, 2001.

This is the so-called "plain meaning" rule. If the meaning is "plain," that's the end of the inquiry and you apply that meaning. The unanimous opinion in *Robinson v. Shell Oil Co.* stated the rule as follows:

> "Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language and 'the statutory scheme is coherent and consistent.'. . .
>
> "The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific

> context in which that language is used, and the broader context of the statute as a whole."

519 U.S. at 340–341 (citations omitted).

The plain meaning rule thus embodies the universal view that interpretations of a statute should be anchored in, and flow from, the statute's text. Its application to a particular statutory provision turns on subjective judgments over which reasonable and intelligent people will differ.

An example of this is *Smith v. United States*, 508 U.S. 223 (1993), in which the Justices agreed that the case should be resolved on the basis of the statute's plain meaning, but reached sharply divergent conclusions as to what that plain meaning was. In *Smith*, the defendant had traded his gun for illegal drugs. He was convicted under a statute that provided enhanced penalties for the "use" of a firearm "during and in relation to ... [a] drug trafficking crime." The majority affirmed his conviction, reasoning that exchanging a firearm for drugs constituted a "use" of the firearm within the plain meaning of the statute—that is, use in the sense of employ. Three Justices dissented, contending vehemently that the plain meaning of the statute covered only the use of a firearm for its intended purpose as a weapon.[68]

b. The Plain Meaning Rule *versus* Legislative History

The extent to which sources outside the statute itself, particularly legislative history, should be consulted to help shed light on the statutory scheme has been the subject of much controversy in recent decades. One school of thought, most closely identified with Supreme Court Justice Antonin Scalia, holds that resort to legislative history is *never* appropriate. This approach is sometimes viewed as a variant of the plain meaning rule.[69] A more widely expressed statement of the plain meaning rule is that legislative history can be consulted but only if it has first been determined that the statutory language is "ambiguous"—that is, that there is no plain meaning.

[68] The federal circuits had likewise split on the plain meaning of this statute prior to the *Smith* decision. *See Smith*, 508 U.S. at 227.

[69] *See* Eric S. Lasky, *Perplexing Problems with Plain Meaning*, 27 Hofstra L. Rev. 891 (1999); R. Randall Kelso, *Statutory Interpretation Doctrine on the Modern Supreme Court and Four Doctrinal Approaches to Judicial Decision-Making*, 25 Pepp. L. Rev. 37 (1997). Professor Kelso describes Justice Scalia's approach as "new textualism."

As a practical matter, however, courts generally examine the legislative history as an integral part of statutory construction. Thus, Sutherland observes:

> "[I]t has been said, usually a court looks into the legislative history to clear up some statutory ambiguity... but such ambiguity is not the *sine qua non* for judicial inquiry into legislative history ... the plain meaning rule is not to be used to thwart or distort the intent of Congress by excluding from consideration enlightening material from the legislative files... ."

2A Sutherland, § 48:01, at 412–413 (citations and quotation marks omitted).

In other words, like all "rules" of statutory construction, the plain meaning rule is "rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists." *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48 (1928) (Holmes, J.), quoted in *Watt v. Alaska*, 451 U.S. 259, 266 (1981). In another often-quoted statement, the Supreme Court said:

> "When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'"

United States v. American Trucking Ass'ns, Inc., 310 U.S. 534, 543–44 (1940), as quoted in *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 10 (1976) (footnotes omitted).

Indeed, the Supreme Court, like other courts, routinely consults the legislative history even if the statutory language seems unambiguous.[70] One example is *Conroy v. Aniskoff*, 507 U.S. 511 (1993), in which the Court found the relevant statute to be "unambiguous, unequivocal, and unlimited." *Id.* at 514. Nevertheless, Justice Stevens, writing for the Court,

[70] "[S]hortly before Justice Scalia's appointment, the Justices consulted the legislative records in almost every case involving the interpretation of a statute. Today, despite years of Justice Scalia's advocation for the plain meaning rule, 'legislative history is [still] used by at least one Justice in virtually every decision of the Supreme Court in which the meaning of a federal statute is at issue.'" *Lasky, supra*, at 896 (footnotes omitted).

examined the legislative history in detail to confirm that its literal reading of the statute was not absurd, illogical, or contrary to congressional intent. Justice Scalia, however, wrote a spirited concurring opinion that described the inquiry into the legislative history as "a waste of research time and ink" as well as a "disruptive lesson in the law." *Id.* at 519.

3. The Limits of Literalism: Errors in Statutes and "Absurd Consequences"

> "There is no surer way to misread any document than to read it literally."
>
> *Guiseppi v. Walling*, 144 F.2d 608, 624 (2nd Cir. 1944) (Learned Hand, J.).

Even the strictest adherence to the plain meaning rule does not justify application of the literal terms of a statute in all cases. There are two well-established exceptions. The first is that statutory language will not be enforced literally when that language is the product of an obvious drafting error. In such cases, courts (and other decision makers) will, in effect, rewrite the statute to correct the error and conform the statute to the obvious intent.

The second exception is the frequently cited canon of construction that statutory language will not be interpreted literally if doing so would produce an "absurd consequence" or "absurd result," that is, one that the legislature, presumably, could not have intended.

a. Errors in Statutes

(1) Drafting errors

A statute may occasionally contain what is clearly a technical or typographical error which, if read literally, could alter the meaning of the statute or render execution effectively impossible. In such a case, if the legislative intent is clear, the intent will be given effect over the erroneous language. One recent example is *Chickasaw Nation v. United States*, 534 U.S. 84 (2001). The decision turned on the effect of a parenthetical reference to the Tax Code that had been included in the Indian Gaming Regulatory Act. After examining the structure and language of the Indian Gaming Regulatory Act as a whole, as well as its legislative history, the Court concluded that the parenthetical reference was "simply a drafting mistake"—specifically, the failure to delete a cross-reference from an earlier version of the bill—and declined to give it any effect. *Chickasaw Nation*, 534 U.S. at 91.

In a number of other cases, courts have followed the same approach by correcting obvious printing or typographical errors. *See United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993); *Ronson Patents Corp. v. Sparklets Devices, Inc.*, 102 F. Supp. 123 (E.D. Mo. 1951); *Fleming v. Salem Box Co.*, 38 F. Supp. 997 (D. Ore. 1940); *Neely v. State of Arkansas*, 877 S.W.2d 589 (Ark.1994); *Pressman v. State Tax Commission*, 102 A.2d 821 (Md. 1954); *Johnson v. United States Gypsum Co.*, 229 S.W.2d 671 (Ark. 1950); *Baca v. Board of Commissioners of Bernalillo County*, 62 P. 979 (N.M. 1900).[71]

Comptroller General decisions have likewise repaired obvious drafting errors. In one situation, a supplemental appropriation act provided funds to pay certain claims and judgments as set forth in Senate Document 94-163. Examination of the documents made it clear that the reference should have been to Senate Document 94-164, as Senate Document 94-163 concerned a wholly unrelated subject. The manifest congressional intent was held controlling, and the appropriation was available to pay the items specified in Senate Document 94-164. B-158642-O.M., June 8, 1976. The same principle had been applied in a very early decision in which an 1894 appropriation provided funds for certain payments in connection with an election held on "November fifth," 1890. The election had in fact been held on November 4. Recognizing the "evident intention of Congress," the decision held that the appropriation was available to make the specified payments. 1 Comp. Dec. 1 (1894). *See also* 11 Comp. Dec. 719 (1905); 8 Comp. Dec. 205 (1901); 1 Comp. Dec. 316 (1895).

Other decisions follow the same approach. *See, e.g.*, 64 Comp. Gen. 221 (1985) (erroneous use of the word "title" instead of "subchapter"); B-261579, Nov. 1, 1995 (mistaken cross-reference to the wrong section of another law); B-127507, Dec. 10, 1962 (printing error causing the statute to refer to "section 12" of a certain township for inclusion in a national forest, rather than "section 13").

[71] *United States National Bank of Oregon* is a particularly interesting case, which concerned whether Congress had repealed a provision of law originally enacted in 1918. The issue turned on the effect, if any, to be given the placement of quotation marks in a later statute that allegedly constituted the repeal. Upon detailed examination of the overall statutory scheme and its evolution over many decades, the Court concluded that the quotation marks were misplaced as a result of a drafting error. Therefore, the 1918 provision had not been repealed.

The Justice Department's Office of Legal Counsel applied Comptroller General decisions in an opinion dated May 21, 1996, that addressed an obvious problem with the application of an appropriations act.[72] The act required the United States Information Agency to move an office to south Florida "not later than April 1, 1996," and made funds available for that purpose. However, the act was not signed into law until April 26, 1996. Recognizing that the act could not be implemented as written, the opinion concluded that the funds remained available to finance the move after April 1.

(2) Error in amount appropriated

A 1979 decision illustrates one situation in which the above rule will not apply. A 1979 appropriation act contained an appropriation of $36 million for the Inspector General of the Department of Health, Education, and Welfare. The bills as passed by both Houses and the various committee reports specified an appropriation of only $35 million. While it seemed apparent that the $36 million was the result of a typographical error, it was held that the language of the enrolled act signed by the President must control and that the full $36 million had been appropriated. The Comptroller General did, however, inform the Appropriations Committees. 58 Comp. Gen. 358 (1979). *See also* 2 Comp. Dec. 629 (1896); 1 Bowler, First Comp. Dec. 114 (1894).

However, if the amount appropriated is a total derived from adding up specific sums enumerated in the appropriation act, then the amount appropriated will be the amount obtained by the correct addition, notwithstanding the specification of an erroneous total in the appropriation act. 31 U.S.C. § 1302; 2 Comp. Gen. 592 (1923).

b. Avoiding "Absurd Consequences"

Departures from strict adherence to the statutory text go beyond cases involving drafting and typographical errors. In fact, it is more common to find cases in which the courts do not question that Congress meant to choose the words it did, but conclude that it could not have meant them to apply literally in a particular context. The generally accepted principle here is that the literal language of a statute will not be followed if it would

[72] Department of Justice Office of Legal Counsel Memorandum for David W. Burke, Chairman, Broadcasting Board of Governors, *Relocation Deadline Provision Contained in the 1996 Omnibus Consolidated Rescissions and Appropriations Act*, May 21, 1996.

produce a result demonstrably inconsistent with clearly expressed congressional intent.

The case probably most frequently cited for this proposition is *Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892), which gives several interesting examples. One of those examples is *United States v. Kirby*, 74 U.S. (7 Wall.) 482 (1868), in which the Court held that a statute making it a criminal offense to knowingly and willfully obstruct or retard a driver or carrier of the mails did not apply to a sheriff arresting a mail carrier who had been indicted for murder. Another is an old English ruling that a statute making it a felony to break out of jail did not apply to a prisoner who broke out because the jail was on fire. *Holy Trinity*, 143 U.S. at 460–61. An example from early administrative decisions might be 24 Comp. Dec. 775 (1918), holding that an appropriation for "messenger boys" was available to hire "messenger girls."[73]

In cases decided after *Holy Trinity*, the Court has emphasized that departures from the plain meaning rule are justified only in "rare and exceptional circumstances," such as the illustrations used in *Holy Trinity*. *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930). *See also United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 n.33 (1978) (citing *Crooks v. Harrelson* with approval; hereafter *TVA v. Hill*).

This exception to the plain meaning rule is also sometimes phrased in terms of avoiding absurd consequences. *E.g.*, *United States v. Ryan*, 284 U.S. 167, 175 (1931). As the dissenting opinion in *TVA v. Hill* points out (437 U.S. at 204 n.14), there is a bit of confusion in this respect in that *Crooks*—again, cited with approval by the majority in *TVA v. Hill*—explicitly states that avoiding absurd consequences is not enough, although the Court has used the absurd consequence formulation in post-*Crooks* cases such as *Ryan*. In any event, as a comparison of the majority and dissenting opinions in *TVA v. Hill* will demonstrate, the absurd consequences test is not always easy to apply in that what strikes one person as absurd may be good law to another.

[73] The decision had nothing to do with equality of the sexes; the "boys" were all off fighting World War I.

The case of *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *vacated on reh'g en banc*, 165 F.3d 1297, *cert. denied*, 527 U.S. 1024 (1999), provides another illustration of this point. Ms. Singleton was convicted of various crimes following testimony against her by a witness who had received a plea bargain in exchange for his testimony. She maintained that her conviction was tainted because the plea bargain constituted a violation of 18 U.S.C. § 201(c)(2), which provides in part:

> "Whoever ... directly or indirectly ... promises anything of value to any person, ... because of the testimony under oath or affirmation given or to be given by such person as a witness upon trial ... before any court ... shall be fined under this title or imprisoned for not more than two years, or both."

A three judge panel of the Tenth Circuit agreed and reversed her conviction. They held that the word "whoever" by its plain terms applied to the federal prosecutor and, just as plainly, the plea bargain promised something of value because of testimony to be given as a witness upon trial.

The full Tenth Circuit vacated the panel's ruling and reinstated the conviction. The majority held that the panel's construction of the statute was "patently absurd" and contradicted long-standing prosecutorial practice. 165 F.3d at 1300. The three original panel members remained unconvinced and dissented. Far from being "absurd," they viewed their construction as a "straight-forward interpretation" of the statute that honored important constitutional values. One such value, they said, was "the proper role of the judiciary as the law-interpreting, rather than lawmaking, branch of the federal government." *Id.* at 1309.

While the absurd consequences rule must be invoked with care, it does have useful applications. The Comptroller General invoked this rule in holding that an appropriation act proviso requiring competition in the award of certain grants did not apply to community development block grants, which were allocated by a statutory formula. B-285794, Dec. 5, 2000 ("Without an affirmative expression of such intent, we are unwilling to read the language of the questioned proviso in a way that would clearly produce unreasonable and impractical consequences."). *See also* B-260759, May 2, 1995 (rejecting a literal reading of a statutory provision that would defeat its purpose and produce anomalous results).

4. Statutory Aids to Construction

The remainder of this section discusses various sources to assist in determining the meaning of statutory language, plain or otherwise. We start with sources that are contained in the statute being construed or in other statutes that provide interpretive guidance for general application. The main advantage of these statutory aids is that, as laws themselves, they carry authoritative weight. Their main disadvantage is that, while useful on occasion, they have limited scope and address relatively few issues of interpretation.

a. Definitions, Effective Dates, and Severability Clauses

Statutes frequently contain their own set of definitions for terms that they use. Obviously, these definitions take precedence over other sources to the extent that they apply.

A statute may also contain an effective date provision that sets forth a date (or dates) when it will become operative. These provisions are most frequently used when Congress intends to delay or phase in the effectiveness of a statute in whole or in part. The general rule, even absent an effective date provision, is that statutes take effect on the date of their enactment and apply prospectively. *See, e.g.*, B-300866, May 30, 2003, and authorities cited. Therefore, effective date provisions are unnecessary if the normal rule is intended. (Later in this chapter we will discuss more complicated issues concerning the retroactive application of statutes.)

Another provision sometimes included is a so-called "severability" clause. The purpose of this provision is to set forth congressional intent in the unhappy event that part of a statute is held to be unconstitutional. The clause states whether or not the remainder of the statute should be "severed" from the unconstitutional part and continue to be operative. Again, the general rule is that statutes will be considered severable absent a provision to the contrary or some other clear indication of congressional intent that the whole statute should fall if part of it is declared unconstitutional. Thus, the clause is unnecessary in the usual case. However, the absence of a severability clause will not create a presumption against severability. *See, e.g., New York v. United States*, 505 U.S. 144, 186–187 (1992).

b. The Dictionary Act

Chapter 1 of Title 1 of the United States Code, §§ 1–8, commonly known as the "Dictionary Act," provides certain rules of construction and definitions that apply generally to federal statutes. For example, section 1 provides in part:

> "In determining the meaning of any Act of Congress, unless the context indicates otherwise—
>
> * * * * * *
>
> "the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals ... ."

Occasionally, the courts use the Dictionary Act to resolve questions of interpretation. *E.g.*, *United States v. Reid*, 206 F. Supp. 2d 132 (D. Mass. 2002) (an aircraft is not a "vehicle" for purposes of the USA PATRIOT Act); *United States v. Belgarde*, 148 F. Supp. 2d 1104 (D. Mont.), *aff'd*, 300 F.3d 1177 (9th Cir. 2001) (a government agency, which the defendant was charged with burglarizing, is not a "person" for purposes of the Major Crimes Act). Courts also hold on occasion that the Dictionary Act does not apply. *See Rowland v. California Men's Colony*, 506 U.S. 194 (1993) (context refutes application of the Title 1, United States Code, definition of "person").

c. Effect of Codification

Congress regularly passes laws that "codify," or enact into positive law, the contents of various titles of the United States Code. The effect of such codifications is to make that United States Code title the official evidence of the statutory language it contains.[74] Codification acts typically delete obsolete provisions and make other technical and clarifying changes to the statutes they codify. Codification acts usually include language stating that they should not be construed as making substantive changes in the laws they replace. *See, e.g.*, Pub. L. No. 97-258, § 4(a), 96 Stat. 877, 1067 (1982) (codifying Title 31 of the United States Code); 69 Comp. Gen. 691 (1990).[75]

[74] If *United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439 (1993), discussed above, had involved codified provisions of law, the Court's task would have been much easier. In fact, the case probably would never have arisen.

[75] Background information about the nature and status of codification efforts can be found on the Web site of the Office of the Law Revision Counsel, U.S. House of Representatives: http://uscode.house.gov.